

2007

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Recommended Citation

David Markell, *Citizen-Friendly Approaches to Environmental Governance*, 37 *ENVTL. L. REP.* 10360 (2007),
Available at: <http://ir.law.fsu.edu/articles/69>

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Citizen-Friendly Approaches to Environmental Governance

by David L. Markell

Editors' Summary: Numerous commentators have urged that government increase opportunities for citizen participation as a way to advance a variety of public policy goals (enhancing government legitimacy, promoting more informed government decisions, etc.). In this Article, David L. Markell explores the experience of an international decisionmaking process that relies heavily on citizen participation, the Commission for Environmental Cooperation's (CEC) citizen submissions process, through the lens of the procedural justice literature, which seeks to understand the reasons why citizens are satisfied with decisionmaking processes. He offers some thoughts about the design and operation of the CEC process in terms of its effectiveness in promoting citizen participation and also considers more generally the design of government processes intended to engage citizens and to promote meaningful public participation in governance.

I. Introduction

Agency officials in the contemporary administrative state have enormous power to carry out the work of government.¹ While the president,² the U.S. Congress,³ and the judiciary⁴

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[*Editors' Note:* This Article is an updated and edited version of longer treatments of this topic the author has previously published, particularly *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL L. 651 (2006) [hereinafter *Understanding Citizen Perspectives*]. The citations for this previous work, which is cited with permission, include *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions*, 30 N.C. J. INT'L L. & COM. REG. 759 (2005) [hereinafter *Governance of International Institutions*]; *The CEC Citizen Submissions Process: On or Off Course*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 256 (David L. Markell & John H. Knox eds., 2003) [hereinafter GREENING NAFTA]; and *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL L. REV. 545 (2000).]

1. See, e.g., Dara K. Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 674 (2007) (noting that “[m]odern governments implement most legal mandates through bureaucracies”); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2094 (2005) (indicating that administrative agencies “constitute the basic, operational structure of modern government”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512 (1992) (noting that “[o]ver the past century, the powers and responsibilities of administrative agencies have grown to an extent that calls into question the constitutional legitimacy of the modern federal bureaucracy”).
2. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (discussing the relationship between the executive branch and the administrative state).

each has some capacity to serve as an institutional check on the actions of agency officials,⁵ despite these checks, agency staff have “nearly unfettered discretion” in carrying out their responsibilities.⁶

The enormous power that unelected agency officials wield, with limited oversight, has spawned an extensive literature concerning the legitimacy of the administrative state.⁷ Indeed, Prof. Jody Freeman has suggested that

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3. See, e.g., E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 150-60 (reviewing mechanisms for legislative oversight of agencies); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006) (discussing the role of Congress in the administrative state).
 4. See, e.g., Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1069 (2006); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990) (discussing judicial review of administrative decisionmaking).
 5. See, e.g., Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 783-90 (1999) (outlining ways in which agencies are held democratically accountable); Cohen et al., *supra* note 1, at 700 (discussing “internalist” and “externalist” perspectives on bureaucratic performance).
 6. See Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227 (2006) (discussing administrative discretion); Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 157-68 (1996) (addressing the reviewability of administrative decisions); Levin, *supra* note 4, at 693-702).
 7. Seidenfeld, *supra* note 1, at 1512; Cary Coglianese, *Weak Democracy, Strong Information: The Role of Information Technology in the Rulemaking Process*, <http://papers.ssrn.com/abstract=961641> (last visited Mar. 19, 2007). For a discussion of institutional legitimacy, see, e.g., James L. Gibson et al., *The Supreme Court and the U.S.*

“[a]dministrative law scholarship has organized itself largely around the need to defend the administrative state against accusations of illegitimacy.”⁸ These accusations have focused on a variety of purported flaws, including unaccountability of agency officials,⁹ a lack of transparency in the operation of the state,¹⁰ limited opportunities for public participation,¹¹ and dissatisfaction with agency performance.¹²

There has been strong support for increasing citizens’ opportunities to participate in governance as a way to increase government legitimacy and to address some of these perceived flaws in the operation of the administrative state. Prof. Jim Rossi, for example, suggests that “[o]ver the last thirty years or so, courts, Congress, and scholars have elevated participation to a sacrosanct status.”¹³ He notes that “recent reform efforts are consistently geared to enhance broad-based participation in the agency decisionmaking process.”¹⁴ Proponents suggest that greater opportunities for public involvement in agency decisionmaking processes may help to enhance accountability and transparency in governance, contribute to more informed, and thereby improved, results,¹⁵ and foster a greater degree of connection

between the governed and the governing (and a blurring of the line between the two) that leads to greater social capital and societal trust.¹⁶

This Article explores ways in which the “procedural justice” literature on citizen satisfaction may shed some light on the options for structuring government decisionmaking processes intended to encourage citizen involvement.¹⁷ Parts II and III of the Article ground this effort to explore the possible value of the procedural justice literature through a case study of a process that is intended to encourage citizen participation, and indeed depends on it, the Commission for Environmental Cooperation’s (CEC) citizen submissions process. This process, which empowers citizens to file complaints in which they claim that any of the North American countries is failing to effectively enforce one or more of its environmental laws, was created with the hope that it would enhance domestic environmental enforcement by increasing government accountability and transparency, and informing the exercise of agency discretion. Part II provides an overview of the CEC, including a brief history, a summary of the purposes of the CEC citizen submissions process, and an overview of the actual operation of the process. Part III reviews the track record of the CEC citizen submissions process and suggests that a potentially important facet of this track record is that citizens’ use of the process in the United States has slowed dramatically in recent years.

Part IV reviews the procedural justice literature on citizen satisfaction with decisionmaking processes. A central insight from this literature is that citizens value the processes used to make decisions, as well as outcomes. In other words, this literature suggests that citizens’ assessments of the fairness of third-party decisionmaking procedures are important to judgments about the legitimacy of such processes, independent of the outcomes of such procedures. This part reviews various factors the procedural justice literature identi-

Presidential Election of 2000: Wounds, Self-Inflicted, or Otherwise?, 33 BRIT. J. POL. SCI. 535 (2003).

8. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546 (2000).
9. See RICHARD MULGAN, *HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES* 36 (2003) (discussing government accountability). See generally ROBERT D. BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* (2001) (discussing the evolution of accountability in various forms of government).
10. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 27 (1998) (referring to the “administrative process” as the “proverbial black box that mysteriously translates legislative inputs into regulatory outcomes”).
11. See *id.* at 97 (discussing how the administrative state does not “encourage widespread participation”).
12. Commentators have raised an enormous array of other concerns about the administrative state such as “capture” of the regulatory process, among others. See, e.g., Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 169 (1990) (discussing capture theory).
13. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 174-75 (1997). The same trend toward increased citizen involvement exists at the international level. For example, in the environmental arena the 1992 Rio Declaration’s Principle 10 provides that “[e]nvironmental issues are best handled with the participation of all concerned citizens at the relevant level” and that “[s]tates shall facilitate and encourage public awareness and participation by making information widely available . . .” Rio Declaration on Environment and Development, princ. 10, June 14, 1992, 31 I.L.M. 874.
14. Rossi, *supra* note 13, at 175. While interest in public participation may be on the rise, commitment to open government and active civic engagement in governance has deep roots in the United States. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 3 (2005).

The United States is a nation built upon principles of liberty. That liberty means not only freedom from government coercion but also the freedom to participate in the government itself. [Jefferson, Adams, and the Founders] invoked an idea of freedom as old as antiquity, the freedom of the individual citizen to participate in the government and thereby to share with others the right to make or to control the nation’s public acts.

Id.

15. STEPHEN MACEDO ET AL., *DEMOCRACY AT RISK: HOW POLITICAL CHOICES UNDERMINE CITIZEN PARTICIPATION AND WHAT WE*

CAN DO ABOUT IT 4 (2005); THE ACCESS INITIATIVE—UNITED STATES, AT THE FRONTLINES OF DEMOCRACY: STRENGTHENING THE PUBLIC VOICE IN STATE ENVIRONMENTAL AFFAIRS 1 (2004), available at http://www.accessinitiative.org/pdf/TAIUS_final.pdf (characterizing including the public in decisionmaking as a “core principle of democracy”).

16. The question of how institutions build legitimacy is a difficult one that remains largely “unanswered.” Gibson et al., *supra* note 7, at 556 (concluding, in a study of the U.S. Supreme Court, that “[u]nderstanding how institutions acquire and spend legitimacy remains one of the most important unanswered questions for those interested in the power and influence of judicial institutions”). Societal trust in government is reported to have dropped significantly in recent years. See, e.g., WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? (John R. Hibbing & Elizabeth Theiss-Morse, eds., 2001) [hereinafter WHAT IS IT ABOUT GOVERNMENT]; MACEDO ET AL., *supra* note 15, at 4 (arguing that “improving our institutions to promote robust citizen engagement is essential to American democracy”).
17. For a definition of procedural justice, see *infra* note 107 and Part IV. This Article does not suggest that any particular level of citizen participation is appropriate. There is a vast literature on the benefits and costs of citizen engagement in governance. See, e.g., Rossi, *supra* note 13, at 182-88 (summarizing the common justifications for “mass participation” in agency decisionmaking); Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183, 274-75 (1997) (listing 10 potential benefits—and 3 commonly raised concerns—of empowering nongovernmental organizations (NGOs) to participate in governance). Obviously, as discussed in more detail below, a wide variety of factors other than citizen satisfaction with decisionmaking processes may affect levels of citizen participation. See, e.g., *infra* notes 18, 104, and 131.

fies as relevant to citizens' perspectives concerning the fairness of particular processes.¹⁸

Part V contains an assessment of the CEC citizen submissions process in the context of the procedural justice literature. My tentative conclusion is that the track record of the process and the anecdotal feedback about it provides some support for the procedural justice thesis, notably that features of the process (such as its neutrality and the extent to which citizens have trust in it) are influencing citizens' interest in using it (that is, citizens' assessments of the process and its utility are apparently shaped by the process itself as well as the outcomes it produces).¹⁹ Systematic follow-up

18. Use of the procedural justice literature needs to be qualified, for a variety of reasons. First, as is discussed *infra* Part IV, this literature is by no means fully developed or mature. Second, another part of the "justice" literature, which I leave for another day, considers how different outcomes of decisionmaking processes affect the level of citizen satisfaction (the issue of "distributive justice"). Third, a range of social scientists are interested in this issue of citizen satisfaction, from a variety of perspectives. See generally WHAT IS IT ABOUT GOVERNMENT, *supra* note 16; James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 539-45, 553 (2003) (discussing the possible relevance of factors such as "institutional loyalty" and "legitimizing symbols"). These perspectives deserve consideration as part of any effort to enhance the legitimacy of government decisionmaking processes. Finally, a variety of factors may have more effect than "procedural justice" in determining levels of citizen participation (such as citizen expertise and resources, among others). See *infra* Part IV.

19. Enhanced understanding of citizen preferences is only one step in the effort to enhance governance. I am not suggesting that citizen preferences should control, or carry any particular amount of weight, in the design of governance institutions. The question of how much of a role citizens should play—how citizens' perspectives and preferences should be balanced against other concerns—is for another time. See, e.g., CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 14-15 (1990) (discussing James Madison's concerns about the "usurpation of government power by well-organized groups with interests adverse to those of the public as a whole"). In recent years, as NGOs have gained *entrée* into previously closed arenas, several commentators have identified a variety of issues that are relevant in considering this issue, including the issue of NGO accountability. Ann Florini, for example, has noted that many NGOs do not act in the broader "public interest" and, moreover, effectively are unaccountable to society:

[T]here is nothing inherent in the nature of civil society that ensures representation of a broad public interest. The neo-Nazi hate groups that exchange repugnant rhetoric over the Internet are just as much transnational civil society networks as are the human rights coalitions. . . . [C]ivil society can seem disruptive, narrow-minded, and above all unaccountable.

ANN M. FLORINI, *THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY* 231-32 (2000). Florini notes that "to date, most NGOs have remained relatively immune to the growing pressure for transparency on the part of governments and the private sector. . . . [T]o leave the issue unaddressed is to threaten the long-term legitimacy of an important contributor to global governance." *Id.* at 233. Paul Posner identifies five generic problems that relate to accountability challenges with third party tools, including goal diversion. Paul L. Posner, *Accountability Challenges of Third-Party Government*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 523, 528-32 (Lester M. Salamon ed., 2002). Prof. Ariel Armony explores the "dark side" of civil society, and its potential to undermine democracy. See ARIEL C. ARMONY, *THE DUBIOUS LINK: CIVIC ENGAGEMENT AND DEMOCRATIZATION* 4 (2004). Armony argues, *inter alia*, that

[c]ivil society does not necessarily promote the public interest or reforms that are beneficial for the majority. . . . Smaller groups of participants with ample resources and privileged access to decisionmaking spheres can impose narrow and parochial interests on the public agenda and, as a result, impose unreasonable burdens on the broader society.

Id.

work is needed to confirm or rebut this sense of the commentary, and to develop a more sophisticated appreciation of the features of the citizen submissions process that are of greatest importance in encouraging or deterring citizens' participation.²⁰ I also suggest the value more generally of undertaking systematic analysis of decisionmaking processes as part of the policymaking enterprise.

II. An Overview of the Commission for Environmental Cooperation and Its Citizen Submissions Process²¹

A. An Overview of the Commission for Environmental Cooperation

The North American Free Trade Agreement (NAFTA) Environmental Side Agreement, the North American Agreement on Environmental Cooperation (NAAEC),²² emerged from the NAFTA negotiations among the three North American countries, Canada, Mexico, and the United States, to liberalize trade throughout the continent.²³ The NAAEC created a new international institution, the CEC, which has been termed a "brave experiment in institution-building."²⁴ Among other things, the CEC: (1) is the "first of its kind in the world in linking environmental cooperation with trade relations"²⁵; (2) has "innovative tools and almost unlimited

20. I am currently working with New York University psychology professor Tom R. Tyler on a follow-up project involving several processes that are intended to encourage citizen participation. To review the survey, see <http://www.createsurvey.com/c/36009-zac1ZV/>.

21. I have previously written about the CEC and its citizen submissions process, and some of the discussion in this section is taken from that earlier work. See Editors' Note at the beginning of these notes.

22. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., arts. 8-19, Sept. 14, 1993, 32 I.L.M. 1480 (1994) [hereinafter NAAEC].

23. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057 [hereinafter NAFTA]. For book-length treatments of the CEC, including discussion of its origins, see, e.g., PIERRE-MARC JOHNSON & ANDRÉ BEAULIEU, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* (1996); GREENING NAFTA, *supra* note 21. For analyses the CEC itself developed or commissioned, see, e.g., TEN-YEAR REVIEW & ASSESSMENT COMM., *TEN YEARS OF NORTH AMERICAN ENVIRONMENTAL COOPERATION* (2004), available at http://www.cec.org/files/PDF/PUBLICATIONS/TRAC-Report2004_en.pdf [hereinafter TRAC]; ENVIRONMENTAL LAW INST., *FINAL REPORT: ISSUES RELATING TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION* (2003), available at http://www.cec.org/files/pdf/JPAC/ELI-Art14-15-Report-Final-5_en.pdf [hereinafter ISSUES RELATING]; JOINT PUB. ADVISORY COMM. (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 COMMISSION FOR ENVIRONMENTAL COOPERATION (2001), available at http://www.cec.org/files/pdf/JPAC/rep11-e-final_EN.PDF [hereinafter LESSONS LEARNED]; INDEPENDENT REVIEW COMM., *FOUR-YEAR REVIEW OF NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: REPORT OF THE INDEPENDENT REVIEW COMMITTEE* (1998), available at http://www.cec.org/pubs_info_resources/law_treat_agree/cfp3.cfm?varlan=english [hereinafter FOUR-YEAR REVIEW].

24. TRAC, *supra* note 23, at 4.

25. *Id.* at ix.

