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Understanding Citizen Perspectives on Government Decision-Making Processes as a Way to Improve the Administrative State

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UNDERSTANDING CITIZEN PERSPECTIVES ON
GOVERNMENT DECISION MAKING PROCESSES AS A WAY
TO IMPROVE THE ADMINISTRATIVE STATE

By

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This Article explores possible insights from the “procedural justice” literature about features of government decision making processes that citizens are likely to consider to be particularly valuable or important. Numerous commentators have urged that the government take steps to increase citizen participation in its decision making processes as a way to offset concerns about government legitimacy. The premise of the Article is that incorporating into government decision making processes features that are important to citizens is a potentially helpful step in fostering meaningful citizen participation. Processes that citizens value are more likely to be processes that citizens use and that enhance citizen confidence in government, while processes with features that citizens find unsatisfactory are more likely to be processes that do not engender meaningful citizen input; they may even operate to undermine citizen confidence.

This Article reviews a framework that the procedural justice literature proposes for assessing citizen satisfaction with decision making processes, and it applies this framework to an international decision making process that relies heavily on citizen participation, 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 increase government accountability and transparency, and inform and thereby improve the exercise of agency discretion. This Article considers the track record of the process in light of the procedural justice literature in an effort to advance thinking about the design of government

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decision making processes that are intended to promote meaningful public participation.

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I. INTRODUCTION

Agency officials in the contemporary administrative state have enormous power to carry out the work of government.¹ While the President,² Congress,³ and Judiciary⁴ each has some capacity to serve as an institutional check on the actions of agency officials,⁵ it is widely believed and understood that despite these checks agency staff have "staggering discretion" in carrying out their responsibilities.⁶

¹ See, e.g., 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"); 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").

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).

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., Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990) (discussing judicial review of administrative decision making).

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).

⁶ See Mariano-Florentino Cuéllar, *Auditing Executive Discretion* (Stanford Pub. Law & Legal Theory, Working Paper No. 116, 2005), available at <http://ssrn.com/abstract=854364>

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, Professor Jody Freeman has suggested that “[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

The question of how institutions build legitimacy is an extraordinarily difficult one that remains largely “unanswered.”¹³ 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. Professor 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.”¹⁴

(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. For a discussion of institutional legitimacy, see, for example, James L. Gibson, et al., *The Supreme Court and the US 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”); ARCHON FUNG, ET AL., THE POLITICAL ECONOMY OF TRANSPARENCY: WHAT MAKES DISCLOSURE POLICIES EFFECTIVE? 6 (Dec. 2004) (unpublished manuscript, on file with the Ash Institute for Democratic Governance and Innovation, John F. Kennedy School of Government, Harvard University), available at <http://www.archonfung.net/papers/FGWEffectiveness.pdf> (noting that transparency systems—systems that require organizations to provide the public with information about their practices—have become increasingly popular over the past several years to the point that some commentators have referred to them as a “third wave” of regulation).

¹¹ See, e.g., Croley, *supra* note 10, 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 Gibson, *supra* note 7, at 556 (2003) (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”); James L. Gibson, *On the Legitimacy of National High Courts*, AM. POL. SCI. REV., June 1998, at 343, 344 (noting that the “most important question in legitimacy research [is] how institutions acquire and sustain legitimacy.”)

¹⁴ 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 towards 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

He notes that “recent reform efforts are consistently geared to enhance broad-based participation in the agency decision making process.”¹⁵ Dean Edward Rubin similarly has observed that “[p]articipatory democracy is a very fashionable idea these days.”¹⁶ Proponents suggest that greater opportunities for public involvement in agency decision making processes may help to enhance accountability and transparency in governance, contribute to more informed, and thereby improved, results,¹⁷ 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.¹⁸

This Article explores the design of governance mechanisms that are intended to incorporate meaningful citizen involvement as a strategy to enhance legitimacy.¹⁹ It does so by focusing attention on what is a central,

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, 3, June 14, 1992, 31 I.L.M. 874.

¹⁵ Rossi, *supra* note 14, at 175.

¹⁶ Rubin, *supra* note 1, at 2104. 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). Breyer writes:

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.

¹⁷ 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 (June 2004), available at http://www.accessinitiative.org/pdf/TAIUS_final.pdf (characterizing including the public in decision making as a “core principle of democracy”).

¹⁸ 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]; Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1457–60 (2005) (observing that law and mechanisms of governance can serve as a tool to enhance trust or social capital, or, as a source for further disaffection—“[t]he nature of the law seems central to societal trust”); MACEDO, *supra* note 17, at 4 (arguing that “improving our institutions to promote robust citizen engagement is essential to American democracy”); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 1, 41–42 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869407. Secrecy impairs trust in the legitimacy of the law and

[a]t one time, public jury trials not only educated ordinary citizens and let them see and influence justice being done, but also contributed to the law’s democratic legitimacy. But today, outsiders neither see nor understand nor participate much in criminal justice. The system is too opaque and remote to educate them well. . . . This secrecy and opacity weakens citizens’ trust in the law and may also make them feel distant and alienated.

Id.

¹⁹ There have been several efforts to recast citizens’ roles in governance in this way. *See, e.g.*, IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 54–100 (1992) (proposing “tripartism”—empowering public interest

threshold question: what is it that citizens like (and dislike) about government decision making processes (particularly administrative agency decision making processes) that purport to value citizen involvement?²⁰ A potentially valuable step in fostering citizen participation in government decision making processes is to incorporate in these processes features that are important to citizens.²¹ Processes that citizens value are likely to be processes that citizens use and that enhance citizen confidence in government, while processes with features that citizens find unsatisfactory are likely to be processes that do not engender meaningful citizen input; they may even operate to undermine citizen confidence.²²

This Article explores ways in which the “procedural justice” literature on citizen satisfaction makes it possible to shed some light on this question of citizen preferences in government decision making processes—i.e., to develop some insights about the types of features citizens think are most valuable or important in decision making processes that incorporate a role for them.²³ The procedural justice literature provides a conceptual

groups in the regulatory process—as a means to address regulatory capture and corruption); Mark Seidenfeld & Janna Satz Nugent, *“The Friendship of the People”: Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 303–15 (2005) (discussing tripartism, collaborative governance, and deliberative participation as possible ways to involve citizens in the regulatory process); Freeman, *supra* note 8 (proposing a collaborative state); *cf.* Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000) (voicing skepticism about same). The administrative state is by no means monolithic and opportunities for public involvement vary widely depending on the function involved (e.g., adjudication, rulemaking, or something else) and, therefore, ideas for reform need to address these contextual realities. *See, e.g.*, ASIMOW ET AL., STATE AND FEDERAL ADMINISTRATIVE LAW 645 (2d ed. 1998).

²⁰ The general topic of public attitudes toward government is receiving increasing interest. *See* WHAT IS IT ABOUT GOVERNMENT, *supra* note 18, at 2.

²¹ 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 14, at 182–88 (summarizing the common justifications for “mass participation” in agency decision making); 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 three commonly raised concerns—of empowering NGOs to participate in governance). Obviously, as discussed in more detail below, a wide variety of factors other than citizen satisfaction with decision making processes may affect levels of citizen participation. *See, e.g.*, *infra* notes 116, 143, 153.

²² Bibas, *supra* note 18, at 40–41. Noting that:

[P]eople respect the law more when it is visibly fair and they have some voice or control over its procedures. Procedural fairness, process control, and trust in insider’s motives contribute greatly to [government’s] legitimacy. [Similarly], [w]hen citizens see that the law reaches substantively just outcomes, the law earns moral credibility . . . [while] [c]onversely, when the law reaches outcomes that are substantively unjust, or at least not visibly just, citizens view the law’s judgments as less credible and less worthy of respect.

Id. While Professor Bibas’s focus was on criminal procedure, his analysis applies to government decision making processes more generally.

²³ I make this effort fully in agreement with Professor Mariano-Florentino Cuéllar’s insight that we still have much to learn about both actual and potential public participation in regulatory policy. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 417 (2005) (noting that “both . . . are complicated phenomena, full of subtleties, and

framework for considering citizen satisfaction with opportunities for involvement in agency decision making. This literature offers a framework for structuring decision making processes in order to engender citizen satisfaction by identifying features of government decision making processes that are likely to be of particular salience to citizens.²⁴

After reviewing a basic framework that the procedural justice literature proposes for assessing citizen satisfaction with decision making processes, I apply this framework to a decision making process that relies heavily on citizen participation, 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 increase government accountability and transparency, that it would inform the exercise of agency discretion, and that it would bolster government effectiveness. As Part III reflects, there is considerable evidence that the process is floundering (or at least not flourishing), at least in the United States. I consider this performance (the track record of the process) in light of the procedural justice literature in order to explore why this may be the case, and what might be done to improve citizen perceptions of the process. The premise, as noted above, is intuitively quite straightforward: understanding the features that citizens like (and dislike) in decision making processes is a potentially important step in structuring decision making processes that are intended to enhance the quality of governance by incorporating meaningful citizen involvement.²⁵

still only partially understood more than a century into the history of the regulatory state").

²⁴ Use of the procedural justice literature for a conceptual framework needs to be qualified, for a variety of reasons. First, as is discussed *infra* Part III, 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 decision making 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 18; James L. Gibson, et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 539-45, 553 (2003), available at <http://www.artsci.wustl.edu/~polisci/gibson/bjps2003.pdf> (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 decision making 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 *supra* note 21; see also *infra* note 153.

²⁵ Enhanced understanding of citizen preferences is only one such step in the effort to enhance governance. I am not suggesting that citizen preferences should control 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 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:

Parts II and III of this Article provide contextual information about the CEC. 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 with a particular focus on patterns of citizens' use of the process. A key finding discussed in Part III is that citizens' use of the process in the United States has slowed dramatically.

Part IV reviews the procedural justice literature on citizen satisfaction with decision making processes. This literature suggests that citizens' assessments of the fairness of third-party decision making procedures is important to judgments about the legitimacy of such processes, independent of the outcomes of such procedures, a result that some have characterized as "counterintuitive." The procedural justice literature provides a framework for considering the extent to which citizens are likely to judge particular processes to be fair or just.

Part V contains an assessment of the citizen submissions process in the context of the procedural justice literature, the track record of the CEC process, and commentary about the process. This Part identifies various features of the process that seem potentially to raise procedural justice concerns. Part VI reinforces the potential value of empirically-based research for the design and evaluation of processes of governance and suggests additional research that will advance understanding of processes that are intended to incorporate meaningful citizen involvement. The yield from this effort, hopefully, will be to encourage greater consideration of empirical work in the design and implementation of institutions of governance,²⁶ and, ultimately, to motivate creation of government decision

"[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). Professor 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 decision-making spheres can impose narrow and parochial interests on the public agenda and, as a result, impose unreasonable burdens on the broader society."

Id.

²⁶ I am currently working with Professor Tom Tyler on a substantial follow-up project

making processes that embody the lessons learned from such work and hopefully prove more effective than current approaches in enhancing citizen confidence in governance.

II. AN OVERVIEW OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION AND ITS CITIZEN SUBMISSIONS PROCESS²⁷

A. An Overview of the CEC

The North American Free Trade Agreement (NAFTA) Environmental Side Agreement, the North American Agreement on Environmental Cooperation (NAAEC),²⁸ emerged from the NAFTA negotiations among the three North American countries, Canada, Mexico, and the United States, to liberalize trade throughout the continent.²⁹ While proponents of NAFTA touted it as the “greenest” trade agreement ever,³⁰ skeptics and other opponents were dubious.³¹ Some participants in the NAFTA debate pushed

involving several processes that are intended to encourage citizen participation.

²⁷ I have previously written about the CEC and its citizen submissions process, and some of the discussion in this section and in Part V is taken from that earlier work, particularly David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545 (2000), David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process*, 30 N.C. J. INT'L L. & COM. REG. 759 (2005) [hereinafter *Governance of International Institutions*], and David L. Markell, *The CEC Citizen Submissions Process: On or Off Course*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, at 256 (David L. Markell & John H. Knox eds., 2003) [hereinafter GREENING NAFTA].

²⁸ North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 8–19, Sept. 14, 1993, 32 I.L.M. 1480 (1994) [hereinafter NAAEC].

²⁹ 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, for example, PIERRE-MARC JOHNSON & ANDRÉ BEAULIEU, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* (1996); GREENING NAFTA, *supra* note 27. For analyses the CEC itself developed or commissioned, see, for example, TEN-YEAR REV. & 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]; ENVTL. L. INST., *FINAL REPORT: ISSUES RELATED 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 RELATED]; JOINT PUB. ADVISORY COMM., *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 REV. 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].

³⁰ Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 318 (1997) (quoting former EPA Administrator William Reilly). See also JOHNSON & BEAULIEU, *supra* note 29, at 121 (stating that NAFTA is “more attentive to environment-related concerns than are most if not all the preceding trade agreements”).

³¹ Steve Charnovitz, *The North American Free Trade Agreement: Green Law or Green Spin?*,

for creation of an “environmental side agreement” that would create an environmental commission that would focus on strengthening North American environmental governance and protecting the North American environment.³² There was considerable jockeying about the need for such an institution and about its possible shape and powers.³³ Ultimately, these negotiations produced sufficient support for NAFTA to allow its passage, accompanied by adoption of an “Environmental Side Agreement,” the NAAEC.³⁴

The NAAEC created a new international institution, the CEC. The CEC has been termed a “brave experiment in institution-building.”³⁵ Among other things, the CEC: 1) is the “first of its kind in the world in linking environmental cooperation with trade relations”,³⁶ 2) has “innovative tools and almost unlimited jurisdiction”³⁷ to address “almost any environmental issue anywhere in North America”,³⁸ and 3) “provides unprecedented opportunities for participation by civil society at the international level.”³⁹

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).⁴⁰ With the important exception of the citizen submissions process, described below,⁴¹ and under some circumstances the article 13 process, the Council is responsible for setting the agenda for the Commission.⁴² The Council

26 LAW & POL’Y INT’L BUS. 1, 68 (1994) (challenging the notion that NAFTA is the “greenest” free trade agreement ever).

³² See Kal Raustiala, *The Political Implications of the Enforcement Provisions of the NAFTA Environmental Side Agreement: The CEC as a Model for Future Accords*, 25 ENVTL. L. 31, 33–34 (1995) (stating that the CEC was the result of pressure from environmental groups who recognized the ecological threat created by liberalized trade); TRAC, *supra* note 29, at 42 (noting that “the NAAEC was negotiated out of a concern that a Party’s lack of enforcement of its environmental laws might provide it with an unfair competitive advantage”). The decision to create an environmental side agreement split the environmental community. Some NGOs were persuaded not to oppose the NAFTA package because of the inclusion of the environmental agreement, while others continued to oppose NAFTA. See Joseph F. DiMento & Pamela M. Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Environmental Side Agreement Implemented*, 10 GEO. INT’L ENVTL. L. REV. 651, 675–81 (1998) [hereinafter *Soft Teeth*].

