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# Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission

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# Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission

JOHN H. KNOX & DAVID L. MARKELL\*

## *Abstract*

The NAFTA Environmental Commission's citizen petition process is an important experiment in "new governance" because of its emphasis on citizen participation, accountability, and transparency as strategies to enhance government legitimacy and improve government performance. Its focus on promoting compliance and enforcement adds to its importance for those interested in those central aspects of the regulatory process. The procedure has had a rocky start in many respects, although there are signs that in some cases it has had a positive impact.

This Article sets forth what we perceive to be the promise of the process, the pitfalls that have undermined its effectiveness to date, and adjustments that would equip it to make a meaningful contribution to North American environmental governance. More generally, the Article provides a framework for evaluating such citizen petition processes and explains how lessons from an analysis of the North American procedure may contribute to assessments of the design and implementation of similar mechanisms in other international and domestic legal regimes.

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## INTRODUCTION

The North American Agreement on Environmental Cooperation (NAAEC), the side agreement to the North American Free Trade Agreement (NAFTA), is intended to promote environmental protection throughout North America.<sup>1</sup> The NAAEC contains a series of provisions that highlight the importance the parties attach to effective enforcement of their environmental laws as a linchpin of environmental protection.<sup>2</sup> In addition to the goal of enhanced environmental protection, the NAAEC emphasizes the importance of principles often associated

1. NAFTA and the NAAEC, along with a companion labor agreement, entered into force together in 1994. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 (1994) [hereinafter NAAEC]; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057. A key purpose of the NAAEC is to “foster the protection and improvement of the environment [in North America] for the well-being of present and future generations.” NAAEC, *supra*, art. 1(a).

2. See, e.g., NAAEC, *supra* note 1, art. 5 (obligating the parties to effectively enforce their environmental laws in order to achieve high levels of environmental protection and compliance); *id.* art. 6 (requiring the parties to provide private access to remedies); *id.* art. 12 (requiring the parties to report annually on their compliance with enforcement-related obligations). The view that effective enforcement is critical to successful regulation is widely accepted. See *infra* note 47 and accompanying text.

with “new governance,” including facilitating public participation and increasing government transparency.<sup>3</sup>

The NAAEC established a new institutional body, the Commission for Environmental Cooperation (CEC or Commission) to advance these objectives.<sup>4</sup> The CEC consists of three key actors: the Council, comprised of the environmental ministers of the three countries; a quasi-independent Secretariat of international civil servants, based in Montreal; and the Joint Public Advisory Committee (JPAC), a body of fifteen citizen representatives, five from each country.<sup>5</sup>

The parties to the NAAEC also created a toolbox for this new set of actors on the North American stage. Perhaps the most important of these new tools is an innovative citizen petition process that can shine a spotlight on the parties’ enforcement of their environmental laws.<sup>6</sup> This procedure empowers any resident of any country in North America (Canada, Mexico, or the United States) to file a submission with the CEC Secretariat claiming that a party is failing to effectively enforce one or more of its environmental laws.<sup>7</sup> In effect, this new mechanism was designed to use a “new governance-like” approach (notably substantial citizen engagement and a commitment to transparency) to improve environmental protection by promoting environmental enforcement, a perceived Achilles heel for environmental regulation on the continent, particularly in Mexico.<sup>8</sup>

Since the CEC began to operate in 1994, there have been many appraisals of its performance, several of which have focused on the submission procedure.<sup>9</sup> The three

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3. See NAAEC, *supra* note 1, pmbll., arts. 1(h), 4, 5(1)(d)–(e) (expressing an intention to focus on principles beyond simply environmental protection, including “public participation in conserving, protecting, and enhancing the environment,” “promot[ing] transparency,” and other methods of increasing public access to compliance information). While there are many versions of new governance, three oft-referenced features are citizen empowerment, transparency, and accountability. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 432, 466–70 (2004) (describing the three overarching goals of new governance as “economic efficiency, political legitimacy, and social democracy,” which include the above features); Neil Gunningham, *The New Collaborative Environmental Governance: The Localization of Regulation*, 36 J.L. & SOC’Y 145, 146–150 (2009) (U.K.) (discussing the characteristics of new governance in the environmental context).

4. NAAEC, *supra* note 1, art. 8.

5. *Id.* arts. 9, 11, 16.

6. See CEC, INDICATORS OF EFFECTIVE ENVIRONMENTAL ENFORCEMENT: PROCEEDINGS OF A NORTH AMERICAN DIALOGUE, at v (1999) (citing the citizen submission process as one of the NAAEC’s means of “examining the effectiveness of the Parties’ enforcement actions”); David L. Markell, *The Citizen Spotlight Process*, 18 ENVTL. F. Mar./Apr. 2001, at 33 (“The primary purpose of the citizen submission process is to enhance *domestic* environmental enforcement through the placement of an *international* spotlight on such practices.”).

7. NAAEC, *supra* note 1, art. 14. Many commentators have characterized the citizen petition process as the central feature of the CEC. E.g., Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT’L & COMP. L. REV. 389, 395 (2004) [hereinafter Raustiala, *Police*]; Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 227 (2008).

8. David L. Markell & John H. Knox, *The Innovative North American Commission for Environmental Cooperation*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 1, 4–6, 9 (David L. Markell & John H. Knox eds., 2003) [hereinafter *Innovative CEC*].

9. See, e.g., JONATHAN GRAUBART, LEGALIZING TRANSNATIONAL ACTIVISM: THE STRUGGLE TO GAIN SOCIAL CHANGE FROM NAFTA’S CITIZEN PETITIONS (2008); GARY CLYDE HUFBAUER &

governments are currently reviewing the procedure again, with a view to considering changes at the Council meeting in the summer of 2012, and the JPAC recently undertook its own review of the procedure.<sup>10</sup>

Our hope in this Article is to contribute constructively to these ongoing reviews. In addition, we want to strengthen the theoretical and empirical foundations for future assessments of this and similar procedures. To that end, we propose a set of metrics for evaluating the process, which are based in part on other citizen petition experiments, the literature on procedural justice, and efforts used to evaluate enforcement performance.<sup>11</sup> We then apply those metrics to the CEC procedure in light of its record over the eighteen years since its adoption. Finally, we offer a series of specific, implementable recommendations for improving the process.<sup>12</sup>

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JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 153–98 (2005); TEN-YEAR REVIEW AND ASSESSMENT COMM., TEN YEARS OF NORTH AMERICAN ENVIRONMENTAL COOPERATION: REPORT OF THE TEN-YEAR REVIEW AND ASSESSMENT COMMITTEE (2004) [hereinafter TRAC REPORT]; KEVIN GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND (2004); GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 8; LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION (John J. Kirton & Virginia W. Maclaren eds., 2002); JPAC, LESSONS LEARNED: CITIZEN SUBMISSIONS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION, FINAL REPORT TO THE COUNCIL OF THE CEC (2001), [http://www.cec.org/Storage/40/3253\\_rep11-e-final\\_EN.PDF](http://www.cec.org/Storage/40/3253_rep11-e-final_EN.PDF) [hereinafter JPAC, LESSONS LEARNED]; Joseph DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651 (1998). For perspectives of three submitters, one from each North American country, see generally Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004); Randy Christensen, *The Citizen Submission Process Under NAFTA: Observations After 10 Years*, 14 J. ENVTL. L. & PRAC. 165 (2004); Gustavo Alanís, *Public Participation within NAFTA's Environmental Agreement: The Mexican Experience*, in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION, *supra*. For a critical article by a former director of the CEC Secretariat's Submissions on Enforcement Matters Unit who is now a member of the JPAC, see Geoff Garver, *Tooth Decay*, 25 ENVTL. F., May/June 2008, at 34.

10. *JPAC Recommends Review of CEC Citizen Submission Process and Examination of the Transboundary Movement of Used Lead-Acid Batteries in North America*, CEC (Dec. 22, 2011), <http://www.cec.org/Page.asp?PageID=122&ContentID=25155&SiteNodeID=655>.

11. We readily acknowledge the difficulty in assessing the “success” or “effectiveness” of any process. For one helpful synthesis of some of the literature that addresses the complexity of such assessments, see David Marsh & Allan McConnell, *Towards a Framework for Establishing Policy Success*, 88 PUB. ADMIN. 564 (2010). With the caveat in mind that policy evaluation remains a matter of art as well as science, we identify below at least one set of metrics that appears to us to be helpful and consider the process in those terms. See *infra* Part II for a discussion of the challenges in evaluation.

12. As is clear from our discussion, we not only offer our own analysis of this track record, we also endorse and synthesize some of the more significant findings about the process documented in previous work. See *infra* Parts II–V. For better or worse, each of us has devoted considerable scholarly effort to the CEC. See generally GREENING NAFTA: THE COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 8; John H. Knox, *Neglected Lessons of the NAFTA Environmental Regime*, 45 WAKE FOREST L. REV. 391 (2010) [hereinafter Knox, *Neglected Lessons*]; John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT'L & COMP. L. REV. 359 (2004) [hereinafter Knox, *Separated at Birth*]; John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1 (2001) [hereinafter Knox, *A New Approach*]; David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1 (2008); David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425 (2010) [hereinafter Markell, *Spotlighting Procedures*]; David L. Markell, *Citizen-Friendly Approaches to Environmental Governance*, 37 ENVTL. L. REP. NEWS & ANALYSIS 10362 (2007); David L. Markell, *The North American Commission for Environmental Cooperation After Ten Years:*

Our assessment of the CEC citizen petition process should be of value for the design, implementation, and assessment of a wide range of new governance procedures intended to promote citizen participation, including in trade, human rights, and environmental agreements.<sup>13</sup> Thus, the experience of the CEC citizen petition process offers fertile soil for consideration of the promises and pitfalls of the substantial number of such processes that now dot the landscape of international and domestic regimes around the world. Issues that we incorporate in our analysis, such as attention to metrics, procedural fairness (including demarcation of roles), and the need for attention to process design and process implementation, are fundamental to review of such processes. Our case study of the CEC petition process is an attempt to enrich understanding of such processes at a conceptual level through a granular as well as theoretical assessment.

The Article proceeds in five steps. First, we explain why the parties adopted the CEC procedure and describe it in more detail. Next, we identify metrics that we think have significant potential to contribute to informed evaluations of the process. The process's citizen-driven character makes the procedural justice literature particularly relevant as a source of insight for assessing its performance. In addition, because the CEC citizen petition process focuses specifically on enforcement failures, we suggest that evaluations should consider it in that context.

Having provided this conceptual landscape, our third Part applies these metrics to the CEC process, taking into account not only its structural features, but also how its actual operations have evolved since the inception of the process and the track record of use and results that has emerged. We conclude that while the process has demonstrated its effectiveness in some respects, it has not realized its potential. We offer a series of recommendations to substantially improve the process's prospects for success in the future. In Part V, we suggest that the design and implementation issues salient to the CEC's performance are relevant to assessments of the performance of other citizen petition processes as well.

## I. THE CEC CITIZEN PETITION PROCESS: ORIGINAL PURPOSES AND PROCESS DESIGN

The NAAEC citizen submission procedure was designed to promote effective enforcement of the environmental laws of the three North American countries.

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*Lessons About Institutional Structure and Public Participation in Governance*, 26 LOY. L.A. INT'L & COMP. L. REV. 341 (2004); David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 667 (2006) [hereinafter Markell, *Citizen Perspectives*]; David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545 (2000) [hereinafter Markell, *Citizen Submission Process*]; David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process*, 30 N.C. J. INT'L L. & COM. REG. 759 (2005); David L. Markell, *The Citizen Spotlight Process*, *supra* note 6.

13. See, e.g., Svitlana Kravchenko, *Giving the Public a Voice in MEA Compliance Mechanisms*, in COMPLIANCE AND ENFORCEMENT IN ENVIRONMENTAL LAW: TOWARD MORE EFFECTIVE IMPLEMENTATION 83 (Leroy Paddock et al. eds., 2011) (noting that there is "increasingly significant [public] participation in environmental compliance and enforcement" under multilateral environmental agreements (MEAs)). Such processes also exist domestically, such as the process empowering citizens to petition the Environmental Protection Agency (EPA) to withdraw a state's authorization to administer various environmental regulatory programs. See *infra* note 39 and accompanying text.

During the NAFTA negotiation in the early 1990s, environmental groups and some members of Congress argued that by removing barriers to international trade and investment, NAFTA would lead U.S. and Canadian companies to move to Mexico to take advantage of its lower environmental standards.<sup>14</sup> As written, Mexican environmental laws were comparable to those of the other countries, but they were far less consistently enforced.<sup>15</sup> Environmental advocates believed that corporations' search for "pollution havens" in Mexico would harm the Mexican environment, contribute to the loss of U.S. and Canadian jobs, and pressure all three countries to weaken their environmental laws.<sup>16</sup>

To address these concerns, the U.S. government proposed the NAAEC, a side agreement to NAFTA that would improve environmental enforcement in Mexico as well as the other two countries.<sup>17</sup> As eventually negotiated by the three NAFTA parties, the agreement requires each country to "effectively enforce its environmental laws,"<sup>18</sup> provides for cooperation and assistance to that end,<sup>19</sup> and establishes two formal compliance mechanisms. One is a traditional intergovernmental method of dispute resolution that allows any party to seek arbitration over whether another party has engaged in a "persistent pattern of failure . . . to effectively enforce its environmental law."<sup>20</sup> In principle, the arbitration may eventually lead to sanctions against the accused party.<sup>21</sup>

The other compliance mechanism is a procedure through which any person or non-governmental organization in any of the three countries may file a submission with the CEC Secretariat claiming that one of the NAFTA parties is failing to effectively enforce its environmental law.<sup>22</sup> If a submission meets certain requirements, then the Secretariat may prepare an investigative report, dubbed a "factual record," on the allegations.<sup>23</sup> Although a factual record cannot result in a legally binding judgment of non-compliance, the drafters hoped that shining a spotlight on a failure to effectively enforce domestic law would encourage better enforcement.<sup>24</sup> The procedure could have a specific deterrent effect—to avoid negative publicity, a government might respond to a submission by increasing its enforcement efforts in the area identified—and a more general effect, in that governments might try to reduce the number of submissions by raising their overall

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14. *Innovative CEC*, *supra* note 8, at 4–6.

