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# Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process

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# Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process

David L. Markell<sup>†</sup>

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## I. Introduction

The *North American Agreement on Environmental Cooperation*<sup>1</sup> (NAAEC), negotiated by Canada, Mexico, and the United States in the early 1990's as part of the North American Free Trade Agreement (NAFTA)<sup>2</sup> discussions, has been called a "unique, highly innovative agreement...."<sup>3</sup> The institution it

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<sup>†</sup> David L. Markell, Steven M. Goldstein Professor, Florida State University College of Law. Professors John Knox, Kal Raustiala, Robert Glicksman, and Dan Tarlock, and Geoff Garver of the CEC, provided helpful comments on earlier drafts of this article. Sarah Lindquist, FSU College of Law '06, provided excellent research assistance. Although the author previously served as Director of the CEC's Submissions on Enforcement Matters Unit and also as a consultant to the CEC, the views expressed here are entirely his own and should not be attributed to the CEC, including its Secretariat. This Article is an updated and expanded version of David L. Markell, *The CEC Citizen Submissions Process: On or Off Course*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, (David L. Markell & John H. Knox eds., 2003). Reprinted with permission of the publisher, <http://www.sup.org>.

<sup>1</sup> North American Agreement on Environmental Cooperation, Sept. 14, 1993, art. 8-19, 32 I.L.M. 1480 (entered into force Jan. 1, 1994).

<sup>2</sup> North American Free Trade Agreement, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289. For a more in-depth review of the history of the negotiations, see NAFTA AND THE ENVIRONMENT (Daniel Magraw ed., 1995); PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW (1996).

<sup>3</sup> TEN-YEAR REV. & ASSESSMENT COMM'N., COMM'N. FOR ENVTL. COOPERATION, TEN YEARS OF NORTH AMERICAN ENVIRONMENTAL COOPERATION 4 (2004).

spawned, the Commission for Environmental Cooperation (CEC), has been termed a “brave experiment in institution-building.”<sup>4</sup> Among other things, the CEC: (1) is the “first international organization created to address the environmental aspects of economic integration;” (2) has “innovative tools and almost unlimited jurisdiction to address regional environmental problems;” and, (3) “provides unprecedented opportunities for participation by civil society at the international level.”<sup>5</sup>

The citizen submissions process that Articles 14 and 15 of the NAAEC establish is a critical part of the CEC. 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....”<sup>6</sup> The process, described in more detail below,<sup>7</sup> allows citizens to direct a spotlight on domestic government enforcement practices in order to promote enhanced enforcement and, ultimately, improved environmental protection.<sup>8</sup> As Professor Kal Raustiala has pointed out, the process gives citizens an unusually prominent role in international governance because it serves as a “fire alarm” type of “review institution;” it allows citizens to initiate claims concerning assertedly ineffective state performance.<sup>9</sup> The process is a variation of what Professor Cass Sunstein has referred to as “informational regulation”— that is, regulation intended to promote effective implementation through

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<sup>4</sup> *Id.*

<sup>5</sup> GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 2 (David L. Markell & John H. Knox eds., 2003) [hereinafter GREENING NAFTA].

<sup>6</sup> ENVTL. L. INST., RESEARCH REPORT: ISSUES RELATING TO ARTS. 14 & 15 OF THE N. AM. AGREEMENT ON ENVIRONMENTAL COOPERATION 4 (2003).

<sup>7</sup> See *infra* Part II for a description of the citizen submission process.

<sup>8</sup> See David L. Markell, *The Citizen Spotlight Process*, ENVTL. FORUM, Mar.-Apr. 2001, at 32, 33.