³³ See DiMento & Doughman, *supra* note 32, at 667–74 (detailing the negotiations and eventual agreement on the structure and functions of the CEC).

³⁴ A labor agreement was adopted as well. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1499 (1993) [hereinafter NAALC].

³⁵ TRAC, *supra* note 29, at 4.

³⁶ *Id.* at ix.

³⁷ GREENING NAFTA, *supra* note 27, at 2.

³⁸ TRAC, *supra* note 29, at ix.

³⁹ GREENING NAFTA, *supra* note 27, at 2.

⁴⁰ NAAEC, *supra* note 28, art. 8–19. See John D. Wirth, *Perspectives on The Joint Public Advisory Committee*, in GREENING NAFTA, *supra* note 27, at 199, 199 (highlighting the broad mandate and substantial achievements of the JPAC).

⁴¹ See *infra* Part II.

⁴² NAAEC, *supra* note 28, 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

approves the annual work plan for the Commission and oversees the work done to implement the work plan.⁴³ The Secretariat develops the draft work plan for Council approval⁴⁴ and takes the lead on implementation of the work plan.⁴⁵ The JPAC is unique in making representatives of civil society part of the governance structure of the CEC; it puts them on the inside.⁴⁶ The JPAC is authorized to provide advice to the Council on any matter within the scope of the NAAEC and takes an active role in soliciting input on key issues from interested North American stakeholders.⁴⁷

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.⁴⁸

Moreover, given the increasing emphasis on “spotlighting” instruments,⁴⁹

GREENING NAFTA, *supra* note 27, at 217–36.

⁴³ NAAEC, *supra* note 28, art. 10(1).

⁴⁴ *Id.* art. 11(6).

⁴⁵ *See id.* art. 11 (describing the Secretariat's structure and procedures for carrying out its technical, administrative, and operational support duties).

⁴⁶ *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 . . .”).

⁴⁷ NAAEC, *supra* note 28, art. 16(4); *see* Joint Pub. Advisory Comm., N. Am. Comm'n for Env'tl. Cooperation, Vision Statement, http://www.cec.org/who_we_are/jpac/vision/ (last visited July 16, 2006) (“Our vision is to . . . ensure active public participation . . . in the actions of the commission.”); Joint Pub. Advisory Comm., N. Am. Comm'n for Env'tl. 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.”).

⁴⁸ John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, in GREENING NAFTA, *supra* note 27, at 9, 13.

⁴⁹ 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,” non-coercive approaches, rather than through conventional “command-and-control” strategies.) *See generally* CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP 59–83, 213–67 (2003) (discussing different strategies for promoting environmental compliance).

citizen participation in governance,⁵⁰ and accountability mechanisms (and government performance),⁵¹ 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).⁵² A 2004 report on the first ten years of the CEC's operations concluded that "[t]he CEC has successfully promoted citizen engagement on environmental issues and increased government accountability regarding the enforcement of environmental laws."⁵³ It suggests that the NAAEC "stands out for its provisions for public participation and for the unprecedented commitment by the three governments to account internationally for the enforcement of their environmental laws."⁵⁴ It continues: "[t]hese provisions make the CEC an international model for providing new avenues of public participation for civil society."⁵⁵ The following section describes this innovative citizen submissions process in more detail.

B. The CEC Citizen Submissions Process

The CEC's JPAC has highlighted the importance of the CEC citizen submissions process as a possible model for enhancing public oversight of government enforcement efforts:

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.⁵⁶

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,

⁵⁰ See *infra* Part IV.A.

⁵¹ 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).

⁵² The Environmental Law Institute (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 RELATED, *supra* note 29, at 4.

⁵³ TRAC, *supra* note 29, at x.

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* See *infra* Part III.

⁵⁶ LESSONS LEARNED, *supra* note 29, at 2. The Environmental Law Institute (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 RELATED, *supra* note 29, at 4; see also TRAC, *supra* note 29, 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 Advice that the process plays a "unique and indispensable role in fostering vigorous environmental enforcement," and a NAC Advice that it is a "cornerstone of the [NAAEC]." *Id.*

and legal specialists . . . in NAAEC's article 14 and 15."⁵⁷ Chris Wold, the principal author of the one U.S. submission to result in a CEC factual record,⁵⁸ 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."⁵⁹

The hope was that this citizen spotlighting mechanism would 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.⁶⁰ 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 of expanding trade.⁶¹

⁵⁷ 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).

⁵⁸ 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).

⁵⁹ *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 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"). Mr. Christensen, a lawyer with the Canadian Sierra Legal Defense Fund (SLDF), probably has as much experience with the CEC process as any U.S. or Canadian NGO, having served as legal counsel on three submissions that have proceeded to factual records. *Id.* at 166 n.1. There were clearly some skeptics as well and, indeed, 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*, (Tex. Ctr. for Pol'y Stud., Austin, Tex.), 1993, at (pt. 2), 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").

⁶⁰ 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) (noting that "Mexico's environmental laws were essentially equivalent to those of the United States and . . . the problem was inadequate compliance with those laws." As a result, the United States and other NGOs that were the driving forces behind the creation of the CEC and its citizen submission mechanism, sought a mechanism that would focus on bolstering domestic enforcement capacity. While the objective was to bolster such capacity across the continent, there was particular interest in a mechanism that would invigorate Mexican enforcement.). 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 29, 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.

⁶¹ See Greg M. Block, *The North American Commission for Environmental Cooperation and*

There are three main actors in the citizen submissions process: the CEC Council;⁶² interested citizens (“civil society”);⁶³ and a Secretariat.⁶⁴ 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).⁶⁵ In addition, the NAAEC empowers citizens to contribute information about the nature and effectiveness of the government enforcement practices at issue in particular submissions.⁶⁶

The NAAEC vests in the CEC Secretariat considerable authority over administration of the process. 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.⁶⁷ 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.”⁶⁸ 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.⁶⁹

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.⁷⁰ 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

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”).

⁶² NAAEC, *supra* note 28, arts. 8–19.

⁶³ *Id.*

⁶⁴ NAAEC, *supra* note 28, arts. 11–15. 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 29, 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 46, at 369. The Joint Public Advisory Committee (JPAC) has also played an important role in the citizen submissions process. *See* Wirth, *supra* note 40, at 199 (discussing the JPAC’s role in the CEC).

⁶⁵ NAAEC, *supra* note 28, art. 14.

⁶⁶ *Id.* art. 15.

⁶⁷ *Id.* art. 14.

⁶⁸ *Id.* art. 14(2)(b).

⁶⁹ *See infra* notes 200–02 and accompanying text (discussing the Secretariat’s track record in performing this responsibility).

⁷⁰ NAAEC, *supra* note 28, arts. 14(2), 15(1).

“factual record.”⁷¹ The Secretariat may unilaterally dismiss a submission at this stage if it determines that a factual record is not warranted.⁷² In either case—a recommendation to proceed with a factual record or a dismissal—the Secretariat must explain the rationale for its decision.⁷³

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) 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.”⁷⁴ The Agreement also specifies that the Secretariat shall consider any information provided by a party.⁷⁵ Another provision in the NAAEC, article 21, gives the Secretariat authority to obtain information from the parties,⁷⁶ and article 11(4) forbids unilateral party efforts to influence the Secretariat in the performance of its responsibilities.⁷⁷ Thus, the Agreement appears to give the Secretariat broad discretion to obtain information about the enforcement practices that are the focus of the 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,⁷⁸ the Secretariat has discretion to develop a final factual record, incorporating any party comments only to the extent the Secretariat deems appropriate.⁷⁹

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

⁷¹ *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.

⁷² *Id.* Council Res. 99-06, at 9.6, C.E.C. Doc. C/99-00/RES/07/Rev.3 (June 28, 1999), http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english (last visited July 16, 2006) [hereinafter Guidelines for Submissions] (“If the Secretariat considers that the submission, in light of any response provide by the Party, does not warrant development of a factual record, . . . the submission process is terminated with respect to that submission.”). The NAAEC requires the Secretariat to terminate a submission that focuses on a matter that is the subject of a pending judicial or administrative proceeding. NAAEC, *supra* note 28, art. 14(3)(a).

⁷³ NAAEC, *supra* note 28, art. 15(1) (recommendation to proceed with a factual record); Guidelines for Submissions, *supra* note 72, at 9.6.

⁷⁴ NAAEC, *supra* note 28, art. 15(4).

⁷⁵ *Id.*

⁷⁶ *Id.* art. 21.

⁷⁷ *Id.* art. 11(4).

⁷⁸ *Id.* art. 15.

⁷⁹ *Id.* art. 15(5)–(6).

submissions process.⁸⁰ 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.⁸¹ 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.⁸²

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).⁸³ The parties’ other “check” is that the Council retains control over public release of final factual records.⁸⁴ 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.⁸⁵

III. THE TRACK RECORD OF CITIZENS’ USE OF THE CEC 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.⁸⁶ This is potentially an important, indeed unique, opportunity for citizens to direct a spotlight onto government enforcement practices that citizens believe are inadequate.⁸⁷ The track record of citizens’ use of the process is likely to be a helpful signal of the process’s prospects for success. A “spotlighting” mechanism that is not being used is likely not as effective as it might be. In contrast, substantial, and increasing, use of the process would be a strong (though, obviously not dispositive) signal of a vibrant, successful mechanism. Thus, the extent of citizens’ use of a citizen-driven spotlighting process such as the

⁸⁰ See Markell, *Governance of International Institutions*, *supra* note 27, at 769–80.

⁸¹ NAAEC, *supra* note 28, 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). The parties structured the process to prevent the Party that is the focus of the submission from unilaterally terminating the process by allowing Council approvals by majority vote, rather than by consensus.

⁸² *Id.*

⁸³ *Id.* art. 15(5)–15(6).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ NAAEC, *supra* note 28, art. 14.

⁸⁷ LESSONS LEARNED, *supra* note 29, at 2.

citizen submissions process is a potentially useful benchmark for assessing its possible utility or value.⁸⁸ This Part reviews the track record of citizen use of the process.

A. Overall Use of the Process

In its 2001 *Lessons Learned: Citizen Submissions Under Articles 14 and 15*, JPAC puts a positive gloss on the extent of citizens' use of the citizen submissions process.⁸⁹ 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."⁹⁰ On the other hand, some commentators have been less impressed with the level of citizen use of the process.⁹¹

Figure 1 provides a comprehensive review of use of the citizen submissions process. It shows that, as of December 31, 2005, citizens have filed a total of fifty-two submissions since inception of the CEC in 1994.

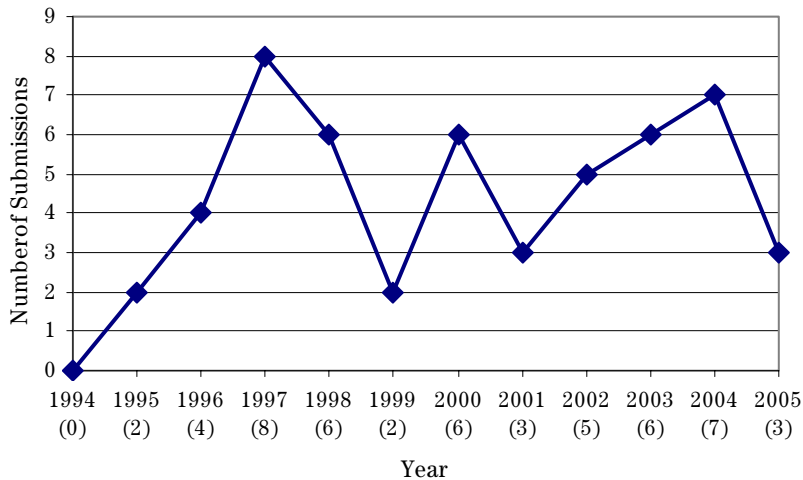


Figure 1. *Citizen Submissions Process: Annual Submissions (Through December 31, 2005)*⁹²

⁸⁸ 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. Others are extrinsic, such as the need for the mechanism in light of the alternatives, the level of concern about government enforcement, resources, other priorities, and the like. See *infra* Part IV.

⁸⁹ LESSONS LEARNED, *supra* note 29, at 13–14.

⁹⁰ *Id.* at 10, 13 (noting that the Secretariat needs additional resources to administer the process because of the workload).

⁹¹ See Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC*, in GREENING NAFTA, *supra* note 27, at 256–57; TRAC, *supra* note 29, at 43 (indicating that the CEC has “received far fewer submissions than initially anticipated”).

⁹² Figure 1 was developed using data released by the Secretariat. COMM’N FOR ENVTL.

Submissions work out to 4.33 per year over this 12-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 4.7 submissions per year (52 divided by 11). 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 fifty-two 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 twenty-two submissions were filed. During the past six years, a total of thirty 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 twenty-eight submissions were filed during the initial six year period (from 1995–2000), while twenty-four have been filed during the more recent five year period. As a result, unless there are an unprecedented number of submissions in 2006, the distribution of submissions between the first and second six year periods is likely to be 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.

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,⁹³ and the investor provision created under NAFTA itself.⁹⁴ These would seem to be natural points of possible comparison for the CEC process, although the processes are by no means identical and other salient differences may exist as well.

The Labor Side Agreement, like the NAAEC, allows NGOs to file petitions. Under the NAALC, the petitions are filed with National Administrative Offices (NAO), bodies that are set up as agencies within the

COOPERATION, ARTICLE 14 SUBMISSION 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 development of the tables and figures in this article.