15. *Id.*

16. *Id.*; Wold, *supra* note 7, at 203. The history of the NAAEC negotiation has been recounted many times. *E.g.*, FREDERICK MAYER, *INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS* 165–204 (1998).

17. Raymond MacCallum, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation*, 8 *COLO. J. INT'L ENVTL. L. & POL'Y* 395, 395 (1997).

18. NAAEC, *supra* note 1, art. 5(1). To avoid backsliding, the agreement also requires each party to "ensure that its laws and regulations provide for high levels of environmental protection." *Id.* art. 3.

19. *E.g.*, *id.* art. 10(3)–(4) ("The Council shall strengthen cooperation on the development and continuing improvement of environmental laws and regulations . . .").

20. *Id.* arts. 22–24.

21. *Id.* arts. 32–36 (stating that a panel may impose an action plan, monetary assessment, or even suspension of NAFTA benefits).

22. NAAEC, *supra* note 1, arts. 14–15. *See generally* Knox, *A New Approach*, *supra* note 12, at 26–32; Markell, *Citizen Submission Process*, *supra* note 12, at 550–54.

23. NAAEC, *supra* note 1, art. 15.

24. *See* Knox, *A New Approach*, *supra* note 12, at 120 (discussing "the sunshine effect resulting from identification of cases of ineffective enforcement").

level of enforcement. Increased attention to a problem could also facilitate other NAAEC mechanisms: its cooperative programs could be brought to bear on situations identified by submissions and, if submissions identified a “persistent pattern” of ineffective enforcement, a NAAEC party could seek sanctions through intergovernmental arbitration.

For submissions to result in factual records, they must clear several hurdles. First, to be considered by the Secretariat at all, a submission must satisfy certain minimal requirements, including that it “provides sufficient information to allow the Secretariat to review the submission.”<sup>25</sup> If the Secretariat determines that the submission is admissible, it must then decide whether to request a response from the party concerned in light of four additional factors: (1) whether “the submission alleges harm to the person or organization making the submission,” (2) whether it “is drawn exclusively from mass media reports,” (3) whether it “raises matters whose further study in this process would advance the goals of this Agreement,” and (4) whether “private remedies available under the Party’s law have been pursued.”<sup>26</sup>

Even submissions that merit a response may receive an investigation of their claims only if they survive two further steps. First, the Secretariat must decide, in light of the submission and the party’s response, whether a factual record is warranted.<sup>27</sup> The NAAEC does not indicate which factors the Secretariat should consider at this stage, beyond stating that the Secretariat may not proceed if the state concerned advises the Secretariat that the matter is the subject of a “pending judicial or administrative proceeding.”<sup>28</sup> The Secretariat has indicated that it takes into account “whether, after considering the Response in light of the Submission, there are any ‘central open questions’ which a factual record could shed light on.”<sup>29</sup> Second, if the Secretariat believes that an investigation should take place, it must ask the Council for approval.<sup>30</sup> For the Secretariat to proceed, at least two of the three members of the Council must vote to authorize preparation of the factual record.<sup>31</sup> Again, the NAAEC does not specify the factors the Council should take into account.

Once a report is authorized, the Secretariat may draw on a wide range of sources, including the parties and the public, as well as develop its own information.<sup>32</sup> The Secretariat submits the factual record in draft to the Council and the state parties have an opportunity to comment on it, although they cannot require the

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25. NAAEC, *supra* note 1, art. 14(1)(c). Other requirements include that the submission “a) is in writing in a language designated by that Party in a notification to the Secretariat; b) clearly identifies the person or organization making the submission; . . . d) appears to be aimed at promoting enforcement rather than at harassing industry; e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any; and f) is filed by a person or organization residing or established in the territory of a Party.” *Id.* art. 14(1).

26. *Id.* art. 14(2).

27. *Id.* art. 15(1).

28. *Id.* art. 14(3)(a).

29. *Skeena River Fishery*, SEM-09-005, Determination Pursuant to Article 15(1) that Development of a Factual Record Is Not Warranted, para. 34 (Aug. 12, 2011). This and all other documents filed with respect to submissions are available on the CEC website, see *Registry of Citizen Submissions*, CEC, [http://www.cec.org/Page.asp?PageID=751&ContentID=&SiteNodeID=250&BL\\_ExpandID=156](http://www.cec.org/Page.asp?PageID=751&ContentID=&SiteNodeID=250&BL_ExpandID=156).

30. NAAEC, *supra* note 1, art. 15(1)–(2).

31. *Id.* art. 15(2).

32. *Id.* art. 15(4).



Secretariat to change its analysis.<sup>33</sup> The Council does have another point of control, however: it decides, again by a two-thirds vote, whether to make the factual record public.<sup>34</sup> After publication, the CEC makes no effort to follow up the factual record or to evaluate its effects.

It should be noted that the original concern that gave rise to the emphasis on promotion of environmental enforcement has proved to be largely without foundation. Studies have indicated that the marginal costs of abating pollution in Canada and the United States are not high enough to justify decisions by corporations to move their operations to Mexico in search of lower-cost environmental standards.<sup>35</sup> Nevertheless, the emphasis on effective enforcement of environmental laws remains of critical importance to the promotion of more general goals, notably sustainable development.<sup>36</sup>

## II. SITUATING THE CEC CITIZEN PETITION PROCESS WITHIN A LARGER FRAMEWORK OF CITIZEN PETITION PROCESSES AND ENFORCEMENT MECHANISMS AND THE SEARCH FOR APPROPRIATE METRICS

The CEC citizen petition process is only one of many similar mechanisms that international and domestic governance bodies have created in recent years.<sup>37</sup> At the local level, for example, thousands of police review boards have been created to monitor the actions of police departments.<sup>38</sup> At the national level, Congress

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33. See *id.* art. 15(5)–(6) (“The Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council.”).

34. *Id.* art. 15(7).

35. See GALLAGHER, *supra* note 9, at 25–33 (detailing empirical evidence showing that costs to reduce pollution are so small that they are not a major factor corporations consider when choosing a location); Secretariat of the CEC, FREE TRADE AND THE ENVIRONMENT: THE PICTURE BECOMES CLEARER 13 (2002) (discussing studies showing that “[t]he importance of environmental regulations in determining where investments are located is, on average, secondary when compared with other factors”); Knox, *Neglected Lessons*, *supra* note 12, at 398 n.38 (explaining that firms may be too large to move, or alternately, have incentives to move other than environmental regulations); HÅKAN NORDSTRÖM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT 37 (WTO Publications 1999), available at [www.wto.org/english/news\\_e/pres99\\_e/environment.pdf](http://www.wto.org/english/news_e/pres99_e/environment.pdf) (discussing a study finding “no systematic evidence that a good environmental performance comes at the expense of reduced profitability”).

36. Knox, *Neglected Lessons*, *supra* note 12, at 408–12.

37. Beyond citizen petition processes of the CEC variety, there has been a great deal of emphasis given to citizen participation in recent years. See, e.g., Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 GOVERNANCE: INT’L J. OF POL’Y, ADMIN. & INSTITUTIONS 529, 530, 532–33 (2009) (describing how citizen recommendations influenced government transparency during the early Obama Administration); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174–75 (1997) (“Greater [citizen] participation is generally viewed as contributing to the democracy, and also to the quality, of decisions by otherwise out-of-touch bureaucrats.” (footnote omitted)). See also generally THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon & Odus V. Elliott eds., 2002) (surveying “the new governance” framework).

38. NAT’L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 288–89 (Wesley Skogan & Kathleen Frydl eds., 2004) (“External citizen oversight agencies have been growing steadily since the late 1970s.”). The National Research Council suggests that “[t]here is very limited evidence regarding the effectiveness of citizen oversight agencies. . . . The published literature generally fails to take into account the multiple goals of oversight agencies; these

incorporated a petition process into the cooperative federalism structure it created for the major environmental regulatory statutes, empowering citizens who think a state is doing a poor job of administering an environmental law to petition the Environmental Protection Agency (EPA) to investigate the state's performance and potentially withdraw state authorization.<sup>39</sup> Internationally, a wide range of petition processes have been created under a variety of environmental, human rights, labor, and trade regimes.<sup>40</sup>

The growing number of these procedures suggests a heightened interest in providing citizens with a formal entry point into governance. More generally, it raises several questions of fundamental importance to contemporary governance. Whether characterized as “fire alarms” or in some other way,<sup>41</sup> the creation of citizen petition processes suggests a belief that allowing individuals and groups to voice their views through such procedures may improve the way our polity functions. For example, a citizen petition process may enhance how government institutions operate by providing them with information they may have overlooked or not been aware of otherwise.<sup>42</sup> Similarly, it may strengthen ties between government and the people it serves and thereby enhance legitimacy.<sup>43</sup> Some argue that it can help to keep government honest, to the extent that government decision-makers may be subject to capture by regulated parties.<sup>44</sup> On the other hand, a poorly functioning citizen petition process may undermine effective governance. For instance, it may

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include . . . conducting . . . investigations of citizen complaints and building citizen confidence in the complaint process.” *Id.* at 289.

39. See, e.g., 33 U.S.C. § 1342(c) (2010) (authorizing public hearings for the Clean Water Act National Pollutant Discharge Elimination System program). The EPA has adopted regulations to implement this process. 40 C.F.R. §§ 123.61–123.64 (2010).

40. Following in the footsteps of NAFTA and the NAAEC, several other U.S. free trade agreements have established citizen submission procedures. E.g., Dominican Republic-Central America-United States Free Trade Agreement, ch. 17, Aug. 5, 2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>; United States-Peru Trade Promotion Agreement, ch. 18, Apr. 12, 2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>; United States-Colombia Trade Promotion Agreement, ch. 18, Nov. 22, 2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>; United States-Panama Trade Promotion Agreement, ch. 17, June 28, 2007, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>. Monitoring mechanisms have long been an integral part of human rights and labor institutions, and many of them are triggered by submissions filed by individuals or groups. See generally GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hannum ed., 2004). The best known and most active is probably the procedure established by the First Optional Protocol to the International Covenant on Civil and Political Rights. Such procedures are much rarer in international environmental law, with the important exception of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, a European agreement that includes a robust system of complaint-based monitoring. See Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements Compliance Mechanisms*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 1, 10 (2007) (“[C]itizens and NGOs have gained the formal right to file complaints and to participate in preparation of national reports.”).

41. Raustiala, *Police*, *supra* note 7, at 390.

42. David L. Markell, “Slack” in the Administrative State and Its Implications for Governance: *The Issue of Accountability*, 84 OR. L. REV. 1, 10 (2005).

43. *Id.*

44. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1685, 1776–77 (1975).

divert attention from more important to less important issues<sup>45</sup> and leave citizens feeling frustrated rather than empowered.<sup>46</sup> For our purposes, a key takeaway point is that assessments of the process should account for its citizen-driven character.

A second critical aspect of the CEC petition process is its focus on a particular part of the regulatory process: effective enforcement. Enforcement has long been viewed as an essential part of regulatory governance. As Senator Joseph Lieberman observed during one of many oversight hearings Congress has held on EPA enforcement, without enforcement “most of the rest of environmental protection lacks meaning, lacks teeth, lacks reality.”<sup>47</sup> Reflecting the importance of enforcement, the EPA has structured its organization to include an office dedicated to it, the Office of Enforcement and Compliance Assurance (OECA).<sup>48</sup> The EPA has developed a number of metrics for evaluating the performance of its enforcement programs and the performance of enforcement programs of EPA-authorized state environmental regulatory regimes.<sup>49</sup> The CEC procedure’s underlying purpose of bolstering domestic enforcement is a second key feature for assessments of its performance.

Four metrics stand out as especially promising tools to assess performance of the citizen petition process in light of its citizen-driven character and its focus on the effectiveness of government enforcement.<sup>50</sup> One is the extent to which citizens are

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45. Jeffrey G. Miller, *Overlooked Issues in the “Diligent Prosecution” Citizen Suit Preclusion*, 10 WIDENER L. REV. 63, 71 (2003).

46. The text is intended to be illustrative, not comprehensive. There are a wide range of purported benefits and risks associated with citizen engagement beyond those listed. Regarding the latter, for example, some have raised concerns about the lack of accountability of NGOs. See, e.g., Ann M. Florini, *The Third Force: The Rise of Transnational Civil Society* 232–33 (2000) (“[T]roubling questions about legitimacy and accountability remain. Transnational civil society networks by definition operate at least in part beyond the reach of the specific governments, businesses, and individuals they most affect.”). Others have identified downsides from “too much transparency.” Coglianese, *supra* note 37, at 536.

47. *Oversight of the Environmental Protection Agency’s Enforcement Program: Hearings Before the Subcomm. on Toxic Substances, Environmental Oversight, Research, and Development of the Comm. on Environment and Public Works*, 101st Cong. 2–3 (1989) (statement of Sen. Joseph I. Lieberman); see also Michael M. Stahl, *Enforcement in Transition*, ENVTL. F. NOV./DEC. 1995, at 19 (“The use of enforcement authority to ensure compliance with environmental statutes is one of the most important aspects of the current national dialogue about the scope of government regulation and the future of ecological protection.”).