<sup>9</sup> Kal Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 50 LOYOLA L. REV. 389, 396 (2005) (Professor Raustiala, among others, has contrasted “fire alarm” mechanisms with “police patrol” approaches, which empower government authorities to undertake such reviews). Professor John Knox, relatedly, suggests that the CEC represents a significant step away from a “Westphalian world” by empowering citizens to monitor Parties’ obligations under the NAAEC to effectively enforce their environmental laws. John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 50 LOYOLA L. REV. 373 (2005).

relatively “soft,” non-coercive approaches, rather than through conventional “command-and-control” strategies.<sup>10</sup> As such, it represents an experiment with a relatively new tool for promoting compliance with the environmental laws.<sup>11</sup> Particularly because of the innovative features or characteristics of the citizen submissions process, the CEC’s implementation of the process to date provides fertile soil for policymakers, members of “civil society,”<sup>12</sup> academics, and others interested in international governance and environmental protection.

Part II of this Article provides an overview of the citizen submissions process. In doing so, it focuses specific attention on the issue of jurisdictional boundaries among key actors in the process, notably the CEC Council, the CEC Secretariat, and members of the public.<sup>13</sup> The allocation of authority for the implementation of international regimes is obviously of considerable importance as we experiment with new forms of global governance.

Part III reviews four Resolutions that the CEC Council has issued relating to the CEC’s “factual record” process.<sup>14</sup> For a variety of reasons, these Resolutions are especially important milestones in the history of the citizen submissions process,

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<sup>10</sup> Cass R. Sunstein, *Information Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618-26 (1999). 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). The focus of the CEC process, which is intended to be primarily on government performance, obviously differs from the focus of information regulation practices that are directed toward influencing regulated party behavior.

<sup>11</sup> U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, ENVIRONMENTAL POLICY TOOLS: A USER’S GUIDE, OTA-ENV-634 130-31 (1995).

<sup>12</sup> One observer suggests that “civil society” is “the ensemble of non-state organizations and relations that constitute associational life.” Jesse C. Ribot, *Representation and Accountability in Decentralized Sahelian Forestry: Legal Instruments of Political-Administrative Control*, 12 GEO. INT’L L. REV. 447, 454 n.24 (2000). Ann Florini defines “civil society” as “[t]he private sector and the amorphous third sector of non-governmental organizations” and notes that they are “becoming key figures in transnational governance . . . .” ANN FLORINI, THE COMING DEMOCRACY: NEW RULES FOR RUNNING A NEW WORLD 15 (2003).

<sup>13</sup> See *infra* Part II.

<sup>14</sup> The CEC Council is comprised of the environmental ministers of the three signatory Parties. See *infra* Part III.

especially in terms of the issue of jurisdictional boundaries.<sup>15</sup>

Part IV offers some thoughts about the possible consequences of these Council Resolutions for the future of the citizen submissions process. It suggests that the Resolutions' possible accretion of power to the CEC Council has the potential to undermine the credibility of the process and the interest of nongovernmental organizations (NGOs) in continuing to use the process. Part IV also identifies some of the issues the CEC experience raises for regional and global governance more generally.

## **II. The Citizen Submissions Process: An Overview and the Issue of Jurisdictional Boundaries Among Key Actors**

The NAAEC citizen submissions process is an international spotlight that is intended to shine on and, thereby, invigorate the domestic environmental enforcement practices of Canada, Mexico, and the United States.<sup>16</sup> The expectation is that invigorated enforcement of the environmental laws will improve compliance with these laws and, thereby, engender higher levels of environmental protection.<sup>17</sup>

Such a spotlight might be expected to have and, indeed, has had, two effects on its core constituencies. It has created expectations for interested citizens and NGOs by providing a new international forum to engage domestic government officials and highlight concerns about domestic governance.<sup>18</sup> It also has

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<sup>15</sup> See *infra* Part III.

<sup>16</sup> Markell, *supra* note 8, at 33.

<sup>17</sup> See, e.g., North American Agreement on Environmental Cooperation, *supra* note 1, art. 5(1). In describing what the citizen submissions process is, it is important to explain what it is not. Among other things, it is not intended to serve as a forum for complaining about domestic environmental governance in the arena of standard-setting. That is, the process is clearly confined to allegations that a government is failing to effectively enforce an environmental law; allegations that the laws themselves are flawed (e.g., because they fail to adequately serve particular environmental values) are off-limits for the process. See Determination Pursuant to Article 14(1) on the North American Agreement on Environmental Cooperation (CEC, A14/SEM/98-003/03/14(1), 1998); David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545, 553-55 (2000).