⁹³ NAALC, *supra* note 34 arts. 27–41.

⁹⁴ NAFTA, *supra* note 29, ch. 11.

labor department of each member state.⁹⁵ In other words, they are not independent of the member governments to which they belong. There have been a total of thirty-two submissions since inception of the process in 1994, as Figure 2 reflects.

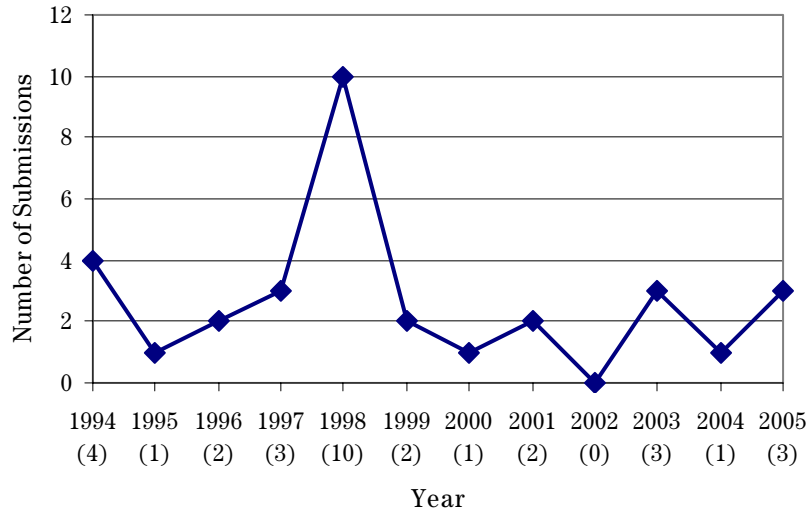


Figure 2: *NAALC Labor Agreement Annual NAO Submissions (Through December 31, 2005)*⁹⁶

These figures suggest at least two salient facts in terms of the Labor process's 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 61.5% 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 twenty-two submissions were filed, while only ten have been filed during the past six years. Thus, two-thirds of the submissions were filed during the first six years, and only one-third over the past five. 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.⁹⁷

⁹⁵ See NAALC, *supra* note 34, 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) (noting that while the NAOs can accept petitions, they "cannot order changes in state or company behavior nor issue sanctions").

⁹⁶ 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 (NAALC)*, <http://www.dol.gov/ILAB/programs/nao/status.htm> (last visited July 16, 2006).

⁹⁷ Another key point concerning the labor process involves the spike in use in 1998. During

Chapter 11 of NAFTA⁹⁸ 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 investors;⁹⁹ it is intended to assure a “minimum standard” of “fair and equitable” treatment for foreign investors,¹⁰⁰ and it limits expropriation or any measure “tantamount to nationalization or expropriation.”¹⁰¹ Investors are empowered to seek relief through binding international arbitration.¹⁰² Investors have filed a total of twenty-seven cases under chapter 11 since NAFTA entered into force in 1994, as Figure 3 reflects.

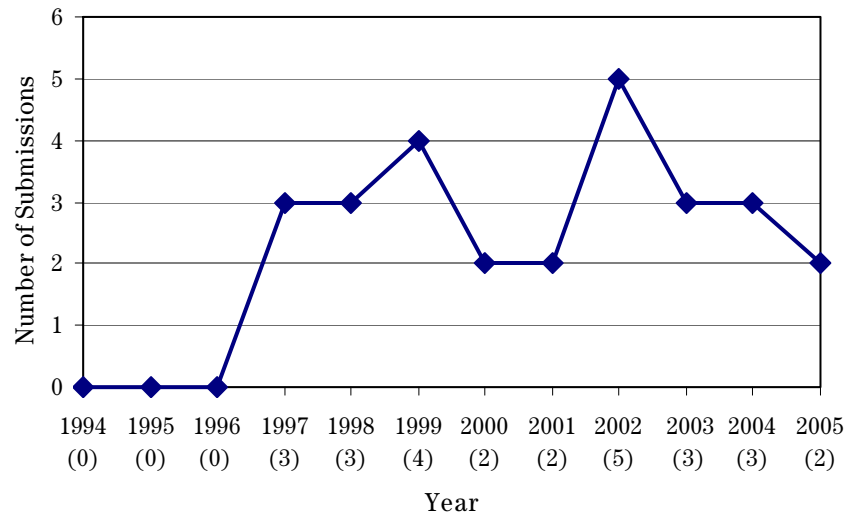


Figure 3: *NAFTA Chapter 11: Annual Submissions (Through December 31, 2005)*¹⁰³

that year ten submissions were filed, while no more than four have been filed any other year. Professor Graubart recently has suggested that “some past petitioners [are] ready to write off the [NAALC] process altogether.” Graubart, *supra* note 95, 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.

⁹⁸ NAFTA, *supra* note 29 at 639–49.

⁹⁹ *Id.* at 639.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 640.

¹⁰² *Id.* at 643; see Sanford E. Gaines, *Protecting Investors, Protecting the Environment: The Unexpected Story of NAFTA Chapter 11*, in GREENING NAFTA, *supra* note 27, at 173, 174–77 (providing an overview of Chapter 11 of NAFTA).

¹⁰³ 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 July

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 52% or a little more 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.¹⁰⁴

16, 2006). The data reflect the number of NAFTA chapter 11 investor-state disputes submitted for arbitration from 1994 through December 31, 2005. The *Waste Management, Inc. v. United Mexican States* claim filed in 1998, first rejected by a tribunal on procedural grounds and then later refiled, is treated 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.

¹⁰⁴ NAFTA Investor-State Arbitrations, *supra* note 103. 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 Bank failed to follow its own operational policies and procedures during the design, appraisal, and/or implementation of a Bank-financed project. Since 1993, the World Bank Inspection Panel has received a total of 34 requests, or about two-thirds as many as the number of CEC submissions. 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), available at <http://web.worldbank.org/> (follow "index" hyperlink; then follow "Inspection Panel" hyperlink; then follow "Policies and Procedures" hyperlink; then follow "Operating Procedure – English"). Several other international financial institutions have established inspection mechanisms since the Bank did so in 1993. 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 Bradlow, *supra*, 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 July 16, 2006).

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 non-discretionary 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 each 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 over the past decade.

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,¹⁰⁵ such an analysis shows that overall 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. The CEC process, again, does not seem to be following the trend lines of the NAALC process; instead, its track record in terms of use is more similar to that of the NAFTA chapter 11 process. 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.¹⁰⁶

B. A More Nuanced Review of the CEC Track Record

A more detailed analysis of the track record of citizens' use of the CEC process tells a potentially different story than the seemingly unsettled 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 fifty-two total submissions, nine have involved the United States, seventeen have involved Canada, and twenty-six have involved Mexico.

¹⁰⁵ 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).

¹⁰⁶ In his review of the track records of the NAAEC and NAALC processes, John 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.

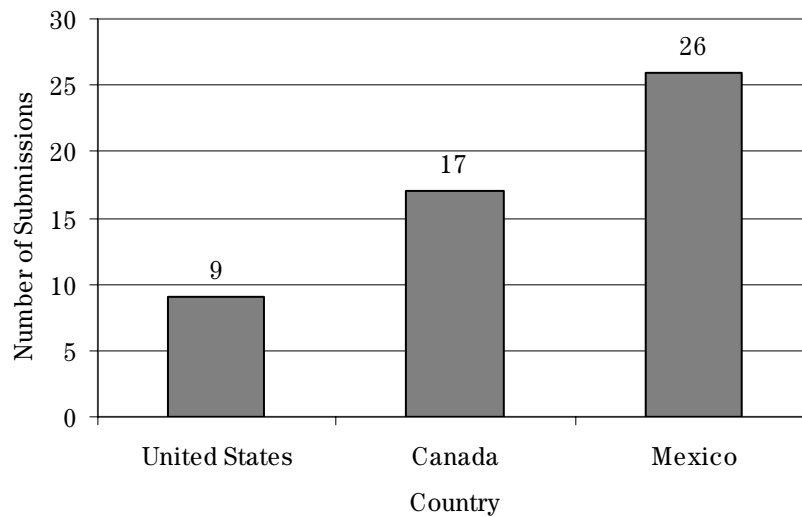


Table 1: *Distribution of Submissions by Country (Through December 31, 2005)*¹⁰⁷

On the one hand, it is not necessarily surprising that Mexico would be the target of more submissions than Canada or the United States. One reason the NAAEC focuses on environmental enforcement, and includes a mechanism that focuses on enforcement failures, is that there was concern that Mexican enforcement was inadequate, and that international scrutiny might be a useful strategy to bolster it.¹⁰⁸ Thus, some might suggest that the distribution of filings reflects that the process is working as intended. In other words, 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.

Beyond differences in the enforcement performance of the respective domestic governments, there also may be good reasons for this disparity. 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.¹⁰⁹

¹⁰⁷ Table 1 was developed using data released by the Secretariat. COMM'N FOR ENVTL. COOPERATION, *supra* note 92.

¹⁰⁸ See, e.g., Knox, *supra* note 60, at 23.

¹⁰⁹ See, e.g., Raustiala, *Police Patrols & Fire Alarms*, *supra* note 61, at 412 (stating that “the disparity in citizen submissions probably reflects the existence of better alternatives in U.S. domestic law”); Christensen, *supra* note 59, 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”); Randy E. Brogdon & Mack McGuffey, *Recent Trends in CAA Citizen Suits: Managing Risk in the Serengeti*, 20 NAT. RESOURCES & ENV'T 17, 17-21 (Winter 2006) (offering reasons why domestic citizen suits in the United States under the Clean

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 largest population, estimated at 297,914,453.¹¹⁰ In comparison, as of July, 2006, Canada’s estimated population is 33,098,932,¹¹¹ and Mexico’s estimated population is 107,449,525.¹¹² As Professor Kal Raustiala has pointed out, “[o]n a per capita basis, complaints against Canada are more than 1400% higher and complaints against Mexico more than 700% higher than complaints against the United States. The United States, with nearly ten times the population of Canada, has fewer submissions filed against it than Canada has even in absolute terms.”¹¹³

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 six years, roughly the first half of its existence. There were a total of twenty-eight submissions during this period, a little more than half of the fifty-two filed to date. Table 2 shows that the distribution of submissions by country during this initial six year period was relatively uniform or balanced. Of the twenty-eight submissions, eight were filed against the United States (29%), nine were filed against Canada (32%), and eleven were filed against Mexico (39%).

Air Act and domestic common law actions may be increasingly popular).

¹¹⁰ U.S. CENSUS BUREAU, U.S. POPULATION CLOCK FOR JAN. 16, 2006, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited July 16, 2006).

¹¹¹ CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, CANADA, <http://www.cia.gov/cia/publications/factbook/geos/ca.html#People> (last visited July 16, 2006) (reporting the most current Canadian census information).

¹¹² CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK, MEXICO, <http://www.cia.gov/cia/publications/factbook/geos/mx.html#People> (last visited July 16, 2006) (reporting the most current Mexican census information).

¹¹³ Raustiala, *supra* note 61, at 412.

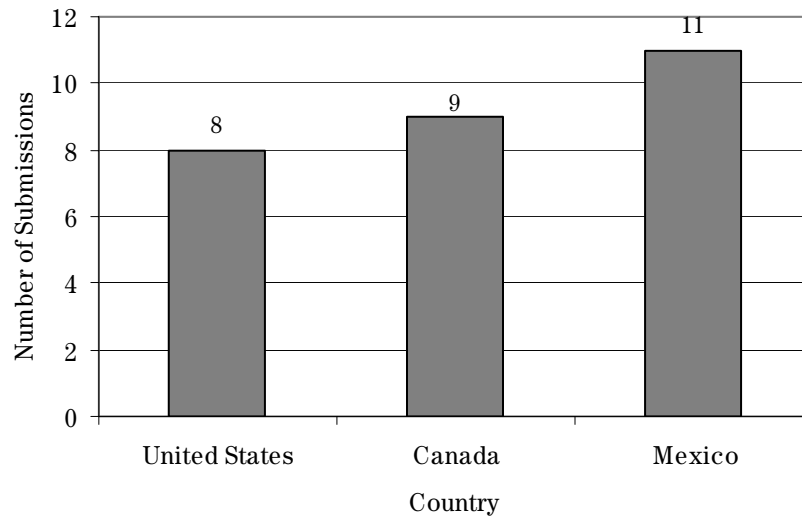


Table 2: *Distribution of Submissions by Country 1994-2000 (Total Submissions 1994-2000)*¹¹⁴

Table 3 shows that the distribution of submissions has changed dramatically during the most recent five year period, from 2001-2005. Table 3 reflects that of the twenty-four submissions filed during this period; only one has involved the United States (4%). Eight submissions have involved Canada (33%), while Mexico is the target of fifteen of the last twenty-four submissions (62.5%). In short, submissions involving the United States have effectively dried up.

¹¹⁴ Table 2 was developed using data released by the Secretariat. COMM'N FOR ENVTL. COOPERATION, *supra* note 92.