48. The OECA shares enforcement authority with the EPA regional offices. EPA OFFICE OF INSPECTOR GEN., EPA MUST IMPROVE OVERSIGHT OF STATE ENFORCEMENT, Report No. 12-P-0113, at 1 (Dec. 9, 2011). The EPA has revamped the structure of the OECA over time. See *id.* at 3 (describing changes being made to the OECA).

49. For a recent review of the EPA’s efforts to establish and implement enforcement measures, see *id.* at 6–8. The EPA’s State Review Framework has been a significant initiative to create greater consistency in such measures. See *Compliance & Enforcement Through State Government: State Review Framework*, U.S. ENVTL. PROT. AGENCY (Jan. 23, 2012), <http://www.epa.gov/compliance/state/srf> (identifying “recommendations for improvement to ensure fair and consistent enforcement and compliance programs across the states”). For another review of “the state/EPA enforcement relationship,” see generally CLIFFORD RECHTSCHAFFEN & DAVID MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP 98–124 (2003).

50. The four metrics we discuss in the text seem especially salient to us in evaluating the performance of a citizen-driven petition process that focuses on effective enforcement. Additional metrics could provide additional insights. Ten years ago, one of us applied a multifactor assessment framework for supranational adjudication developed by Laurence Helfer and Anne-Marie Slaughter to the CEC submission procedure, modifying it to reflect the way that the CEC mechanism relies on non-adversarial monitoring and managerial methods to promote compliance. See generally Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997);

using it.<sup>51</sup> If citizens are using a process frequently, that is a sign of vitality, at least in the eyes of key stakeholders. Growth in use over time is another signal that a process has value. We suggest that there is a presumption of failure for a citizen petition process that citizens do not use, or that they use less and less as time passes.<sup>52</sup>

A second measure involves operation of the process and, in particular, treatment of petitions. In our view, the work on procedural justice is particularly helpful in assessing how petitions have been treated.<sup>53</sup> That literature suggests that it is important to consider the “procedural justness” of a procedure as well as the outcomes it produces.<sup>54</sup> Procedural justice includes features such as the nature of opportunities to participate in a process, whether the authorities are considered to be neutral, the extent to which people trust the authorities, and the degree to which people are treated with dignity and respect during the process.<sup>55</sup> We also consider

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Knox, *A New Approach*, *supra* note 12. More generally, the literature on “policy success” contains many formulations concerning appropriate measures of performance, while acknowledging that to some degree the “criteria for establishing success are contested.” Marsh & McConnell, *Towards a Framework for Establishing Policy Success*, *supra* note 11, at 565, 567; *see, e.g.*, Allan McConnell, *Policy Success, Policy Failure and Grey Areas In-Between*, 30 J. PUB. POL. 345, 346, 349–50 (2010) (suggesting that there are at least three forms of policy success—process success, program success, and political success—but also noting that “[a]ssumptions of what constitutes success take many forms” and “[t]he policy sciences lack an over-arching heuristic framework which would allow analysts to approach the multiple outcomes of policies in ways that move beyond the often crude, binary rhetoric of success and failure”). To some extent metrics must be contextual. While the metrics we use in this Article are obviously most relevant to other processes that incorporate important roles for citizens and focus on enforcement, they may be helpful in other contexts as well. For example, procedural justice concepts have been applied to a broad range of decision-making processes. *See, e.g.*, Tom Tyler & David Markell, *The Public Regulation of Land-Use Decisions: Criteria for Evaluating Alternative Procedures*, 7 J. EMPIRICAL LEGAL STUD. 538, 538 (2010) (assessing the application of procedural justice in land-use regulation through factors such as “overall acceptability *ex ante*; robustness; consensus; procedurality; and their ranking on nonfairness issues”).

51. We have urged citizen use as a performance measure for citizen petition processes in previous work. Markell, *Spotlighting Procedures*, *supra* note 12, at 433; Knox, *Separated at Birth*, *supra* note 12, at 379–80; Markell, *Citizen Perspectives*, *supra* note 12, at 665–76.

52. Of course, a default presumption that citizen use of a citizen petition process is an important performance measure may be overcome by other indicia of performance. For example, a single use of the process, or a handful of uses, may have enormous value in terms of environmental protection or government enforcement policies and practices. Or, similarly, even limited use may somehow dramatically transform citizen confidence in governance efforts and in compliance with environmental requirements more generally. As a general matter, however, we suggest that it is reasonable to consider the extent to which citizens are using a citizen-driven petition process in evaluating the success of such a process.

53. *See generally* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC’Y REV. 103 (1988) (measuring citizens’ satisfaction with legal procedure). For two previous efforts that use procedural justice concepts to assess the CEC process, *see* Markell, *Citizen Perspectives*, *supra* note 12, at 682–707 (containing a detailed assessment of the CEC citizen petition process using the lens of the procedural justice literature), and Markell & Tyler, *supra* note 12, at 22–27 (comparing the CEC process and several other citizen-driven processes from a procedural justice perspective).

54. TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 75–102 (1997).

55. *Id.*; Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117, 117 (2000) (finding that “people are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair”). There are different formulations for evaluating the procedural justice of a process, and it also appears that the precise criteria and the weight they receive vary depending on the circumstance; the discussion in the text is intended to provide a sense of the kinds of features that may be important in assessing procedural justice.

the issue of timeliness in reviewing treatment of petitions.<sup>56</sup> It seems obvious that a procedure that does not reach timely results is likely to be considered less effective and attractive than one that does, all else remaining equal.

A third measure involves outcomes or results. Ultimately, a key purpose of the citizen petition process is to spotlight ineffectual government enforcement in order to prod government enforcers to improve performance in this arena. Thus, the key question here is what impact, if any, the CEC citizen petition process has had on the effectiveness of domestic enforcement.

Defining effective government performance, and effective enforcement in particular, is no simple task.<sup>57</sup> Wrestling over the years with the substantial challenge of developing effective measures,<sup>58</sup> the EPA has identified and used several, both to evaluate its own enforcement personnel and to assess state enforcement performance.<sup>59</sup> For our purposes, the key point is that the effects the CEC citizen petition process has had on government enforcement performance represent an important metric for evaluating the value of the procedure. For example, have submissions led parties to change their enforcement policies and practices (for example, by increasing the number of inspections or the number of enforcement actions), contributed to improved compliance with the law, or helped produce reductions in amounts of pollution released into the environment? Again, the key

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56. The issue of timeliness does not necessarily fit neatly into the procedural justice literature, but procedural justice and timeliness both relate to treatment of petitions, and for our organizational purposes, we believed it sensible to treat them together for that reason.

57. A recent Canadian Auditor General audit noted that “[m]easuring the performance of environmental enforcement programs is difficult.” OFFICE OF THE AUDITOR GEN. OF CAN., REPORT OF THE COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT: CHAPTER 3, ENFORCING THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999, at 20 (2011). In 1993, Congress adopted the Government Performance and Results Act (GPRA) in an effort to “shift the focus of government performance and accountability away from . . . the activities being performed to the *results* and *outcomes* of those activities,” and it “modernize[d]” this Act in 2010. OFFICE OF THE INSPECTOR GEN., EPA’S PROGRESS IN USING THE GOVERNMENT PERFORMANCE AND RESULTS ACT TO MANAGE FOR RESULTS 1 (June 13, 2001) [hereinafter EPA’S PROGRESS]. See generally GPRA of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993); GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (2011). There have been a variety of evaluations of implementation of the GPRA over the years, including of the EPA’s progress. See, e.g., EPA’S PROGRESS, *supra* (discussing EPA efforts to implement the GPRA).

58. The EPA is not the only agency to tackle this challenge. The Organisation for Economic Co-operation and Development (OECD) has developed a list of measures, which includes compliance rates, repeat violations and duration of non-compliance, pollution releases, and changes in environmental quality, among others. OFFICE OF THE AUDITOR GEN. OF CAN., *supra* note 57, at 21 (Dec. 2011) (citing EUGENE MAZUR, OUTCOME PERFORMANCE MEASURES OF ENVIRONMENTAL COMPLIANCE ASSURANCE: CURRENT PRACTICES, CONSTRAINTS AND WAYS FORWARD, OECD ENVIRONMENTAL WORKING PAPER NO. 18 (2010)).

59. For a recent assessment, see EPA OFFICE OF INSPECTOR GEN., *supra* note 48. For book-length treatment of the effort to develop and implement performance measures for environmental enforcement and compliance promotion efforts, among other topics, see generally RECHTSCHAFFEN & MARKELL, *supra* note 49 (noting that one typology of enforcement measures divides them into four categories: inputs (the level of resources invested), outputs (the level of activity, such as numbers of inspections undertaken or cases brought), outcomes (penalty dollars assessed, value of injunctive relief imposed, etc.), and environmental results (changes in environmental conditions resulting from enforcement activity)). In its most recent annual report on enforcement and compliance results, the EPA focuses primarily on outputs (levels of activity) and outcomes (results from enforcement cases), while also including one measure of environmental or public health benefits estimated to result from such cases. EPA, FISCAL YEAR 2011 EPA ENFORCEMENT & COMPLIANCE ANNUAL RESULTS (Dec. 8, 2011).

question is whether the CEC process has spurred changes in enforcement practices and, if so, whether these changes have improved the quality of the environment.<sup>60</sup>

Finally, we suggest the value of a somewhat less obvious metric: the effect the process has had on the public. A key purpose of the NAAEC is to promote constructive civic engagement in environmental issues across the continent.<sup>61</sup> Beyond participation in the citizen petition process itself, therefore, we believe it worth asking whether the process has contributed to deeper or more extensive and helpful civic engagement. Establishing parameters for such a metric is obviously a challenging task. We nevertheless include such a metric because we think that, despite the obvious challenges, it is worth considering given the attention that civic participation has attracted and the importance the drafters of the NAAEC (and many other legal regimes) attach to it. We also are aware of the extraordinary declines in trust in governance institutions in recent years and believe that ideas to reverse or at least slow these declines, including outside-the-box performance measures of this sort, are extremely important for those interested in bolstering a vibrant civil society.<sup>62</sup> We offer below some observations about performance of the process in light of this metric that we do not view in any way as complete, but which we hope enrich the conversation about the value of including a performance metric of this sort and the viability of doing so.

Our experience with the CEC process suggests another element of the analytical frame beyond the search for value and the appropriate metrics for conducting this search: the extent to which it is possible to separate the contribution of process design and process implementation to performance successes and deficiencies. This strikes us as an important, albeit difficult, inquiry. Taken to the extreme, design flaws may be fatal to a process's prospects, especially if redesign is unlikely. In contrast, stumbles in implementation may be much easier to fix.<sup>63</sup> As we indicate below, although there are certainly structural problems with the CEC procedure, we believe that shortcomings in its implementation are responsible for many of the failures ascribed to it. Thus, the challenge is to identify these

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60. Alternatively, the process could have value even if it did not lead to such changes if it caused the government to explain why its extant enforcement approaches were reasonable.

61. NAAEC, *supra* note 1, art. 1(h) (listing as an "objective" of the NAAEC "promot[ing] transparency and public participation in the development of environmental laws, regulations and policies").

62. See, e.g., Lydia Saad, *Americans Express Historic Negativity Toward U.S. Government*, GALLUP (Sept. 26, 2011), <http://www.gallup.com/poll/149678/americans-express-historic-negativity-toward-government.aspx> (reporting a September 2011 Gallup poll finding that "[a] record-high 81% of Americans are dissatisfied with the way the country is being governed, adding to negativity that has been building over the past 10 years"); Stanley B. Greenberg, *Why Voters Tune Out Democrats*, N. Y. TIMES, July 31, 2011, at SR1 (finding that trust in government has diminished significantly, noting that "[j]ust a quarter of the country is optimistic about our system of government—the lowest since polls by ABC and others began asking this question in 1974").

63. Analysis of this question in the CEC context may shed light on an issue that has captured attention on a broader scale: whether NGOs tend to allocate a disproportionate portion of their energy and resources in efforts to influence policy design and give implementation issues relatively short shrift. See, e.g., David G. Victor et al., *Introduction and Overview*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* 1-2 (David G. Victor et al. eds., 1998) (noting that although "most analysts... focus on... [treaty] formulation, negotiation, and content[.]... it is not legislation alone, but rather the implementation process that determines whether a commitment has any practical influence" (citations omitted)).

shortcomings in implementation, and then to identify, adopt, and implement strategies that will address them.

### III. APPLYING THE METRICS TO THE CEC CITIZEN PETITION PROCESS

Part III explains how the procedure has worked in practice over the eighteen years since its creation and evaluates the procedure in light of the four metrics identified in Part II: success at attracting submissions; timeliness and fairness; effectiveness at meeting its environmental aims; and promotion of public involvement generally.

#### A. *The Procedure in Practice*

The CEC received its first submission in 1995.<sup>64</sup> Through the end of 2011, it has received 78 submissions, an average of 4.6 a year.<sup>65</sup> The number of submissions filed each year has varied from 2 to 7. More than half of the submissions—40—have been directed against Mexico, 29 against Canada, and only 10 against the United States.<sup>66</sup> As Chart One indicates, the number of submissions received annually against Canada and Mexico has not greatly changed over time, but the number against the United States dropped precipitously after the first few years.

**Chart One: Number of Submissions by Year**<sup>67</sup>

	'95	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11
CN	0	2	5	1	0	1	1	2	2	3	0	1.5	3	1	2	2	2
MX	0	1	2	5	0	3	2	3	4	3	3	4	2	2	3	2	1
US	2	1	0	1	2	2	0	0	0	1	0	0.5	0	0	0	0	0
Total	2	4	7	7	2	6	3	5	6	7	3	6	5	3	5	4	3

The submissions, nearly all of which have been submitted by environmental groups, have identified a wide range of alleged failures of enforcement on the part of the three countries, including failures to enforce laws concerning air and water pollution, environmental impact assessment, toxic waste, and protection of endangered species. Chart Two sets out the disposition of the submissions received through 2011.