26. GREENING NAFTA, *supra* note 21, at 2.

27. TRAC, *supra* note 23, at ix.

28. GREENING NAFTA, *supra* note 21, at 2.

29. NAAEC, *supra* note 22, art 8-19. See John D. Wirth, *Perspectives on the Joint Public Advisory Committee*, in GREENING NAFTA, *supra* note 21, at 199 (highlighting the broad mandate and substantial achievements of the JPAC).

jurisdiction”²⁶ to address “almost any environmental issue anywhere in North America”²⁷; and (3) “provides unprecedented opportunities for participation by civil society at the international level.”²⁸

The CEC has three players: (1) a Council, comprised of the environmental ministers of the three Parties; (2) a Secretariat, essentially the Commission’s staff, located primarily in Montreal; and (3) an innovative independent advisory committee made up of five citizens from each of the countries, known as the Joint Public Advisory Committee (JPAC).²⁹ With the important exception of the citizen submissions process, described below,³⁰ the Council is responsible for setting the agenda for the Commission.³¹ The Council approves the annual work plan for the Commission and oversees the work done to implement the work plan.³² The Secretariat develops the draft work plan for Council approval³³ and takes the lead on implementation of the work plan.³⁴ The JPAC is unique in making representatives of civil society part of the governance structure of the CEC; it puts them on the inside.³⁵ The JPAC is authorized to provide advice to the Council on any matter within the scope of the Agreement and takes an active role in soliciting input on key issues from interested North American stakeholders.³⁶

The CEC’s reach, and potential importance, transcends its NAFTA roots and trade/environment origins. As John Knox and I have suggested elsewhere, it represents an experiment in regional environmental governance and should be of considerable interest to those interested in cooperative efforts on environmental issues:

[T]he NAAEC and the CEC are much more than window dressing for NAFTA. The NAAEC establishes the first regional environmental organization in North America and gives it interesting, innovative mandates; it addresses environmental issues related to economic integration in more detail than any other agreement outside the European Union; and it provides new opportunities

for direct public participation in its implementation. In all of these respects, the NAAEC offers lessons for other countries seeking to address shared environmental problems against a backdrop of increasing economic integration—which is to say, all countries.³⁷

Moreover, given the increasing emphasis on “spotlighting” instruments,³⁸ citizen participation in governance,³⁹ and accountability mechanisms (and government performance),⁴⁰ the particular part of the CEC that is the focus of this Article, its citizen submissions process, deserves particular attention because it is an example of a spotlighting mechanism intended to facilitate such participation and accountability (and improved performance).⁴¹ The following section describes this innovative citizen submissions process in more detail.

B. The Commission for Environmental Cooperation Citizen Submissions Process

The CEC citizen submissions process has been touted as a possible model for enhancing public oversight of government enforcement efforts. As the CEC’s JPAC put it:

In preparing this Report, we have been conscious of the importance of the Articles 14 and 15 submission process as a vehicle for public oversight of the enforcement of environmental laws by the Parties to the [NAFTA] and as a possible model for similar efforts under other trade agreements within the Americas and the world.⁴²

A variety of commentators have echoed this sentiment. As one commentator has suggested, “[t]he Citizen’s Submission Process [is] perhaps the most important function of the Secretariat of the CEC, and definitely the one that has captured the most attention of environmental groups, the private sector, and legal specialists”⁴³ Chris Wold, the principal author of the one U.S. submission to result in a CEC

30. See *infra* Part II.

31. NAAEC, *supra* note 22, art. 10(1). The Secretariat also has some discretion under Article 13 of the NAAEC. *Id.* art. 13. For an assessment of one Secretariat Article 13 report, see Dan Tarlock & John E. Thorson, *Coordinating Land and Water Use in the San Pedro River Basin*, in *GREENING NAFTA*, *supra* note 21, at 217-36.

32. NAAEC, *supra* note 22, art. 10(1).

33. *Id.* art. 11(6).

34. See *id.* art. 11 (describing the Secretariat’s structure and procedures for carrying out its technical, administrative, and operational support duties).

35. See *id.* art. 16; Janine Feretti, *Innovations in Managing Globalization: Lessons From the North American Experience*, 15 *GEO. INT’L ENVTL. L. REV.* 367, 370 (2003) (discussing the JPAC’s creation as signaling the Parties’ “commitment to public participation” and as an example of the Parties’ building the public’s role “into the structure of the Commission . . .”).

36. NAAEC, *supra* note 22, art. 16(4); See *JOINT PUB. ADVISORY COMM., NORTH AM. COMM’N FOR ENVTL. COOPERATION, ASSURING PUBLIC PARTICIPATION 1* (2003), available at http://www.cec.org/files/PDF/JPAC/FactSheet_EN%20fin.pdf (“Since 1994, the Committee has made several calls for public comment on specific topics and has made important advice to Council and Secretariat, contributing to the CEC’s work.”).

37. John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, in *GREENING NAFTA*, *supra* note 21, at 9, 13.

38. Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 *U. PA. L. REV.* 613, 618-26 (1999) (discussing “informational regulation,” that is, regulation intended to promote effective implementation through relatively “soft,”

noncoercive approaches, rather than through conventional “command-and-control” strategies). See generally CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT AND THE STATE/FEDERAL RELATIONSHIP* 59-83, 213-67 (2003) (discussing different strategies for promoting environmental compliance).

39. See *supra* note 13.

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

41. *ISSUES RELATING*, *supra* note 23, at 4.

42. *LESSONS LEARNED*, *supra* note 23, at 2. ELI has characterized the process as “[b]y far the most innovative and substantial mechanism created within the NAAEC for fostering transparency and public participation.” *ISSUES RELATING*, *supra* note 23, at 4; *TRAC*, *supra* note 23, at 42, 43 (“One of the key mechanisms the NAAEC created to meet its objective of enhancing compliance with, and enforcement of, environmental laws and regulations is the citizen submission process This mechanism is the NAAEC’s most innovative and most controversial.”). The *TRAC Report* also quotes a JPAC Advisor that the process plays a “unique and indispensable role in fostering vigorous environmental enforcement.” *Id.*

43. Beatriz Bugeda, *Is NAFTA Up to Its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 *U. RICH. L. REV.* 1591, 1596 (1999).

44. 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, 416 (2004).

45. *Id.* Wold also noted that “[c]itizens had strongly supported the Citizen Submission Process and played an active role in supporting and employing the mechanism” *Id.* at 416; see also Randy

factual record,⁴⁴ notes that “[m]any had regarded the Citizen Submission Process as a potential model for accountability and governance for a new breed of international institutions—a positive response to globalization that gives citizens a voice in the often impenetrable affairs of international organizations.”⁴⁵

In short, the process was intended to be an important feature of the countries’ efforts to bolster domestic governance capacity in response to concerns that the liberalized trade made possible by NAFTA would increase pressures on domestic governments because of “race to the bottom,” scale, and other possible effects.⁴⁶ The hope was that this citizen spotlighting mechanism would empower citizens and invigorate the domestic environmental enforcement practices of Canada, Mexico, and the United States, which would lead to improved compliance and higher levels of environmental protection.⁴⁷

There are three main actors in the citizen submissions process: the CEC Council⁴⁸; interested citizens (“civil society”)⁴⁹; and a Secretariat.⁵⁰ In creating the process, the parties assigned a substantial role to citizens of the three North

American countries. The NAAEC empowers citizens to start the spotlighting process and, thereby, influence where the spotlight will shine (the process is launched with the filing of a citizen complaint, called a submission).⁵¹ In addition, the NAAEC empowers citizens to contribute information about the nature and effectiveness of the government enforcement practices at issue in particular submissions.⁵²

The NAAEC vests in the CEC Secretariat considerable authority over administration of the process.⁵³ Under the NAAEC’s division of responsibilities, it is the Secretariat’s job to conduct the initial review of a submission and decide, based on a variety of factors contained in NAAEC Article 14(1) and (2), whether to reject the submission or to ask the targeted country for a response.⁵⁴ Article 14(2)(b), for example, directs the Secretariat to consider whether the submission “raises matters whose further study in [the citizen submissions] process would advance the goals of this Agreement.”⁵⁵ If the Secretariat determines that a submission does not warrant further review, based on the Secretariat’s consideration of the submission in light of the Article 14(1) and (2) factors, the Secretariat may unilaterally dismiss the submission.⁵⁶

For submissions that survive the Secretariat’s Article 14(1) and (2) filtering process, it is the Secretariat’s responsibility both to request a response from the Party whose enforcement efforts are the focus of the submission, and to review the submission in light of any such response.⁵⁷ The Secretariat then determines whether to notify the Council that, in the Secretariat’s view, it would be appropriate under the NAAEC to prepare a “factual record.”⁵⁸ The Secretariat may unilaterally dismiss a submission at this stage if it determines that a factual record is not warranted.⁵⁹ In either case—a recommendation to proceed with a factual record or a dismissal—the Secretariat must explain the rationale for its decision.⁶⁰

If the Council directs the Secretariat to go forward with the development of a factual record, the Secretariat has the opportunity and responsibility to develop information relating to the allegations in the submission of a failure to effectively enforce and then to prepare a draft factual record that contains the results of its investigative work. Article 15(4)

Christensen, *The Citizen Submission Process Under NAFTA: Observations After 10 Years*, 14 J. ENVTL. L. & PRAC. 165 (2004) (noting that the citizen submission process has been an effective means of “highlighting environmental problems, compelling governments to engage in debates, and bringing about positive environmental change through independent factual investigations”). Significant elements of the environmental community continued to oppose NAFTA despite the commitment to create the NAAEC and establish the CEC. See, e.g., Mary E. Kelly, *NAFTA’s Environmental Side Agreement: A Review and Analysis*, pt. 2 (Tex. Ctr. for Pol’y Stud., Austin, Tex. 1993), available at <http://www.ciesin.org/docs/008-099/008-099ii.html> (suggesting that “the non-binding, virtually advisory role of most CEC reports and recommendations [undermine] the value of having such a broad scope of issues come under the CEC”).

46. See Greg M. Block, *The North American Commission for Environmental Cooperation and the Environmental Effects of NAFTA: A Decade of Lessons Learned and Where They Leave Us*, 26 LOY. L.A. INT’L & COMP. L. REV. 445, 451 (2004) (examining the effects of trade liberalization on environmental expenditures); Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT’L & COMP. L. REV. 389, 395 (2004) (noting that “[m]any environmentalists believe that trade liberalization undermines environmental protection not only in terms of a race to the bottom in regulatory standards, but also in a race-to-the-bottom in implementation and enforcement”).
47. David L. Markell, *The Citizen Spotlight Process*, ENVTL. F., Mar./Apr. 2001, at 33; see 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, 23 (2001). In its June 1998 report, the Independent Review Committee (IRC) suggests that the process “feed[s] into the Council’s responsibility to promote high environmental standards and their enforcement, and to prevent a race to the bottom from occurring.” FOUR-YEAR REVIEW, *supra* note 23, at 8. In the IRC’s view, the process provides “some 350 million pairs of eyes to alert the Council of any ‘race to the bottom’ through lax environmental enforcement.” *Id.* at 17.
48. NAAEC, *supra* note 22, arts. 8-19.
49. *Id.*
50. *Id.* arts. 11-15. The JPAC has also played an important role in the citizen submissions process. See Wirth, *supra* note 29, at 199 (discussing the JPAC’s role in the CEC).
51. NAAEC, *supra* note 22, art. 14.
52. *Id.* art. 15.
53. The TRAC Report characterizes the Secretariat as “unique among intergovernmental organizations in the combination of its traditional service role to the governments that created it with responsibilities where the Secretariat has certain autonomy (Articles 13 to 15. . . .)” TRAC, *supra* note 23, at 32. A former CEC Executive Director has

stated that there is a “significant natural tension between the Secretariat and the Parties” because of the independent authority of the Secretariat. Feretti, *supra* note 35, at 369.

54. *Id.* art. 14.
55. *Id.* art. 14(2)(b).
56. *Id.*
57. NAAEC, *supra* note 22, arts. 14(2), 15(1).
58. *Id.* art. 15(1). Factual records are the endpoint of the citizen submission process and provide information about the nature of the Party’s enforcement practices at issue and about the effectiveness of those enforcement practices.
59. *Id.* Council Res. 99-06, at 9.6, C.E.C. Doc. C/99-00/RES/07/Rev.3 (June 28, 1999), available at http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english [hereinafter Guidelines for Submissions].
60. NAAEC, *supra* note 22, art. 15(1) (recommendation to proceed with a factual record); Guidelines for Submissions, *supra* note 59, at 9.6.
61. NAAEC, *supra* note 22, art. 15(4).
62. *Id.*
63. *Id.* art. 21.
64. *Id.* art. 11(4).
65. *Id.* art. 15.

of the Agreement authorizes the Secretariat to consider “any relevant technical, scientific or other information” that is: (1) “publicly available”; (2) “submitted by interested non-governmental organizations or persons”; (3) submitted by the JPAC; or (4) “developed by the Secretariat or by independent experts.”⁶¹ The Agreement also specifies that the Secretariat shall consider any information provided by a Party.⁶² Another provision in the NAAEC, Article 21, gives the Secretariat authority to obtain information from the Parties,⁶³ and Article 11(4) forbids unilateral Party efforts to influence the Secretariat in the performance of its responsibilities.⁶⁴ Thus, the Agreement appears to give the Secretariat broad discretion to obtain information about the enforcement practices that are the focus of each submission, including hiring experts to assist it and requesting information from the country involved.

Finally, after developing a draft factual record and submitting it to the Council for comments,⁶⁵ the Secretariat has discretion to develop a final factual record, incorporating any Party comments only to the extent the Secretariat deems appropriate.⁶⁶

While the NAAEC gives considerable authority to citizen submitters (including the power to trigger the process and thereby to determine on what enforcement practices the spotlighting mechanism will shine), and to the Secretariat to administer the process, it is also clear that, in creating the CEC, the parties vested considerable power in the Council, reflecting their intention to retain an important role in the implementation of the citizen submissions process.⁶⁷ As suggested above, the process creates specific “checks” that the Council may exercise at particular stages in the citizen submissions process. Thus, the NAAEC gives the Council a “check” on submissions for which the Secretariat believes development of a factual record is warranted. Instead of allowing the Secretariat unilaterally to determine to proceed with the preparation of a factual record, the parties reserve in the Council authority to terminate a submission at this stage.⁶⁸ The NAAEC requires that the Secretariat recommend preparation of a factual record to the Council and it empowers the Council to decide, after it reviews the Secretariat’s Recommendation, whether to dismiss the submission or direct the Secretariat to prepare a factual record.⁶⁹

The process creates two additional Party “checks” on the Secretariat’s authority, both following the Secretariat’s preparation of a draft factual record. First, the NAAEC requires that the Secretariat submit draft factual records to the Council, and it authorizes each Party to provide comments to the Secretariat on the draft (important limitations on these Party “checks” are that parties’ comments must be confined

to the “accuracy” of the draft, and the Secretariat need only take such comments into account, when the Secretariat deems appropriate, but it is not obligated to incorporate them).⁷⁰ The Parties’ other check is that the Council retains control over public release of final factual records.⁷¹ The Secretariat must submit each final factual record to the Council, and it is up to the Council to determine whether to release it to the public.⁷²

III. The Track Record of Citizens’ Use of the Citizen Submissions Process

As noted above, citizens initiate the citizen submissions process by filing a submission in which they allege that a Party is failing to effectively enforce one or more of its environmental laws.⁷³ This is potentially an important, indeed unique, opportunity for citizens to direct a spotlight onto government enforcement practices that citizens believe are inadequate.⁷⁴ The track record of citizens’ use of the process is likely to be a helpful signal of the process’ prospects for success. Infrequent, and declining, use would seemingly raise a “red flag” about citizen perceptions about the value of the process, while frequent, and increasing, use would be a promising sign concerning its utility, actual and perceived.⁷⁵ As the following brief overview of the track record of citizen use of the process reflects, while citizen use has been relatively stable overall, citizen use of the process to challenge the effectiveness of U.S. environmental enforcement has declined precipitously in recent years.