<sup>18</sup> Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 and 15 of the North American Commission on Environmental Cooperation*, 26 LOYOLA L. REV. 415 (2005). For a review of some of the reasons why this forum may

created apprehension on the part of the NAAEC Parties that are its potential targets (and creators).<sup>19</sup>

A key issue in the operation of the NAAEC citizen submissions process involves the scope of the authority of each of the main actors: the CEC Council (comprised of the environmental ministers of the three Parties);<sup>20</sup> interested citizens (“civil society”);<sup>21</sup> and a Secretariat created under the NAAEC to assist in implementation of the citizen submissions process, among other responsibilities.<sup>22</sup> It is clear that in creating the NAAEC, the Parties intended to retain an important role in the implementation of the citizen submissions process, vesting considerable power in the CEC Council.<sup>23</sup> In creating the process, however, the Parties also assigned a substantial role to citizens of the three North American countries by empowering them 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).<sup>24</sup> In addition, the NAAEC empowers citizens to contribute information about the nature and effectiveness of the government enforcement practices at issue in particular submissions.<sup>25</sup>

The NAAEC, similarly, created a Secretariat to administer the citizen submissions spotlighting process, and the Agreement vested in the CEC Secretariat considerable authority over administration of the process. Under the NAAEC’s division of

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be of particular interest and value to NGOs, as well as some of the arguable shortcomings in the process, see Markell, *supra* note 8, at 32.

<sup>19</sup> For a discussion of the pressures that led the Parties to create the process despite its potential to embarrass them, see Kal Raustiala, *Citizen Submissions and Treaty Review in NAAEC*, in GREENING NAFTA, *supra* note 5, at 256.

<sup>20</sup> North American Agreement on Environmental Cooperation, *supra* note 1.

<sup>21</sup> See *supra* note 12 for a discussion concerning the definition of “civil society.”

<sup>22</sup> North American Agreement on Environmental Cooperation, *supra* note 1, art. 14, 15. In addition to the actors referenced in the text, the Joint Public Advisory Committee (JPAC) plays a role in the citizen submissions process. See John D. Wirth, *Perspectives on the Joint Public Advisory Committee*, in GREENING NAFTA, *supra* note 5 at 199.

<sup>23</sup> See *infra* Part III.

<sup>24</sup> North American Agreement on Environmental Cooperation, *supra* note 1, art. 14.

<sup>25</sup> *Id.* art. 15.

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.<sup>26</sup> 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..."<sup>27</sup> 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 unilaterally may dismiss the submission. The Secretariat has exercised this initial review or filtering responsibility under Article 14(1) and (2) fairly rigorously: during the CEC's first ten plus years (through February 15, 2005), the Secretariat has either terminated or notified submitters of the need to revise twenty-three submissions under Article 14(1) or (2), out of a total of fifty submissions filed.<sup>28</sup>

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 and to review the submission in light of any such response.<sup>29</sup> The Secretariat then determines whether to notify the Council that, in the Secretariat's view, it

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<sup>26</sup> For more complete summaries of the citizen submissions process, *see, e.g.*, John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 *ECOLOGY L.Q.* 1 (2001); Markell, *supra* note 17.

<sup>27</sup> North American Agreement on Environmental Cooperation, *supra* note 1, art. 14(2)(b).

<sup>28</sup> Of these twenty-three submissions, sixteen were ultimately terminated because no revised submissions were received within thirty days after the request or the Secretariat determined that the revised submission still did not meet Article 14 requirements. In one submission – *Coal-Fired Power Plants* – the Secretariat has received a revised submission but has not determined if the revised submission meets the Article 14(1) requirements. Additionally, under Guideline 3.10 the Secretariat has requested that the submitters of four submissions fix "minor errors" in their submissions before proceeding with the Article 14 analysis. The Secretariat is currently reviewing submission number 50 – *Crushed Gravel in Puerto Rico* – for compliance with these Article 14 provisions. All information regarding the procedural status of the submissions was found using the "Citizen Submissions on Enforcement Matters" link at the CEC website, <http://www.cec.org> (last visited Apr. 6, 2005).