64. *Spotted Owl*, SEM-95-001, Submission, at 13 (June 30, 1995).

65. The average has stayed between 4 and 5 since the early years of the procedure. Markell, *Citizen Perspectives*, *supra* note 12, at 667. When not otherwise noted, figures are calculated from information available at the CEC *Registry of Citizen Submissions*, *supra* note 29.

66. One of the submissions was directed at both Canada and the United States. *Devils Lake*, SEM-06-002, Submission, at 1 (March 24, 2006).

67. *Devils Lake*, SEM-06-002, which was directed at Canada and the United States, is treated as 0.5 against each. *Id.*

**Chart Two: Disposition of Submissions**

Submissions against . . .	<u>Canada</u>	<u>Mexico</u>	<u>US</u>	<u>Total</u>	<u>Pending</u>
Filed	28.5	40	9.5	78	
Response Requested	14	27	6	47	5
Factual Record Requested	11	13	2	26	1
Factual Record Authorized	9	8	2	19	2
Factual Record Published	7	7	1	15	3

Most have not cleared the first three hurdles: the Secretariat decisions on whether a submission is admissible, merits a response by a party, and warrants a factual record. The Secretariat has found about one-third of the submissions inadmissible or otherwise not meriting a response. Of those to which party responses have been requested, the Secretariat has decided not to recommend factual records for almost 40%.<sup>68</sup> In sum, and taking into account submissions that have been removed for other reasons (for example, withdrawal by the submitters), the Secretariat has recommended a factual record in 26 cases, about one-third of all the submissions it has received. For reasons that are unclear, the percentage of submissions resulting in a Secretariat recommendation has decreased in recent years. The last Secretariat recommendation for a factual record was in May 2008; since then, it has decided not to recommend a factual record for any of the 6 submissions that have reached this stage of the procedure.

Of the 26 Secretariat recommendations for factual records, 21 have resulted in Council decisions through the end of 2011.<sup>69</sup> The Council has approved 19 Secretariat requests for factual records and denied only 2. The Council's apparent deference to the Secretariat is deceiving, however. Of the 19 Council approvals, more than half have narrowed the scope of the factual record.<sup>70</sup>

The Secretariat has prepared 15 factual records, 7 each on Canada and Mexico and 1 on the United States, and it is currently preparing 3 more, 1 on each country.<sup>71</sup> Each report, which is usually more than 100 pages, reviews in great detail the law and facts pertaining to the situation identified by the submission. Factual records do not

68. Of the 47 submissions found to merit a response, 2 were withdrawn by the submitters before a Secretariat decision on whether to request a factual record, 1 was consolidated with another, and 1 still awaits a decision. Of the remaining 43, the Secretariat decided to request a factual record for 26, or 60.5%.

69. Of the other 5, 2 were withdrawn by the submitters before the Council made a decision, 1 was consolidated by the Council with another submission, and 2 await Council decision.

70. See *infra* Part III.B.2.b.

71. The nineteenth approval was later terminated after the submitters withdrew their request for a factual record. See *infra* note 117.



include judgments as to whether a party has failed to effectively enforce its environmental law, although it is possible to draw conclusions on that issue from the information presented. To date, the Council has decided to publish every factual record, albeit sometimes after a lengthy delay.

### *B. Applying the Metrics*

In this section, we apply the four metrics previously identified: (1) Is the procedure attracting submissions? (2) Is it timely and procedurally fair? (3) Is it effective? (4) Is it promoting public involvement?

#### 1. Is the procedure attracting submissions?

For the United States, the answer is clearly no. Only 2 submissions concerning U.S. law have been filed since 2000, and none since 2006.<sup>72</sup> In contrast, the procedure has received a steady flow of submissions directed at Canadian and Mexican enforcement. This difference is often attributed to the greater availability of domestic legal remedies in the United States than in Canada and Mexico.<sup>73</sup> Many of the submissions directed at Mexico, in particular, concern failures to enforce domestic law against individual projects.<sup>74</sup> Canadian environmental groups, in contrast, have often used the procedure to allege program-wide failures to enforce. Such a “programmatically” submission resulted in the first Canadian factual record, in *BC Hydro*, a comprehensive look at environmental damage caused by hydroelectric dams in British Columbia.<sup>75</sup> The submitters found the report valuable<sup>76</sup> and it was followed by a series of similar submissions, several of which have also resulted in factual records.<sup>77</sup>

It has been suggested that the CEC procedure may be a useful way to draw attention to similar problems in the United States,<sup>78</sup> and two programmatic submissions have been targeted at the U.S. government.<sup>79</sup> Although they both resulted in Secretariat recommendations for factual records, the Council narrowed the first so drastically as to make it virtually worthless,<sup>80</sup> and the second has yet to

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72. The first was *Coal-fired Power Plants*, SEM-04-005, which was approved for a factual record that has not yet been published; the second was *Devils Lake*, SEM-06-002, which was also directed against Canada and was dismissed by the Secretariat as inadmissible in August 2006.

73. *E.g.*, Christensen, *supra* note 9, at 171–72; GRAUBART, *supra* note 9, at 143.

74. *See, e.g.*, *Cozumel*, SEM-96-001 (proposed terminal for tourist ships); *Aquanova*, SEM-98-006 (shrimp farm); *Metales y Derivados*, SEM-98-007 (abandoned lead smelter); *El Boludo Project*, SEM-02-004 (gold mine); *ALCA-Iztapalapa*, SEM-03-004 (footwear materials factory); *Coronado Islands*, SEM-05-002 (natural gas terminal).

75. *BC Hydro*, SEM-97-001, Final Factual Record (June 11, 2000).

76. Christensen, *supra* note 9, at 174–75.

77. *E.g.*, *BC Mining*, SEM-98-004; *BC Logging*, SEM-99-004; *Ontario Logging*, SEM-02-001.

78. Marirose J. Pratt, *The Citizen Submission Process of the NAAEC: Filling the Gap in Judicial Review of Federal Agency Failures to Enforce Environmental Laws*, 20 EMORY INT’L L. REV. 741, 772–76, 783 (2006); Wold et al., *supra* note 9, at 423–24.

79. *See, e.g.*, *Migratory Birds*, SEM-99-002 (1999); *Coal-fired Power Plants*, SEM-04-005 (2004).

80. *See* Wold et al., *supra* note 9, at 425–29 (“The Council’s decision to narrow the scope of the factual record prevented the Secretariat from obtaining exactly the type of information submitters sought in order to achieve positive environmental results from the process.”).

result in a factual record more than seven years after it was filed.<sup>81</sup> When it is eventually published, the report could conceivably reawaken interest in the relevance of the procedure to the United States.

That is an optimistic perspective. A more negative one would warn that the interest of Canadian and Mexican environmental groups in the procedure may be declining. Although it is too early to identify a clear trend, there are some troubling signs. As Chart One indicates, the 7 total submissions received by the CEC in 2010–11 were the fewest filed in any consecutive two years since 1995–96. The procedure received only 1 submission directed at Mexico in 2011, the lowest number since 1999, and the 3 submissions concerning Mexico filed in 2010–11 were the fewest in any two consecutive years since 1999–2000. The Canadian environmental group that has filed the most submissions resulting in factual records withdrew its most recent submission after the Council narrowed its scope in December 2010.<sup>82</sup> And at a JPAC meeting in the fall of 2011, submitters complained about a variety of problems with the procedure, including lengthy delays, Council interference, and the lack of follow-up of factual records.<sup>83</sup> In response to a survey of submitters asking whether the mechanism “needs to be revised and amended,” almost every submitter said yes.<sup>84</sup>

## 2. Is the submissions procedure timely and fair?

The short answer is no. The submission procedure has been strongly criticized on these grounds almost from its inception, and the criticisms have grown louder and more justified over time.

### a. Timeliness

In response to early criticisms that the procedure was taking too long, the JPAC conducted a thorough review that concluded that the Secretariat should take no more than six months from the time a submission is filed to the decision whether to request a factual record, the Council should take no more than three months to decide whether to authorize it, and the Secretariat should take no more than thirteen months to plan and develop the factual record.<sup>85</sup> Emphasizing the importance of completing factual records “while the conditions that prompted their development are still current and when the available policy options have not been narrowed by the passage of time,” the JPAC said that the entire process should be completed within no more than two years.<sup>86</sup> The Council agreed, stating that it is “commit[ted] to

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81. *Coal-fired Power Plants*, SEM-04-005.

82. *Species at Risk*, SEM-06-005, Withdrawal (Jan. 17, 2011).

83. JPAC, *Re: Submissions on Enforcement Matters (SEM) and Cross Border Movements of Chemicals in North America*, Advice to Council 11-04 (Dec. 7, 2011), [http://www.cec.org/Page.asp?PageID=122&ContentID=25148&SiteNodeID=656&BL\\_ExpandID=1](http://www.cec.org/Page.asp?PageID=122&ContentID=25148&SiteNodeID=656&BL_ExpandID=1) [hereinafter JPAC, Advice to Council 11-04].

84. JPAC, *Summary of Responses to the JPAC Questionnaire on Submitters' Experiences with the Citizen Submission Process Under NAAEC Articles 14 and 15*, CEC, 10, <http://www.cec.org/Storage.asp?StorageID=10150> [hereinafter JPAC, *Summary of Responses*]. Of 24 responses, 92% answered “Yes,” none answered “No,” and 8% answered “Don’t Know.”

85. JPAC, *LESSONS LEARNED*, *supra* note 9, at 15.

86. *Id.*

making best efforts, and to encourage the Secretariat to make best efforts, to ensure that submissions are processed in as timely a manner as is practicable, such that ordinarily the submission process will be completed in no more than two years following the Secretariat's receipt of a submission."<sup>87</sup>

In fact, "[t]he average length of time from the filing of a submission to the issuance of a factual record . . . [has been] 4.5 years."<sup>88</sup> Worse, the process has become much slower over time. The first 3 factual records, published in 1997, 2000, and 2002, were published about two years and nine months, on average, after the submission was filed.<sup>89</sup> The next 6, all of which were published in 2003, took nearly five years, and the most recent 6, published from 2004 to 2008, averaged almost exactly five years.<sup>90</sup> In recent years, the procedure has slowed even more. Of the 3 factual records being prepared when this Article went to press, 2 were filed more than seven years ago and the third was filed *nine* years ago.<sup>91</sup>

Much of the delay and, in particular, the recent increase in the delay, is due to the Council. From 1996 to 2004, the Council considered 16 recommendations for factual records and took, on average, about five months to decide whether to authorize them.<sup>92</sup> While that fell short of the JPAC's suggested standard of three months, it was far more timely than what has come since. Since 2004, the Council has decided whether to approve only 5 recommendations, and its decisions have come, on average, more than *two years* after the Secretariat recommendations. The trend is worsening: the 3 most recent decisions were made 36, 30, and 39 months after the Secretariat recommendations.<sup>93</sup> These are the longest delays in CEC history, but the record is already certain to fall again. Two pending Secretariat recommendations for factual records have been awaiting Council decision since May 2008 and April 2007, nearly four and five years ago.<sup>94</sup>

The Council has also taken longer to decide whether to make the final factual records public.<sup>95</sup> Here, the NAAEC provides a specific guideline: that the Council

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87. CEC Council, *Response to the Joint Public Advisory Committee (JPAC) Report on Lessons Learned Regarding the Articles 14 and 15 Process*, Res. 01-06 (June 29, 2001), <http://www.cec.org/Page.asp?PageID=122&ContentID=1127&SiteNodeID=272>.

88. Markell, *Spotlighting Procedures*, *supra* note 12, at 442. The average length of time between points in the submission process is calculated from information available at the CEC *Registry of Submissions*, *supra* note 29.

89. Markell, *Spotlighting Procedures*, *supra* note 12, at 443 (showing that the average number of days between submission and publication was 1006).

90. *Id.* (showing that the average number of days was 1784 and 1825, respectively).

91. *Quebec Automobiles*, SEM-04-007, Acknowledgement (filed November 2004); *Coal-fired Power Plants*, SEM-04-005, Acknowledgement and Annex (filed September 2004 and, after revision, January 2005); *Lake Chapala II*, SEM-03-003, Acknowledgement (filed May 2003).

92. The Council reviewed 16 Secretariat recommendations in this period. The calculation includes the decision in *Oldman River II* to delay consideration of the request while a domestic case was pending. *Oldman River II*, SEM-97-006, Council Res. (May 16, 2000). It does not include the eventual decision by the Council to authorize a factual record in that case. *Id.* Council Res. (Nov. 16, 2001).

93. *Lake Chapala II*, SEM-03-003 (recommendation made on May 18, 2005, and decision made on May 30, 2008); *Coal-fired Power Plants*, SEM-04-005 (recommendation made on Dec. 5, 2005, and decision made on June 23, 2008); *Species at Risk*, SEM-06-005 (recommendation made on Sept. 10, 2007, and decision made on Dec. 20, 2010).

94. *Ex Hacienda II*, SEM-06-003, Recommendation (May 12, 2008); *Hermosillo II*, SEM-05-003, Recommendation (Apr. 4, 2007).