75. There are other signals or indicators of success or failure as well. Some are intrinsic to the process, such as the significance of the practices that are spotlighted. Further, extrinsic factors may be relevant to the effectiveness of the process, such as the need for the mechanism in light of the alternatives, the level of concern about government enforcement, Environmental NGO resources, other priorities, and the like. *See infra* Part IV. In addition, processes may be effective—in the sense that they may help to build societal trust—with respect to nonparticipants who nevertheless approve of and/or benefit from the processes being used. Greg Block wrote in a 2003 article that

[a] number of Mexican nongovernmental organizations (NGOs) and policy analysts attest to the positive impact the CEC has made on transparency in governmental decisionmaking and access to information, as well as certain aspects of domestic environmental policy. The CEC’s access to information policies, decisionmaking records, citizen submission process, and public Council sessions have helped shape Mexican citizens’ expectations for the conduct of government business for national agencies and public institutions. That the Mexican Environmental Ministry is regarded as one of the more open and transparent Mexican government agencies is in a small, but not inconsequential way, due to its intense interaction with the CEC and civil society.

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); *see also* Yang, *infra* note 151, at 443. Professor Yang notes that there are several points in the citizen submissions process that have the potential to produce information that otherwise might not see the light of day and, once made public, lead to improvements in domestic environmental enforcement practices. *Id.*

66. *Id.* art. 15(5)-(6).

67. *See* Markell, *Governance of International Institutions*, *supra* note 21, at 769-80.

68. NAAEC, *supra* note 22, art. 15(2). (“The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.”) (emphasis added).

69. *Id.*

70. *Id.* art. 15(5)-15(6).

71. *Id.*

72. *Id.*

73. NAAEC, *supra* note 22, art. 14.

74. LESSONS LEARNED, *supra* note 23, at 2.

76. LESSONS LEARNED, *supra* note 23, at 13-14.

77. *Id.* at 10, 13 (noting that the Secretariat needs additional resources to administer the process because of the workload).

78. *See* Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC*, in GREENING NAFTA, *supra* note 21, at 256, 257; TRAC,

A. Overall Use of the Process

In its 2001 report, *Lessons Learned: Citizens Submissions Under Articles 14 and 15*, the JPAC puts a positive gloss on the extent of citizens' use of the citizen submissions process.⁷⁶ It notes that “[c]itizen [s]ubmissions [p]lay an [e]ssential [r]ole in [a]chieving the [g]oals of the NAAEC. . . . NGOs from the NAAEC countries have repeatedly turned to the Articles 14 and 15 process when they

believed that domestic environmental remedies were not adequate to address their complaints.”⁷⁷ On the other hand, some commentators have been less impressed with the level of citizen use of the process.⁷⁸

Figure 1 provides a comprehensive review of use of the citizen submissions process. It shows that, as of December 31, 2006, citizens have filed a total of 58 submissions since inception of the CEC in 1994.

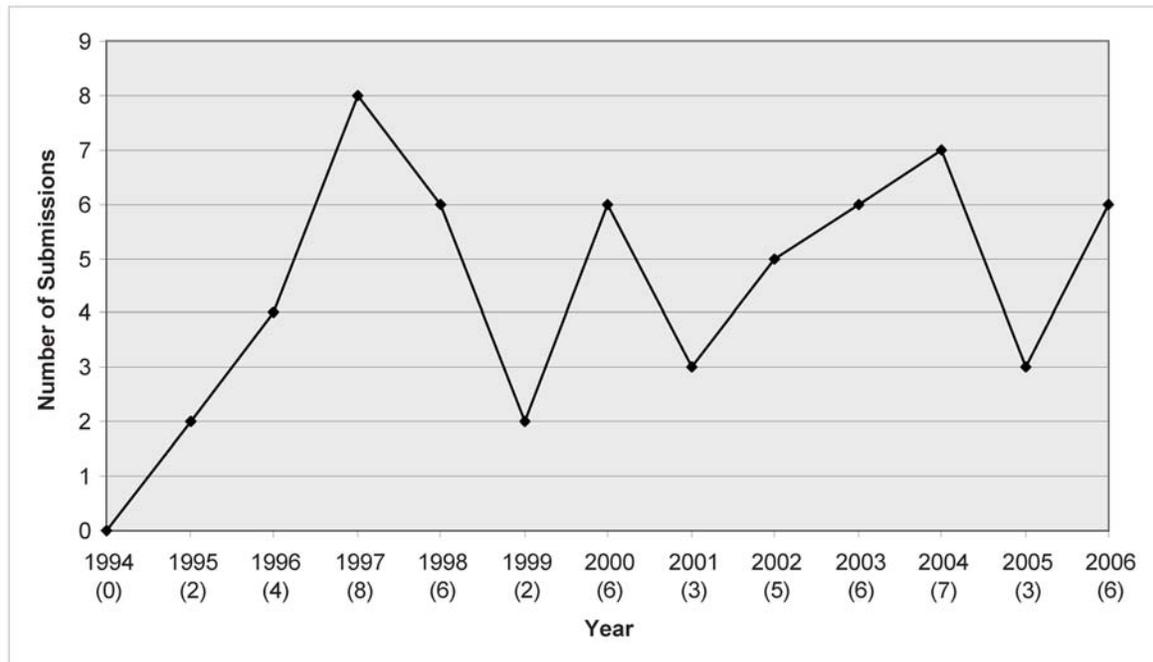


Figure 1: *Citizen Submissions Process: Annual Submissions (Through December 31, 2006)*⁷⁹

Submissions work out to 4.5 per year over this 13-year period. If one were to start the clock from the beginning of 1995, the year in which the first submission was filed, the average is 4.8 submissions per year (58 divided by 12). Thus, regardless of whether one begins counting submissions at the time the citizen submissions process was first available for business, or whether one waits a year to give the process a chance to become better known, the total of 58 submissions translates into between four or five submissions per year.

The other feature of this record that seems to be potentially relevant to use is the question of trends in use over time. Has the process experienced a significant increase or decrease in its use since its inception? A significant increase seemingly would suggest a vital process that is perceived to be useful. A significant decrease seemingly would portend a process that is not perceived to have sufficient promise or value to warrant use.

As Figure 1 reflects, here the record is not particularly clear. During the first six years of the process, from 1994–1999, a total of 22 submissions were filed. During the past seven years, a total of 36 submissions have been filed. This track record suggests that the process is experiencing an increase in use. One qualification, however, is that the picture of a trend of increasing submissions is much less clear if one discounts the start-up year (1994, when no submissions were filed). That is, if one begins with 1995, a total of 28 submissions were filed during the initial six-year period (from 1995–2000), while 30 have been filed during the more recent six-year period. As a result, the distribution of submissions between the first and second six-year periods is relatively equal. In short, viewed on its own, the track record appears to reflect a pattern of relatively stable use, with moderate ebbs and flows annually, rather than a significant increase or decrease in use over time.

supra note 23, at 43 (indicating that the CEC has “received far fewer submissions than initially anticipated”).

79. Figure 1 was developed using data released by the Secretariat, as well as the CEC website. *See* CEC, ARTICLE 14 CITIZEN SUBMISSIONS ON ENFORCEMENT MATTERS: PROCESS STATUS AS OF 27 JANUARY 2006 (2006) (on file with author). The Secretariat develops these status updates periodically and makes them available to the public. As a general matter, I am especially indebted to Damian Zimmerman, J.D. expected 2007, Florida State University College of Law, for his work in the development of the tables and figures in this Article.

80. North American Agreement on Labor Cooperation, U.S.–Can.–Mex., Sept. 14, 1993, 32 I.L.M. 1499 arts. 27–41 (1993) [hereinafter NAALC].

81. NAFTA, *supra* note 23, ch. 11.

In addition to reviewing the track record of the CEC process on its own, it also may be helpful to evaluate this record by comparing it with other citizen-driven mechanisms. There are two citizen-driven processes under the suite of NAFTA Agreements besides the CEC citizen submissions process: the citizen submissions mechanism created under the Labor Side Agreement,⁸⁰ and the investor provision created under NAFTA itself.⁸¹ These would seem to be natural points of possible comparison for the CEC process, al-

though the processes are by no means identical and, indeed, there are significant differences between them.

The Labor Side Agreement, like the NAAEC, allows nongovernmental organizations (NGOs) to file petitions. Under the NAALC, the petitions are filed with National Administrative Offices (NAOs), bodies that are set up as agencies within the labor department of each member state.⁸² In other words, they are not independent of the member governments. There have been a total of 36 submissions since inception of the process in 1994, as Figure 2 reflects.

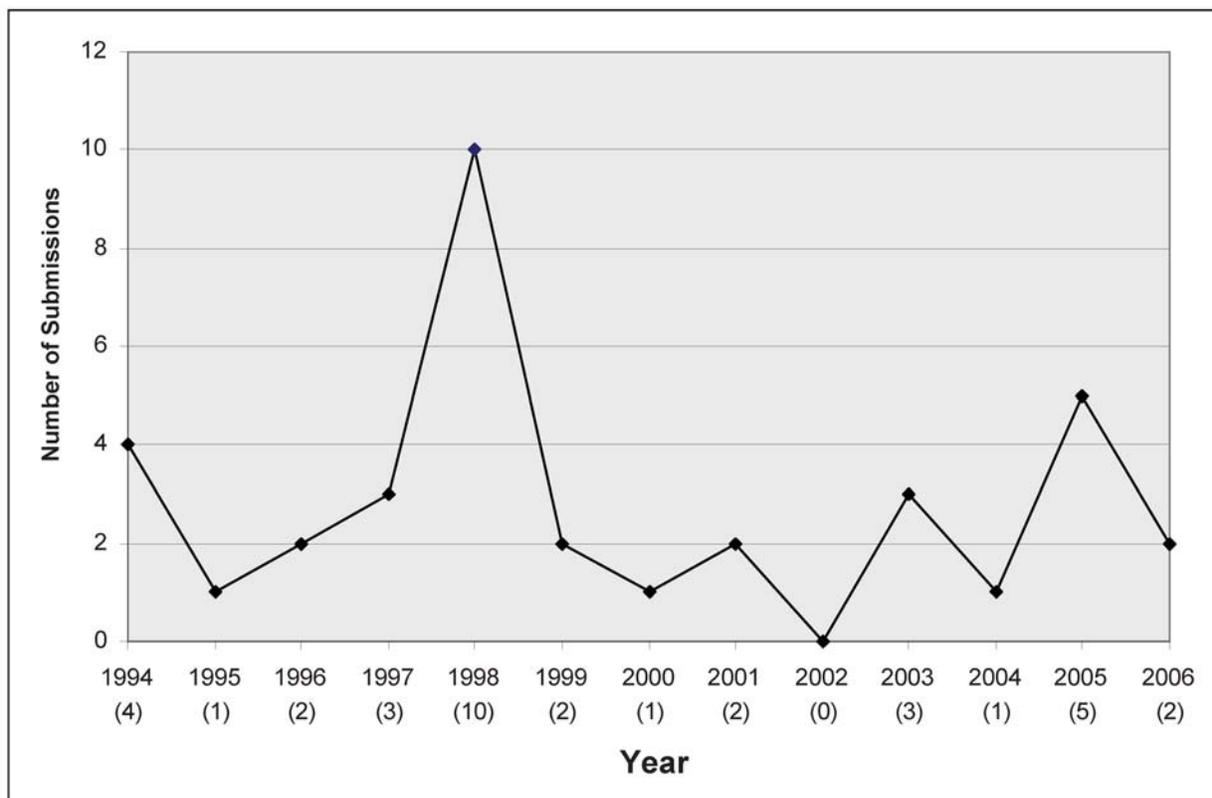


Figure 2: NAALC Labor Agreement Annual NAO Submissions (Through December 31, 2006)⁸³

These figures suggest at least two salient facts in terms of the Labor process' relevance as a possible point of comparison for the CEC citizen submissions process. First, the environmental citizen submissions process has experienced much more use than the Labor Agreement process: only 62% as many submissions have been filed under the latter as under the former. Further, the Labor Agreement statistics reflect a

significant decline in use over the past several years. During the first six years of its operation, a total of 22 submissions were filed, while only 14 have been filed during the past seven years. Thus, more than 60% of the submissions were filed during the first six years, and less than 40% over the past seven years. In short, in terms of total use and trends in use, the CEC process appears to be much more vibrant than does the Labor Agreement process.⁸⁴

82. See NAALC, *supra* note 80, art. 15 (requiring each party to treaty to establish National Administrative Office at the federal government level); Jonathan Graubart, "Politicizing" a New Breed of "Legalized" Transnational Political Opportunity Structures: Labor Activists Uses of NAFTA's Citizen-Petition Mechanism, 26 BERKELEY J. EMP. & LAB. L. 97, 99 (2005).

83. Figure 2 was developed using data released by the U.S. Department of Labor, U.S. Dep't of Labor, *Status of Submissions Under the North American Agreement on Labor Cooperation*, <http://www.dol.gov/ILAB/programs/nao/status.htm#> (last visited Mar. 6, 2007), as updated via a March 6, 2007 e-mail from and telephone conversation with John Mondejar, Information Officer in the Trade Agreement Administration and Technical Cooperation Office of the Bureau of International Labor Affairs of the U.S. Department of Labor (e-mail on file with the author).

84. Another key point concerning the Labor process involves the spike in use in 1998. During that year 10 submissions were filed, far more than in any other year. Professor Graubart has suggested that "some past petitioners [are] ready to write off the [NAALC] process altogether." Graubart, *supra* note 82, at 98. He suggests that "[s]hifts in the broader political context affect the value" of mechanisms like the NAALC, and that the reduction in perceived value of the NAALC process is attributable to a less supportive U.S. Administration, and a Mexican President who is less vulnerable to shaming campaigns. *Id.* at 101. He concludes that a "deteriorating political climate guts the political value of quasi-judicial, nonbinding mechanisms." *Id.* at 121. Graubart suggests, however, that the process has "proven its political worth" through the changes it has engendered, and that the NAALC is "likely to regain value when political circumstances turn favorable again." *Id.* at 101, 140.

Chapter 11 of NAFTA⁸⁵ includes a variety of provisions that are intended to protect foreign direct investment by North American investors in other North American countries. It establishes that, for instance, government measures should not discriminate between foreign and domestic investors⁸⁶; it is intended to assure a “minimum standard” of “fair and equitable” treatment for foreign investors,⁸⁷ and it

limits expropriation or any measure “tantamount to nationalization or expropriation.”⁸⁸ Investors are empowered to seek relief through binding international arbitration.⁸⁹ Investors have filed a total of 28 cases under Chapter 11 since NAFTA entered into force in 1994, as Figure 3 reflects.

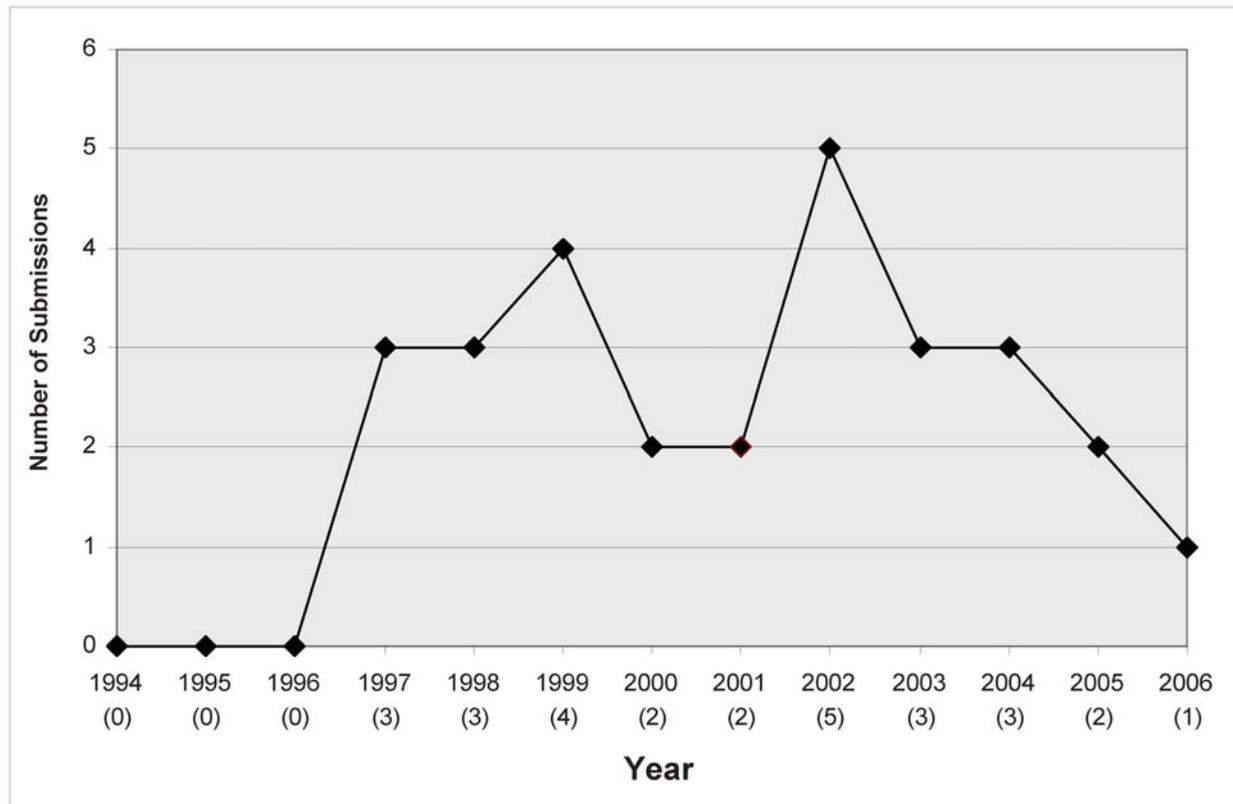


Figure 3: NAFTA Chapter 11: Annual Submissions (Through December 31, 2006)⁹⁰

In terms of the possible salience of the NAFTA Chapter 11 experience for assessing the track record of the CEC citizen submissions process, over the same period of time the CEC process has received much more citizen use than has the

NAFTA Chapter 11 process. The latter has experienced 48%, or a little less than half as many submissions. The figure reflects that after the first three years (during which no petitions were filed), use has been relatively stable.⁹¹

85. NAFTA, *supra* note 23, at 639-49.

86. *Id.* at 639.