<sup>29</sup> North American Agreement on Environmental Cooperation, *supra* note 1, art. 15(1). Thus far, the Parties uniformly have provided such responses.

would be appropriate under the NAAEC to prepare a “factual record.”<sup>30</sup> The Secretariat may unilaterally dismiss a submission at this stage if it determines that a factual record is not warranted.<sup>31</sup> In either case (a recommendation to proceed with a factual record or a dismissal), the Secretariat must explain the rationale for its decision.<sup>32</sup> As of February 15, 2005, the Secretariat had made eighteen recommendations to the Council that a factual record is warranted and dismissed eleven submissions after receiving a Party’s response.<sup>33</sup>

The process creates specific “checks” that the Council may exercise at particular stages in the citizen submissions process. Thus, the NAAEC creates a “check” for the Council for submissions for which the Secretariat believes development of a factual record is warranted, as indicated above. Instead of allowing the Secretariat to unilaterally determine to proceed with the preparation of a factual record, Article 15(2) of the NAAEC empowers the Council, after it receives the Secretariat’s Recommendation, to decide whether to authorize the Secretariat to prepare a factual record.<sup>34</sup> A potentially important feature of this

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<sup>30</sup> *Id.* 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. *Id.*

<sup>31</sup> *See id.*; Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (C/99-00/RES/07/Rev.3 Council Res. 99-06), at No. 9.6 (June 28, 1999), available at [http://www.cec.org/files/PDF/COUNCIL/99-06e\\_EN.pdf](http://www.cec.org/files/PDF/COUNCIL/99-06e_EN.pdf) (“If the Secretariat considers that the submission, in light of any response provided by the Party, does not warrant development of a factual record . . . the submission process is terminated with respect to that submission”).

<sup>32</sup> North American Agreement on Environmental Cooperation, *supra* note 1, art. 15(1) (recommendation to proceed with a factual record); Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, *supra* note 31.

<sup>33</sup> The CEC provides the final determination of each submission in its “Citizen Submissions on Enforcement Matters” link on its webpage, [www.cec.org](http://www.cec.org). Additionally, as of December 31, 2004, two submissions were withdrawn by the submitters before the Secretariat decided whether to recommend a factual record or dismiss the submission, and two submissions are pending either as a response from the government or a decision by the Secretariat.

<sup>34</sup> North American Agreement on Environmental Cooperation, *supra* note 1, 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).



check is that only a two-thirds vote of the Parties is required to go forward with the preparation of such a record.<sup>35</sup> Thus, the Party that is the focus of the submission cannot unilaterally terminate the process at this stage. As of February 15, 2005, the Council has directed the Secretariat to develop factual records for fourteen submissions and has issued two Resolutions in which it rejected the Secretariat's recommendation and, instead, dismissed the submission.<sup>36</sup>

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.<sup>37</sup> The Agreement also specifies that the Secretariat shall consider any information

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<sup>35</sup> *Id.*

<sup>36</sup> Council Resolution 02-13 (May 16, 2000) (Cytrar II Submission); Instruction to the Secretariat of the Commission of Environmental Cooperation Regarding the Assertion that Mexico is Failing to Effectively Enforce Its Environmental Law in Relation to the Establishment and Operation of Cytrar Hazardous Waste Landfill, in the city of Hermosillo, Senora, Mexico (Dec 10, 2002) (C/C.01/02-06/02-13/RES/Final), available at <http://www.cec.org/files/pdf/sem/01-1-Res-E.pdf>; Instruction to the Secretariat of the Commission of Environmental Cooperation Regarding the Assertion that Canada Is Failing to Effectively Enforce Certain Environmental Protection Standards Regarding the Agricultural Pollution Emanating from Livestock Operations (SEM-97-003) (Quebec Hogs submission) (C/C.01/00-04/RES/01/Rev.03), available at <http://www.cec.org/files/pdf/sem/97-3-res-e.pdf>. The Quebec Hogs submission was dismissed by a 2-1 vote, with the United States voting to proceed with a factual record and Canada and Mexico voting to dismiss, and the Cytrar II Submission was dismissed by a unanimous vote. The Council, in another May 16, 2000 Resolution (Council Resolution #00-02), deferred consideration of the Oldman River submission (in one of the November 16, 2001 Resolutions discussed in more detail below, the Council voted to go forward with a factual record for this submission). Decision by Council Regarding Submission on Enforcement Matters (May 16, 2000) (SEM-97-006) C/C.01/00-04/RES/02, available at [http://www.cec.org/files/pdf/COUNCIL/00-02e\\_EN.pdf](http://www.cec.org/files/pdf/COUNCIL/00-02e_EN.pdf).