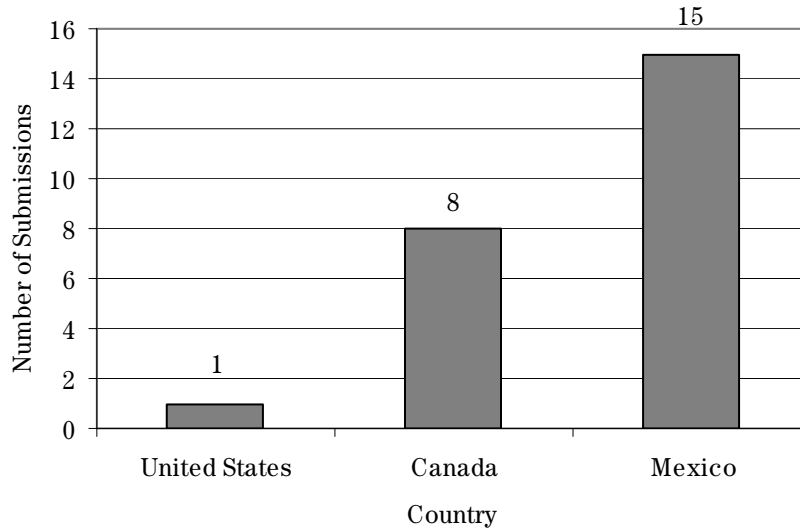


Table 3: *Distribution of Submissions by Country 2001-2005 (Total Submissions 2001-2005)*¹¹⁵

This precipitous decline in U.S. submissions raises a host of issues. For purposes of this Article, the question is whether implementation of the process has led to citizen dissatisfaction for reasons suggested by the procedural justice literature, which in turn has caused citizens virtually to abandon the process for the United States.¹¹⁶ And, the obvious follow-up question: to the extent that implementation of the process has been unsatisfactory to citizens (and this may have led to a decision to limit use of the process to challenge U.S. enforcement), is it possible to identify features of the process that have been particularly problematic and to develop fixes that will ameliorate concerns?¹¹⁷

There is some evidence that U.S. submitters (and prospective submitters) have been frustrated with implementation of the process, in terms of submissions challenging U.S. enforcement. Jay Tuchten, an early

¹¹⁵ Table 3 was developed using data released by the Secretariat. COMM'N FOR ENVTL. COOPERATION, *supra* note 92. The totals above reflect the name of the member country listed as the "Party Concerned" in each submission.

¹¹⁶ The distribution of submissions also raises questions concerning whether outcome-based factors or factors independent of the process are contributing to changes in distribution of use, including, for example, changes in priorities after September 11th or other developments, availability of reduced resources, availability of domestic mechanisms, greater comfort with government enforcement (unlikely in my view), or heightened skepticism concerning the efficacy of "shaming" mechanisms in the current political climate. See Graubart, *supra* note 95, at 137-40 (discussing the changes in the political climate and subsequent shifts in the NAALC petition process).

¹¹⁷ A concern has been raised that the distribution of submissions raises geopolitical issues concerning the possible effect of this trend on Mexico's commitment to the process if the trend continues. If the trend continues, Mexico's commitment to the process might become an issue.

U.S. submitter who challenged U.S. practices, for example, criticized the process because of what he believed to be the Secretariat's overly narrow interpretation of the scope of the process, which he suggested substantially reduced its value.¹¹⁸ There is considerable anecdotal evidence that Council actions in overseeing and implementing the process have triggered significant citizen 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:

[T]he 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.¹¹⁹

Part V provides a more detailed review of citizen satisfaction concerning implementation of the process. 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.

¹¹⁸ Jay Tuchton, *The Citizen Petition Process Under NAFTA's Environmental Side Agreement: It's Easy to Use, but Does it Work?*, 26 ENVTL. L. REP. 10,031, 10,031 (1996). Most other commentators have given the Secretariat high marks for its decisions concerning these submissions. See *infra* notes 211–17 and accompanying text. 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 24 submissions filed since 2000, a few that focus on Canadian or Mexican enforcement include U.S. individuals and/or NGOs as co-submitters. See, e.g., Ontario Power Generation (SEM-03-001), C.E.C. Doc. A14/SEM/03-001/22/14(1)(2) (Aug. 14, 2003), http://www.cec.org/files/pdf/sem/03-1-DET%2014_1_2_en.pdf (last visited July 16, 2006) (discussing Canada's failure to effectively enforce the Canadian Environmental Protection Act and the Federal Fisheries Act against the Ontario Power Generations coal-fired plant); Ontario Logging (SEM-02-001), C.E.C. Doc. A14/SEM/02-001/01/SUB (Feb. 4, 2002), http://www.cec.org/files/pdf/sem/03-1-DET%2014_1_2_en.pdf (last visited July 16, 2006) (discussing Canada's alleged failure to effectively enforce subsection 6(a) of the *Migratory Birds Regulations* against the logging industry in Ontario); Montreal Technoparc (SEM-03-005), C.E.C. Doc. A14/SEM/03-005/12/14(1)(2) (Aug. 14, 2003), http://www.cec.org/files/pdf/sem/03-5-DET14_1_2_en.pdf (last visited July 16, 2006) (discussing Canada's alleged failure to effectively enforce section 36(3) of the Fisheries Act in connection to alleged discharges of pollutants into the St. Lawrence River); Coronado Islands (SEM-05-002), C.E.C. Doc. A14/SEM/05-002 (May 2, 2005), http://www.cec.org/files/pdf/sem/05-2-SUB_en.pdf (last visited July 16, 2006) (discussing a submission regarding a finding that Mexico failed to effectively enforce its environmental law within the meaning of NAAEC by allowing the construction of a liquefied natural gas re-gasification terminal adjacent to an environmentally sensitive area).

¹¹⁹ TRAC, *supra* note 29, at 40. The TRAC Report continues: "Canadian and Mexican NGOs, however, have valued the increased transparency that the citizens' submission process has brought to specific issues in each of these countries." *Id.*

IV. USING THE LITERATURE ON "PROCEDURAL JUSTICE" AS A POSSIBLE FRAMEWORK FOR CONSIDERING THE DESIGN AND IMPLEMENTATION OF GOVERNMENT DECISION MAKING PROCESSES, INCLUDING THE CEC CITIZEN SUBMISSIONS PROCESS

As discussed above,¹²⁰ 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, unfortunately, is that 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."¹²¹ Even if this were not the case, it is still worthwhile to understand the extent to which government institutions are operating in ways that increase or diminish levels of citizen trust or confidence. The purpose of this Part is to explore the beginnings of a possible framework for assessing citizen satisfaction with institutions of governance, including government decision making processes intended to promote meaningful public participation.¹²² This framework is drawn from the social science literature on "procedural justice."¹²³

The question of how best to evaluate decision making processes based on their "legitimacy" is not an easy one to answer.¹²⁴ Intuitively, one might think that outcomes of decision making 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,"¹²⁵ 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.¹²⁶ While it may be "difficult to believe that people will find a negative or undesirable outcome more acceptable simply because of the

¹²⁰ See *supra* notes 7–18 and accompanying text.

¹²¹ TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 85 (1997). See also Cross, *supra* note 18, at 1457–60.

¹²² As noted *supra*, citizen satisfaction is not the only factor that should be considered in designing such processes.

¹²³ One leading commentator defines "procedural justice" to involve participants' satisfaction with decision making processes. Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of 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* at 27, 39 (Gerold Mikula ed., 1980) ("[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.").

¹²⁴ See *supra* notes 7–18 and accompanying text.

¹²⁵ TYLER, *supra* note 121, at 76.

¹²⁶ See Tyler, *supra* note 123, at 108–10 (examining procedural justice in the context of citizen experiences with police and courts).

manner in which it was arrived,¹²⁷ 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 decision making 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 decision making process is “procedurally just” is an important factor in assessing the legitimacy of such process.¹²⁸ As 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”¹²⁹—the distinction between substantive and procedural justice. Evaluations of the fairness of the procedures by which outcomes are determined have been labeled “judgments of procedural justice.”¹³⁰

Thibaut and Walker undertook the first systematic psychological research program to try to demonstrate the importance of procedural justice in the 1970s.¹³¹ They hypothesized that a person’s evaluation of the fairness of decision making procedures influences his reaction to the outcomes of those procedures that is distinct from his reaction to the outcomes themselves.¹³² Their studies demonstrated that people’s assessments of the fairness of third-party decision making procedures shape their satisfaction with their outcomes.¹³³ Subsequent studies of procedural justice support Thibaut and Walker’s pioneering work, finding that participants’ level of satisfaction with decision making processes is “influenced by their judgments about the fairness” of such processes.¹³⁴ Tom Tyler, one of the leading commentators in this area, summarizes the literature in a 2000 article, *Social Justice: Outcome and Procedure*.¹³⁵

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

¹²⁷ See TYLER, *supra* note 121, at 76.

¹²⁸ Tyler, *supra* note 123, at 117.

¹²⁹ TYLER, *supra* note 121, at 75.

¹³⁰ *Id.* at 76.

¹³¹ 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).

¹³² *Id.* at 548.

¹³³ *Id.* at 549.

¹³⁴ Tyler, *supra* note 123, 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.

¹³⁵ See generally Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCHOL. 117 (2000).

decisions, primarily by assessing the fairness of their decision-making procedures. Hence, using fair decision-making procedures is the key to developing, maintaining, and enhancing the legitimacy of rules and authorities and gaining voluntary deference to social rules.¹³⁶

Tyler suggests that procedural justice may be even more important than distributive justice in some contexts in shaping participants' perspectives concerning the fairness of decision making 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 decision-making 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.¹³⁷

Tyler concludes that "there are important reasons for optimism concerning the viability of justice-based strategies for conflict resolution."¹³⁸ That is, decision making strategies that are "procedurally just" would seem to have significant potential to ameliorate citizens' distrust of government, independent of the outcomes of such processes.¹³⁹

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 decision making processes in order to enhance legitimacy to the extent that doing so is consistent with other objectives. Given the social science findings described above, the CEC process seems to represent a particularly good opportunity for the government to gain legitimacy. The area of focus of the process is environmental enforcement, an arena in which the right decision is often not clear from an objective sense.¹⁴⁰ Further, other opportunities for meaningful citizen engagement with government officials are limited.¹⁴¹ Thus, if government wants to gain legitimacy for its actions in this arena, it would seem to be particularly helpful to it to have decision making processes that are fair and perceived as such. The CEC process, a highly innovative mechanism that incorporates a

¹³⁶ *Id.* at 120.

¹³⁷ TYLER, *supra* note 121, at 100.

¹³⁸ Tyler *supra* note 135, at 124.

¹³⁹ 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 sense of fairness in cases in which those procedures do not materially advance actual justice).

¹⁴⁰ Heckler v. Chaney, 470 U.S. 821, 831-32, 837 (1985) (holding that government decisions not to enforce generally are not subject to judicial review in part because of the numerous factors involved in such decisions).

¹⁴¹ Markell, *supra* note 51, at 44.

significant opportunity for public involvement, is one possible model for a mechanism that, if effective, will enhance legitimacy of and confidence in government enforcement practices.¹⁴²

Given that government would be well-served by considering the issue of “procedural justice” in formulating decision making processes, the next question involves whether there are guideposts for evaluating the extent to which decision making processes are likely to be “procedurally just.” To paraphrase Professor Tyler, assuming an answer in the affirmative to the first issue raised—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 decision making 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.¹⁴³ 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.”¹⁴⁴

Different scholars have posited different criteria for evaluating the procedural justice of decision making processes.¹⁴⁵ Professor Tyler suggests

¹⁴² On the other hand, even if prospective submitters believe 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, as noted *supra* note 138 (accompanying quote), 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 105, at 381. It certainly bears further research to gauge the extent to which citizens consider the extent to which a process is “procedurally just,” as well as the extent to which citizen interest in a process is determined by their views concerning the likelihood that the process will give them what they want. As noted *supra* note 7–18, other factors are likely to be relevant to citizens as well, including the availability of alternative venues in which to raise their concerns. A great many factors, in short, may influence the level of citizen participation, and the extent to which a process is perceived to be “procedurally just” may be only one of them. Another issue, not addressed in detail in this Article, involves the extent to which the involvement of organized interests should be viewed as a surrogate or proxy in assessing adequacy of participation. See, e.g., Cuéllar, *supra* note 23, at 429–35 (examining public involvement in the regulatory process).

¹⁴³ Tyler, *supra* note 123, at 106.

¹⁴⁴ TYLER, *supra* note 121, at 92. People’s ratings of the importance of differing criteria vary depending on the nature of the situation. These findings suggest there is no universally fair or unfair procedure. *Id.* See also Tyler, *supra* note 123, at 123–24, 127 (suggesting that under differing circumstances citizens judge procedural fairness by different criteria and that therefore there are no universally fair procedures for allocation and dispute resolution; different procedures are appropriate in different circumstances); Leventhal, *supra* note 123, at 39–40 (suggesting that the basic criteria used to evaluate the fairness of procedures change with circumstances).

¹⁴⁵ TYLER, *supra* note 121, at 87 (describing the different criteria of commentators and recognizing that the framework for procedural justice is evolving); Leventhal, *supra* note 123, 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”).

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 participate,¹⁴⁶ 2) whether the authorities are neutral,¹⁴⁷ 3) the degree to which people trust the motives of the authorities,¹⁴⁸ 4) and whether people are treated with dignity and respect during the process.¹⁴⁹

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 rationales for this decline, notably the possibility that prospective users may be skeptical about the procedural justice of the process.¹⁵⁰ In the next Part, I review the

¹⁴⁶ Tyler, *supra* note 135, at 121–22 (noting that, where people may participate in the resolution of their disputes or may voice their opinions to decision-makers, they view such a procedure as more fair, even when their comments carry little weight in the outcome of the conflict).

¹⁴⁷ *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.")

¹⁴⁸ *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).

¹⁴⁹ *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 123, 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), and Thibaut & Walker, *supra* note 130, at 563–64 (highlighting process control and decision control as two primary criteria for evaluating procedural justice). Commentators have noted that some of these considerations may trade-off. For an example, see TYLER, *supra* note 121, at 93–94 (noting the trade-off between fairness and non-fairness criteria, such as between providing representation—a voice for participants—and efficiency). Professor Tyler provides an example in the sentencing context:

Literature on the psychology of judicial sentencing argues that magistrates can make high-quality decisions that particularize punishment to the situation of each individual defendant only if they have wide latitude to sentence inconsistently. This argument suggests that consistency in sentencing is in conflict with decision quality, operationalized in this case by sentences that will effectively rehabilitate criminals.

Tyler, *supra* note 123, at 106–07.

¹⁵⁰ Outcome-related ("distributive justice") issues may be a factor as well. *See, e.g., supra* notes 116, 143 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 Sept. 11 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

workings of the process in the context of this procedural justice framework.