87. *Id.*

88. *Id.* at 640.

89. *Id.* at 643; see Sanford E. Gaines, *Protecting Investors, Protecting the Environment: The Unexpected Story of NAFTA Chapter 11*, in *GREENING NAFTA*, *supra* note 21, at 174-77 (providing an overview of Chapter 11 of NAFTA).

90. Figure 3 was developed using data released by the U.S. Department of State. U.S. Dep't of State, *NAFTA Investor-State Arbitrations*, <http://www.state.gov/s/l/c3439.htm> (last visited Mar. 6, 2007). My thanks to Marin Dell, Florida State University Law Librarian, for her help in researching this information. The data reflect the number of NAFTA Chapter 11 Investor-State Disputes submitted for arbitration from 1994 through December 31, 2006. The *Waste Management, Inc. v. United Mexican States* claim filed in 1998, first rejected by a tribunal on procedural grounds and then later refiled, only counts as one claim. Similarly, the more than 100 claims listed as *Cases Regarding the Border Closing Due to BSE Concerns* are treated as one claim.

91. Other citizen-driven mechanisms were created by international institutions at about the same time as the NAAEC citizen submissions process was established. The World Bank's inspection panel, created in 1993, allows people directly and adversely affected by a proposed bank project to claim that the World Bank failed to follow its own operational policies and procedures during the design, appraisal, and/or implementation of a World Bank-financed project. Since 1993 the World Bank Inspection Panel has received a total of 34 requests. There has been a significant decline in submissions to the Inspection Panel over the second half of its existence. While there were 20 submissions during the first six years (from 1994-1999), there have only been 14 over the past six years (2000-2005). See Daniel D. Bradlow, *Private Complaints and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 *Geo. J. INT'L L.* 403, 411-20 (2005) (discussing the World Bank Inspection Panel). Significant differences in the mechanisms may account for these differences in track record, such as their jurisdictional scope, and standing to bring a claim. The World Bank Inspection Panel, Res. No. 93-10, World Bank (Sept. 22, 1993), reprinted in World Bank Inspection Panel, *Operating Procedures Annex 1* (1994). Several other international financial institutions have established inspection mechanisms since the World Bank did so in 1993.

What insights, if any, should we glean from the CEC's track record, when viewed independently, and relative to other citizen-driven mechanisms created around the same time? While comparative analysis of different institutions with different structures, powers, and constituencies should obviously be done with considerable caution,⁹² such an analysis shows that use of the CEC process (between four and five submissions per year) is not out of line with the other NAFTA citizen-driven institutions. If anything, there has been greater recourse to the CEC mechanism than to the others.

Trends in use of the CEC mechanism are not particularly clear. There has been an ebb and flow in use of the CEC process, but there has not been a significant increase or decrease in overall use, if one compares the early years of the process and the more recent period. It is unclear, at this point, how use of the CEC process will evolve over time, including whether the CEC process is experiencing a long gestation period before it takes off, or whether use will remain relatively stable or decline in the future.⁹³

B. A More Nuanced Review of the CEC Citizen Submissions Process Track Record

A more detailed analysis of the track record of citizens' use of the CEC process tells a potentially different story than the picture one might glean from the numbers reviewed in the preceding section. In particular, a look at the number of submissions disaggregated based on the country targeted reveals trends in use that suggest that citizens have not embraced the process as a viable mechanism for raising concerns about U.S. enforcement; indeed, for the past few years they seem to have virtually abandoned it for this purpose.

Table 1 provides a more detailed breakdown of citizen submissions than Figure 1 above, by reviewing the distribution of submissions by country involved. It shows that, overall, of the 58 total submissions, 10 have involved the United States, 19 have involved Canada, and 30 have involved Mexico (a 2006 submission, 06-002, Devils Lake, targeted both Canadian and U.S. enforcement practices and I have included it for each country.)

Bradlow, *supra*, at 409. Further, the European Union created the European Ombudsman in the Maastricht Treaty in 1992 to investigate complaints of maladministration in the European Union governing bodies. Any citizen of the Union or any natural or legal person residing or having its registered office in a member state can lodge a complaint with the Ombudsman. Use of this process has been significantly greater than use of any of the NAFTA-created processes, including the CEC process and also significantly greater than use of the World Bank's Inspection Panel, and use has increased dramatically since inception of the process. *See id.* at 449-53 (discussing the European Ombudsman). The citizen submissions process created in the 1997 Canada-Chile Agreement on Environmental Cooperation provides another basis for comparison. This process has received only four submissions to date, none since 2002. None of the submissions resulted in a factual record. Canadian Nat'l Secretariat, Canada-Chile Agreement on Env'tl. Cooperation Submissions Registry, <http://www.can-chil.gc.ca/English/Profile/JSC/Registry/Registry.cfm> (last visited Feb. 15, 2007).

In addition, domestic mechanisms exist as well. In the United States, for example, citizens have a broad range of potential mechanisms for raising concerns about performance, including citizen suits under statutory law against violators, citizen suits against government agencies for not performing nondiscretionary acts, common law actions, and the opportunity to participate in various ways in

government enforcement and permitting actions. Professor Jim May reports that the trend is toward more citizen suit activity, indicating that since 1995, citizens have filed about one lawsuit each week and submitted more than 4,500 notices of intent to sue, which translates to about two notices of intent to sue every business day. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 4 (2003). Use of this domestic mechanism obviously dwarfs use of the CEC process.

92. *See* 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, 379 (2004).

93. In his review of the track records of the NAAEC and the NAALC processes, Knox concludes that the CEC procedure is more effective, in part because citizens have continued to use it. He "urg[ed] labor and environmental advocates to recognize the relative success of the NAAEC and [to] work to build on its provisions." *Id.* at 360.

94. Table 1 was developed using the data released by the Secretariat. CEC, *supra* note 79.

95. *See, e.g.*, Knox, *supra* note 47, at 23.

96. *See, e.g.*, Raustiala, *Police Patrols & Fire Alarms*, *supra* note 46, at 412 (stating that "the disparity in citizen submissions probably reflects the existence of better alternatives in U.S. domestic

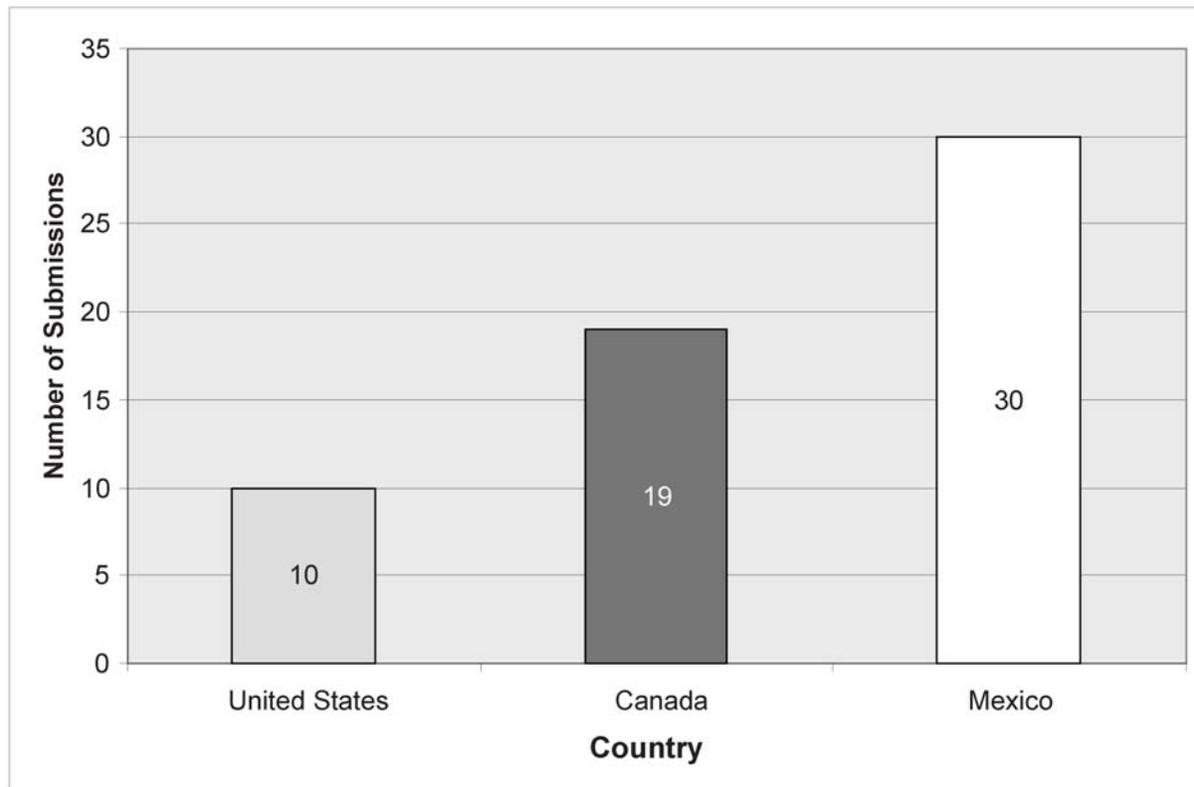


Table 1: *Distribution of Submissions by Country (Through December 31, 2006)*⁹⁴

On the one hand, it is not necessarily surprising that Mexico would be the target of more submissions than Canada or the United States. The process originally was created in part because of concerns about Mexican enforcement, so it is consistent with that original conception for submissions to disproportionately target Mexico.⁹⁵ Thus, some might suggest that the distribution of filings reflects that the process is working as intended. There also may be good reasons for the disparity beyond differences in the enforcement performance of the respective governments. For example, significant differences in the availability of domestic tools for citizens to challenge government performance and/or to take action on their own to address inadequate enforcement may well be important factors underlying the disparity in submissions across countries.⁹⁶

On the other hand, the disparity is arguably significant given the populations of each country—the United States, which has by far the fewest submissions, has by far the larg-

est population, estimated at just over 300 million.⁹⁷ In comparison, Canada's estimated population is slightly more than 33 million,⁹⁸ and Mexico's estimated population is approximately 107 million.⁹⁹

The more significant finding concerning the track record of citizen use of the citizen submissions process relates to trends in use, rather than to the overall use of the process depicted above. In particular, there has been a significant change in use of the process in recent years in terms of the countries citizens are targeting. Table 2 reviews use of the process during its first seven years, roughly the first half of its existence. There were a total of 28 submissions during this period, approximately half of the 58 filed to date. Table 2 shows that the distribution of submissions by country during this initial seven year period is relatively uniform or balanced. Of the 28 submissions, eight were filed against the United States (29%), nine were filed against Canada (32%), and 11 were filed against Mexico (39%).

law"); Christensen, *supra* note 45, at 171 (stating that a "common explanation given for the low usage of the citizen submission process in the United States is the wide availability of domestic enforcement mechanisms").

97. U.S. Census Bureau, *U.S. Population Clock for Jan. 16, 2006*, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited Mar. 5, 2007).

98. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK, CANADA*, <https://www.cia.gov/cia/publications/factbook/geos/ca.html> (last visited Mar. 5, 2007) (reporting the most current Canadian census information).

99. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK, MEXICO*, <https://www.cia.gov/cia/publications/factbook/geos/mx.html> (last visited Mar. 5, 2007) (reporting the most current Mexican census information).

100. Table 2 was developed using data released by the Secretariat. CEC, *supra* note 79.

101. SEM-06-002 (Devils Lake Submission, filed Mar. 30, 2006).

102. Secretariat Determination (Aug. 21, 2006), available on the CEC website.

103. Table 3 was developed using data released by the Secretariat. CEC,

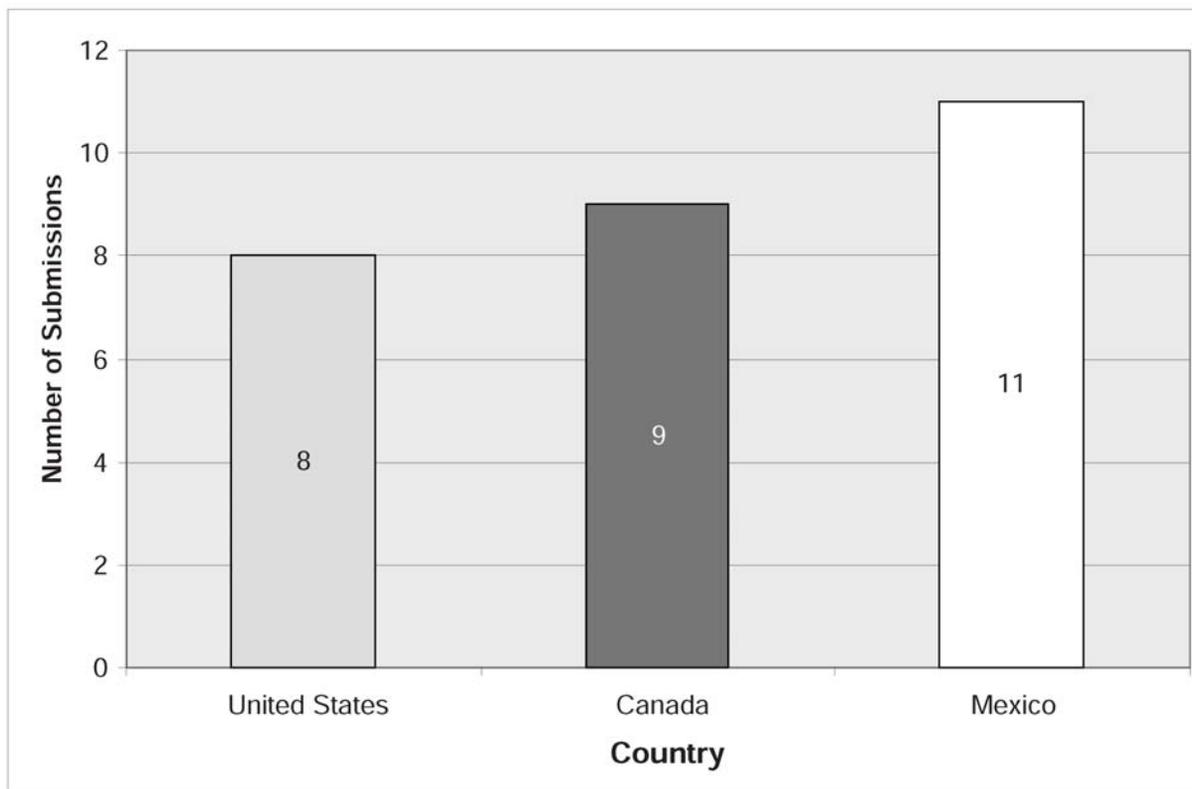


Table 2: *Distribution of Submissions by Country 1994-2000 (Total Submissions 1994-2000)*¹⁰⁰

Table 3 shows that the distribution of submissions has changed dramatically during the most recent six-year period, from 2001-2006. Table 3 reflects that of the 30 submissions filed during this period, only two have involved the United States, and one of these two focused on Canadian as well as U.S. actions in enforcing (or allegedly failing to effectively enforce) their treaty obligations under the 1909 Boundary Waters Treaty.¹⁰¹ Even counting this submission, which the Secretariat dismissed on the ground that it did not involve an environmental law,¹⁰² the United States has only

been the focus of two of the past 30 submissions (or 6-7%). Ten submissions have involved Canada (33%) (including the Boundary Waters submission), while Mexico is the target of 19 of the last 30 submissions (more than 60%). In short, the number of submissions involving the United States has dropped precipitously both in an absolute sense and relative to the numbers of submissions involving the other parties.

supra note 79. The totals above reflect the name of the member country listed as the "Party Concerned" in each submission.