<sup>37</sup> North American Agreement on Environmental Cooperation, *supra* note 1, art. 15(4).

provided by a Party.<sup>38</sup> Another provision in the NAAEC, Article 21, gives the Secretariat authority to obtain information from the Parties,<sup>39</sup> and Article 11(4) forbids unilateral Party efforts to influence the Secretariat in the performance of its responsibilities.<sup>40</sup>

The process creates two Party “checks” on the Secretariat’s authority 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.<sup>41</sup> An important limitation on this Party “check” is that the Agreement specifies that Parties’ comments must be confined to the “accuracy” of the draft.<sup>42</sup> An additional limitation on this Party “check” is that the Agreement does not obligate the Secretariat to incorporate even these narrowly focused comments. Instead, it simply requires that the Secretariat take such comments into account, when appropriate.<sup>43</sup>

After the Secretariat considers the Parties’ comments and incorporates them as it deems appropriate into a final factual record, the Parties’ final “check” is that the Secretariat submits the final factual record to the Council, leaving it to the Council to determine whether to release it to the public (again, a two-thirds vote of the Council members is required to make a final factual record public).<sup>44</sup> As of December 31, 2004, the Secretariat has submitted ten final factual records to the Council, and the Council in each case has unanimously approved their release.<sup>45</sup>

This review of the citizen submissions process is intended to

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* art. 21.

<sup>40</sup> *Id.* art 11(4).

<sup>41</sup> *Id.* art. 15(5).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* art. 15(6).

<sup>44</sup> *Id.*

<sup>45</sup> Final Factual Records have been released for: *Aquanova*, *BC Hydro*, *BC Logging*, *BC Mining*, *Cozumel*, *Metales y Derivados*, *Migratory Birds*, *Oldman River II*, *Rio Magdalena*, and *Molymex II*. The final Factual Records are available through the “Citizen Submissions on Enforcement Matters” link of the CEC website at <http://www.cec.org>.

suggest that an important feature of the process is its allocation of authority and responsibility among the Parties, civil society, and the Secretariat—its creation of “jurisdictional boundaries” that establish the respective parameters for action by the different actors in the process.<sup>46</sup> The considerable tension and acrimony that this question of boundaries has spawned during the early years of the process is evidence of the importance that many attach to its resolution.<sup>47</sup> A common theme of the NGO community and of scholarly commentary has been that the NAAEC’s allocation of authority limits the authority of the Council to some degree by creating an independent role for the Secretariat and an important role for citizens.<sup>48</sup> Numerous NGOs and commentators have further suggested that the Council has fallen short in respecting limits on its authority and that, for the process to operate as intended (and for it to be credible with the members of civil society), the Council needs to do a better job of adhering to the self-imposed limits contained in the NAAEC and accord appropriate respect to the integral roles of the Secretariat and citizens in the process.<sup>49</sup>

This issue has received the most attention in the context of the four Resolutions the Council issued in November 2001, in which the Council directed the Secretariat to prepare factual records with respect to four submissions. Part III reviews these Resolutions in

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<sup>46</sup> This Article does not suggest that any particular allocation of power is appropriate but, instead, focuses on the nature of the allocation the Parties seemed to create in the NAAEC and the extent to which they have implemented this allocation. *Cf.* CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* 8 (2001).