95. The NAAEC requires the Secretariat to submit a draft factual record to the Council and the governments to provide any comments within 45 days. NAAEC, *supra* note 1, art. 15(5). Reception of

must decide “normally” within 60 days after the Secretariat submits the report.<sup>96</sup> Except for the decision on the very first factual record, which exceeded that limit by about a month, the Council complied with the 60-day rule for the first 10 factual records, through 2004. For the 5 more recent factual records, the Council has violated the rule every time, averaging more than five months and twice taking seven.<sup>97</sup>

The Secretariat has also contributed to the delays. Recall that the 2001 JPAC report suggested that the Secretariat should take no longer than 13 months to prepare a draft report.<sup>98</sup> Of the first 9 factual records—those issued before 2004—only 2 met that standard, but they generally came close, averaging fewer than 16 months.<sup>99</sup> The next 6, issued from 2004 to 2008, averaged more than 27 months, an increase, on average, of almost a year.<sup>100</sup> Again, the situation has gone from bad to worse: the factual records currently in preparation are going to exceed the previous averages by far. The Secretariat presented 1 of the 3 pending reports, *Quebec Autos*, in draft to the Council in March 2011, nearly *five years* after it was authorized in June 2006.<sup>101</sup> (Making the situation worse, the Secretariat has yet to present the final report to the Council despite having received government comments in May 2011.)<sup>102</sup> Meanwhile, the Secretariat has spent more than three years each on the other 2 pending factual records, *Lake Chapala II* and *Coal-fired Power Plants*, without presenting a draft to the Council.<sup>103</sup>

The Secretariat’s delays appear to be extending to earlier stages in the submission procedure as well. Since the beginning of the process, it has taken, on average, under five months to decide whether to request a response from a party.<sup>104</sup> For the submissions filed in 2010 and 2011, it has taken an average of almost one year to decide whether a response is warranted.<sup>105</sup>

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these comments has not been a significant source of delay.

96. *Id.* art. 15(7).

97. See *Tarahumara*, SEM-00-006 (nearly five months, from July 26, 2005, to December 21, 2005); *Ontario Logging*, SEM-02-001 (seven months, from June 20, 2006, to January 31, 2007); *Pulp & Paper*, SEM-02-003 (seven months, from June 28, 2006, to January 31, 2007); *ALCA-Iztapalapa II*, SEM-03-004 (over six months, from November 16, 2007, to May 30, 2008); *Montreal Technoparc*, SEM-03-005 (nearly three months, from March 28, 2008 to June 23, 2008).

98. JPAC, LESSONS LEARNED, *supra* note 9, at 15.

99. See *Cozumel*, SEM-96-001 (8.75 months); *BC Hydro*, SEM-97-001 (21 months); *Rio Magdalena*, SEM 97-002 (16 months); *Oldman River*, SEM-97-006 (17 months); *BC Mining*, SEM-98-004 (16.5 months); *Aquanova*, SEM-98-006 (15.75 months); *Metales y Derivados*, SEM-98-007 (16.5 months); *Migratory Birds*, SEM-99-002 (12.5 months); *BC Logging*, SEM-00-004 (17 months).

100. See *Molymex II*, SEM-00-005 (24 months); *Tarahumara*, SEM-00-006 (23.5 months); *Ontario Logging*, SEM-02-001 (27.75 months); *Pulp & Paper*, SEM-02-003 (27.5 months); *ALCA-Iztapalapa II*, SEM-03-004 (26.5 months); *Montreal Technoparc*, SEM-03-005 (39.5 months).

101. See *Quebec Automobiles*, SEM-04-007 (factual record authorized in June 2006, and draft presented in March 2011).

102. *Id.* (showing in timeline dates comments received from Mexico and Canada).

103. See *Lake Chapala II*, SEM-03-003, Resolution (May 30, 2008); *Coal-fired Power Plants*, SEM-04-005, Resolution (June 23, 2008).

104. This number includes the time the Secretariat spent considering filings before making a decision either to reject a submission under Article 14 or to request a response from a government, on average, for each of the 72 cases in which the Secretariat made such a decision. This average is calculated from information available at the CEC *Registry of Submissions*, *supra* note 29.

105. This average includes a submission that has been awaiting a decision for nearly two years. *Alberta Tailings*, SEM-10-002 (filed April 2010). To arrive at an average time, this submission was treated

Unsurprisingly, when the 2011 JPAC survey asked submitters whether they believed that the time the CEC took in their case was “a reasonable amount of time for processing submissions,” 22 of 23 respondents answered no.<sup>106</sup> These lengthy and growing delays must make the procedure less attractive to potential submitters.<sup>107</sup> Why should anyone try to use a mechanism for investigating cases of ineffective enforcement if the mechanism will not produce a result for many years?

b. Fairness

Studies of the submission procedure have consistently concluded that the Secretariat makes objective decisions based on a careful review of the submissions and the relevant factors set out in the NAAEC.<sup>108</sup> The criticisms of the procedure as unfair have been directed at the governments, both in their individual capacities and acting collectively through the Council.

The procedure is structurally biased in favor of the governments. It provides them rights that the submitters do not have: the governments may comment on a draft factual record before it is finalized; they may decide whether it may be published at all; and, most important, they may choose not to authorize it in the first place.<sup>109</sup> Moreover, the governments have used their powerful position to tilt the playing field even more in their favor. Individual governments have sometimes declared part or all of their responses to be confidential<sup>110</sup> or failed to cooperate with Secretariat inquiries in the course of preparing the factual record.<sup>111</sup> Acting together in the Council, they have often delayed making decisions, as explained above, so that factual records are finally released many years after the submissions on which they were based.<sup>112</sup>

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as if it were decided in March 2012. Obviously, the average will rise the longer it remains undecided.

106. JPAC, *Summary of Responses*, *supra* note 84, at 7.

107. See Garver, *supra* note 9, at 38 (discussing current examples of extreme delay).

108. See, e.g., GRAUBART, *supra* note 9, at 127–28 (“The secretariat has followed a principled and professional standard of review, which includes . . . justifying decisions according to legal provisions.”); TRAC REPORT, *supra* note 9, at 45 (“Submitters and outside observers by and large believe that the Secretariat has performed its obligations well.”); Wold et al., *supra* note 9, at 421–23 (“Scholars, NAAEC review committees, and members of the public are virtually unanimous in applauding the Secretariat’s rigorous review of submissions for eligibility and for determination on whether a factual record is warranted.”); CEC, FOUR-YEAR REVIEW OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: REPORT OF THE INDEPENDENT REVIEW COMMITTEE § 3.3.3 (1998) (“While observers (and the Parties) may, and some certainly have, criticized specific decisions, this Committee has seen nothing to suggest that the decisions of the Secretariat lack proper foundation.”).

109. See *supra* notes 26–34 and accompanying text; see also NAAEC, *supra* note 1, arts. 39, 42 (giving government parties the ability to prevent disclosure of certain confidential and sensitive information).

110. See, e.g., *Crushed Gravel in Puerto Penasco*, SEM-05-001, Party Response, at 2 (May 12, 2005) (requesting that a portion be kept confidential); *Metales y Derivados*, SEM-98-007, Final Factual Record, at 9 n.1 (Feb. 7, 2002) (stating that Mexico had designated its response confidential and later rescinded the designation).

111. See, e.g., *Tarahumara*, SEM-00-006, Final Factual Record, at 83–84 (July 26, 2005) (describing Mexican failure to provide information about enforcement actions); Christensen, *supra* note 9, at 175 (describing Canadian refusal to cooperate with Secretariat investigation in *BC Hydro*, SEM-98-001).

112. The Council also has potential points of control over the Secretariat’s decisions through its appointment of the Secretariat’s Executive Director and its authority to veto staff appointments by the Executive Director. NAAEC, *supra* note 1, art. 11(1), (3). The NAAEC requires each party to “respect the international character of the responsibilities of the Executive Director and the staff and . . . not seek to influence them in the discharge of their responsibilities,” *id.* art. 11(4), and the Secretariat’s conduct of

Although the Council has only rarely exercised its authority to deny a Secretariat's request for a factual record, it has often narrowed the scope of the factual record.<sup>113</sup> In some cases, the narrowing left intact the bulk of the Secretariat recommendation, but in others, the Council decision vitiated the report before it was prepared. A striking example is the *Migratory Birds* case, in which the submission alleged a systematic failure on the part of the United States to enforce its laws prohibiting the taking of migratory birds by logging activities.<sup>114</sup> The Secretariat recommended a factual record to look at the broad allegations, which potentially concerned thousands of takings.<sup>115</sup> The Council directed the Secretariat to investigate only two specific instances mentioned in a footnote in the submission, with the result that the Secretariat spent months carrying out a formal investigation into the alleged deaths of a few birds.<sup>116</sup> Similarly, the most recent Council authorization of a factual record, the December 2010 decision in the *Species at Risk* case, restricted the Secretariat proposal so much that the submitter withdrew the submission on the ground that the limits imposed by the Council would "frustrate objective evaluation of Canada's failure to enforce" its law.<sup>117</sup>

Each of these actions has been criticized by the JPAC, independent reviewers, environmental groups, and academics, and in response the Council has sometimes backed down. For example, in the spring of 2000, the Alternative Representatives—lower-ranking government officials appointed by the Council ministers to represent them between Council sessions—denied one Secretariat request for a factual record, indefinitely postponed consideration of another, and proposed that the Council establish a governmental working group to oversee the Secretariat's procedure for preparing factual records.<sup>118</sup> The decisions provoked a surge of criticism, and at its June 2000 meeting, the Council ministers abandoned the idea and instead gave the JPAC a greater role in advising the Council on the procedure.<sup>119</sup> After the Council narrowed the scope of several factual records in November 2001, including the *Migratory Birds* submission against the United States described above, there was another wave of criticism, culminating in a 2003 "advice letter" from the JPAC "strongly recommend[ing] that Council refrain in the future from limiting the scope of factual records presented for decision by the Secretariat."<sup>120</sup> Again, the attention

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its responsibilities under the procedure has appeared to be independent of the Council's influence. See Markell, *Citizen Perspectives*, *supra* note 12, at 693 ("[T]he Secretariat's track record in performing these central functions in the citizen submission process certainly does not reflect that the Secretariat has 'rubber-stamped' submissions.").

113. E.g., *Species at Risk*, SEM-06-005, Council Res. (Dec. 20, 2010); *Lake Chapala II*, SEM-03-003, Council Res. (May 30, 2008); *Montreal Technoparc*, SEM-03-005, Council Res. (Aug. 20, 2004); *Oldman River II*, SEM-97-006, Council Res. (Nov. 16, 2001); *Aquanova*, SEM-98-006, Council Res. (Nov. 16, 2001); *Migratory Birds*, SEM-99-002, Council Res. (Nov. 16, 2001); *BC Mining*, SEM-98-004, Council Res. (Nov. 16, 2001); *BC Logging*, SEM-00-004, Council Res. (Nov. 16, 2001).

114. *Migratory Birds*, SEM-99-002, Submission, at 4 (Nov. 17, 1999).

115. *Id.*, Recommendation, at 2, 11 (Dec. 15, 2000).

116. Garver, *supra* note 9, at 36; Wold et al., *supra* note 9, at 426–37.

117. *Species at Risk*, SEM-06-005, Withdrawal, at 2 (Jan. 17, 2011).

118. Knox, *A New Approach*, *supra* note 12, at 71–73.

119. *Id.* at 71–73. One result was JPAC, LESSONS LEARNED, *supra* note 9, a report published the following year.

120. JPAC, *Re: Limiting the Scope of Factual Records and Review of the Operation of CEC Council Resolution 00-09 Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Advice to Council 03-05 (Dec. 17, 2003), <http://www.cec.org/Page.asp?PageID=122&Content>

seemed to have some effect: in 2004, the Council approved the preparation of a programmatic factual record examining claims that Canada failed to effectively enforce its protections for migratory birds against logging operations throughout Ontario.<sup>121</sup> In 2008, a coalition of environmental groups and academics signed a letter complaining about the undue Council delays in making decisions on Secretariat recommendations,<sup>122</sup> and the Council shortly thereafter approved two factual records that had been pending since 2005.<sup>123</sup>

As this brief history indicates, however, after the negative attention from the JPAC and outside reviewers decreased, the governments returned to the same types of conduct, including narrowing the scope of factual records and delaying their approval and publication. As described above, delays in Council decisions are at all-time lengths, and the Council's most recent decision on a Secretariat recommendation, in December 2010, narrowed the scope of the submission so much that the submitter withdrew it.<sup>124</sup>

Another round of external pressure is currently building. The JPAC held a public meeting on the submission procedure in November 2011 at which the participants "overwhelmingly voiced concern that the SEM process is not being administered consistent with the spirit and intent of the NAAEC."<sup>125</sup> In December 2011, the JPAC informed the Council that "citizens and environmental groups who have tried to put the process to good use are finding it increasingly difficult to justify using the process because the considerable effort required to prepare submissions does not reliably lead to timely and useful information," and stated that it "supports the public's perspective that the SEM process is, for the most part, unduly time-consuming and that the Parties are insufficiently responsive to the information it produces."<sup>126</sup>

The Council has established a "SEM Modernization Task Force," composed of government officials, which is preparing recommendations on the procedure for Council action at its meeting in the summer of 2012.<sup>127</sup> The JPAC has advised the Council that "its focus, through the SEM Modernization Task Force, should be on the timeliness and accessibility of the process, on giving more deference to the

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ID=1274&SiteNodeID=295&BL\_ExpandID= [hereinafter JPAC, Advice to Council 03-05]; see generally David L. Markell, *The CEC Citizen Submissions Process: On or Off Course?*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 8, at 274 (analyzing the November 2001 decisions to examine the NAAEC's "allocation of authority issue").

121. *Ontario Logging*, SEM-02-001, Council Res. (Mar. 12, 2004).