104. The distribution of submissions also raises questions concerning the possible influence of distributive justice-related issues, e.g., outcome-based factors. That is, even if prospective submitters believe

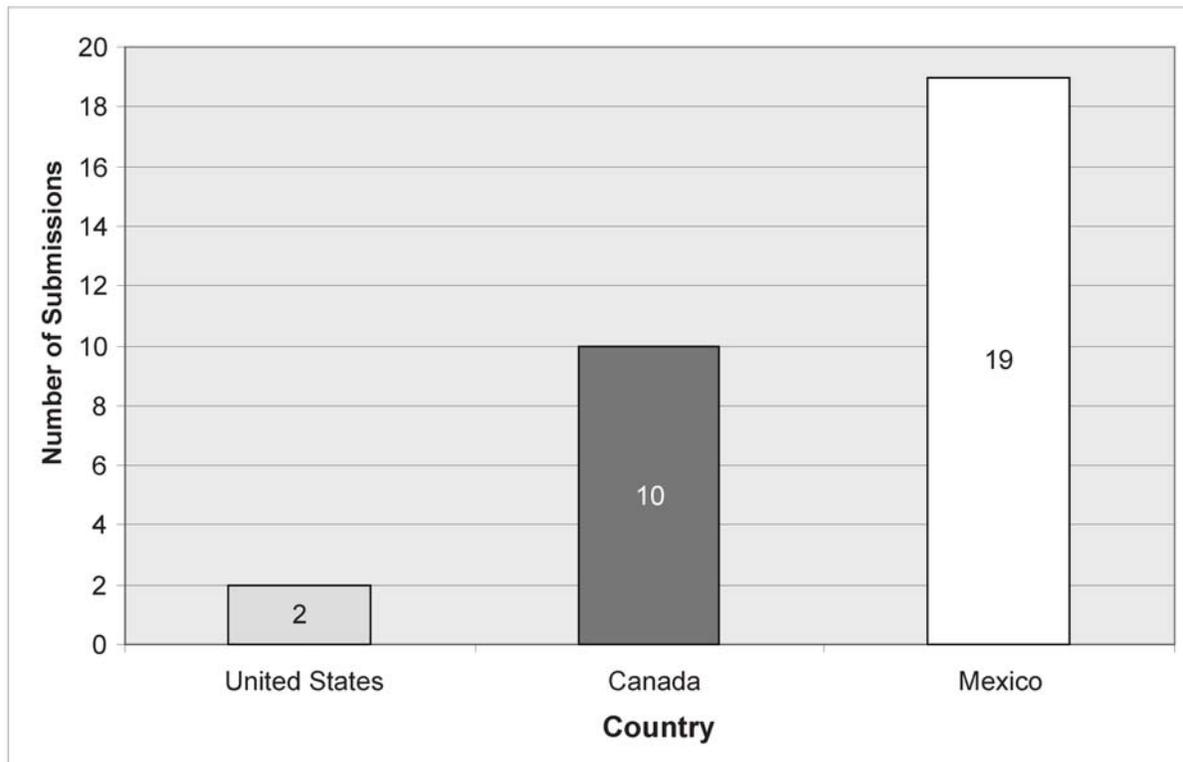


Table 3: *Distribution of Submissions by Country 2001-2006 (Total Submissions 2001-2006)*¹⁰³

This substantial decline in U.S. submissions raises a host of issues. For purposes of this Article, one key question involves the extent to which citizen dissatisfaction with the process for procedural justice reasons may have influenced citizens virtually to abandon the process for the United States.¹⁰⁴ And, the obvious follow-up question: to the extent that implementation of the process has been unsatisfactory to citizens concerned about U.S. environmental enforcement (and this may have motivated citizens to reduce use

that the process is “procedurally just,” they might not have much interest in using it if the end result is not likely to be of value to them. Thus, in considering the procedural justice implications of a mechanism such as the CEC citizen submission process, it is also important to keep in mind the possible salience to citizens of the issue of effectiveness (outcomes). Suggesting the likely importance of distributive justice to citizen satisfaction, Professor Knox concludes that “the utility of a reporting procedure [i.e., the CEC process] depends on the value of the reports it produces.” Knox, *supra* note 92, at 381. Extrinsic factors also may have affected use of the process including, for example, changes in priorities after September 11th, availability of resources, availability of domestic mechanisms, trust in government enforcement, or skepticism concerning the efficacy of “shaming” mechanisms in the current political climate. See Graubart, *supra* note 82, at 137-40 (suggesting that changes in the political climate have influenced use of the NAALC petition process). A related point is that the lack of submissions involving U.S. practices does not mean that U.S. NGOs have abandoned the process. Of the 30 submissions filed since 2000, a few that focus on Canadian or Mexican enforcement include U.S. individuals and/or NGOs as co-submitters.

105. See *supra* notes 7-16 and 75 and accompanying text.

106. TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 85 (1997).

107. As noted *supra*, citizen satisfaction is not the only factor that should be considered in evaluating such processes. One leading commenta-

tor defines “procedural justice” as involving participants’ satisfaction with decisionmaking processes. Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of*

of the process to challenge such enforcement), is it possible to identify features of the process that have been particularly problematic and to develop fixes that will ameliorate concerns? Part V reviews some of the commentary concerning citizen satisfaction with the process for possible insights regarding these questions. First, though, this Article lays the groundwork for considering this question by reviewing the psychology literature on satisfaction in order to provide a tentative framework for considering citizen perspectives.

IV. An Overview of the Procedural Justice Literature

It is seemingly always worthwhile to try to increase understanding of ways in which government activities operate to increase or diminish levels of citizen trust or confidence. As discussed above,¹⁰⁵ numerous scholars have argued that trust in government, and in institutions of governance, is indispensable for the continuing legitimacy of the state. The conventional wisdom—that, unfortunately, we are operating “against the backdrop of fifty years of declining legitimacy for legal and political authorities. People are less willing to trust political and legal authorities than in the past”¹⁰⁶—increases the importance of such inquiries. This part reviews a possible framework, which is drawn from the social science literature on procedural justice for assessing citizen satisfaction with institutions of governance, includ-

tor defines “procedural justice” as involving participants’ satisfaction with decisionmaking processes. Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of*

ing government decisionmaking processes intended to promote meaningful public participation.¹⁰⁷

The question of how best to evaluate decisionmaking processes based on their “legitimacy” or capacity to increase trust is not an easy one to answer.¹⁰⁸ Intuitively, one might think that outcomes of decisionmaking processes are the variable most likely to influence perceptions of participants and others about the legitimacy of such processes. It might be expected, in other words, that results will be determinative. To borrow from the psychology literature, because the “instrumental orientation of social-psychological models of the person . . . view[s] people as wanting to maximize the resources they gain in interactions with others . . . ,”¹⁰⁹ good results will engender increased confidence while adverse results will lead to diminished trust.

The psychology literature, however, suggests a result that some have characterized as “counterintuitive,” notably that the extent to which a process is procedurally just is extremely important to judgments about its legitimacy.¹¹⁰ While it may be “difficult to believe that people will find a negative or undesirable outcome more acceptable simply because of the manner in which it was arrived,”¹¹¹ the psychology literature on procedural justice suggests that is the case. A key insight from this literature, in short, is that legitimacy should not be assessed solely on the basis of the distributional implications of decisionmaking processes, i.e., based on the fairness or justice of the outcomes different types of processes are likely to yield. Instead, outcome favorability and fairness are not identical—citizens clearly make distinct fairness judgments—and the extent to which a decisionmaking process is “procedurally just” is an important factor in assessing the legitimacy of such process.¹¹² As Prof. Tom Tyler has put it, “the expanded model [of social justice] recognizes that people are concerned about how decisions are made as well as about what those decisions are”—the distinction between procedural and substantive justice.¹¹³ Evaluations of the fairness of the procedures by which outcomes are determined have been labeled “judgments of procedural justice.”¹¹⁴

John Thibaut and Laurens Walker undertook the first systematic psychological research program in the 1970s to try to demonstrate the importance of procedural justice.¹¹⁵ They

hypothesized that a person’s evaluation of the fairness of decisionmaking procedures influences the individual’s reaction to the outcomes of those procedures that is distinct from the person’s reaction to the outcomes themselves.¹¹⁶ Their studies demonstrated that peoples’ assessments of the fairness of third-party decisionmaking procedures shape their satisfaction with their outcomes.¹¹⁷ Subsequent studies of procedural justice support Thibaut and Walker’s pioneering work, finding that participants’ level of satisfaction with decisionmaking processes is “influenced by their judgments about the fairness” of such processes.¹¹⁸ Professor Tyler, one of the leading commentators in this area, summarizes the literature in a 2000 article, *Social Justice: Outcome and Procedure*.¹¹⁹

Studies of the legitimacy of authority suggest that people decide how legitimate authorities are, and how much to defer to those authorities and to their decisions, primarily by assessing the fairness of their decisionmaking procedures. Hence, using fair decisionmaking procedures is the key to developing, maintaining, and enhancing the legitimacy of rules and authorities and gaining voluntary deference to social rules.¹²⁰

Professor Tyler suggests that procedural justice even may be more important than distributive justice in some contexts in shaping participants’ perspectives concerning the fairness of decisionmaking processes, including in contexts in which the “right” decision is unclear:

In many social situations, it is not at all clear what decision or action is correct in an objective sense. . . .

Thibaut & Walker (1978) argue that what is critical to good decisionmaking in outcome-ambiguous situations is adherence to norms of fairness, and fairness is most evident when procedures that are accepted as just are used to generate the decision.¹²¹

Professor Tyler concludes that “there are important reasons for optimism concerning the viability of justice-based strategies for conflict resolution.”¹²² That is, decisionmaking strategies that are procedurally just would seem to have significant potential to ameliorate citizens’ distrust of government, independent of the outcomes of such processes.¹²³

Legal Procedures, 22 LAW & SOC’Y REV. 103, 121 (1988); see also Gerald S. Leventhal, *What Should Be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 39 (Gerold Mikula ed., 1980) (indicating that “a justice rule is defined as a belief that allocative procedures are fair when they satisfy certain criteria. This type of justice rule is referred to as a procedural rule, to distinguish it from distribution rules.”).

108. See *supra* note 7-16 and accompanying text.

109. TYLER ET AL., *supra* note 106, at 76.

110. See Tyler, *supra* note 107, at 108-10 (examining procedural justice in the context of citizen experiences with police and courts).

111. See TYLER ET AL., *supra* note 106, at 76.

112. Tyler, *supra* note 107, at 117.

113. TYLER ET AL., *supra* note 106, at 75.

114. *Id.* at 76.

115. See John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978) (proposing a general theory of procedure for resolving conflicts, based on social psychology research examining characteristics of various systems in the legal process).

116. *Id.* at 548.

117. *Id.* at 549.

118. Tyler, *supra* note 107, at 103. Tyler went on to state:

Past studies have consistently found that judgments of the fairness of the procedures that occur when citizens deal with legal authorities influence citizen satisfaction and evaluation of those authorities. . . .

The findings . . . strongly support the suggestion of prior research that a key determinant of citizen reactions to encounters with legal authorities is the respondents’ assessment of the fairness of the procedures used in that contact.

Id. at 117, 128.

119. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117 (2000).

120. *Id.* at 120.

121. TYLER ET AL., *supra* note 106, at 100.

122. Tyler, *supra* note 119, at 124.

123. One interesting question that this finding raises involves the extent to which “procedurally just” processes may operate as a placebo to dampen citizens’ concerns about government decisions that citizens should be concerned about. See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994) (questioning the value of procedures that create a

In short, given government's interest in increasing its legitimacy with its citizens, it seems that government routinely would want to consider the procedural justice of its decisionmaking processes. The next question involves whether there are guideposts for evaluating the extent to which decisionmaking processes are likely to be procedurally just. To paraphrase Professor Tyler, assuming an answer in the affirmative to the first issue—whether procedural justice matters—the analysis then turns to the second—the criteria that may be helpful in evaluating the fairness of procedures.

Commentators have tended to focus on three key issues in formulating frameworks for assessing the procedural justice of different decisionmaking processes: (1) the criteria to be used to evaluate fairness; (2) the weight to be given each criterion; and (3) how the criteria are related.¹²⁴ Further, commentators have suggested that the answers to these questions are contextual rather than universal; that is, peoples' perceptions of procedural justice "are found to vary depending on the nature of the situation."¹²⁵

Different scholars have posited different criteria for evaluating the procedural justice of decisionmaking processes.¹²⁶ Professor Tyler suggests that the following four criteria are likely to be particularly important to individuals' determinations about whether governmental procedures are fair or just: (1) the nature of opportunities to participate¹²⁷; (2) whether the authorities are neutral¹²⁸; (3) the degree to which people trust the motives of the authorities¹²⁹; and (4) whether people are treated with dignity and respect during the process.¹³⁰

sense of fairness in cases in which those procedures do not materially advance actual justice).

124. Tyler, *supra* note 107, at 106.

125. TYLER ET AL., *supra* note 106, at 92. *See also* Tyler, *supra* note 107, 123-24, 127 (suggesting that under differing circumstances citizens judge procedural fairness by different criteria and therefore there are no universally fair procedures for allocation and dispute resolution; different procedures are appropriate in different circumstances); Leventhal, *supra* note 107, at 39-40 (suggesting that the basic criteria used to evaluate the fairness of procedures change with circumstances).

126. TYLER ET AL., *supra* note 106, at 87 (describing the different criteria of commentators and recognizing that the framework for procedural justice is evolving); Leventhal, *supra* note 107, at 39 (suggesting that "[t]he criteria that define the rules of fair procedure can only be guessed at this time, because there have been few studies of procedural fairness").

127. Tyler, *supra* note 119, at 121-22 (noting that where people may participate in the resolution of their disputes or may voice their opinions to decisionmakers, they view such a procedure as more fair, even when their comments carry little weight in the outcome of the conflict).

128. *See id.* at 122 (explaining people's attribution of fairness to procedures in which the authorities follow impartial rules and make decisions based on objective factors, not personal feelings. "Basically, people seek a 'level playing field' in which no one is unfairly disadvantaged.").

129. *See id.* (describing the importance of trust—based on the authority's thoughtful consideration of the arguments presented and efforts to preserve fairness—in shaping people's views of procedural fairness).

130. *See id.* (pointing to the impact of the general desire to be treated with dignity and respect on perceptions of fairness). For other formulations, compare Leventhal, *supra* note 107, at 39 (listing six criteria for procedural justice: (1) consistency; (2) the ability to suppress bias; (3) decision quality or accuracy; (4) correctability; (5) representation; and (6) ethicality); Thibaut & Walker, *supra* note 115, at 563-64 (highlighting process control and decision control as two primary criteria for evaluating procedural justice). Commentators have

Part III of this Article demonstrates that prospective users of the citizen submissions process have reduced their use of the process in recent years to challenge the effectiveness of U.S. environmental enforcement efforts. This part provides a theoretical framework for considering possible reasons for this decline, notably the possibility that prospective users may be skeptical about the procedural justice of the process.¹³¹ In the next part, I review the workings of the process in order to explore the possibility that procedural justice may be affecting citizen satisfaction.