V. ASSESSMENTS OF THE CEC CITIZEN SUBMISSIONS PROCESS IN LIGHT OF ITS
TRACK RECORD AND THE PROCEDURAL JUSTICE LITERATURE

This Part considers insights from the procedural justice literature that may be helpful in assessing the CEC citizen submissions process. A central insight from this literature is that the views of prospective submitters and other interested parties of the citizen submissions process, including the value in using it, may be based on procedural justice as well as distributive justice considerations.¹⁵¹ As noted in Part IV, there is no consensus framework at this point for assessing the extent to which any decision making process is likely to be procedurally just.¹⁵² In addition, there is a recognition that what is procedurally just will vary with the circumstances.¹⁵³ This Article analyzes the citizen submissions process with these caveats and qualifications in mind.

Applying Tyler's four criteria for assessing the legitimacy of decision making processes to the submissions process (opportunities to participate, neutrality, trust, and treatment with dignity and respect),¹⁵⁴ 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. As the 2004 TRAC Report puts it with respect to the latter, "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."¹⁵⁵ In other words, while particular features of the process may be partially responsible for citizen frustration, according to several commentators, the parties' actions have undermined citizen satisfaction with the process in terms of several elements of procedural justice that Professor Tyler has identified.¹⁵⁶

clear and enforceable results. In Canada and Mexico, there are significantly fewer domestic avenues available for achieving similar results.

Christensen, *supra* note 59, 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) (describing the interaction between EPA goals and state implementation). 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 95, at 101.

¹⁵¹ See *supra* Part III; see also *supra* note 150.

¹⁵² See *supra* Part III.

¹⁵³ See *supra* Part III.

¹⁵⁴ See *supra* Part III.

¹⁵⁵ TRAC, *supra* note 29, at 42–43.

¹⁵⁶ This Article focuses on the first three elements. There are, of course, issues associated with the procedural justice of the process that do not stem from the parties' implementation of

A. Opportunities for Meaningful Participation

The CEC citizen submissions process provides three main opportunities for active citizen participation. First, it is citizens who launch the process by filing submissions.¹⁵⁷ Neither the CEC Secretariat nor the CEC Council may initiate an investigation under the CEC citizen submissions process *sua sponte*; the capacity of either to act under the process is predicated on a citizen filing a submission that identifies alleged enforcement failures.¹⁵⁸ Thus, the process empowers 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 thirty days after receiving the dismissal.¹⁵⁹ 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.¹⁶⁰

Finally, if the CEC decides to develop a factual record, the factual record process gives interested citizens a chance to submit information to the CEC Secretariat. 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."¹⁶¹ 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.

There are also significant limits affecting citizens' opportunities to participate in the CEC process, some of which have been the focus of citizen critiques. I discuss here three limitations that various commentators have identified. 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.¹⁶² 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

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.

¹⁵⁷ NAAEC, *supra* note 28, art. 14(1).

¹⁵⁸ *Id.*

¹⁵⁹ COMM'N FOR ENVTL. COOPERATION OF N. AM., 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/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 72, at 6.1.

¹⁶⁰ For an overview of *res judicata*, see, for example, RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982).

¹⁶¹ NAAEC, *supra* note 28, art. 15(4).

¹⁶² LESSONS LEARNED, *supra* note 29, at 4.

development of a factual record.¹⁶³ In *Lessons Learned*, JPAC recommended that it would “improve public confidence in the decision making process” to allow submitters to submit a response, particularly where “a Party’s response includes new information not referred to in the original Submission.”¹⁶⁴

To address a second limitation on citizen participation in the process, after the Secretariat has submitted a recommendation to the Council to develop a factual record, 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.”¹⁶⁵ 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.”¹⁶⁶

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.¹⁶⁷ 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.¹⁶⁸

Because of these limitations on citizen participation, Professor Yang has argued that “[o]nce a submission has been filed, the process is entirely controlled and managed by the Secretariat and Council.”¹⁶⁹ While, as noted

¹⁶³ *Id.* at 12.

¹⁶⁴ *Id.* at 16.

¹⁶⁵ *Id.*

¹⁶⁶ COMM’N FOR ENVTL. COOPERATION OF N. AM., *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)).

¹⁶⁷ NAAEC, *supra* note 28, art. 15(5).

¹⁶⁸ 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), http://www.cec.org/files/pdf/sem/BC-Hydr-Fact-record_en.pdf (last visited July 16, 2006).

¹⁶⁹ 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”).

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 limits in opportunities to participate may be a factor in citizen satisfaction.

Two other more systemic limitations to 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 decision-makers (the Secretariat or the Council); similarly, there is little, if any, formal opportunity for citizens to engage the party whose practices are at issue. Jody Freeman, among others, has argued that such interactions beyond the exchange of written materials have value. She suggests that "collaborative governance" (i.e., multi-stakeholder processes) are likely "to be sites at which regulatory problems are redefined, innovative solutions [are] devised, and institutional relationships [are] rethought."¹⁷⁰ While further research would be useful to determine the weight citizens attach to the lack of opportunity for such interactions, 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.¹⁷¹ On the other hand, another 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

¹⁷⁰ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 7 (1997). 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.

¹⁷¹ See JOINT PUB. ADVISORY COMM., 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 [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 Hervé Pageot that:

The Party and the submitter 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.

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 29, at 5.

effort that other organizations can support.¹⁷²

Second, there is no support for citizens to participate in the process. Domestic environmental laws often provide attorneys' fees to citizens, at least under certain circumstances.¹⁷³ Some laws also provide NGOs with funding to enable them to hire technical support, in order to facilitate meaningful citizen participation.¹⁷⁴ The CEC provides neither. Features of the CEC process may reduce the need for citizen support. 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.¹⁷⁵ Further, the CEC process is less process-intensive than civil litigation in the United States since there is no discovery or other pre-trial work of the sort that characterizes such practice.¹⁷⁶ Thus, 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.¹⁷⁷ Another question that deserves follow-up involves the weight that citizens attach to such funding mechanisms and the importance of not including such a mechanism in the CEC process.

A final issue relating to participation involves the extent to which the process helps inform citizens independent of their active participation in it. The CEC itself and outside commentators frequently have highlighted the importance of transparency. In its *Framework for Public Participation in CEC Activities*, for example, the CEC states that "the CEC endeavor[s] to conduct its activities in an open and transparent fashion."¹⁷⁸ In keeping with

¹⁷² Christensen, *supra* note 59, at 183.

¹⁷³ See, e.g., 33 U.S.C. § 1365(d) (2000); ROBERT L. GLICKSMAN, ET AL., 989 n.8; ENVIRONMENTAL PROTECTION: LAW AND POLICY (4th ed. 2003).

¹⁷⁴ See, e.g., Markell, *supra* note 51, at 14 (discussing measures states have taken to encourage citizen participation, citing specifically efforts in New York).

¹⁷⁵ 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).

¹⁷⁶ Raymond MacCallum, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 395, 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.

¹⁷⁷ Some commentators suggest that Council decisions have made the process more difficult, time consuming, and expensive for submitters. See *infra* note 224. ELI suggests, for example, 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 RELATED, *supra* note 29, 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.*

¹⁷⁸ COMM'N FOR ENVTL. COOPERATION, FRAMEWORK FOR PUBLIC PARTICIPATION IN COMMISSION

this objective, the Framework indicates that the public “should be provided with all relevant CEC documents . . . for their [the public’s] involvement in CEC activities.”¹⁷⁹

The process has the potential to inform citizens about government enforcement policies and practices and the government’s thinking in developing and implementing such policies and practices, because of the transparency of the process, the obligations it imposes on the governments to explain their actions (and inaction), and the opportunities it gives the Secretariat to explain its views and develop additional information.¹⁸⁰ For example, citizens have access to countries’ responses to submissions, to the Secretariat’s reasoning concerning the submission in the form of the various documents the Secretariat issues in connection with each submission, to documents that others submit during the pendency of the factual record process, and to factual records themselves.¹⁸¹ Some commentators have suggested that the information flow the process generates, and the transparency of the process, are helpful to citizens, and ultimately to the formulation and implementation of environmental policy:

The citizen submission process and the information systems operated by the CEC create political pressure by allowing public scrutiny of a NAFTA party’s record of effectively enforcing its domestic environmental laws. With improved information about and a clearer understanding of North American environmental issues, implementation of and compliance with NAAEC will be more effective. The NAAEC, in light of its objectives, clearly wanted more information to be made open to the public. The availability of information concerning environmental issues affects national behavior, and thus supports the effectiveness of the NAAEC.¹⁸²

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 decision making and access to information, as well as certain

FOR ENVIRONMENTAL COOPERATION ACTIVITIES 5 (1999) *available at* http://www.cec.org/files/pdf/publications/guide19_en.pdf.

¹⁷⁹ *Id.*

¹⁸⁰ *See supra* Part II.B and accompanying notes.

¹⁸¹ For a few years the Council delayed public release of Secretariat recommendations to prepare factual records, but it abandoned this approach in the face of considerable criticism. Council Res. 01-06, 1-2, C.E.C. Doc. C/01-00/RES/06/Rev. 4 (June 29, 2001), http://www.cec.org/files/PDF/COUNCIL/Res-06r4_EN.pdf (last visited July 16, 2006). Mexico, in particular, has received criticism for asserting confidentiality concerning some of the materials it has submitted and thereby reducing the transparency of the process. JOINT PUB. ADVISORY COMM., PUBLIC COMMENTS RELATED TO THE CITIZENS SUBMISSION PROCESS UNDER ARTICLES 14 AND 15 OF THE NAAEC: HISTORICAL PERSPECTIVE/LESSONS LEARNED 2 (2001), *available at* http://www.cec.org/who_we_are/jpac/comments/EHC2.pdf.

¹⁸² Mark R. Goldschmidt, *The Role of Transparency and Public Participation in International Environmental Agreements: The North American Agreement on Environmental Cooperation*, 29 B.C. ENVTL. AFF. L. REV. 343, 392 (2002).

aspects of domestic environmental policy. The CEC's access to information policies, decision making 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.¹⁸³

Professor Vega-Cánovas states that "the NAAEC appears to have enhanced the capacity of domestic interest groups to engage national government decision-makers in international relations" and indirectly influence government policy.¹⁸⁴

Thus, the procedural justice literature suggests that citizens' opportunities to participate in decision making 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, and of whether there are ways to revamp the CEC process to engender greater citizen satisfaction with opportunities to participate.

B. Neutrality and Trust

There seems to be a significant overlap in these criteria, at least in

¹⁸³ 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, *supra* note 169, 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. First, the existence of the process may trigger work by submitters to compile and present information in their submissions about domestic enforcement practices that would not be gathered and developed if the forum did not exist. Second, in its screening determinations early in the process the Secretariat provides an independent perspective on issues such as the types and extent of environmental harms potentially resulting from the enforcement practices at issue. Third, the country's response often contains information about its enforcement practices that otherwise would not be gathered, developed or shared. Fourth, the Secretariat's recommendations that a factual record be prepared provide another opportunity for this neutral body to review the assertions in the submission and the response of the country, and consider whether developing information would be likely to enhance domestic environmental enforcement, as well as serve other public policy goals (a Secretariat decision to dismiss a submission at this juncture also may add value by providing a neutral perspective about the weight or merit of the submitter's concerns). The countries' collective response to the Secretariat's recommendations is another point for consideration of the enforcement practices at issue in a submission. Finally, the creation of a factual record provides extensive opportunity for obtaining, developing, and presenting substantial information about whether a country has failed to effectively enforce its environmental laws in a particular context. *Id.*

¹⁸⁴ Gustavo Vega-Cánovas, *NAFTA and the Environment*, 30 DENV. J. INT'L L. & POL'Y 55, 61 (2001).

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."¹⁸⁵ 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."¹⁸⁶ 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."¹⁸⁷

Other than citizen submitters, the CEC Secretariat and the CEC Council are the primary participants in the CEC citizen submissions process. Thus, this section examines the role that each of these entities has played for insights concerning the extent to which each is perceived to be neutral and has gained the trust of NGOs; and for insights concerning the implications of their performance for NGOs' overall sense as to whether the process is neutral and deserves trust.

To begin with the Secretariat, it is by no means inevitable that citizens would think highly of the Secretariat based on the institutional design of the CEC. The Council members appoint the CEC Executive Director.¹⁸⁸ Thus, to the extent that citizens are leery of the parties as neutral actors because of their inherent conflict of interest in implementing the citizen submissions process (on the one hand, the parties are supposed to work together as the Council to support the Agreement, while on the other the parties are the subject or target of submissions),¹⁸⁹ citizens might well be concerned that the Secretariat's neutrality or independence is compromised by the Executive Director's accountability to the parties.¹⁹⁰ Further, the Executive Director traditionally has had a three year term, renewable one time at the discretion of the Council.¹⁹¹ NGOs might perceive that this arrangement

¹⁸⁵ TRAC, *supra* note 29, at 5.

¹⁸⁶ *Id.* at 45 (citing Memorandum from Geoffrey Garver, Dir., Submissions on Enforcement Matters Unit, to Jon Plaut, Chair, JPAC (Feb. 15, 2002) (on file with author)).

¹⁸⁷ *Id.* I explore these issues in more detail in *Governance of International Institutions*, *supra* note 27.

¹⁸⁸ Comm'n for Env'tl. Cooperation, Rules of Employment, Rule 13, http://www.cec.org/files/PDF/PUBLICATIONS/EMP-dec-2002_en.pdf (last visited July 16, 2006); NAAEC, *supra* note 28, art. 11.

¹⁸⁹ *Governance of International Institutions*, *supra* note 27.

¹⁹⁰ Article 11(4) of the NAAEC is intended to ameliorate this concern, as well as related concerns about undue Party influence on CEC staff. See NAAEC, *supra* note 28, art. 11(4) (explaining NAAEC functions).

¹⁹¹ NAAEC, *supra* note 28, art. 11(1).

creates the potential that an Executive Director might try to curry favor with the Council in order to maximize the chances for renewal.

The Council also has the possibility of influencing the selection and renewal of CEC staff, including members of the CEC Submissions Unit. The Council-appointed Executive Director appoints the CEC staff.¹⁹² In addition, the Council has a veto over such appointments.¹⁹³ Further, CEC staff generally operate on two or three year renewable contracts, which creates similar potential leverage for the Council through its control of the identity of the Executive Director.¹⁹⁴

Another aspect of the CEC structure and operation that seemingly creates a potential for Secretariat bias in favor of the Council and against the interest of citizens whose submissions press the parties is that the Secretariat works closely with the Council on the “cooperative work program” of the CEC. Indeed, the vast majority of Secretariat professional staff focuses its attention on the cooperative program and the majority of the CEC’s budget is allocated to these activities.¹⁹⁵ There is a chance that the Secretariat might favor the parties in the citizen submissions process in order to improve prospects for success for the cooperative program, and/or that citizens might perceive that this arrangement creates built-in Secretariat bias in favor of the parties.