122. The letter also criticized other Council actions, including the narrowing of Secretariat recommendations. Letter from Ecojustice to Hon. John Baird, Minister of the Env't, Les Terrasses de la Chaudière, Adm'r Stephen L. Johnson, EPA, and Juan Rafael Elvira Quesada, Secretario, Secretaría de Medio Ambiente y Recursos Naturales (Apr. 23, 2008), [http://www.ecojustice.ca/media-centre/media-release-files/CEC.LTR.INTERFERFENCE.FINAL.2008.04.23.pdf/at\\_download/file](http://www.ecojustice.ca/media-centre/media-release-files/CEC.LTR.INTERFERFENCE.FINAL.2008.04.23.pdf/at_download/file). One of the authors was among the signatories.

123. *Lake Chapala II*, SEM-03-003, Council Res. (May 30, 2008); *Coal-fired Power Plants*, SEM-04-005, Council Res. (June 23, 2008).

124. *Species at Risk*, SEM-06-005, Withdrawal (Jan. 17, 2011).

125. JPAC, Advice to Council 11-04, *supra* note 83.

126. *Id.*

127. Letter from Michelle DePass, Alternate Rep. for the U.S., Council of the CEC, to Dr. Irasema Coronado, JPAC Chair, CEC (Aug. 21, 2011), [http://www.cec.org/Storage/136/16075\\_Council\\_to\\_JPAC\\_Aug\\_21\\_2011-lr.pdf](http://www.cec.org/Storage/136/16075_Council_to_JPAC_Aug_21_2011-lr.pdf).

Secretariat's independent recommendations and interpretations in the process, and on follow-up to factual records."<sup>128</sup>

3. Is the procedure effective at closing the gap between laws on the books and in practice?

In some cases, the submission procedure has certainly resulted in greater attention to environmental problems and increased levels of environmental protection. While it may seem counterintuitive to suggest that a process that does not result in a legally binding decision can have much effect, increased transparency and public attention can cause governments to change their behavior, and studies have demonstrated that such changes have occurred as a result of CEC factual records.

In one study of the effectiveness of the procedure, Jonathan Graubart looked at all submissions filed before 2003 and followed their development through 2006.<sup>129</sup> Of the 10 factual records published to that point, he found that 7 had resulted in "significant" success, which he defined as "actual policy changes."<sup>130</sup> The other 3 had had "modest" success, defined as "formal advancement of the cause onto the government's agenda."<sup>131</sup> In another study, which concentrated on factual records concerning Mexico, Jonathan Dorn identified specific improvements in 4 of the 6 he reviewed.<sup>132</sup> For example, the very first factual record, in the *Cozumel* case, resulted in a reduction in the size of the proposed project and the establishment of a marine park.<sup>133</sup> Later reports have spurred greater attention to the environmental effects of dams in British Columbia,<sup>134</sup> reduced the environmental impacts of a commercial shrimp farm in the Mexican state of Nayarit,<sup>135</sup> helped to lead to the cleanup of an abandoned lead smelter in Tijuana,<sup>136</sup> and contributed to greater efforts by Mexico to reduce illegal logging in the Sierra Tarahumara.<sup>137</sup>

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128. JPAC, Advice to Council 11-04, *supra* note 83.

129. GRAUBART, *supra* note 9, at 123.

130. *Id.* at 124-25.

131. *Id.*

132. Jonathan G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT'L ENVTL. L. REV. 129, 130-138 (2007). The four cases were *Cozumel*, SEM-96-001, *Aquanova*, SEM-98-006, *Metales y Derivados*, SEM-98-007, and *Tarahumara*, SEM-00-006. The seventh factual record concerning Mexico, *ALCA-Iztapalapa II*, SEM-03-004, was published after Dorn's study. Earlier, a review of the CEC's performance in its first decade, conducted by outside experts appointed by the CEC Council, also identified concrete improvements resulting from several of the first factual records, and concluded that it "has had a modest but positive environmental impact." TRAC REPORT, *supra* note 9, at 46.

133. Dorn, *supra* note 132, at 131; Alanís, *supra* note 9, at 186.

134. Christensen, *supra* note 9, at 174-75 (discussing *BC Hydro*, SEM-97-001, Final Factual Record (June 11, 2000)).

135. Dorn, *supra* note 132, at 133-34 (discussing *Aquanova*, SEM-98-006, Final Factual Record (May 5, 2003)); TRAC REPORT, *supra* note 9, at 46.

136. Dorn, *supra* note 132, at 134-35 (discussing *Metales y Derivados*, SEM-98-007, Final Factual Record (Feb. 7, 2002)).

137. Dorn, *supra* note 132, at 137-38 (discussing *Tarahumara*, SEM-00-006, Final Factual Record (July 26, 2005)).



The procedure may contribute to environmental protection by providing more information about environmental problems; validating the submitters' concerns through careful, objective investigation; and increasing pressure on the government to justify its inaction. As Graubart emphasizes, these benefits do not operate in isolation; rather, they provide opportunities that "require political mobilization from activists to be of use."<sup>138</sup> In every successful case, the submitters "expended considerable effort to promote their cause, substantiate their allegations, mobilize supporters, and lobby governments."<sup>139</sup> In other words, the factual record is useful as part of a broader campaign. As a result, it may be difficult to distinguish the particular effects of the factual record from other efforts by the submitters and their allies.<sup>140</sup> The problem is made more difficult by the lack of any organized follow-up by the CEC itself. Nevertheless, submitters have often pointed to the factual records as providing an important contribution to the final result.<sup>141</sup>

#### 4. Has the submission procedure led to greater public involvement generally?

Although the exact effects are hard to determine, it seems likely that the procedure has contributed to greater public participation in international and domestic institutions in three ways. First, the procedure provides opportunities for environmental activists from different countries to work together. Many of the submissions are filed by multiple environmental groups, including organizations from more than one country.<sup>142</sup> In the words of one Canadian submitter, the procedure helps to build international coalitions "by providing a clear and visible effort that other organizations can support."<sup>143</sup> Moreover, environmental groups have cooperated in activities related to the procedure, such as JPAC meetings, and joint letters advocating changes in the procedure.<sup>144</sup>

Second, the submission procedure may strengthen environmental activists' domestic networks. On the basis of interviews with Mexican activists, Minsu Longiaru concluded that many of them "reported greater success in expanding their domestic [than their transnational] ties through the CEC."<sup>145</sup> In particular, the organizers of the two *Lake Chapala* submissions "used the citizen [submission] process to help form two civil society coalitions, each of which roughly corresponded to the two CEC petitions."<sup>146</sup> Even though the Secretariat dismissed the first submission as inadmissible, "activists considered it successful because they were able to use the process to expand their domestic networks."<sup>147</sup> The environmentalists used the submission to draw attention to the problem within Mexico, and the "[w]idespread media attention" the submissions received "caused Lake Chapala

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138. GRAUBART, *supra* note 9, at 131.

139. *Id.* at 123.

140. *See, e.g.,* Dorn, *supra* note 132, at 137–38 (explaining the difficulty of determining the contribution of the *Tarahumara* factual record to the greater Mexican attention to illegal logging).

141. Alanís, *supra* note 9; Christensen, *supra* note 9, at 174, 183–84; Dorn, *supra* note 132, at 133–34.

142. *See* Christensen, *supra* note 9, at 173, 178 (describing petitions filed by coalitions of NGOs).

143. *Id.* at 183.

144. *See supra* notes 118–126 and accompanying text.

145. Minsu Longiaru, *The Secondary Consequences of International Institutions: A Case Study of Mexican Civil Society Networks and Claims-Making*, 37 CAL. W. INT'L L.J. 63, 100 (2006).

146. *Id.* at 101.

147. *Id.* at 103.

activists to be invited by other Mexican groups to speak at their events and to network and build alliances with them.”<sup>148</sup> In turn, these ties enabled the groups to make the second submission stronger, resulting in its approval for a factual record.<sup>149</sup>

Finally, and most generally, scholars have suggested that the procedure, together with other elements of the CEC, have raised the expectations of Mexican citizens as to the proper levels of transparency and public participation in public institutions. Greg Block, a former official of the CEC, has argued that this has helped to lead to demands by Mexicans for greater openness and transparency in their domestic environmental agencies in particular.<sup>150</sup> And Jonathan Graubart suggests that Mexican activists have used the procedure to help them try to develop “a legal rights culture.”<sup>151</sup>

#### IV. IMPROVING THE SUBMISSION PROCEDURE

The previous Part suggests that the procedure has real strengths. It can increase public participation and help to improve environmental protection in North America. But it also has serious and growing weaknesses. In particular, it seems to have become less timely and less fair in recent years, largely as a result of actions by the governments acting through the Council. In this Part, we propose improvements to the submission procedure and briefly explain how each proposal would strengthen the procedure in light of the metrics identified above. The proposals are principally aimed at improving the procedure’s timeliness, fairness, and effectiveness. We believe that a more timely, fair, and effective procedure would also attract more submissions and promote wider public participation.<sup>152</sup>

Our list does not include proposals that would require amending the NAAEC. For example, we do not suggest, as some have, that the submission procedure should result in binding decisions or that individuals and environmental groups should be able to trigger the arbitration process under Part V of the agreement.<sup>153</sup> Although such changes might make the submission procedure more effective, we believe that it is unrealistic to expect the governments to renegotiate the NAAEC. Fortunately, substantial improvements to the procedure are possible without such amendments.

The proposals are directed at four stages: (a) from the initial filing of a submission to the Secretariat decision whether to recommend a factual record; (b) from the Secretariat recommendation to the Council decision whether to approve it; (c) from the Council authorization to the publication of a factual record; and (d) actions concerning a factual record taken after publication.

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148. *Id.* at 102.

149. *Id.* at 108; *Lake Chapala II*, SEM-03-003.

150. Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 516 (2003).

151. GRAUBART, *supra* note 9, at 142.

152. Besides strengthening the procedure itself, another way to encourage submissions might be for the CEC to more actively disseminate information about the procedure to potential submitters. On the other hand, after eighteen years of operation, the procedure is well known among North American environmental groups, which have been the main sources of submissions.

153. *E.g.*, Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement’s Citizen Submission Process: A Case Study of Metales y Derivados*, 76 COL. L. REV. 443, 495–96 (2005).

A. *From Filing a Submission to Recommending a Factual Record*

1. *The Secretariat should update the guidelines for using the procedure.* In general, one of the strengths of the procedure is its accessibility to submitters. In the 2011 JPAC poll of submitters, 95% of the respondents indicated that it was easy to gather information about the procedure.<sup>154</sup> Almost all of the submitters consulted the “Guidelines for Submissions on Enforcement Matters,” a short guide prepared by the CEC, and all of those who did found it helpful.<sup>155</sup> Nevertheless, the Guidelines, which were adopted in 2000, could be brought up to date to reflect Secretariat decisions that have clarified some points of the submission procedure. For example, the Guidelines should set out the factors the Secretariat takes into account in deciding whether to recommend a factual record.<sup>156</sup>

2. *The Secretariat must meet reasonable deadlines.* As noted above, the JPAC suggested in 2001 that the Secretariat should take no longer than six months to decide whether a submission warrants a factual record. Experience with the procedure since then has demonstrated that this timeline is probably unrealistic. Delays may result from causes beyond the Secretariat’s control, such as insufficient information provided by the submitters or late responses from governments. Even apart from such factors, the Secretariat has never been able to meet this deadline consistently.

The Secretariat has taken, on average, about four and one-half months to decide whether to request a response from a government.<sup>157</sup> That number may be misleadingly high, however, inflated by delays in submissions filed in the first years of the procedure and in the most recent two years. For submissions filed from 1999 to 2008, the Secretariat averaged less than three months to make its decision. After a response is received, the Secretariat has taken an average of nearly eleven months to decide whether to recommend a factual record.<sup>158</sup> Here, too, the average has dropped after the early years. For all submissions filed after 1998, the average is just under nine months.<sup>159</sup>

It seems reasonable to expect the Secretariat to aim to improve on these averages except in unusual cases. Reasonable deadlines, therefore, would require the Secretariat to spend no more than two months to decide whether a response is warranted and no more than eight months on whether to recommend a factual

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154. JPAC, *Summary of Responses*, *supra* note 84, at 2. Of the twenty-four respondents, none said that it was difficult; three did not answer.

155. *Id.* at 3. See SECRETARIAT OF THE CEC, BRINGING THE FACTS TO LIGHT: A GUIDE TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 11–24 (2007), [http://www.cec.org/Storage/41/3331\\_Bringing%20the%20Facts\\_en.pdf](http://www.cec.org/Storage/41/3331_Bringing%20the%20Facts_en.pdf) (providing the “Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation” developed by the CEC).

156. See, e.g., *Skeena River Fishery*, SEM-09-005, Determination Pursuant to Article 15(1) that Development of a Factual Record Is Not Warranted, paras. 34–47 (Aug. 12, 2011) (providing the reasoning for its determination that a factual record need not be developed).

157. See *supra* note 104 and accompanying text.

158. This is an average of the time the Secretariat has taken to make its 42 decisions whether to request a factual record, with the exception of one outlier, *Rio Magdalena*, SEM-97-002. The decision in that case took three and one-half years, nearly one and one-half years longer than the next longest decision. Including *Rio Magdalena* would raise the average by almost one month.

159. This calculation does not include *Wetlands in Manzanillo*, SEM-09-002, a pending case in which the Secretariat has yet to make a recommendation more than a year after the government response.

record. If necessary in exceptionally difficult cases, the Secretariat could extend these deadlines by up to one-half, allowing it to take three months and one year, respectively, for these decisions.