V. Assessments of the Citizen Submissions Process in Light of the Procedural Justice Literature

As noted in the preceding part, a central insight from the procedural justice literature is that the views of prospective submitters and others interested in the citizen submissions process are likely to be based on procedural justice as well as distributive justice considerations.¹³² As also noted in Part IV, however, there is no consensus framework at this point for assessing the extent to which any decisionmaking process is likely to be procedurally just.¹³³ In addition, there is a recognition that what is procedurally just will vary with the circumstances.¹³⁴ The reader should keep these caveats and

noted that some of these considerations may trade off. For an example, see TYLER ET AL., *supra* note 106, at 93-94 (noting the trade off between fairness and nonfairness criteria, such as between providing representation—a voice for participants—and efficiency).

131. Outcome-related ("distributive justice") issues may be a factor as well. *See, e.g., supra* note 104 and accompanying text. Of course, it is possible that the explanation for the track record described in Part II lies in whole or in part in developments external to the process itself. It may be, for example, that use has declined because concerns about environmental enforcement are less salient than they used to be, that priorities have shifted because of September 11th or other developments, that resources have diminished, or that alternative domestic processes to address NGO concerns have improved. Randy Christensen has commented on the availability of domestic mechanisms as a possible reason why a decline in submissions targeting the United States has not been accompanied by a similar decline in Canadian or Mexican submissions:

A common explanation given for the low usage of the citizen submission process in the U.S. is the wide availability of domestic enforcement mechanisms to pressure the government to comply with environmental laws. These mechanisms include avenues such as "citizen suit" provisions under federal environmental law statutes that result in clear and enforceable results. In Canada and Mexico, there are significantly fewer domestic avenues available for achieving similar results.

Christensen, *supra* note 45, at 171.

Further, domestic expectations may be different as well, including different expectations created by the relatively adversarial nature of the U.S. legal system, and these differences may partially account for differences in use and in reactions to the implementation experience. *See, e.g.,* David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship*, 24 HARV. ENVTL. L. REV. 1 (2000). Another possible explanation for the decline is that "shifts in the broader political context [may have] affected the value" of the CEC mechanism, as Professor Graubart suggests has been the case for the NAALC. Graubart, *supra* note 82, at 101.

132. *See supra* Part IV; *see also supra* note 131.

133. *See supra* Part IV.

134. *See id.*

135. *See id.*

136. TRAC, *supra* note 23, at 40. The *TRAC Report* continues: "Canadian and Mexican NGOs, however, have valued the increased trans-

qualifications in mind in reviewing the effort in this part to consider the citizen submissions process through the lens of the procedural justice literature.

Applying Professor Tyler's four criteria for assessing the legitimacy of decisionmaking processes to the submissions process (opportunities to participate, neutrality, trust, and treatment with dignity and respect),¹³⁵ the short answer is that the literature suggests apparent shortcomings in the operation of the process from a procedural justice standpoint. Part of the blame may lie with the structure of the process, while the actions of the governments of the three participating countries also appear to be responsible for some of the dissatisfaction. The 2004 TRAC Report, for example, has the following to say about the impact of Council actions on U.S. NGO support for the CEC:

The CEC has less support than could have been anticipated among its major stakeholder groups (NGOs, business, academia) in the United States for a variety of reasons. The interest of US NGOs has declined. . . . US NGO dissatisfaction with what they see as the Council weakening the citizens' submission process . . . has contributed to this detachment.¹³⁶

The TRAC Report continues: "while they [the parties] publicly embrace the values that underlie the process—transparency, accountability, stronger environmental protection—they have in practice sought to circumscribe it, for reasons not well appreciated by outside observers."¹³⁷

In other words, according to several commentators, while particular features of the process may be partially responsible for citizen frustration, the parties' actions have undermined citizen satisfaction with the process in terms of several elements of procedural justice that Professor Tyler has identified.¹³⁸

A. The Structure of the Process

The CEC citizen submissions process provides three main opportunities for active citizen participation. First, the process empowers citizens to launch the process by filing submissions.¹³⁹ Neither the CEC Secretariat nor the CEC Council may initiate an investigation under the CEC citizen submissions process; the capacity of either to act under the process is predicated on a citizen filing a submission that identifies alleged enforcement failures.¹⁴⁰ Thus, the process allows citizens to decide where to shine the CEC spotlight. Common sense suggests that this opportunity to frame the issues is an important element under the rubric of opportunities to participate.

Next, if the CEC Secretariat decides that a submission is inadequate and dismisses it, a citizen may refile the submission

within 30 days after receiving the dismissal.¹⁴¹ Further, there is nothing to stop a citizen from filing a new submission if the Secretariat or Council decides not to develop a factual record based on a citizen's initial submission. Thus, citizens are not subject to res judicata-type constraints on filing submissions.¹⁴²

Finally, interested citizens have a chance to submit information to the CEC Secretariat if the CEC decides to develop a factual record. Article 15(4) of the agreement authorizes the Secretariat to consider "any relevant technical, scientific or other information" that is "submitted by interested non-governmental organizations or persons."¹⁴³ Thus, following their initiation of the process, citizens may contribute additional information for consideration as part of the development of a factual record, if a submission makes it to that point.

The process also limits citizens' opportunities to participate. I discuss here three limitations that various commentators have criticized. First, if the CEC Secretariat determines that a submission raises matters that deserve further consideration, the Secretariat can request additional information from the relevant Party and then determine whether to dismiss the submission or to recommend to the Council that a factual record be developed.¹⁴⁴ Some commentators have urged that Submitters should have an opportunity to respond to a Party's response before the Secretariat makes its final decision as to whether to recommend development of a factual record.¹⁴⁵ In *Lessons Learned*, the JPAC recommended that it would "improve public confidence in the decisionmaking process" to allow submitters to submit a response, particularly where "a Party's response includes new information not referred to in the original Submission."¹⁴⁶

A second limitation on citizen participation in the process is that citizens have no opportunity to provide input during the period that extends from a Secretariat Recommendation to the Council that a factual record should be developed until the Council issues its decision whether or not to proceed. The JPAC and others have recommended that submitters should have an opportunity, if a Party "chooses to submit additional information directly to the Council in response to such a recommendation from the Secretariat . . . to make a brief written reply to such information so that the Council can make a more fully informed decision on the Secretariat's recommendation."¹⁴⁷

To date, the Council has rejected these suggestions, stating that they would "lead to exchanges . . . that will result in a more adversarial public submissions process which we do not believe would benefit the process."¹⁴⁸

files/PDF/SEM/BringingFacts-Jun02_en.pdf [hereinafter BRINGING THE FACTS TO LIGHT]. Any dismissal of a submission is supposed to include an explanation of the reasons for the dismissal. Guidelines for Submissions, *supra* note 59, at 6.1.

137. TRAC, *supra* note 23, at 42-43.

138. There are, of course, issues associated with the procedural justice of the process that do not stem from the parties' implementation of the agreement. This part identifies some of these concerns as well. The commentary suggests, however, that the Parties' stances on a variety of issues are among the more significant features of implementation that have caused citizen dissatisfaction.

139. NAAEC, *supra* note 22, art. 14(1).

140. *Id.*

141. CEC, BRINGING THE FACTS TO LIGHT: A GUIDE TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 14 (2000), available at <http://www.cec.org/>

142. For an overview of res judicata, see, for example, RESTATEMENT (SECOND) OF JUDGMENTS §17 (1982).

143. NAAEC, *supra* note 22, art. 15(4).

144. LESSONS LEARNED, *supra* note 23, at 4.

145. *Id.* at 12.

146. *Id.* at 16.

147. *Id.*

148. CEC, THE JPAC AT TEN: A REVIEW OF THE JOINT PUBLIC ADVISORY COMMITTEE TO THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 15 (2005) (quoting Letter from Council (Mar. 6, 2002)).

149. NAAEC, *supra* note 22, art. 15(5).

A third limitation that citizens have identified in their opportunities to participate involves the Secretariat's draft factual records. When the Council directs the Secretariat to prepare a factual record, the Secretariat develops a draft factual record, which it provides to the Council but is not authorized to share with the submitters for their review or comment.¹⁴⁹ Thus, while the Secretariat obtains and considers the Parties' comments on draft factual records before it develops a final factual record, NGOs are not allowed to see the draft, let alone comment on it. As might be expected, the NGO community has balked at this uneven playing field in terms of its opportunities to participate.¹⁵⁰

Because of these limitations on citizen participation, Prof. Tseming Yang has argued that "[o]nce a submission has been filed, the process is entirely controlled and managed by the Secretariat and Council."¹⁵¹ While, as noted above, citizens do have the right to submit information as part of the factual record process, Professor Yang's perspective likely captures the larger point, notably that citizens may have less confidence in the neutrality of the process than they would otherwise because of these limits in opportunities to participate.

Two other limitations on citizen participation deserve attention as well. First, the entire CEC process generally takes place through submission and exchanges of written documents. While the process is underway, there is little, if any, opportunity for citizens to engage the CEC decisionmakers (the Secretariat or the Council); similarly, there is little, if any, opportunity for citizens to engage the Party whose practices are at issue. Professor Freeman, among others, has argued that such interactions beyond the exchange of written materials have value. She suggests that "collaborative governance," i.e., multistakeholder processes, are likely "to be sites at which regulatory problems are redefined, innovative solutions [are] devised, and institutional relationships [are] rethought."¹⁵² Some citizens have complained that this limitation reduces the value of citizen participation, and also significantly reduces the utility of what they consider to be a

"cooperative" rather than an adversarial process.¹⁵³ On the other hand, one commentator has suggested that, despite this general limitation to formal, written exchanges, the process does enable or facilitate a dialogue, either in the context of the process itself, or at a domestic level, noting that the process:

[I]s most effectively utilized where submitters are engaged in ongoing advocacy and wish to draw government into "discussion" on issues as framed by the submitters, or where the submitters are seeking a mechanism that will provide access to decision-makers or media. The citizen submission process also can assist in the building of international coalitions by providing a clear and visible effort that other organizations can support.¹⁵⁴

Second, there is no support for citizens to participate in the process. Domestic U.S. environmental laws often provide attorneys fees to citizens, at least under certain circumstances.¹⁵⁵ Some laws also provide NGOs with funding to enable them to hire technical support in order to facilitate meaningful citizen participation.¹⁵⁶ The CEC does not provide either. Features of the CEC process presumably reduce the level of citizen investment compared to domestic litigation, although some commentators suggest that Council decisions have made the process more difficult, time-consuming, and expensive for submitters than was originally intended.¹⁵⁷ The CEC Secretariat is supposed to serve as the neutral investigator of concerns that citizens raise (citizens act primarily as pullers of the CEC "fire alarm," calling the Secretariat and Parties to action); this arguably limits the need for extensive citizen submissions.¹⁵⁸ Further, the CEC

[hereinafter JPAC WORKSHOP] (noting the views of Cliff Wallis that submitters should be allowed to present their case orally). The commission further notes the views of Herve Pageot that:

The Party and the submitters should meet in the event that Council does not decide to proceed with the development of a factual record. The idea is that the system should encourage consensus, not provoke confrontation. In this way, submitter could ascertain the reasons adduced by Council as well as the positions of the other Parties.

150. Two offsetting features of this process are: (1) the Parties' comments have ultimately become a matter of public record since the Secretariat has included such comments as appendices in its final factual records, which are available to the public; and (2) the Parties' comments are supposed to be limited to raising issues concerning the accuracy of the draft factual record, although that has not always been the case. See, e.g., BC Aboriginal fisheries Commission et al. (SEM-97-001) (May 30, 2000), available at http://www.cec.org/files/pdf/sem/BC-Hydr-Fact-record_en.pdf.

151. Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 U. COLO. L. REV. 443, 478 (2005); cf. Jonathan Graubart, *Giving Meaning to New Trade-Linked "Soft Law" Agreements on Social Values: A Law-In-Action Analysis of NAFTA's Environmental Side Agreement*, 6 UCLA J. INT'L L. & FOREIGN AFF. 425, 433 (2001) (suggesting that "each phase offers political opportunities for submitters to advance their underlying cause in terms of receiving official legitimacy for their concern, forcing a response from the government or advancing their issues on the governmental agenda").

152. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 7 (1997). Professor Freeman invokes the "republican principle [that] unanticipated or novel solutions are likely to emerge from face-to-face deliberative engagement among knowledgeable parties who would never otherwise share information or devise solutions together." *Id.* at 22-23.

153. See JPAC, WORKSHOP ON THE HISTORY OF CITIZEN SUBMISSIONS PURSUANT TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 3 (2000), available at http://www.cec.org/who_we_are/jpac/pdfs/sr-wrkshp-e.pdf

Id. at 3. JPAC notes that the BC Hydro Factual Record process, which included an opportunity for the key stakeholders to interact with the experts the Secretariat retained to assist with the Factual Record, "incorporated procedures to improve public participation that were not present in the Cozumel Pier Factual Record." LESSONS LEARNED, *supra* note 23, at 5.

154. Christensen, *supra* note 45, at 183.

155. See, e.g., 33 U.S.C. §1365(d), ELR STAT. FWPCA §505; ROBERT L. GLICKSMAN ET AL., 1037 n.8, ENVIRONMENTAL PROTECTION: LAW AND POLICY (5th ed. 2007).

156. See, e.g., Markell, *supra* note 40, at 14 (discussing measures states have taken to encourage citizen participation, citing specifically efforts in New York).

157. ELI, for example, suggests that the Council's decision concerning the Ontario Logging submission "appears to add to the existing 'pleading' requirements of the NAAEC a new and higher evidentiary threshold for the sufficiency of information necessary to support allegations of non-enforcement." ISSUES RELATING, *supra* note 23, at iv. ELI notes that doing so "potentially increases the financial and human resources burdens placed on [submitters]." *Id.* It cites some of the individuals it interviewed as arguing that "in setting the bar for 'sufficient information' too high, the Council may render it prohibitively difficult for citizens to participate in the process." *Id.*

158. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (comparing congressional "police-patrol" oversight with citizen "fire-alarm" oversight).

159. Raymond MacCallum, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Co-*

process is less process-intensive than civil litigation in the United States since there is no discovery or other pretrial work of the sort that characterizes such practice.¹⁵⁹ In sum, while at least in theory the investment of citizens need not be as great to bring a case before the CEC as would be the case domestically, it is possible that barriers to participation and lack of funding to help citizens overcome them affect citizen satisfaction.¹⁶⁰

In short, the procedural justice literature suggests that citizens' opportunities to participate in decisionmaking processes affect their degree of satisfaction with such processes. The CEC citizen submissions process affords citizens significant opportunities to participate, but citizens also have complained about some of the limitations in these opportunities. This discussion is intended to identify some of the positive aspects of opportunities to participate in the CEC process as well as citizen concerns. Further systematic inquiry will help to enhance understanding of citizens' perspectives, e.g., concerning the weight citizens attach to the lack of opportunity for in person interactions, and the weight that citizens attach to the lack of funding mechanisms, and the potential impact on citizen satisfaction of revamping the CEC process in various ways.