<sup>47</sup> Some early commentators anticipated these tensions. *See, e.g.*, FOUR-YEAR REVIEW OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: REPORT OF THE INDEPENDENT REVIEW COMMITTEE (June 1998). Numerous observers have commented on their presence. *See, e.g.*, Paul Stanton Kibel, *The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case*, 39 COLUM. J. TRANSNAT'L L. 395 (2001); Knox, *supra* note 26; Raustiala, *supra* note 9; Christopher Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 175 (2002).

<sup>48</sup> *See, e.g.*, Wold et al., *supra* note 18; ENVTL. L. INST., *supra* note 6, at 13; TEN-YEAR REV. & ASSESSMENT COMM., *supra* note 3, at 45; JPAC Advice to Council, no. 01-07, Oct. 23, 2001, JPAC Advice to Council, n. 03-05, Dec. 17, 2003, available at <http://www.cec.org>.

<sup>49</sup> *See supra* notes 47 & 48, and the sources cited therein.

some detail.

### III. The Four Council Resolutions

This Article focuses on the allocation of authority or jurisdictional boundaries issue in the particular context of four Resolutions that the CEC Council issued on November 16, 2001, in which the Council directed the CEC Secretariat to prepare factual records in connection with four citizen submissions.<sup>50</sup> The Council's issuance of these Resolutions to develop factual records represents an important milestone in the formative years of the citizen submissions process. Through these Resolutions, the Council authorized preparation of more factual records than it had directed to be developed during the first seven years of the process.<sup>51</sup> The importance of these Council actions for the direction and credibility of the process is magnified because factual records are at the heart of the citizen submissions spotlighting process. They serve as its primary and most in-depth spotlighting mechanism.

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<sup>50</sup> See Instruction to the Secretariat of the Commission for the Environmental Cooperation Regarding the Assertion that the Government of the US is Failing to Effectively Enforce the Migratory Bird Treaty Act (SEM-99-002) (C/C.01/01-06/RES/04/Final) (Nov. 16, 2001), *available at* <http://www.cec.org/files/pdf/COUNCIL/res-01-10e.pdf>; Instruction to the Secretariat of the Commission for Environmental cooperation Regarding the Assertion that Canada Is Failing to Effectively Enforce Section 36(3) of the Fisheries Act (SEM-98-004) (C/C.01-06/RES/05/Final) (Nov. 16, 2001), *available at* <http://www.cec.org/files/pdf/COUNCIL/res01-11e.pdf>; Instruction to the Secretariat of the Commission for Environmental cooperation Regarding the Assertion that Canada Is Failing to Effectively Enforce Sections 35 (1) and 36(3) of the Fisheries Act (SEM-98-004) (C/C.01-06/RES/02/Final) (Nov. 16, 2001), *available at* <http://www.cec.org/files/pdf/COUNCIL/res01-12e.pdf>. The Council actually issued five Resolutions on that date, but the fifth, Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that Mexico Is Failing to Effectively Enforce Provisions of Its General Law on Ecological Balance and Environmental Protection, Forestry Law, Mexican Official Standard NOM-062-ECOL-1994 and NOM-059-ECOL-1994, The Law of National Waters and Its Regulations, the Fisheries Law and Its Regulations and the Federal Criminal Code with Respect to the Activities of Granjas Aquanova (SEM-98-006) (C/C.01/01-06/RES/01/Final) (Nov. 16, 2001), *available at* <http://www.cec.org/files/pdf/COUNCIL/res-01-09e.pdf>, does not raise the issues addressed in this Article and will, therefore, not be discussed.

<sup>51</sup> Before November 2001, the Council had authorized the preparation of only three factual records. David L. Markell, *The CEC Citizen Submissions Process*, in GREENING NAFTA, *supra* note 5 at 274, 294 n.7 & app.