Finally, the Council and its surrogates (high level agency officials) meet regularly throughout the year with the Secretariat on various matters, including citizen submissions process issues. There is no corresponding final opportunity for citizens to engage the Secretariat in this way. JPAC’s presence at these meetings seemingly has the potential to offset this potential for imbalance (perceived and/or real) to some degree, but not entirely.¹⁹⁶

In short, because of the institutional design of the CEC, there are numerous reasons why citizens might be inclined to be wary of the Secretariat and skeptical of its neutrality. I now turn to the Secretariat’s track record in implementing the process for possible insights as to whether the Secretariat’s implementation of its responsibilities may have

¹⁹² *Id.* art. 11(2).

¹⁹³ *Id.* art. 11(3).

¹⁹⁴ I am not aware of any evidence that the structural features concerning the Executive Director or SEM Unit staff discussed in the text have raised concerns to date. The NAAEC makes clear the “international character” of the Secretariat staff and directs the parties to respect this character. *Id.* art. 11(4). Further, article 11(2)(a) specifies that staff be “appointed and retained . . . strictly on the basis of efficiency, competence and integrity.” *Id.* art. 11(2)(a).

¹⁹⁵ See Comm’n for Env’tl. Cooperation, Advice to Council No. 02-11 (Oct. 21, 2002), <http://www.cec.org/files/pdf/JPAC/02-11eRev1.pdf> (last visited July 16, 2006).

¹⁹⁶ The JPAC is allowed to provide advice to the Council on any matter that is within the scope of the NAAEC. NAAEC, *supra* note 28, art. 16. In recent years, the JPAC has been a regular participant in Secretariat/Party meetings to facilitate the JPAC’s playing this role. See Wirth, *supra* note 40, at 199, 204–05 (describing JPAC’s relationship with the Secretariat). The concerns I raise in the text are, to the best of my knowledge, hypothetical in nature. I am not aware of any evidence that these institutional features have created a sense of skepticism concerning Secretariat neutrality, or that they have undermined such neutrality. See, *supra* note 194.

exacerbated, or allayed, possible citizen concerns about Secretariat neutrality.

The CEC Secretariat conducts an initial review of each submission based on a set of factors contained in the NAAEC (article 14(1) and 14(2)) and determines whether to consider the submission further or dismiss it.¹⁹⁷ If the Secretariat determines that the submission warrants further review, the Secretariat requests that the relevant party prepare and submit a written response to the submission.¹⁹⁸ Otherwise, the Secretariat dismisses the submission, thereby completing consideration of the submission under the citizen submissions process.¹⁹⁹

The Secretariat's track record in performing this early filtering function suggests that it has been fairly rigorous in its review. It certainly has not served as a "rubber stamp" for citizen complaints. As of December 31, 2005, sixteen submissions have been dismissed at the article 14(1) or (2) stage, and the Secretariat has requested a response for 36 submissions (see Table 4).

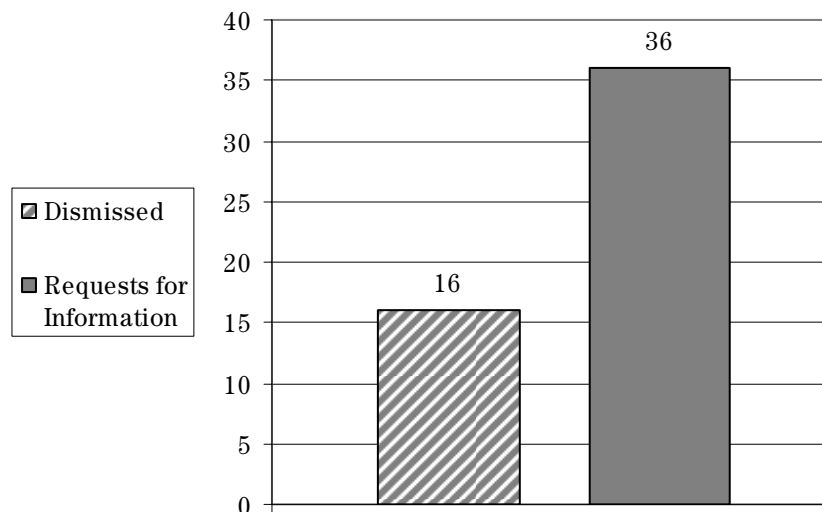


Table 4: *Secretariat's Decisions under article 14(1) and (2) (Through December 31, 2005)*²⁰⁰

¹⁹⁷ NAAEC, *supra* note 28, arts. 14(1), 14(2).

¹⁹⁸ *Id.* art. 14(2).

¹⁹⁹ The submitter may re-submit within 30 days and the Secretariat will review this revised submission. BRINGING THE FACTS TO LIGHT, *supra* note 159, at 12.

²⁰⁰ Table 4 was developed using data released by the Secretariat. COMM'N FOR ENVTL. COOPERATION, *supra* note 92. The actual handling of submissions complicates the picture at the margins since, in some cases, the Secretariat has issued two or more rulings at the 14(1) or 14(2) stage. In some cases, for example, the Secretariat initially dismissed a submission, the submitter re-filed, and the Secretariat then requested a response from the party. *See, e.g.*, Comm'n for Env'tl. Cooperation, Citizen Submissions on Enforcement Matters, El Boludo

Thus, in exercising its filtering responsibility at this early stage of the citizen submissions process the Secretariat has dismissed more than 30% of the 52 submissions filed to date.²⁰¹

The Secretariat's second decision, following the parties' response,²⁰² is to either recommend development of a factual record, or dismiss the submission.²⁰³ A factual record, again, is the ultimate product of the citizen submissions process and is considered to be the most visible part of the CEC spotlight and the most comprehensive review of information relevant to the alleged enforcement failures.²⁰⁴ If the Secretariat determines that further review is appropriate through development of a factual record, the Secretariat provides a Recommendation to that effect to the Council (again, comprised of the leading environmental officials of the parties).²⁰⁵ The Recommendation contains the Secretariat's analysis of the submission and response, and explains why the Secretariat thinks that further review of the allegations in the submission is warranted. Alternatively, the Secretariat is empowered to unilaterally dismiss a submission at this point in the process—thus, terminating consideration of the submission.²⁰⁶

Here again, the Secretariat's performance might be a source of concern

Project, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=80> (last visited July 16, 2006). Thus, the number of Secretariat dismissals at this stage is greater than depicted in Table 4. Further, Table 4 also arguably over counts the number of submissions since some submissions were later re-filed outside the 30-day window. *See, e.g.*, Comm'n for Env'tl. Cooperation, Citizen Submissions on Enforcement Matters, Molymex I, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=54> (last visited July 15, 2006); Comm'n for Env'tl. Cooperation, Citizen Submissions on Enforcement Matters, ALCA-Iztapalapa, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=81> (last visited July 16, 2006); Comm'n for Env'tl. Cooperation, Citizen Submissions on Enforcement Matters, Environmental Pollution in Hermosillo, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=100> (last visited July 16, 2006).

²⁰¹ Secretariat rejection of a submission at the 14(1) stage should not necessarily be viewed as 'anti-submitter.' Such a rejection, followed by 30 days for re-filing, provides submitters with an opportunity to strengthen the submission so that it has a greater likelihood of producing a factual record. Further, submitters may re-file submissions that the Secretariat dismisses at the article 14(1) stage and in some cases such re-filed submissions have reached the factual record stage. *See, e.g.*, Comm'n for Env'tl. Cooperation, Citizen Submissions on Enforcement Matters, Molymex II, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=56> (last visited July 16, 2006); Comm'n for Env'tl. Cooperation, Citizen Submissions on Enforcement Matters, ALCA-Iztapalapa II, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=93> (last visited May 28, 2006); Comm'n for Env'tl. Cooperation, Citizen Submissions on Enforcement Matters, Environmental Pollution in Hermosillo II, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=108> (last visited July 16, 2006).

²⁰² parties are not obligated to file a response if the Secretariat requests one, but thus far the parties uniformly have done so. BRINGING THE FACTS TO LIGHT, *supra* note 159, at 14. In either event, following its request for a response and any Party response, the Secretariat reaches a second decision stage.

²⁰³ *See* NAAEC, *supra* note 28, art. 15(1).

²⁰⁴ Several phases of the citizen submissions process have the potential to serve as a spotlight, but the creation of a factual record is the most significant part of this spotlighting process. *See, e.g.*, Yang, *supra* note 169, at 456–57.

²⁰⁵ NAAEC, *supra* note 28, art. 15.

²⁰⁶ *Id.*

for submitters.²⁰⁷ As of December 31, 2005, the Secretariat has made twenty-one recommendations to the Council that a factual record is warranted and dismissed eleven submissions after receiving a party's response (see Table 5).

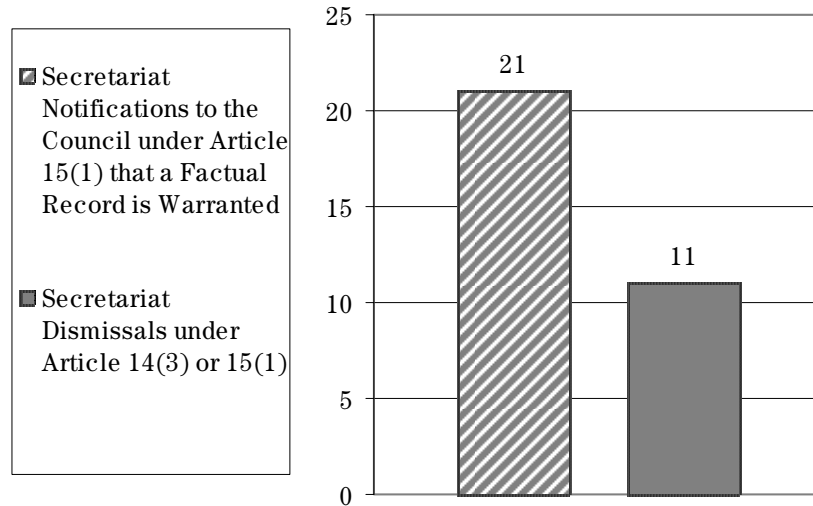


Table 5: *Secretariat Decisions to Recommend Factual Records or Dismiss Submissions Following a party Response (Through December 31, 2005)*²⁰⁸

Thus, the Secretariat has dismissed more than 1/3 of the submissions it has considered at this stage of the process.²⁰⁹

In short, the Secretariat's track record in performing these central functions in the citizen submissions process certainly does not reflect that the Secretariat has "rubber-stamped" submissions. Instead, the Secretariat has served as a fairly vigilant filter. Consequently, citizens may be disappointed with these Secretariat outcomes. This track record, in other words, might confirm citizens' fears that they are not likely to receive much support from the Secretariat.

The anecdotal feedback concerning the Secretariat's performance

²⁰⁷ On the other hand, some submitters might believe that Secretariat decisions at the 15(1) stage have provided considerable information regarding the submitters' assertions, in a way that might satisfy "procedural justice" concerns.

²⁰⁸ Table 5 was developed using data released by the Commission for Environmental Cooperation. Comm'n for Env'tl. Cooperation, *Who We Are / Council*, http://cec.org/who_we_are/council/resolutions/index.cfm?varlan=English (last visited July 14, 2006) [hereinafter *Who We Are*]. CEC Council Resolutions from 1994 through 2005 were reviewed to determine the number per year in which the CEC Secretariat made the decision to either recommend the preparation of a factual record under article 15(1) or to dismiss a submission following a party response under article 14(3) or 15(1). The number of those resolutions were then totaled separately as reflected above.

²⁰⁹ COMM'N FOR ENVTL. COOPERATION, *supra* note 92.

reflects confidence in the Secretariat's neutrality and trust in its performance—despite possible concerns of the sort described above regarding institutional design and actual performance. External reviews of the citizen submissions process generally have given the Secretariat high marks for its impartiality and for the quality of the determinations issued. A 1998 review of the CEC conducted by the Independent Review Committee (IRC) surveyed the work of the citizens submission process and some of the scholarly and other commentary about the process, and concluded that “[t]he record on the submissions that have been subject to Secretariat decisions to date appears to show a consistent and well reasoned group of decisions.”²¹⁰ Furthermore, the report stated:

While observers (and the Parties) may, and some certainly have, criticized specific decisions, this Committee has seen nothing to suggest that the decisions of the Secretariat lack proper foundation. Indeed, the IRC generally concurs with the view expressed by some commentators that the decision-making by the Secretariat has been professional and appropriate.²¹¹

Because of its favorable assessment, the IRC saw no reason to recommend refinements to the process.²¹²

More recent studies have generally been positive in their review of Secretariat performance—characterizing citizen perception of this performance as quite supportive. The TRAC 2004 report found that “[s]ubmitters and outside observers by and large believe that the Secretariat has performed its obligations well.”²¹³ Chris Wold, the lawyer for the submitters who filed the only submission to lead to a factual record involving the United States, similarly has stated that “the Secretariat has established itself as a highly professional institution that carefully interprets the NAAEC in a way that promotes the NAAEC’s objectives.”²¹⁴ Wold notes that “[s]cholars, NAAEC review committees, and members of the public are virtually unanimous in applauding the Secretariat’s rigorous review of submission for eligibility and for determination on whether a factual record

²¹⁰ FOUR-YEAR REVIEW, *supra* note 29, § 3.3.3; *see also*, Chris Wold et al., *supra* note 58, at 421 n.26 (discussing the Secretariat’s even-handed and objective approach toward eligibility and development of the factual record).

²¹¹ FOUR-YEAR REVIEW, *supra* note 29, § 3.3.3. *Compare* Kal Raustiala, *International “Enforcement of Enforcement” Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT’L L. 721, 730–43 (1996) (providing a favorable assessment of the Secretariat’s decisions in the citizen submissions process), *with* Tutchton, *supra* note 118, at 48–69 (criticizing the Secretariat’s actions).