B. Neutrality and Trust

There is a significant overlap in these criteria, at least in terms of the CEC process, making joint treatment appropriate. The CEC's most recent commissioned report, the 2004 TRAC report, concludes that, in spite of various successes, one of the "important concerns" that has emerged is that the citizens' submission process ("the NAAEC's most innovative public participation mechanism") "has become mired in controversy."¹⁶¹ The TRAC report suggests that the Council's performance in particular has raised concerns about the neutrality of the citizen submissions process and triggered a decline in trust. The TRAC Report, for example, quotes a submission from a team of legal advisors from the three countries who advise the Secretariat on the citizen submissions process that Council-imposed restrictions on the scope of the process "ha[ve] the potential to permanently undermine the integrity of the process to the point where it is of limited interest to potential submitters."¹⁶² The legal advisors highlighted the importance of public confidence in the process and the dangers posed by a loss of such confidence: "Process integrity and credibility are critical because it is a public process that relies on and is driven by the responses

and actions of citizens and NGOs in the three countries."¹⁶³ In the rest of this part, I review the Council's performance and some of the commentary about the Council's record.¹⁶⁴

A superficial review of the Council's and individual parties' track records in responding to individual submissions suggests that citizens should have a high degree of trust in the Council. The Parties' first opportunity to participate in the CEC process is to submit a response to a submission when the CEC Secretariat requests one.¹⁶⁵ To date, the countries have provided a formal, written response to each submission for which the Secretariat has requested one even though they are not legally obligated to do so.¹⁶⁶ Indeed, many of these responses have been quite substantial.¹⁶⁷ On the other hand, skeptical citizens, particularly, might not find much solace in the Parties' having provided responses, since in many of their responses the Parties have argued that further investigation or information gathering (that is, development of a factual record) is not appropriate.¹⁶⁸ Instead, in many responses the Party involved has urged the Secretariat to dismiss the submission.¹⁶⁹ Thus, if the Parties' positions at this stage had prevailed, the citizen submissions process would have produced few factual records, despite its operation for more than 10 years. My own intuitive sense is that a substantively valuable response is likely to earn a Party credibility with many submitters, even if the Party ultimately urges dismissal of the submission, but this question deserves further investigation.

The first opportunity for the Council as a whole to participate in the CEC citizen submission process is its decision, following receipt of a Secretariat recommendation to prepare a factual record, whether to direct the Secretariat to proceed with development of such a record¹⁷⁰ or whether to reject such a Recommendation and direct dismissal of the submission.¹⁷¹ As of December 31, 2005, the Council has authorized the Secretariat to prepare factual records for sixteen submissions and it has directed the Secretariat to dismiss two submissions.¹⁷² Thus, in the vast majority of cases

cess generally have given the Secretariat high marks for its impartiality and for the quality of the determinations issued. Markell, *supra*, *Understanding Citizen Perspectives*.

165. NAAEC, *supra* note 22, art. 14(2).

166. *Id.*

167. See, e.g., U.S. Response, Great Lakes (SEM-98-003), C.E.C. Doc. A14/SEM/98-003/RSP (Mar. 12, 1999), available at <http://www.cec.org/files/pdf/sem/98-3-rsp-e.pdf>. Other responses have contained little information of value. Further, Mexico has asserted confidentiality concerning at least part of several of its formal, written responses, thereby preventing the public from reviewing them, despite the NAAEC's strong overall objective of promoting transparency and frequent statements by the Council supporting this objective. Markell, *supra*, *Understanding Citizen Perspectives*.

168. See, e.g., Canada Response, BC Hydro (SEM-97-001), C.E.C. Doc. A14/SEM/97-001/05/RSP (July 21, 1997), available at <http://www.cec.org/files/pdf/sem/97-1-RSP-E.PDF>; U.S. Response, Migratory Birds (SEM-99-002), C.E.C. Doc. A14/SEM/99-002/04/RSP (Feb. 29, 2000), available at <http://www.cec.org/files/pdf/sem/ACF1842.PDF>. This has not always been the case.

169. LESSONS LEARNED, *supra* note 23, at 11-12.

170. NAAEC, *supra* note 22, art. 15(2).

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

172. Markell, *supra*, *Understanding Citizen Perspectives*.

173. See *supra* note 168.

174. See *supra* notes 58-68 (describing in more detail the Council's process for approving release of a final factual record).

175. NAAEC, *supra* note 22, art. 15(7).

operation, 8 COLO. J. INT'L ENVTL. L. & POL'Y 395, 421 (1997) (noting that "the procedure potentially provides a means of private participation in the promotion of enforcement, which avoids the expense of domestic legal proceedings"). Related to this, Secretariat information-gathering efforts may obviate or diminish the need for citizen Freedom of Information Act (FOIA) requests, which can be time-consuming and expensive to pursue.

160. See TRAC, *supra* note 23, at 32.

161. *Id.* at 5.

162. *Id.* at 45 (citing Memorandum from Geoffrey Garver, Director, Submissions on Enforcement Matters Unit, to Jon Plaut, Chair, JPAC (Feb. 15, 2002) (on file with author)).

163. *Id.* I explore these issues in more detail in *Governance of International Institutions*, *supra* note 21.

164. Other than citizen submitters and the Council, the CEC Secretariat is the primary participants in the CEC citizen submissions process. As I discuss elsewhere, external reviews of the citizen submissions pro-

to come before it (88%), the Council has appeared to be responsive to citizen concerns and Secretariat judgments that such concerns warrant more in-depth review and attention from the citizen submissions process. Interestingly, this is the case even though for many submissions for which the Secretariat recommended that a factual record be developed,¹⁷³ the Party whose enforcement practices were at issue had initially urged dismissal of the submission. One might reasonably conclude that citizens would be satisfied with, and supportive of, the Council's record at this first decision point for it in the process.

The second Council decision point in the process involves the decision whether to approve release of a final factual record. As noted above, following the Secretariat's development of a draft factual record, the Secretariat seeks comments from the Council concerning the accuracy of the draft, develops a final factual record, and submits this final record to the Council.¹⁷⁴ It then is up to the Council to decide, by two-thirds vote, whether to release the factual record to the public.¹⁷⁵ The Council has voted unanimously to release the factual records that the Secretariat has submitted.¹⁷⁶

All in all, the Council's record seems supportive of the submissions process and would seem likely to engender confidence that the Council is maintaining a neutral stance in performing its role and has earned the trust of interested parties. In particular, in the vast majority of cases (16 out of 18) the Council has endorsed the Secretariat's recommendation that a factual record be developed.¹⁷⁷ For each of the affirmative votes, the Council endorsement has been unanimous.¹⁷⁸ Even the Party that has been the subject of the submission has voted to pursue a factual record.¹⁷⁹ The fact that for several submissions the targeted Party on its own viewed the submission to be unworthy of further review under the process, and then later acceded to such further review,¹⁸⁰ arguably also lends support for the notion that the parties are able, when acting as the Council, to put aside any parochial perspective that otherwise might be ascribed to them and operate as custodians of the process. Bolstering the seemingly positive nature of this Council track record is the fact that the Council has unanimously approved the release of final factual records.

Nevertheless, there are abundant signs in the commentary about the process that citizens do not trust the Council or the

individual Parties, and that citizens lack confidence in the neutrality of any of the government actors. The sense one gets is that the submitter (and prospective submitter) community views the Council to be distinctly unenthusiastic about the process. There is considerable evidence that submitters consider the Council to be extremely reluctant to fulfill its minimum responsibilities and, in many cases, as affirmatively undermining the process.

The Council has taken at least five types of actions that appear to have sowed distrust and a sense of lack of neutrality.¹⁸¹ First, critics have criticized the Council for purportedly overstepping its authority, and intruding on or usurping the responsibilities and authority of the CEC Secretariat. As suggested above,¹⁸² the Parties have not retained plenary authority to make the decisions required under the citizen submissions process. Instead, they have given the Secretariat certain responsibilities and a significant degree of independence in the implementation of the process, while also giving submitters certain powers as well (notably, for our purposes, the power to launch the process and thereby identify the alleged failures to effectively enforce that should receive detailed scrutiny). As I also have suggested elsewhere, the question of boundaries of authority has arisen several times during the early years of the process.¹⁸³ A common theme of the NGO community and of scholarly and other commentary is that, for the process to operate as intended (and for it to be credible with civil society), the Parties need to do a better job of adhering to the self-imposed limits contained in the NAAEC and, relatedly, to accord appropriate

the Parties, such as not providing information that the Secretariat has requested, delaying the process, and attempting to pre-empt CEC review through "desultory enforcement actions. . . ." TRAC, *supra* note 23, at 46. The TRAC Report similarly found that "[m]any observers" perceived the Council's four November 2001 Resolutions as "contradicting" a 2000 Council Resolution that implied that the Council would ask JPAC to "review changes to the process before they were introduced." *Id.* at 44. Randy Christiansen indicated that the BC Hydro submitters "alleged that the process was compromised by non-cooperation and political interference by the Government of Canada, resulting in a less valuable factual record than was possible." Christiansen, *supra* note 45, at 175. Wold identified three "principal means" in which the Council has, in his view, undermined the process:

The Council has adversely affected the ability of the Citizen Submission Process to achieve better environmental results. The Council has degraded the process through three principal means: (1) disallowing examinations of allegations of a broad pattern of ineffective enforcement, (2) limiting the scope of factual records and (3) questioning the sufficiency of information.

Wold et al., *supra* note 44, at 423.

182. See *supra* note 21 and accompanying text.

183. *Governance of International Institutions*, *supra* note 21, at 762-80. Some early commentators anticipated these tensions. See, e.g., JOHNSON & BEAULIEU, *supra* note 23, at 131-69 (charting creation and the structural conflicts inherent in the NAAEC); FOUR-YEAR REVIEW, *supra* note 23 (describing division of responsibilities and noting the separation of authority). Numerous observers have commented on the presence of such tensions. See, e.g., Christopher Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 175 (2001) (noting tension surrounding the submissions procedure). See generally Knox, *supra* note 60; Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT'L L. 395 (2001).

184. See, e.g., CEC, ADVICE TO COUNCIL No: 01-07 (2001), available at <http://www.cec.org/files/pdf/JPAC/01-07E.pdf>.

185. TRAC, *supra* note 23, at 32.

186. *Id.* at 45.

176. See CEC's website. CEC, *Who We Are/Council*, http://cec.org/who_we_are/council/resolutions/index.cfm?varlan=English (last visited Feb. 15, 2007) [hereinafter *Who We Are*] (providing Council resolutions from 1994 through the present).

177. See *supra* tbl. 6.

178. See *Who We Are*, *supra* note 176.

179. See *id.*

180. See, e.g., Submission, BC Hydro (SEM-97-001), C.E.C. Doc. A14/SEM/97-001/01/SUB* (Apr. 2, 1997), available at <http://www.cec.org/files/pdf/sem/ACF756.pdf>. In its response, Canada urged that a factual record was not appropriate. Canada Response, BC Hydro (SEM-97-001), C.E.C. Doc. A14/SEM/97-001/05/RSP (July 21, 1997), available at <http://www.cec.org/files/pdf/sem/97-1-RSP-E.PDF>. But in Council Resolution 98-07 Canada joined the United States and Mexico in voting to develop a factual record. Council Res. 98-07, 1, C.E.C. Doc. C/C.01/98-00/RES/03/Rev.3 (June 24, 1998).

181. I have not tried to include every nuance in the process that raises procedural justice concerns. Instead, I have focused on what appear to be among the more significant concerns. Other Council actions have triggered procedural justice concerns as well. For example, the TRAC Report identifies other complaints submitters have made of

respect to the Secretariat's integral role in the process.¹⁸⁴ The 2004 TRAC Report notes that "if many have criticized the Council for not providing sufficient overall direction to the Secretariat's environmental cooperation program, they have also expressed concern about the Council exercising [sic] too much direction on the administration of Articles 14/15 where the Secretariat has specific responsibilities under the NAAEC."¹⁸⁵ It reports that interested stakeholders have argued that "the Council has exceeded its legal authority by making decisions that the NAAEC assigns to the Secretariat . . ."¹⁸⁶ The Environmental Law Institute (ELI) similarly concluded that the Council has not sufficiently respected the independence of the Secretariat.¹⁸⁷

One example of this criticism of Council over-reaching involves the Council's decision, in issuing four Resolutions in November 2001 that authorized the Secretariat to develop factual records, as the Secretariat had recommended, to change the focus of the factual records sought by submitters.¹⁸⁸ While these submissions alleged widespread failures to enforce,¹⁸⁹ supported by the Secretariat's Recommendations to develop factual records of a scope broad enough to explore such alleged failures, the Council's Resolutions directed the Secretariat to only develop factual records concerning the specific examples of failures to enforce effectively asserted by the submitters.¹⁹⁰ A February 2002 memorandum from the director of the CEC Secretariat's submissions unit to the chair of the JPAC makes this clear:

[T]he Council included instructions [in the four Resolutions] to prepare factual records regarding specific cases raised in the submissions, but did not include instructions regarding allegations in each of those submissions of widespread failures to effectively enforce environmental laws. For each of those four submissions, the Secretariat had recommended preparing factual records in regard to the widespread allegations of failures to effectively enforce.¹⁹¹

187. ISSUES RELATING, *supra* note 23, at 23-24 (providing opposing views on the authority of the Council); *see also id.* at iii (noting that to be effective, the Secretariat "needs to maintain its independence as a neutral investigative body in order to ensure public trust in the [citizen submissions] process").

188. Council Res. 01-10, C.E.C. Doc. C/C.01/01-06/RES/03/FINAL (Nov. 16, 2001), *available at* <http://www.cec.org/files/PDF/COUNCIL/res-01-08e.pdf>; Council Res. 01-10, C.E.C. Doc. C/C.01/01-06/RES/01/FINAL (Nov. 16, 2001), *available at* <http://www.cec.org/files/PDF/COUNCIL/res-01-09e.pdf>; Council Res. 01-10, C.E.C. Doc. C/C.01/01-06/RES/04/FINAL (Nov. 16, 2001), *available at* <http://www.cec.org/files/PDF/COUNCIL/res-01-10e.pdf>; Council Res. 01-11, C.E.C. Doc. C/C.01/01-06/RES/05/FINAL (Nov. 16, 2001), *available at* <http://www.cec.org/files/PDF/COUNCIL/res01-11e.pdf>.

189. ALLIANCE FOR THE WILD ROCKIES ET AL., SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL COOPERATION PURSUANT TO ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (SEM 99-002), C.E.C. Doc. A14/SEM-99-002/01/SUB (1999), *available at* <http://www.cec.org/files/pdf/sem/99-2-SUB-E.pdf> (alleging failure to enforce effectively the Migratory Bird Treaty Act in the United States).

190. *See supra* note 184.

191. Memorandum from Geoffrey Garver, Director, Submissions on Enforcement Matters Unit, requesting information on issues in JPAC Advice to Council 01-09, 2 (Feb. 15, 2002), *available at* <http://www.cec.org/files/PDF/SEM/Memo-garver-e.pdf>. ELI has reached this conclusion as well, noting that the Council "significantly narrowed the scope of the investigation" in each of its resolutions. ISSUES RELATING, *supra* note 23, at iii, 5, noting, for example, that:

[a]lthough the Council approved the preparation of factual records with respect to each of these submissions, it signifi-

In its review of the Council's actions, ELI concluded that "[p]ersuasive textual arguments can be and have been made to suggest that the Council's resolutions were not within the scope of authority granted to it under the NAAEC."¹⁹² ELI continued by stating that the Council's actions also "appear to violate the object and purpose, or 'spirit,' of the Agreement, the fundamental objectives of which include the enhancement of transparency and public participation in environmental decisionmaking."¹⁹³ ELI concluded that "[m]any commentators expressed the view that, by intervening in the fact-finding process, the Council [was] undermining the independence of the Secretariat and the credibility of the process."¹⁹⁴

The Council's actions may have contributed to a loss of citizen trust in the citizen submissions process or in the Council, and thereby may have potentially contributed to a decline in use of the process. As the TRAC report concludes:

There is an argument to be made that the process could generate more environmental benefits if the Council sought to restrict it less. Some observers have argued, for example, that the actions of the Council have eroded the credibility of the process and are directly responsible for the fact that no new submissions have been brought against the United States Government in the last four years and that large environmental NGOs are not using the process.¹⁹⁵

A second criticism is that the Council has taken actions that have circumscribed the scope of the CEC process and thereby limited its utility. The TRAC Report notes that "[t]he Council has adopted a series of measures over the years to narrow the process's scope."¹⁹⁶ It also notes that the "JPAC, the NACs, the US GAC, academics, independent observers and NGOs have widely and repeatedly criticized the Council for these actions."¹⁹⁷

Citizens and others have criticized the four November 2001 Council Resolutions discussed above as an example of Council actions that have sought to narrow the scope of the process and the types of enforcement failures that it may address. In an October 2003 report to the JPAC concerning these four Resolutions, ELI concluded that

[T]he Council jeopardized the ability of those [factual] records to fully expose the controversy at issue. Spe-

cantly narrowed the scope of the investigation. That is, rather than order the preparation of factual records on the alleged widespread failure to effectively enforce, it instructed the Secretariat to develop factual records concerning only specific examples of the alleged widespread failure that were detailed in the submission.