The Resolutions' importance as potential indicators of the prospects for the citizen submissions process is heightened by the fact that one of the Resolutions involves the first Secretariat recommendation to develop a factual record involving the United States and, therefore, the first occasion for the Council to consider such a recommendation. The United States had been the only Party that had not yet voted to reject a Secretariat recommendation, and the public and, most likely, the other Parties were interested in learning whether the United States' support for the citizen submissions process would remain firm even when the spotlight would be on its own enforcement practices. In 1994, the United States had issued an Executive Order in which the President committed to vote in favor of Secretariat recommendations except in extremely limited circumstances.<sup>52</sup> The recommendation focusing on U.S. enforcement practices arguably put this Order to a stricter test than the recommendations that had preceded it.

At a superficial level, the Resolutions suggest a congruity of views among Council, Secretariat, and submitters about factual records. In each Resolution, the Council agreed with the Secretariat's recommendation, and the submission itself, that a factual record should be developed.<sup>53</sup> But, this superficial congruity of views disappears upon closer examination of the Resolutions. A wide chasm becomes evident.

The four Council Resolutions dramatically changed the focus of the factual records that the submitters requested and that the Secretariat recommended by substantially limiting or redefining the scope of the factual records to be developed. While the submitters asserted that broad, programmatic failures to effectively

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<sup>52</sup> "To the greatest extent practicable, pursuant to Articles 15(1) and 15(2), where the Secretariat of the Commission for Environmental Cooperation ("Secretariat") informs the Council that a factual record is warranted, the United States shall support the presentation of such factual record." Exec. Order No. 12915, 59 Fed. Reg. 25775 (May 18, 1994).

<sup>53</sup> See Oldman River, Council Res. 01-08 (2001), available at <http://www.cec.org/files/pdf/COUNCIL/res-01-08e.pdf>; Migratory Birds, Council Res. 01-10 (2001), available at <http://www.cec.org/files/pdf/COUNCIL/res-01-10e.pdf>; B.C. Mining, Council Res. 01-11 (2001), available at <http://www.cec.org/files/pdf/COUNCIL/res01-11e.pdf>; B.C. Logging, Council Res. 01-12 (2001), available at <http://www.cec.org/files/pdf/COUNCIL/res01-12e.pdf>.

enforce particular environmental laws existed,<sup>54</sup> and while the Secretariat recommended that these asserted widespread failures to effectively enforce be investigated through development of factual records,<sup>55</sup> the Council Resolutions declined to direct the Secretariat to develop factual records on such broad, programmatic alleged failures to effectively enforce. Instead, the Resolutions directed the Secretariat to develop factual records concerning some of the isolated examples of asserted failures to effectively enforce that the submitters had included as illustrations of the broader failures.<sup>56</sup>

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<sup>54</sup> See ALLIANCE FOR THE WORLD ROCKIES ET AL., SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL COOPERATION PURSUANT TO ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 11-12 (CEC, A14/SEM-99-002/01/SUB, 1999) (suggesting that the U. S. failure to enforce the Migratory Bird Act was nationwide in scope), *available at* <http://www.cec.org/files/pdf/sem/99-2-SUB-E.pdf>; SIERRA CLUB OF BRITISH COLUMBIA ET AL., THE GOVERNMENT OF CANADA'S FAILURE TO ENFORCE THE FISHERIES ACT AGAINST MINING COMPANIES IN BRITISH COLUMBIA: A SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL COOPERATION PURSUANT TO ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 6, 12-13 (1998) (asserting ineffective Canadian enforcement of the Fisheries Act against mining operations, on a widespread basis), *available at* <http://www.cec.org/files/pdf/sem/98-4-SUB-E.pdf>; DAVID SUZUKI FOUNDATION ET AL., SUBMISSION PURSUANT TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 12-13 (2000) (similarly asserting a broad-based Canadian failure to effectively enforce the Fisheries Act, in this case against the logging industry), *available at* <http://www.cec.org/files/pdf/sem/00-4-SUB-E.pdf>; THE FRIENDS OF THE OLDMAN RIVER, NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION ARTICLE 14 SUBMISSION (1997) (alleging a widespread failure to effectively enforce the Canadian Environmental Assessment Act), *available at* <http://www.cec.org/files/pdf/sem/97-6-SUB-E.pdf>.