3. *Government responses should be timely and public.* For the most part, governments have filed responses no more than two or three months after receiving the Secretariat request. Governments should strive to meet the earlier, two-month deadline, taking three months only if necessary. Governments should also refrain from declaring all or significant parts of their submissions to be confidential.<sup>160</sup>

4. *Submitters should have the right to reply to government responses.* A fundamental point of unfairness in the procedure is that governments can respond to submissions but submitters do not have a similar opportunity to respond to governments. Submitters should have a period of time, no more than two months, to file a written reply.<sup>161</sup>

#### *B. From Recommendation to Authorization of a Factual Record*

1. *The Council should always authorize Secretariat recommendations.*<sup>162</sup> The problem at the root of the criticisms of the procedure as unfair is the dual role that the submission procedure assigns the governments: as party to a dispute and as judge of the same dispute.<sup>163</sup> The procedure threatens governments with embarrassment. That is not a byproduct of the procedure; it is how the procedure is supposed to work. The potential embarrassment of a report showing that a government is failing to enforce its environmental law effectively is the engine that drives the government to explain its actions and improve its performance.<sup>164</sup> However, the dual role of the governments on the Council allows them to respond to this incentive by weakening the process that produces the embarrassing reports rather than by strengthening their laws.

This problem is made worse by the adversarial approach the governments have usually taken to submissions. Rather than treating submissions as an indication of a problem or potential problem and offering to work cooperatively to resolve it, they

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160. See JPAC, LESSONS LEARNED, *supra* note 9, at 11, 17 (discussing the need to limit confidentiality to encourage public participation and for a timely disclosure of non-confidential information); Yang, *supra* note 153, at 493 (proposing “formalizing and opening up the factual record development process”).

161. The JPAC has recommended a 30-day submitter response period. JPAC, LESSONS LEARNED, *supra* note 9, at 16.

162. This suggestion has been made many times. See Wold, *supra* note 7, at 249 (“As many have proposed, the easiest way to transform the citizen submission process would be to eliminate the governments’ role in determining whether a factual record is warranted.”).

163. See JPAC, Advice to Council 03-05, *supra* note 120 (referring to “an emerging perception of Council being in conflict of interest”); Letter from Jean Perras, Chair, Canadian Nat’l Advisory Comm., to Hon. David Anderson, Minister of the Env’t, Les Terrasses de la Chaudière, Hon. André Boisclair, Ministre d’État à l’Environnement et à l’Eau, Gouvernement du Québec, Hon. Lorne Taylor, Minister of Env’t, Gov’t of Alberta, Hon. Steve Ashton, Minister of Conservation, Gov’t of Manitoba (Mar. 17, 2003), [http://www.naaec.gc.ca/eng/nac/adv032\\_e.htm](http://www.naaec.gc.ca/eng/nac/adv032_e.htm) (noting “the potential for an apparent conflict of interest”) [hereinafter Canadian NAC Advice Letter].

164. Of course, embarrassment is not an *inevitable* product of the procedure. Not all submissions are well-grounded, and even those that point to failures to enforce may give the government an opportunity to provide a reasonable explanation why effective enforcement has not occurred.

have generally acted as if they are defendants accused of violating the law.<sup>165</sup> Then, after filing their brief contesting the claimant's allegations, they move to the judge's chair and decide whether to allow the case to proceed.<sup>166</sup> While they have usually resisted the temptation to dismiss the indictment altogether, so to speak, they do often reduce the charge by narrowing the scope of the recommended factual record, delaying its authorization, or both.

The best way to avoid this problem is for the governments to get out of the business of deciding which reports to authorize and which to avoid. It is not necessary to amend the NAAEC to achieve this result. The Council could adopt a resolution authorizing in advance all factual records proposed by the Secretariat. The resolution would not bind the Council from changing its mind in the future. But it would represent a political commitment that would be difficult to reverse, especially with the passage of time. For the United States, it would reflect the commitment it made shortly after the entry into force of the NAAEC, in an Executive Order, that "[t]o the greatest extent practicable, . . . where the Secretariat of the [CEC] informs the Council that a factual record is warranted, the United States shall support the preparation of such factual record."<sup>167</sup>

In addition to strengthening the procedure, such a decision would benefit governments. Summoning the political will to adopt a blanket authorization would be difficult but, once the decision was taken, it would spare the government representatives to the CEC the need to confront repeatedly, into the indefinite future, similarly difficult political decisions.<sup>168</sup> If the Council removed itself from the procedure, then governments would remain free to criticize reports, but they would no longer face the decision whether to approve reports as judges that they opposed as defendants. Moreover, the Council could combine this step with a quid pro quo, in the form of a declaration that the parties would not trigger the sanctions

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165. The submitters, too, typically see the process as accusatory. *E.g.*, Wold, *supra* note 7, at 205, 232, 249. It is possible to imagine steps that would make the process less adversarial. The Ten-year Review and Assessment Committee recommended that the Council, working with the JPAC and the Secretariat, consider including a mediation step in the procedure, at which the concerned government and the interested parties could try to resolve the underlying problem amicably. TRAC REPORT, *supra* note 9, at 54; *see also* Letter from Aldo A Morell, Acting Chair, U.S. Nat'l Advisory Comm., to Hon. Lisa P. Jackson, Adm'r, U.S. EPA (Oct. 29, 2006), [http://www.epa.gov/ofacmo/nac/pdf/2009\\_10\\_nac\\_advice\\_letter.pdf](http://www.epa.gov/ofacmo/nac/pdf/2009_10_nac_advice_letter.pdf) (recommending that the U.S. government propose such a mechanism). The Council has not taken up this suggestion.

166. It is true that no one state party can block a decision to authorize a factual record, but in practice the governments have never voted to override the objection of the party accused. Each of the other parties is undoubtedly reluctant to cause ill-feeling in a close ally, and mindful that (at least for Canada and Mexico) the next submission brought to the Council may well be directed against it.

167. Exec. Order No. 12,915, 59 Fed. Reg. 25,775 (May 13, 1994), at § 2(d)(1). Similarly, Canada's environmental minister recommended to the Council in 1996 that to avoid appearances of conflict of interest, the Council should vote to approve Secretariat recommendations. Canadian NAC Advice Letter, *supra* note 163.

168. This difficulty is more pronounced since, as a practical matter, most Council decisions are taken not by the environmental ministers, who meet only once a year, but rather by lower-ranking officials who may have less discretion to make decisions that might be seen as leading to embarrassment of their government. *See* TRAC REPORT, *supra* note 9, at 31 ("Because the [government officials with day-to-day responsibility] do not have the ability to communicate direction when none has been provided by the Council, their default role has become primarily a defensive one: to protect the interests of their respective countries or agencies . . .").

mechanisms of Part Five of the NAAEC in any cases brought to the submission procedure.<sup>169</sup>

2. *If the Council does not remove itself from the procedure entirely, then it should make the following commitments:*

a. *to take no more than three months to decide whether to authorize a factual record.* As described above, the JPAC suggested in 2001 that the Council should decide whether to authorize a factual record within three months of the Secretariat recommendation.<sup>170</sup> Until 2005, the Council averaged five months for its decisions, not much more than the suggested deadline. Since then, the delays in reviewing Secretariat recommendations have reached unjustifiable lengths, averaging more than two years. The two Secretariat recommendations currently awaiting Council decision, which are not included in that average, have been pending for nearly four and five years. There is no possible excuse for delays of this magnitude.

To restore basic public confidence in the procedure, the Council should immediately authorize factual records in *Ex Hacienda II*<sup>171</sup> and *Hermosillo II*,<sup>172</sup> the two cases with pending Secretariat recommendations, and it should pledge to make future decisions within three months, in line with the JPAC recommendation. To enforce this pledge against itself, it should pre-authorize the Secretariat to proceed with factual records in any case in which the Council has not acted within three months of the Secretariat recommendation.

b. *to stop narrowing the scope of factual records and otherwise interfering with Secretariat decisions.* The NAAEC gives the Secretariat the authority to decide whether to recommend factual records.<sup>173</sup> The Council does not have the authority to instruct the Secretariat to prepare a factual record, only to approve or disapprove a request.<sup>174</sup> It would seem to follow that it is beyond the scope of the Council's authority to instruct the Secretariat to prepare a factual record with a different scope than the one proposed.<sup>175</sup> The Council's 2001 decisions narrowing several factual records were roundly criticized at the time, including in a 2003 advice letter from the JPAC.<sup>176</sup> Although the Council appeared to refrain from narrowing for some time, it returned to the practice in December 2010.<sup>177</sup> The Council should recommit to deciding on the requested factual record as proposed.

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169. NAAEC, *supra* note 1, arts. 34–36. Although it seems unlikely that the mechanism will ever be used, it is not hard to imagine, in a worsening economic climate, growing dissatisfaction with NAFTA of the type expressed during the 2008 presidential campaign. In many ways, the submission procedure is a safety valve for pressures to use sanctions to address environmental issues. If the valve is not working, the pressure to use sanctions may increase.

170. The U.S. National Advisory Committee has also strongly endorsed a 90-day rule. *See, e.g.*, U.S. NAC Advice 2008–9 (Dec. 15, 2008), <http://www.epa.gov/ofacmo/nac/response/index.html>.

171. *Ex Hacienda II*, SEM-06-003.

172. *Hermosillo II*, SEM-05-003.

173. NAAEC, *supra* note 1, art. 15(1).

174. *Id.* art. 15.

175. *See* Wold et al., *supra* note 9, at 440–41 (describing the Council's limited scope of authority regarding the development of factual records).

176. *Id.* at 417.

177. *See* Species at Risk, SEM-06-005, Council Res. (Dec. 20, 2010) (narrowing the factual record). *See also supra* notes 82, 117, 124 and accompanying text.

c. *to explain its decisions if it does disapprove or narrow a recommendation.* If the Council does disapprove or narrow a Secretariat recommendation, it should explain its reasoning in detail, as the JPAC suggested ten years ago.<sup>178</sup>

C. *From the Authorization to the Publication of the Factual Record*

On the whole, the Secretariat has received high marks for its preparation of factual records. One recurrent criticism, however, is that the end result should be more conclusive and authoritative. Again, making the report legally binding would require a major change to the agreement, one that the parties would not accept. But the submission procedure could be more definitive without becoming legally binding: factual records could reach conclusions as to whether the government has failed to effectively enforce its laws, much as the reports produced by the NAFTA labor side agreement's submission procedure do.<sup>179</sup>

While such conclusions could be useful, we believe that factual records already provide a clear picture of the situation. We recognize that the governments are entrenched in their view that including clear conclusions would be *ultra vires* the agreement. While we disagree with that view, we doubt that the addition of formal conclusions would necessarily justify the political effort necessary to obtain them. Instead, we focus in this section on the importance of improving the timeliness of the factual records.

1. *The Secretariat should greatly shorten the amount of time it takes to produce a factual record.* As Part III describes, the Secretariat has taken longer and longer to develop a factual record. In 2001, the JPAC recommended that the Secretariat take no more than thirteen months to submit a draft factual record to the Council, and the first 9 factual records averaged less than sixteen months to prepare.<sup>180</sup> The next 6 averaged more than two years,<sup>181</sup> and the 3 currently in development were all authorized more than three years ago.<sup>182</sup> Indeed, one was authorized nearly six years ago, in June 2006.<sup>183</sup>

The Secretariat can and should do much better. It should return to the earlier standard. We propose that it normally take no more than twelve months from Council authorization (or the time that the Secretariat decides to prepare a factual record, if the Council adopts our suggestion that the Council generally authorize all Secretariat recommendations) to prepare a draft factual record. In exceptional cases, and with an explanation of why the additional time is necessary, the Secretariat could take up to eighteen months.

2. *The Council should adopt a one-time authorization to the Secretariat to publish all factual records.* To give the Council its due, it has never decided not to publish a factual record, but it has often delayed approving their publication, and the

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178. JPAC, LESSONS LEARNED, *supra* note 9, at 15–16.

179. *See, e.g.*, U.S. NAT'L ADMIN. OFFICE BUREAU OF INT'L LABOR AFFAIRS, REPORT OF REVIEW OF U.S. NAO SUBMISSION NO. 2003-01, at 80–87 (Aug. 3, 2004), <http://www.dol.gov/ilab/media/reports/nao/submissions/Sub2003-01.pdf> (detailing conclusive findings by the U.S. National Administrative Office pursuant to the North American Agreement on Labor Cooperation).

180. *See supra* notes 98–103 and accompanying text.

181. *See supra* notes 98–103 and accompanying text.

182. *See supra* notes 101–103 and accompanying text.

183. *See supra* notes 101 and accompanying text.

delays have again grown longer in recent years. After meeting the NAAEC's 60-day rule without exception for the 9 factual records published from 2000 through 2004, the Council has failed to meet the rule every time since.<sup>184</sup>

As with the decision to authorize factual records, it would be far preferable for the Council to remove itself from the procedure entirely. Here, the justification is even clearer. There is no reason for the Council ever to refuse to publish a report. Governments are free to express their disagreements with the Secretariat; indeed, they have the right to include their comments in the factual record itself. Moreover, it seems inconceivable that the Council would ever decide not to publish a factual record. The decision to do so would result in an enormous outcry from the JPAC, the national advisory committees, and the public, as well as a correspondingly intense interest in seeing the report whose publication was forbidden.

3. *Alternatively, the Council should never exceed the 60-day period.* At a bare minimum, the Council should immediately return to its previous practice of publishing factual records within the 60-day period stated in the NAAEC. The history of the procedure demonstrates that the governments can easily decide to publish a factual record within 60 days. Moreover, routinely delaying publication beyond that period is flatly contrary to the terms of the agreement.<sup>185</sup>

#### *D. After the Publication of the Factual Record*

Our principal suggestion here is that there should be regular follow-up of factual records. We do not mean the response of the government, if any, to the report. Obviously, if the report reveals failures in effective enforcement, then the responsible government should respond by correcting the problem. By "follow-up," however, we refer to a process for examining what happened after a factual record was published.