Id. at 5-6. As might be expected, NGOs, including several submitters, have articulated this view and criticized the Council for its actions. *Governance of International Institutions*, *supra* note 21, at 781-93.

192. ISSUES RELATING, *supra* note 23, at vi.

193. *Id.*

194. *Id.* at v.

195. TRAC, *supra* note 23, at 46.

196. *Id.* at 44.

197. *Id.* at 45.

198. ISSUES RELATING, *supra* note 23, at v.

199. *Id.* at 6-12, 13, 27; Kibel, *supra* note 183, at 416-71; Christensen, *supra* note 45, at 178-80.

cifically, the factual records were not able to address evidence of widespread enforcement failures, cumulative effects that stem from such widespread patterns, or the broader concerns of submitters about implementation of enforcement policies.¹⁹⁸

The Secretariat, as well as outside observers such as ELI, have highlighted specific ways in which the Resolutions changed (and limited) the types of information the Secretariat developed compared to the types of information it would have developed had the Resolutions endorsed the submissions and Recommendations.¹⁹⁹ Wold, among others, has claimed that the Council Resolutions, in rejecting broad-based factual records that focus on alleged widespread enforcement failures, significantly reduced the value of the citizen submissions process because, at least in the United States, it is those types of enforcement failures that citizens have limited ability to address through domestic mechanisms:

Submitters quickly recognized that the process was especially useful when examining a broader pattern of government conduct which, if not adequately justified or explained, might reveal a systematic failure to enforce environmental law. This is especially true in the United States where the [U.S.] Supreme Court has ruled that an agency's decision not to take enforcement action with respect to a specific case is "presumed immune from judicial review." [Heckler v. Chaney, 470 U.S. 821, 832 (1985).]²⁰⁰

In a recent article, Wold says explicitly:

Without question, the submitters would never have prepared *Migratory Birds* if they had known that the Council would, in an arbitrary and unexplained fashion, limit the record to two specific instances cited only as examples of widespread government nonenforcement.²⁰¹

He indicates that "[t]he *Migratory Birds* submitters found the Citizen Submission Process attractive *only* because of its capacity to investigate the U.S. broad pattern of nonenforcement of the MBTA."²⁰² His conclusion about the results of the Council's narrowing the scope of the factual record in connection with the submission he prepared suggests that this narrowing has likely not improved citizens' current perceptions of the value of the process:

The absurdity of the result is patent: the Council directed the Secretariat to develop a factual record in *Migratory Birds* that resembled neither the issues presented by the submitters nor those recommended for study by the Secretariat. Indeed, it is the factual record that nobody wanted.²⁰³

200. Wold et al., *supra* note 44, at 423 (quoting Heckler v. Chaney, 470 U.S. 821, 832, 15 ELR 20335 (1985)).

201. *Id.* a 426.

202. *Id.*

203. *Id.* at 427. Randy Christensen offers a similar view on this issue:

Unfortunately, initial predictions that the mechanism was vulnerable to political manipulation have proven accurate over 10 years. Council actions have prevented a fulsome investigation of allegations of enforcement failure in many cases, depriving submitters and the public generally of a unique opportunity for discussing enforcement failures and improving environmental law enforcement. Given initial objections to the citizen submission process by the Canadian and Mexican governments, . . . it is not surprising that Parties have used their powers to influence the process.

Third, the Council has been criticized for failing adequately to explain its decisions, particularly when it rejects Secretariat Recommendations to prepare factual records.²⁰⁴ The Council, in the first Resolution that rejected a Secretariat Recommendation to prepare a factual record, provided no explanation at all for the Council's decision.²⁰⁵ John Knox noted that the Council "simply denied the development of a factual record without further explanation," and charged that "such a decision runs counter to the entire conception of NACEC and NAAEC."²⁰⁶

In response to citizen criticism, in 2001 the Council agreed to explain its rationale for dismissing submissions for which the Secretariat had recommended development of a factual record,²⁰⁷ but the explanations the Council has provided to date have been of limited utility.

It is likely that the JPAC, in *Lessons Learned*, has captured the public's view of this state of affairs, notably that the Council should provide reasoned explanations for its decisions, just as is expected of the Secretariat:

The articles 14 and 15 process should . . . be characterized by decisionmaking that is open, informed and reasoned. The current Guidelines require the Secretariat staff to indicate its reasons for a decision under Article 15(1) to recommend a factual record and at certain other decisionmaking points within the Article 14(1) and (2) reviews. These requirements provide the Parties, the Council and the public with the requisite confidence that the review is being conducted both openly and on a reasoned basis. For this reason, similar considerations should govern any Council decision not to accept the Secretariat's recommendation to develop a factual record. The obligation to state substantive reasons for important governmental decisions affecting the environment should not be seen as an unreasonable burden, particularly where the Secretariat has, after investigation, indicated its reasons for recommending such a factual record.²⁰⁸

Christensen, *supra* note 45, at 180-81.

204. The Council later explained its reasons for limiting the scope of factual records in a June 2004 letter to JPAC. Letter from José Manuel Bulas Montoro, Alternate Representative for Mexico, Council of the CEC, to Donna Tingley, 2004 Chair, JPAC, CEC (Jun. 3, 2004) (on file with author). The Council also addresses the "sufficiency of information" issue in this letter. *Id.*

205. Council Res. 00-01, C.E.C. Doc. C/C.01/00-04/RES/0/Rev.03 (May 16, 2000), available at http://www.cec.org/files/pdf/COUNCIL/res01r3e_EN.pdf.

206. See JPAC WORKSHOP, *supra* note 153, at 4 (reporting a paraphrasing of all participants' comments). Knox commented that Council should explain in all cases why it adopted a Resolution on whether or not to develop a factual record. *Id.* Knox pointed out that this did not occur in the *Quebec Hog Farm* case. *Id.*

207. Council Res. 01-06, 2, C.E.C. Doc. C/01-00/RES/06/Rev.4 (June 29, 2001), available at http://www.cec.org/files/pdf/COUNCIL/Res-06r4_EN.pdf.

208. LESSONS LEARNED, *supra* note 23, at 15-16. Also related to the issue of reasoned explanations, the Council has been characterized as opposing allowing the Secretariat to reach formal conclusions, or to make Recommendations, regarding allegations of a failure to effectively enforce, and several commentators have criticized this aspect of the process. JPAC WORKSHOP, *supra* note 153, at 7-8. Knox's comments were summarized as contending that

[E]ven though NAAEC does not explicitly prohibit factual records from containing conclusion or recommendations, that is a point that JPAC should not support, since the Parties are convinced that the purpose of factual records is not to reach conclusions of law. . . . [Knox] felt the battle is not

Fourth, the Council has taken actions that citizens have complained make it more difficult for them to use the process effectively.²⁰⁹ The 2004 TRAC report suggests that Council actions “may make it prohibitively difficult for citizens to file submissions.”²¹⁰ Similarly, in its 2003 report ELI indicates that the Council has increased the burden on submitters—that the increased level of specificity required means that concerned citizens groups must expend more resources and money to research exact violations rather than relying on “evidence of widespread, systemic failures to enforce” environmental laws.²¹¹ As the JPAC put it in a 2003 memo, “[d]efining the scope of factual records to require citizens’ groups to detail every specific violation to be included in the Secretariat’s investigations potentially increases the financial and human resources burdens placed on these groups.”²¹²

Finally, there is the issue of confidentiality. Despite the emphasis the NAAEC gives to increasing transparency and accountability,²¹³ the Council has on occasion taken actions that reduce transparency and these actions have triggered complaints from citizens. For example, in 1999 the Council acted to preclude the Secretariat from making public its recommendation to the Council to develop a factual record until 30 days had passed.²¹⁴ In *Lessons Learned*, the JPAC summarized citizen sentiment on this Council-imposed limitation on transparency as follows:

worth fighting, since the Parties will most certainly put up a resistance.

Id.; LESSONS LEARNED, *supra* note 23, at 13. Stating that:

[M]any commentators believed that factual records should be able to reach conclusions . . . as to a Party’s “effective enforcement of its environmental law” . . . and should also include recommendations for further action by a Party to impose the effectiveness of such enforcement. Other, however, believed that JPAC should not support such an approach since the Parties believe that the purpose of factual records is not to reach “conclusions of law” and will resist these proposals.

Id. These concerns seemingly raise distributive as well as procedural justice concerns.

209. JPAC WORKSHOP, *supra* note 153, at 5.

210. TRAC, *supra* note 23, at 45.

211. ISSUES RELATING, *supra* note 23, at 19. A similar complaint is that “[t]he Council’s resolutions appear to require submitters to allege specific violations in order to support the development of a factual record.” *Id.* at 19.

212. CEC, ADVICE TO COUNCIL No: 03-05, at 2 (2003), available at http://www.cec.org/files/PDF/JPAC/Advice03-05_EN.pdf.

213. See, e.g., NAAEC, *supra* note 22, art. 1(h) (identifying transparency as one of the goals); Yang, *supra* note 151, at 444 (indicating that transparency is the “major goal” of the process). The Council itself frequently touts its commitment to transparency and the importance the NAAEC gives to transparency as an objective. See, e.g., Council Res. 99-06, C.E.C. Doc. C/99-00-07/Rev.3 (June 28, 1999), available at http://www.cec.org/files/PDF/COUNCIL/99-06e_EN.pdf (noting the importance of transparency and fairness in the citizen submissions process); Council Res. 00-09, C.E.C. Doc. C/00-00/RES/09/Rev.2 (June 13, 2000), available at http://www.cec.org/files/PDF/COUNCIL/00-09e_EN.pdf (similarly recognizing the importance of transparency in the citizen submissions process).

214. See Guidelines for Submissions, *supra* note 59, at 10.2 (directing the Secretariat to notify the public that the Secretariat had made a Recommendation 30 days after the Secretariat submitted the Recommendation).

215. LESSONS LEARNED, *supra* note 23, at 10. JPAC itself formally recommended that the “current 30-day ‘blackout’ period should

The commentators spoke virtually as one against the requirements that a Secretariat recommendation to the Council . . . be withheld from the public for 30 days after its submission to the Council. It was widely agreed that there is “no need” for the requirement, that “it should be eliminated,” that it is impractical, and that it does not stand up to serious analysis, and that, in general, it seriously undermines the purpose of the Articles 14 and 15 process.²¹⁵

It was only after citizen complaints about this directive that the Council revised it to allow the Secretariat to make its Recommendations available to the public (in addition to providing them to the Council) in a more timely manner.²¹⁶

Also on the issue of confidentiality, in *Lessons Learned*, the JPAC reported that “[s]everal commentators expressed concern regarding what they perceived as an increase in parties’ reliance on the confidentiality provisions of [the NAAEC].”²¹⁷ The JPAC itself expressed the view that

[A] Party’s right to invoke that [the confidential information] defense against disclosure should be narrowly construed and should be limited to those circumstances in which it is expressly authorized by [the NAAEC]. . . . Anything broader than that . . . will serve principally to dilute the effectiveness of a procedure that relies on public disclosure and scrutiny for its credibility and acceptance. If a Party invokes the privacy defense, it should state the reasons and the provisions it relies on.²¹⁸

I close this part with a quotation from an article by Wold, the attorney whose submission led to the only factual record concerning U.S. enforcement practices. Wold notes:

[E]arly support [for the process] . . . has waned considerably as the decisions of the CEC’s Council . . . have eroded public confidence in the process. The Council has marginalized the Secretariat’s independence by narrowing the scope of submissions, a role designated to the Secretariat. In addition, it has ignored the JPAC’s advice on implementation of the submission process. Moreover, the member governments have chosen to treat the Citizen Submission process as adversarial, rather than cooperative. . . .

The Council . . . [has] seriously inhibited the Citizen Submission Process from achieving more positive environmental results and deeply undermined the Secretariat and the JPAC. Consequently, support for the Citizen Submission Process in the United States is very low.²¹⁹

Wold concludes:

Environmental groups who have supported the development and implementation of the Citizen Submission Process are growing increasingly frustrated over the Council’s unwillingness to respect the boundaries established in the process. If this perception continues, many of the groups who have supported and defended the Citi-

either be abolished or substantially reduced.” *Id.* at 16; see also JPAC Workshop, *supra* note 153, at 4 (suggesting that the 30-day delay is “nonsensical, impractical and does not stand up to serious analysis”).

216. Council Res. 01-06, *supra* note 207, at 1-2.

217. LESSONS LEARNED, *supra* note 23, at 11.

218. *Id.* at 17; see also Yang, *supra* note 151, at 454, 475-76.

219. Wold et al., *supra* note 44, at 417-18. The Council has responded to some of these criticisms. See e.g., Montoro, *supra* note 204.

220. Wold et al., *supra* note 44, at 443-44.

zen Submission Process may simply abandon the process and declare it, and the CEC, inappropriately tailored to meet the challenges of environmental enforcement.

The Council certainly knows what it must do to restore public confidence in the process and to ensure its effectiveness. It must release its grip on the process and embrace the NAAEC's cooperative spirit. The question is whether it has the political will to do so.²²⁰

VI. Conclusion

Much recent scholarship has supported increasing citizen participation in governance, and there has been considerable activity to encourage greater citizen involvement in various stages of governance. The creation of the CEC citizen submissions process in the mid-1990s is one example of this phenomenon. As ELI put it in its 2003 report, "[a] fundamental objective of the [NAAEC] is to enhance public participation in environmental decision-making. By far the most innovative and substantial mechanism [in the NAAEC] . . . for fostering these goals is the citizen submissions process. . . ."²²¹

For those interested in promoting more citizen engagement, a key question involves how to structure decision-making processes to produce this result. This Article suggests that the psychology literature on procedural justice offers one framework for thinking about how mechanisms intended to encourage citizen involvement should be structured. This literature seeks to advance understanding of the types of process features that are likely to yield high levels of participant satisfaction, and the types of features that are not.

My effort in this Article to explore the CEC citizen submissions process through the lens of the procedural justice literature suggests the possible relevance of procedural justice to the level of citizen use of that process in the United States. Systematic work is needed to confirm or rebut the sense of the commentary about the CEC process that I have

outlined. Empirical work would be helpful, for example, to confirm (or not) the sentiments expressed in the commentary concerning possible reasons why citizen satisfaction with the process appears to be limited and to have declined in recent years, at least with regard to submissions involving the United States. Related, there would seem to be considerable potential value in exploring systematically why submissions concerning Canada and Mexico have not experienced similar declines. Future empirical work concerning the CEC citizen submission mechanism might focus on at least three questions that in particular seem well worth exploring: (1) what features of the process are of greatest importance or salience to citizens from a procedural justice perspective; (2) what is the importance to citizens of procedural justice vis-à-vis distributive justice concerns; and (3) how relevant are extrinsic factors (such as culture, the availability of alternative mechanisms, etc.) to citizens' interest in using the process.²²²

The larger purpose of the Article is to suggest the importance of systematic analysis of process design as part of the policymaking enterprise.²²³ The yield from this effort, hopefully, will ultimately be to motivate creation of government decisionmaking processes that embody the lessons learned from such work and hopefully prove more effective than current approaches in enhancing citizen confidence in governance.

concerns, which are summarized in the text: "The repeated attempts by Council to influence the handling of specific submissions have not only impeded the operation of the spotlight, but have also undermined public confidence in the process." Christensen, *supra* note 45, at 184-85. But his perspective on future use of the process in Canada also suggests the likely relevance of nonprocedural justice factors to the level of citizen use: "Despite these deficiencies, it is likely that the environmental groups will continue to use the mechanism in attempts to deal with non-enforcement issues within Canada, as there are few domestic alternatives." *Id.*

223. Gibson et al., *supra* note 7, at 538, 555 (noting that "we have a long way to go in understanding the relationship between institutional performance and legitimacy" and that "only with more valid measures of institutional legitimacy can we make progress in unraveling the causal linkages between performance and legitimacy").

221. ISSUES RELATING, *supra* note 23, at v.

222. Randy Christensen, a principal Canadian submitter, echoes Wold's