²¹² A study published around the same time found that citizens thought highly of the Secretariat’s performance. DiMento & Doughman, *supra* note 32, at 695–96 (reporting results of a survey the authors had undertaken concerning the process, and concluding that “[i]n general, respondents concluded that the response of the Secretariat to each of the submissions was appropriate”).

²¹³ TRAC, *supra* note 29, at 45. The April 2001 JPAC *Lessons Learned* report reached much the same conclusion. LESSONS LEARNED, *supra* note 29, at 9–15 (noting also, though, that timeliness needs to be improved in operation of the process, including in the Secretariat’s performance of its responsibilities, and concluding that the Secretariat required additional resources to complete its work more expeditiously).

²¹⁴ Wold et al., *supra* note 58, at 421 (2004).

is warranted.”²¹⁵

Thus, despite possible institutional design issues or concerns based on results or outcomes, anecdotal information suggests considerable NGO confidence or trust in the Secretariat’s performance of its responsibilities in the citizen submissions process.²¹⁶

The level of citizen trust in the Council and the individual parties, and the level of citizen confidence in the Council’s neutrality, appear, at least anecdotally, to be much lower.²¹⁷ Part of this may be due to the institutionally-created “conflict of interest” that the structure of the process creates.²¹⁸ At least superficially, on the other hand, there are parts of the track record of the Council’s performance in responding to individual submissions that seem quite supportive of the process, and therefore might have been expected to earn the Council credibility for its efforts.

The parties’ first opportunity to participate in the CEC process comes when the CEC Secretariat determines that a submission warrants a party response.²¹⁹ It is not clear how citizens view the parties’ performance at this stage of the process. It might be reasonable to assume that citizens generally would conclude that the parties’ participation at this stage reflects an effort to support the process since 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.²²⁰ Indeed, many of these responses have been quite substantial.²²¹

²¹⁵ *Id.* See also Knox, *supra* note 105, at 383 (suggesting that “[t]he Secretariat’s impartiality and thoroughness, which it demonstrates by its careful quasi-judicial opinions as well as its rejection of submissions that do not meet the NAAEC criteria, lend its recommendations added weight”).

²¹⁶ The TRAC Report notes that: “[g]overnmental officials have criticized the Secretariat’s lack of understanding of government decision-making processes and the political needs of Council members. All three parties have felt that the Secretariat has at some time exceeded its authority under NAAEC.” TRAC, *supra* note 29, at 32. The TRAC report does not offer much insight regarding the significance of the level of Party criticism (e.g., whether a Party is concerned with one possible instance of Secretariat “overreaching” or whether one or more parties believes the problem is more endemic), or regarding the merits of such concerns.

²¹⁷ See *infra* notes 221, 233–72 and accompanying text.

²¹⁸ In its Advice 03-05, JPAC noted that there is an “emerging perception” that the Council has a conflict of interest and noted that it may “reflect a structural challenge within the NAAEC itself.” Comm’n for Env’tl. Cooperation, Advice to Council No: 03-05, 3, http://www.cec.org/files/PDF/JPAC/Advice03-05_EN.pdf (last visited May 28, 2006). Notably, JPAC and others have argued that “[i] these decisions/actions will adversely affect the credibility of the process; and [ii] they will contribute to an emerging perception of the Council members operating with a conflict of interest.” TRAC, *supra* note 29, at 45; see also *Governance of International Institutions*, *supra* note 27, at 780–87.

²¹⁹ NAAEC, *supra* note 28, art. 14(2).

²²⁰ *Id.*

²²¹ See, e.g., U.S. Response, Great Lakes (SEM-98-003), C.E.C. Doc. A14/SEM/98-003/RSP (Mar. 12, 1999), <http://www.cec.org/files/pdf/sem/98-3-rsp-e.pdf> (last visited July 16, 2006). 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. See, e.g., Council Res. 00-09, C.E.C. Doc. C/00-00/RES/09/Rev.2 (June 13, 2000), http://www.cec.org/files/PDF/COUNCIL/00-09e_EN.pdf (last visited May 28, 2006) (favoring

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.²²² Instead, in many responses the party involved has urged the Secretariat to dismiss the submission.²²³ 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 ten 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 processes arises in response to a Secretariat recommendation to the Council that a factual record be developed. When it receives a Recommendation from the Secretariat, the Council decides, by two-thirds vote, whether to direct the Secretariat to proceed with development of a "factual record"²²⁴ or whether to reject such a Recommendation and direct dismissal of the submission.²²⁵ As Table 6 reflects, 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.²²⁶

transparency); JPAC Advisory Committee Session No. 00-01, C.E.C. Doc. J/00-02/SR (March 23–24, 2000), http://www.cec.org/files/pdf/JPAC/SR0001E_EN.PDF (last visited May 28, 2006); Comm'n for Env'tl. Cooperation, Citizen Submissions on Enforcement Matters, Crushed Gravel in Puerto Penasco, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=106> (last visited July 16, 2006); Comm'n for Env'tl. Cooperation, Citizen Submissions on Enforcement Matters, Lake Chapala II, <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=90> (last visited July 16, 2006); *see also* LESSONS LEARNED, *supra* note 29, at 11 (noting that "[s]everal commentators expressed concern regarding what they perceived as an increase in parties' reliance on the confidentiality provisions of articles 39 and 42").

²²² *See, e.g.*, Canada Response, BC Hydro (SEM-97-001), C.E.C. Doc. A14/SEM/97-001/05/RSP (July 21, 1997), <http://www.cec.org/files/pdf/sem/97-1-RSP-E.PDF> (last visited Jul 16, 2006); U.S. Response, Migratory Birds (SEM-99-002), C.E.C. Doc. A14/SEM/99-002/04/RSP (Feb. 29, 2000), <http://www.cec.org/files/pdf/sem/ACF1842.PDF> (last visited July 16, 2006). This has not always been the case.

²²³ LESSONS LEARNED, *supra* note 29, at 11–12.

²²⁴ NAAEC, *supra* note 28, art. 15(2).

²²⁵ *Id.*

²²⁶ The Council initially deferred consideration of the Oldman River submission before voting to endorse a factual record for this submission. *Compare* Council Res. 00-02, 1, C.E.C. Doc. C/C.01/00-04/RES/02 (May 16, 2000), http://www.cec.org/files/PDF/COUNCIL/00-02e_EN.pdf (last visited July 16, 2006) (deferring consideration), *with* Council Res. 01-08, 2, C.E.C. Doc. C/C.01/01-06/RES/03/Final (Nov. 16, 2001), <http://www.cec.org/files/PDF/COUNCIL/res-01-08e.pdf> (last visited July 16, 2006) (endorsing factual record). Similarly, the Council initially deferred consideration of the Secretariat recommendation to prepare a factual record for SEM-02-001 and later issued a Resolution directing preparation of a factual record for this submission. *See* Council Res. 03-05, C.E.C. Doc. C/C.01/03-02/RES/05/final (Apr. 22, 2003), http://www.cec.org/files/PDF/COUNCIL/Res-Ontario-Logging_en.pdf (last visited July 16, 2006); Council Res. 04-03, C.E.C. Doc. C/C.01/04-01/RES/03 (Mar. 12, 2004), http://www.cec.org/files/PDF/COUNCIL/Ontario-Logging-Res-04-03_en.pdf (last visited July 16, 2006). In Council Resolution 05-04 (issued Apr. 1, 2005), the Council directed the Secretariat to

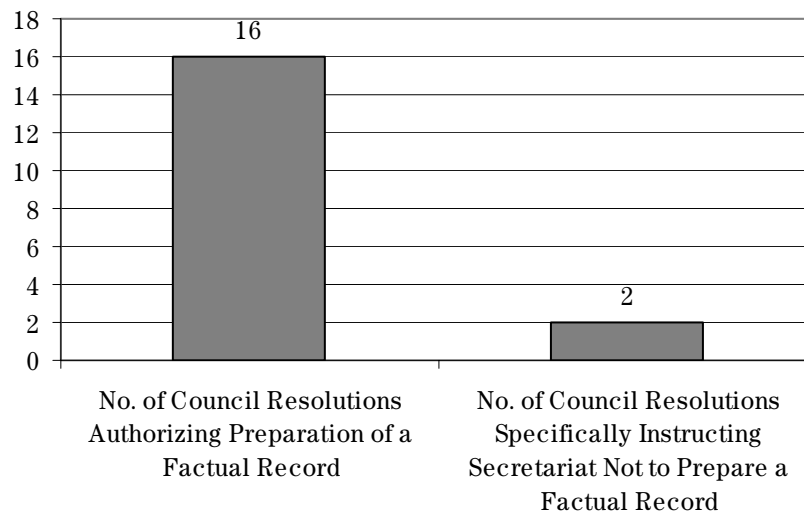


Table 6: *Council Resolutions Authorizing Factual Records or Dismissing Decisions*²²⁷

Thus, in the vast majority of cases 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 in many of the submissions for which the Secretariat recommended that a factual record be developed, the party whose enforcement practices were at issue had initially urged dismissal of the submission.²²⁸ One might reasonably conclude that citizens would be satisfied with, and supportive of, the Council's record at this first decision point 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.²²⁹ It then is up to the Council to decide, by two-thirds vote, whether to release the factual record to the public.²³⁰ The Council has voted

prepare a factual record for SEM-04-006, and directed that the Secretariat consolidate this submission with the Ontario Logging submission (SEM-02-001) "for the purpose of developing one consolidated factual record for both submissions." Council Res. 05-04, C.E.C. Doc. C/C.01/05/RES//04/Final (Apr. 1, 2005), http://www.cec.org/files/PDF/COUNCIL/Res-05-04_en.pdf (last visited July 165, 2006).

²²⁷ Table 6 was developed using data released by the Secretariat. COMM'N FOR ENVTL. COOPERATION, *supra* note 92.

²²⁸ See *supra* note 222.

²²⁹ See *supra* notes 71–81 and accompanying text (describing in more detail the Council's process for approving release of a final factual record).

²³⁰ NAAEC, *supra* note 28, art. 15(7).

unanimously to release the factual records that the Secretariat has submitted.²³¹

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 (sixteen out of eighteen) the Council has endorsed the Secretariat's recommendation that a factual record be developed.²³² For each of the affirmative votes, the Council endorsement has been unanimous.²³³ Even the party that has been the subject of the submission has voted to pursue a factual record.²³⁴ The fact that for several submissions the targeted party on its own viewed the submission as being unworthy of further review under the process, and then later acceded to such further review,²³⁵ 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.²³⁶

²³¹ See *Who We Are*, *supra* note 208 (providing Council resolutions from 1994 through the present).

²³² See *supra* Table 6.

²³³ See *Who We Are*, *supra* note 209.

²³⁴ *Id.*

²³⁵ See, e.g., Submission, BC Hydro (SEM-97-001), C.E.C. Doc. A14/SEM/97-001/01/SUB* (April 2, 1997), <http://www.cec.org/files/pdf/sem/ACF756.pdf> (last visited July 16, 2006). 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), <http://www.cec.org/files/pdf/sem/97-1-RSP-E.PDF> (last visited July 16, 2006). 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), http://www.cec.org/files/PDF/COUNCIL/98-07e_EN.pdf (last visited July 16, 2006).

²³⁶ See Council Res. 04-07, C.E.C. Doc. C/C.01/06/RES/1/final (Sept. 24, 2004), http://www.cec.org/files/PDF/COUNCIL/RES-04-07_en.pdf (last visited July 16, 2006) (making public the factual record for *Molymex II* (SEM-00-005)); Council Res. 03-03, C.E.C. Doc. C/C.01/03-02/RES/03/Final (April 22, 2003), http://www.cec.org/files/PDF/COUNCIL/Res-MBTA_en.pdf (last visited July 16, 2006) (making public the factual record for *Migratory Birds* (SEM-98-007)); Council Res. 02-01, C.E.C. Doc. C/C.01/02-01/RES/01/Final (Feb. 7, 2002), <http://www.cec.org/files/PDF/COUNCIL/RES02-01Metales-eng.PDF> (last visited July 16, 2006) (making public the factual record for *Metales y Derivados* (SEM-98-007)); Council Res. 00-04, C.E.C. Doc. C/00-00/RES/08/Rev.1 (June 11, 2000), http://www.cec.org/files/PDF/COUNCIL/00-04e_EN.pdf (last visited July 16, 2006) (making public the factual record for *BC Hydro* (SEM-97-001)); Council Res. 03-06, C.E.C. Doc. C/C.01/03-05/RES/06 (June 23, 2003), http://www.cec.org/files/PDF/COUNCIL/Res-Aquanova-06-final_en.pdf (last visited July 16, 2006) (making public the factual record for *Aquanova* (SEM-98-006)). Council Res. 03-12, C.E.C. Doc. C/C.01/03-06/RES/12/final (Aug. 7, 2003), http://www.cec.org/files/PDF/COUNCIL/Res-BC-Logging-03-12_en.pdf (last visited July 16, 2006) (making public the factual record for *BC Logging* (SEM-00-004)); Council Res. 03-13, C.E.C. Doc. C/C.01/03-06/RES/13/final (Aug. 7, 2003), http://www.cec.org/files/PDF/COUNCIL/Res-oldman-river-II_en.pdf (last visited July 16, 2006) (making public the factual record for *Oldman River II* (SEM-97-006)); Council Res. 03-04, C.E.C. Doc. C/C.01/03-02/RES/04/final (Apr. 22, 2003), http://www.cec.org/files/PDF/COUNCIL/Res-Tarahumara_en.pdf (last visited July 16, 2006) (making public the factual record for *Tarahumara* (SEM-00-006)); Council Res. 03-15, C.E.C. Doc. C/C.01/03-06/RES/15/final (May 12, 2003), http://www.cec.org/files/PDF/COUNCIL/Res-magdalena-03-15_en.pdf (last visited July 16,

Nevertheless, there are abundant signs in the commentary about the process that citizens do not have complete trust in 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 as being distinctly unenthusiastic about the process. There is considerable evidence that submitters consider the Council extremely reluctant to fulfill its responsibilities and, in many cases, as affirmatively undermining the process.