Following up factual records offers several important benefits. First, it increases knowledge of the effects of the submission procedure. Was the underlying problem satisfactorily addressed? If so, how? If not, why not? Careful examination of these questions will benefit those directly affected by the problems as well as others facing similar problems. Second, follow-up can increase the engagement of those affected by the problem that gave rise to the factual record. Those directly concerned—the people who live near the project, or who use the ecosystem, or who are supposed to be protected by the law that is the subject of the factual record—should have the opportunity to explain how the factual record process affected, or failed to affect, that problem.

Finally, follow-up can lead to concrete improvements in the situation that gave rise to the original submission, and in the submission procedure itself. This advantage follows from the first two. An objective analysis of the effects of a factual record, combined with the participation of those directly concerned, should lead to concrete recommendations for improvements of the situation that gave rise to the factual record and, more generally, improvements to the procedure that could lead to better factual records in the future.

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184. See *supra* note 97 and accompanying text.

185. NAAEC, *supra* note 1, art. 15(7).



As noted above, scholars have reviewed the effects of some factual records,<sup>186</sup> but their research, while valuable, does not provide all of the benefits of a more regularized system of follow-up. Academic studies reflect the particular interests and expertise of those carrying them out; the studies typically do not have sufficient resources to facilitate public engagement; and their recommendations do not necessarily receive government attention or lead to concrete changes.

One fairly minimal method of institutional follow-up would be for governments to report through the CEC on what they have done in response to factual records. The JPAC suggested in 2001 that the governments adopt this approach.<sup>187</sup> Another method entailing a greater degree of commitment would be for the Council to use the CEC's cooperative mechanisms to address problems identified by factual records.<sup>188</sup> In 2003, in response to a suggestion from the U.S. National Advisory Committee, the U.S. government recommended to the other parties that they consider following up factual records through the CEC intergovernmental working group on enforcement.<sup>189</sup> The Council did not adopt that suggestion, but it did commit in its 2005–2010 Strategic Plan to “exploring ways for each Party to communicate how matters raised in factual records may be addressed over time.”<sup>190</sup>

The Council has not implemented this commitment. In 2008, in response to renewed attention from the JPAC to the need to follow up factual records, the Council stated merely that follow-up should be left to individual governments.<sup>191</sup> Each government does have the resources and the responsibility to ensure that its laws are effectively enforced, and each is well-placed to explain what it did (or did not do) in response to a factual record, although it may find it difficult to be objective in evaluating how successful its response was at addressing the problems, if any, identified by the report. In any event, the same considerations that cause these governments to resist authorizing and publishing potentially embarrassing factual records in the first place appear to be leading them to avoid reviewing their response to their own factual records. They face similar disincentives to following up factual records collectively.

In lieu of action by the Council, the logical CEC organ to follow up factual records is the JPAC itself. The JPAC is experienced in facilitating public engagement; it is objective, with no stake in whether a particular factual record is embarrassing to a government or whether it reveals flaws in the Secretariat's or the

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186. *E.g.*, GRAUBART, *supra* note 9; Dorn, *supra* note 132; Yang, *supra* note 153.

187. JPAC, LESSONS LEARNED, *supra* note 9, at 17.

188. *See* Knox, *A New Approach*, *supra* note 12, at 118–20. The Council has the authority—and, indeed, the obligation—to promote effective enforcement in all three countries on a cooperative basis. NAAEC, *supra* note 1, art. 10(4)(a) (“The Council shall encourage . . . effective enforcement by each Party of its environmental laws and regulations . . .”).

189. Advisory Letter from John Knox, Chair, Nat'l Advisory Comm., to the Hon. Marianne Lamont Horinko, Acting Adm'r, EPA (Oct. 29, 2003), [www.epa.gov/ofacmo/nac/advice/nac\\_2003\\_10\\_advisory\\_letter.htm](http://www.epa.gov/ofacmo/nac/advice/nac_2003_10_advisory_letter.htm) (“[W]e were pleased to learn that U.S. government officials had made efforts to convince their counterparts on the CEC Enforcement Working Group to explore a mechanism to follow up factual records.”).

190. CEC, LOOKING TO THE FUTURE: STRATEGIC PLAN OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION 2005–2010, at 14 (2005).

191. Letter from David McGovern, Alternate Rep. for Canada, Council of the CEC to Jane Gardner, Chair for 2008, JPAC (Aug. 14, 2008), [http://www.cec.org/files/PDF/ABOUTUS/Response%20to%2008-01\\_en.pdf](http://www.cec.org/files/PDF/ABOUTUS/Response%20to%2008-01_en.pdf) (“Therefore, any type of action by the Parties to follow up on factual records is a matter of domestic policy as opposed to a requirement of the NAAEC.”).

Council's handling of the submission procedure. It can and already does provide recommendations to the Council and the Secretariat that are taken seriously.

Therefore, we recommend that *the JPAC should institute a procedure for following up factual records*. In 2008, the JPAC approved a plan to undertake just such a procedure. Specifically, it stated that it would:

begin this ongoing, yearly initiative by selecting, at minimum, one factual record each year and soliciting the views of interested parties (NGOs, citizens, government, etc.) concerning:

- steps taken by a Party and relevant others regarding the enforcement of environmental laws following the publication of the factual record;
- progress made in addressing the enforcement issues identified in the factual record within a certain period of time after the publication of the factual record; and
- improvement in the general underlying environmental conditions and concerns that led to the submission.<sup>192</sup>

The Council responded that “any such action would be beyond the scope of the NAAEC.”<sup>193</sup> It stated that the factual record is the last step in the submission procedure “as described in Articles 14 and 15” and “any type of action by the Parties to follow up on factual records is a matter of domestic policy as opposed to a requirement of the NAAEC.”<sup>194</sup> This response misunderstands the issue. The question is not whether the NAAEC *requires* the parties to follow up factual records, but whether it *authorizes* the JPAC to examine their effects. It clearly does. Article 16 of the NAAEC authorizes the JPAC to “provide advice to the Council on any matter within the scope of this Agreement . . . and on the implementation and further elaboration of this Agreement . . . .”<sup>195</sup> Effective enforcement of environmental laws is indisputably within the scope of the agreement. Indeed, that is what the agreement is (almost) all about. It is indisputable that factual records are relevant to the effective enforcement of environmental laws. Indeed, that is what factual records are (almost) all about.

After the Council's 2008 letter, the JPAC has not pursued its plan to follow up factual records. It should reverse course, inform the Council that it respectfully disagrees with the Council's views, and proceed to choose three factual records to review, one for each country.

Any mechanism adopted should be guided by the notion that “[f]or performance information to be useful, it must be complete, accurate, valid, timely,

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192. JPAC, *Re: Submissions on Enforcement Matters: From Lessons Learned to Following Up Factual Records*, Advice to Council 08-01, (Feb. 27, 2008), [http://www.cec.org/Page.asp?PageID=122&ContentID=958&SiteNodeID=290&BL\\_ExpandID=91](http://www.cec.org/Page.asp?PageID=122&ContentID=958&SiteNodeID=290&BL_ExpandID=91).

193. Letter from David McGovern to Jane Gardner, *supra* note 191.

194. *Id.*

195. NAAEC, *supra* note 1, art. 16(4).

and easy to use.”<sup>196</sup> Scholarly studies indicate that some—though far from all—petitions have produced quite favorable results in terms of improved environmental protection and improved government enforcement policies and practices.<sup>197</sup> Compiling such performance information for the CEC process in a more systematic way would enhance government accountability tremendously. Such information would be of great interest to submitters and go a long way toward enabling submitters and others to assess the outcomes the process has produced.<sup>198</sup> In its December 2011 response to an EPA Office of Inspector General report about state environmental enforcement, the EPA noted the “power of public accountability” to encourage better performance.<sup>199</sup> While the EPA was referring to the impact on regulated parties, the same would likely be true for government actors as well.

### CONCLUSION: INSIGHTS ABOUT CITIZEN PETITION PROCESS DESIGN AND IMPLEMENTATION FROM THE CEC EXPERIENCE

Having diagnosed problems with the CEC petition process and offered recommendations that we believe will help to put that process much more on track, we now suggest a series of insights from the CEC experience that are relevant to the design and implementation of citizen petition processes more generally.

Citizens’ use of a submission procedure is an obvious indicator of its effectiveness. The level of citizen use is likely to depend on a series of variables, including barriers to entry and perceived value from participation. As we point out, at least some submitters believe the CEC process is reasonably accessible (that is, it has limited barriers to entry), though there have been complaints about the amount of information required and other steps expected of submitters. As we also point out, perceived value depends on a variety of factors, including timeliness, expected outcomes, and available alternatives. The record of use, and the commentary, suggest that submitters perceive the value of the process differently for different countries, in part because of differences in domestic legal tools. Ultimately, process designers would be well-advised to consider each of these issues as well as political realities in structuring such processes so that they will receive an “appropriate” level of citizen use. The CEC experience also suggests that implementation of such processes (in addition to their design) has the potential to affect use as well. As a result, actions to implement a process must be taken mindful of the potential impact on citizens’ interest in using the process.

Perceptions concerning the timeliness and procedural justness of the CEC petition process have affected its use and perceptions about its value. As we and others have catalogued, the process moves very slowly and delays have gotten much worse in recent years. It is understandable that submitters are virtually unanimous in

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196. *GPRM Modernization Act Provides Opportunities to Help Address Fiscal, Performance, and Management Challenges: Hearing Before the Comm. on the Budget, U.S. Senate*, 112th Cong. 2 (2011) (statement of Gene Dodaro, Comptroller General of the United States) [hereinafter *Senate Hearing on GPRM Modernization Act*].

197. *See supra* Part III.

198. Developing such information about performance might well help government policy makers as well. As the GAO has noted, “decision makers often do not have the quality performance information they need to improve results.” *Senate Hearing on GPRM Modernization Act, supra* note 196, at 2 (statement of Gene Dodaro, Comptroller General of the United States).

199. EPA OFFICE OF INSPECTOR GEN., *supra* note 48, at 44.

their view that the process is much too slow when the Council has still not made a decision about either of the two currently pending Secretariat recommendations for factual records, which were submitted to the Council almost four and five years ago (in May 2008 and April 2007). Similarly, the Secretariat is still developing draft factual records that the Council authorized well over three years ago. We have made several recommendations to expedite the process. Concerns about timeliness may well arise in other citizen petition processes and care should be taken during the initial process design and during implementation to address them.<sup>200</sup>

The CEC experience suggests that procedural justice issues may arise because of process design and process implementation. For example, various commentators have expressed concerns about the countries' performing dual roles (as the "target" of submissions and also as key players during the decision-making process about how a petition should be handled). Similarly, the CEC process is structured to allow the parties greater opportunity for input than a submitter enjoys. Each of these design issues calls into serious question the fairness of the citizen petition process. Further, the Council has clearly exacerbated these fairness concerns, especially by its actions in narrowing the scope of authorized factual records, which many reviewers claim represent overreaching and also significantly reduce the value of the process. The CEC experience highlights the importance of procedural justice issues to the effectiveness of a process. We offer several recommendations in terms of process implementation that would make the process much more procedurally just and thereby likely increase its use and credibility. The procedural justice literature suggests the value of contextualized efforts to ensure the procedural justness of citizen-driven processes more generally. We hope that our analysis and recommendations provide a starting point for such efforts for other procedures.

Another insight from the CEC process that has broader applicability involves the recurring calls for follow-up on factual records. In its recent audit of Environment Canada's enforcement program, the Canadian Office of the Auditor General observed that "[w]ell-managed programs operate according to a systematic management cycle consisting of planning, doing, checking, and improving."<sup>201</sup> The design of the CEC petition process does not specifically include a "checking" or "improving" component, though it contemplates that such components may be incorporated. The lack of such a follow-up effort so far has resulted in lost chances for learning, strengthening of trust between government agencies and interested stakeholders, and performance improvement. The failure to incorporate such components to date, and the Council's apparent resistance to doing so, suggests the value of explicitly incorporating into process design each of these elements of a well-managed program. Even absent explicit incorporation of such follow-up, the groundswell of support for such monitoring reflects the value of integrating such work as part of process implementation.

A final observation from the CEC experience involves the importance of citizen involvement during process implementation as well as process design. Some commentators have suggested that NGOs invest considerable resources during the stage of process design but then pay less attention to program implementation. At

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200. For example, there have been complaints that the EPA Petition to Withdraw process drags out in some cases.

201. OFFICE OF THE AUDITOR GEN. OF CAN., *supra* note 57, at 8–9.

least one lesson that we draw from the CEC experience is the importance of formally integrating citizens into the ongoing work of a process, here through the JPAC. As we indicate above, the JPAC has been vigilant in monitoring the implementation of the CEC process. It has been willing to raise concerns when it thought the situation required it. And in at least some instances, the Council responded positively. While there have obviously been significant problems in the implementation of the CEC process, it is likely that these problems would have become far worse if the JPAC had not been watching and weighing in.

The effort to improve the effectiveness of the CEC citizen petition process is an ongoing one with many chapters yet to be written. Our assessment is that the citizen petition process has done some good to date. At the same time, significant shortcomings in the operation of the process have undermined its effectiveness and the credibility of the countries. We believe that there are readily available strategies to address these shortcomings and that implementing them would enable the process to be much more effective in the future than it has been thus far. Our diagnosis of the challenges and recommendations for fixes is intended to contribute to the ongoing effort to improve the process and to provide a foundation that will inform future evaluations.

The CEC experience also holds important lessons for the design and implementation of citizen petition processes more generally. A wide variety of such processes exists, with different designs and implementation experiences. We hope that this review of the CEC process contributes to the ongoing search for mechanisms that will be increasingly effective in engaging and informing citizens and government officials alike, and that will strengthen people's trust in the officials who serve them.