The Council appears to have created this sentiment not only in actions relating to particular submissions, but also in more routine interventions in the process. Five specific instances of Council actions are illustrative of the types of actions the Council has undertaken that appear to have sowed distrust and a sense of lack of neutrality.²³⁷

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, the parties have not retained plenary authority to make the decisions required under the citizen submissions process.²³⁸ 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 present purposes, the power to launch the process and thereby identify the alleged failures to enforce effectively that should receive detailed scrutiny). Also, as suggested elsewhere, the question of boundaries of authority has arisen several times during the early years of the

2006) (making public the factual record for *Rio Magdalena* (SEM-97-002)). The Council has not electronically provided a Resolution authorizing release of the *Cozumel* factual record (SEM-96-001).

²³⁷ 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 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 29, 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. To provide examples of other complaints not discussed in the text, 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 59, at 175. Chris 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 58, at 423.

²³⁸ See *supra* note 27 and accompanying text.

process.²³⁹ 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 respect to the Secretariat’s integral role in the process.²⁴⁰ 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.”²⁴¹ 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”²⁴² ELI concluded that this Council overreaching has jeopardized “public trust” in the process.²⁴³

One clear criticism has been that when the Council issued four Resolutions in November 2001 that authorized the Secretariat to develop factual records, as the Secretariat had recommended, the Council changed the focus of factual records sought by submitters.²⁴⁴ While these submissions alleged widespread failures to enforce,²⁴⁵ supported by the

²³⁹ *Governance of International Institutions*, *supra* note 27, at 762-780 (primarily focusing on the question of boundaries of authority and discussing in more detail the issues here discussed). Some early commentators anticipated these tensions. *See, e.g.*, JOHNSON & BEAULIEU, *supra* note 29, at 131-69 (charting creation and the structural conflicts inherent in NAAEC); FOUR-YEAR REVIEW, *supra* note 29 (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).

²⁴⁰ *Governance of International Institutions*, *supra* note 27, at 762-80; *see, e.g.*, Comm’n for Evtl. Cooperation, Advice to Council No: 01-07 (Oct. 23, 2001), <http://www.cec.org/files/pdf/JPAC/01-07E.pdf> (last visited May 28, 2006) (expressing frustration with the council’s actions in connection with the citizen submissions process).

²⁴¹ TRAC, *supra* note 29, at 32.

²⁴² TRAC, *supra* note 29, at 45.

²⁴³ ISSUES RELATED, *supra* note 29, 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”).

²⁴⁴ Council Res. 01-08, C.E.C. Doc. C/C.01/01-06/RES/03/FINAL (Nov. 16, 2001), <http://www.cec.org/files/PDF/COUNCIL/res-01-08e.pdf> (last visited Apr. 11, 2006); Council Res. 01-10, C.E.C. Doc. C/C.01/01-06/RES/01/FINAL (Nov. 16, 2001), <http://www.cec.org/files/PDF/COUNCIL/res-01-09e.pdf> (last visited Apr. 11, 2006); Council Res. 01-10, C.E.C. Doc. C/C.01/01-06/RES/04/FINAL (Nov. 16, 2001), <http://www.cec.org/files/PDF/COUNCIL/res-01-10e.pdf> (last visited Apr. 11, 2006); Council Res. 01-11, C.E.C. Doc. C/C.01/01-06/RES/05/FINAL (Nov. 16, 2001), <http://www.cec.org/files/PDF/COUNCIL/res01-11e.pdf> (last visited Apr. 11, 2006).

²⁴⁵ 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 (Nov. 17, 1999), <http://www.cec.org/files/pdf/sem/99-2-SUB-E.pdf> (last visited May 21, 2006) (alleging failure to enforce effectively the Migratory Bird Treaty Act in the United States).

Secretariat's Recommendations to develop factual records of a scope broad enough to detect such 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.²⁴⁶ 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.²⁴⁷

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."²⁴⁸ 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 decision making."²⁴⁹ ELI concluded that "by intervening in the fact-finding process, the Council [was] undermining the independence of the Secretariat and the credibility of the process."²⁵⁰

The Council's actions may have contributed to a loss of citizen trust in the citizen submissions process or trust 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

²⁴⁶ See *supra* note 239 (containing Secretariat's recommendations).

²⁴⁷ 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 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 RELATED, *supra* note 29, at iii. ELI notes that:

"[a]lthough the Council approved the preparation of factual records with respect to each of these submissions, it significantly 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 27, at 781–93.

²⁴⁸ ISSUES RELATED, *supra* note 29, at iv.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

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.²⁵¹

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.”²⁵² It also notes that “JPAC, the NACs, the US GAC, academics, independent observers and NGOs have widely and repeatedly criticized the Council for these actions.”²⁵³

Citizens 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 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. Specifically, 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.²⁵⁴

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.²⁵⁵ Chris 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 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.”²⁵⁶

²⁵¹ TRAC, *supra* note 29, at 46.

²⁵² *Id.* at 44.

²⁵³ *Id.* at 45.

²⁵⁴ ISSUES RELATED, *supra* note 29, at iv.

²⁵⁵ ISSUES RELATED, *supra* note 29, at 6–13, 27 (2003); Kibel, *supra* note 239, at 416–71; Christensen, *supra* note 59, at 178–80.

²⁵⁶ Wold et al., *supra* note 58, at 423 (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

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.²⁵⁷

He indicates that “[t]he *Migratory Birds* submitters found the Citizen Submission Process attractive *only* because of its capacity to investigate the United States’ broad pattern of nonenforcement of the MBTA.”²⁵⁸ His conclusion about the results of the Council’s narrowing the scope of the factual record in connection with the submission he prepared does not inspire much confidence in 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.²⁵⁹

Third, the Council has been criticized for failing adequately to explain its decisions, particularly when it rejects Secretariat recommendations to prepare factual records.²⁶⁰ 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.²⁶¹ 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.”²⁶²

²⁵⁷ *Id.* at 426.

²⁵⁸ *Id.*

²⁵⁹ *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.

Christensen, *supra* note 59, at 180–81.

²⁶⁰ 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 Comm’n for Env’tl. Cooperation, to Donna Tingley, 2004 Chair, Joint Pub. Advisory Comm., Comm’n for Env’tl. Cooperation (June 3, 2004) (on file with author). The Council also addresses the “sufficiency of information” issue in this letter. *Id.*

²⁶¹ Council Res. 00-01, C.E.C. Doc. C/C.01/00-04/RES/0/Rev.03 (May 16, 2000), http://www.cec.org/files/pdf/COUNCIL/res01r3e_EN.pdf (last visited July 15, 2006).

²⁶² See JPAC WORKSHOP, *supra* note 171, at 4 (reporting a paraphrasing of all participants’ comments). John Knox commented that Council should explain in all cases why it adopted a

In response to this criticism, in 2001 the Council agreed to explain its rationale for dismissing submissions for which the Secretariat had recommended development of a factual record,²⁶³ but the explanation the Council has provided to date has been of limited utility.²⁶⁴

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 decision-making 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 decision-making 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.²⁶⁵

Fourth, the Council has taken actions that citizens have complained make it more difficult for them to use the process effectively.²⁶⁶ The 2004

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.*

²⁶³ Council Res. 01-06, 2, C.E.C. Doc. C/01-00/RES/06/Rev.4 (June 29, 2001), http://www.cec.org/files/pdf/COUNCIL/Res-06r4_EN.pdf (last visited July 16, 2006).

²⁶⁴ See Council Res. 02-03, C.E.C. Doc. C/C.01/02-01/RES/03/Final (May 17, 2002), http://www.cec.org/files/PDF/COUNCIL/council_res_02-03_en.pdf (last visited July 16, 2006).

²⁶⁵ LESSONS LEARNED, *supra* note 29, 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 171, at 7–8. John 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 worth fighting, since the Parties will most certainly put up a resistance.

Id.; see also LESSONS LEARNED, *supra* note 29, 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.

²⁶⁶ JPAC WORKSHOP, *supra* note 171, at 5.

TRAC report suggests that Council actions “may make it prohibitively difficult for citizens to file submissions.”²⁶⁷ 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 in manpower and money to research exact violations rather than just relying on “evidence of widespread, systemic failures to enforce” environmental laws.²⁶⁸ As 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.”²⁶⁹

Finally, there is the issue of confidentiality. Despite the emphasis the NAAEC gives to increasing transparency and accountability,²⁷⁰ 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 thirty days had passed.²⁷¹ In *Lessons Learned*, the JPAC summarized citizen sentiment on this Council-imposed limitation on transparency as follows:

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.²⁷²

²⁶⁷ TRAC, *supra* note 29, at 45.

²⁶⁸ ISSUES RELATED, *supra* note 29, 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

²⁶⁹ Comm’n for Env’tl. Cooperation, *supra* note 218, at 2.

²⁷⁰ See, e.g., NAAEC, *supra* note 28, art. 1(h) (identifying transparency as one of the goals); Yang, *supra* note 169, 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), http://www.cec.org/files/PDF/COUNCIL/99-06e_EN.pdf (last visited July 14, 2006) (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), http://www.cec.org/files/PDF/COUNCIL/00-09e_EN.pdf (last visited July 14, 2006) (similarly recognizing the importance of transparency in the citizen submissions process).

²⁷¹ See generally Council, Council’s View on Council Resolution 00-09, 3 (Nov. 2004), http://www.cec.org/files/pdf/COUNCIL/Council-Report-00-09_en.pdf (last visited July 15, 2006) (opining on the change to section 10.2 of the Guidelines for Submissions on Enforcement Matters under articles 14 and 15 of the NAAEC that previously directed the Secretariat to notify the public that the Secretariat had made a recommendation 30 days after the Secretariat submitted the recommendation); Guidelines for Submissions, *supra* note 72, 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).

²⁷² LESSONS LEARNED, *supra* note 29, at 10. JPAC itself formally recommended that the “current 30-day ‘blackout’ period should either be abolished or substantially reduced.” *Id.* at 16;

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.²⁷³

Also on the issue of confidentiality, in *Lessons Learned* 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].”²⁷⁴ 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.²⁷⁵

Chris Wold, the attorney whose submission led to the only factual record concerning U.S. enforcement practices, shares many of the critiques of the Council examined above. He 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.²⁷⁶

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

see also JPAC Workshop, *supra* note 171, at 4 (suggesting that the 30 day delay is “nonsensical, impractical and does not stand up to serious analysis”).

²⁷³ Council Res. 01-06, *supra* note 181 at 1–2.

²⁷⁴ LESSONS LEARNED, *supra* note 29, at 11.

²⁷⁵ *Id.* at 17; see also Yang, *supra* note 169, at 454, 475–76.

²⁷⁶ Wold, *supra* note 58, at 417–18. The Council has responded to some of these criticisms. See, e.g., Montoro, *supra* note 260.

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.²⁷⁷

VI. CONCLUSION

Strong interest exists today in increasing citizen participation in governance to bolster government legitimacy. There may be a number of reasons why a mechanism of governance intended to facilitate or encourage such participation is or is not effective in doing so. Success or failure may be due to factors largely extrinsic to the mechanism or process itself, such as the low priority that prospective citizen participants give to the issues the process addresses, limited citizen resources, or the availability of alternative processes. Similarly, the outcomes available through a process may limit citizen interest in participating in it. People's "preferences for the processes by which . . . policy decisions are made" may be relevant as well.²⁷⁸

This Article suggests that the psychology literature on procedural justice offers one framework for thinking about the design of institutions to encourage citizen involvement. 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. This Article applies this literature in the context of a particular governance mechanism that is intended to encourage meaningful citizen involvement and, indeed, depends on it, the CEC citizen submissions process, in order to explore why early citizen enthusiasm for the process may have turned into citizen disaffection, at least with respect to use of the process to challenge U.S. enforcement policies and practices. Using the terminology from the psychology literature, it appears that citizen concerns about neutrality and trust, in particular, may be affecting citizen confidence in the process and their interest in using it.²⁷⁹

Systematic, empirical work is a logical next step to test the sense of the commentary that this Article offers. In the context of the CEC process, empirical work would be helpful, for example, to confirm (or not) the sentiments expressed in the commentary concerning possible reasons why

²⁷⁷ Wold, *supra* note 58, at 443–44. Randy Christensen, a principal Canadian submitter, echoes Mr. Wold's concerns: "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 59, at 184–85. But he continues: "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.*

²⁷⁸ WHAT IS IT ABOUT GOVERNMENT, *supra* note 18, at 4. Of course, because of other considerations, it may be that "[citizen] disapprobation of the current system [is] preferable to the style of government that would make the people happy." *Id.* at 1. Further, other factors besides the process design issues discussed in the procedural justice literature may affect citizen satisfaction.

²⁷⁹ See *supra* Part III (discussing these terms).

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 Mexico and Canada 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 relative importance 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.

Beyond the specific context of the CEC citizen submission process, this Article suggests the possible value of multi-faceted analyses of institutions of governance that are intended to promote citizen participation, and the potential value of the procedural justice literature as one tool in undertaking such analyses. Systematic work on citizen satisfaction obviously will be helpful in developing more informed and sophisticated understandings generally of the features of decision making processes that citizens value.²⁸⁰ As this work yields greater understanding, it will be up to policy makers and others to use this knowledge to revisit mechanisms that already exist and to design new mechanisms of governance.²⁸¹

²⁸⁰ Gibson, *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”).

²⁸¹ For one such observation, *see, e.g.*, Christensen, *supra* note 59, at 180–81 (suggesting that formally constituted advisory groups may serve as an effective counterweight to reduce possible government interference). What was not foreseen was the level of success that groups and advisory groups (such as the JPAC) would have in resisting Council attempts to manipulate and “reform” the process. The participation of the formal advisory groups have been central to maintaining the integrity of the citizen submission process. In each case where Council attempts have been rebuffed, the advisory groups have issued formal “advice” or communications to the Council.

Christensen suggests that “the environmental side agreement’s strong environmental mandate and formal public advisory bodies have proven surprisingly effective counterbalances to Council abuses. With sufficient reform, the mechanism could provide a model for addressing environmental concerns in future trade agreements.” *Id.* at 165.