<sup>55</sup> See SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA, ARTICLE 15(1) NOTIFICATION TO COUNCIL THAT DEVELOPMENT OF A FACTUAL RECORD IS WARRANTED (2001) (B.C. Logging), *available at* <http://www.cec.org/files/pdf/sem/00-4-ADV-E.PDF>; SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA, ARTICLE 15(1) NOTIFICATION TO COUNCIL THAT DEVELOPMENT OF A FACTUAL RECORD IS WARRANTED (2001) (B.C. Mining), *available at* <http://www.cec.org/files/pdf/sem/98-4-ADV-E.PDF>; SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA, ARTICLE 15(1) NOTIFICATION TO COUNCIL THAT DEVELOPMENT OF A FACTUAL RECORD IS WARRANTED (2001) (Migratory Birds), *available at* <http://www.cec.org/files/pdf/sem/99-2-ADV-E.PDF>; SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION OF NORTH AMERICA, ARTICLE 15(1) NOTIFICATION TO COUNCIL THAT DEVELOPMENT OF A FACTUAL RECORD IS WARRANTED (1999) (Oldman River), *available at* <http://www.cec.org/files/pdf/sem/97-6-ADV-E.PDF>.

<sup>56</sup> See *supra* note 53.

The *Migratory Birds* submission is a good example.<sup>57</sup> The Secretariat recommended that a factual record be prepared concerning the alleged failure of the United States to enforce the Migratory Bird Treaty Act (MBTA) on a nationwide basis.<sup>58</sup> The Secretariat's recommendation provided no indication at all that the Secretariat thought that it would be useful to develop a factual record limited to two isolated instances of alleged failures to effectively enforce the MBTA, as the Council ultimately directed in its Resolution.<sup>59</sup> The submitters devoted a single paragraph to these two instances in their submission,<sup>60</sup> the United States did not even mention the two alleged examples in its response,<sup>61</sup> and the Secretariat devoted little attention to them in its recommendation.<sup>62</sup> Further, the questions highlighted in the Secretariat's recommendation as warranting in-depth review in a factual record focused almost entirely on the broad alleged failure to enforce the MBTA effectively. For example, it recommended a review of the overall numbers of migratory birds killed in logging operations (operations for which the United States conceded it does not enforce the MBTA), compared to the numbers killed through activities for which the United States does take enforcement action.<sup>63</sup>

Thus, by directing the Secretariat to develop a factual record that focuses on two isolated instances of asserted failures to effectively enforce, the Council may well have directed the Secretariat to prepare a factual record even though the Secretariat itself would have determined that a factual record that focused only on these isolated incidents was not warranted.<sup>64</sup> Many of the

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<sup>57</sup> See *Migratory Birds Submission* (CEC, A14/SEM-99-002/01/SUB, 1999), available at <http://www.cec.org/files/pdf/sem/99-2-SUB-E.pdf>.

<sup>58</sup> See *Migratory Birds Recommendation* (CEC, A14/SEM/99-002/11/AVD), available at <http://www.cec.org/files/pdf/sem/ACFA30.pdf>.

<sup>59</sup> See *supra* notes 57 & 58.

<sup>60</sup> See *supra* note 57.

<sup>61</sup> *Migratory Birds Party Response* (CEC, A14/SEM/99-002/04/RSP), available at <http://www.cec.org/files/pdf/sem/ACF1842.PDF>

<sup>62</sup> See *supra* note 58.

<sup>63</sup> *Id.*

<sup>64</sup> See *infra* note 71 and accompanying text. A related question, not addressed in detail here, is how much the Council may depart from a submission in directing the preparation of a factual record. The submitters for the four

issues that the submission raised, which the Secretariat believed warranted development of a factual record, may be beyond the scope of the Council Resolution.<sup>65</sup> One of the lawyers for the submitters has stated specifically that the submitters would not have gone forward on this basis.<sup>66</sup>

A February 2002 memorandum from the Director of the CEC Secretariat's Submissions Unit to the Chair of the Joint Public Advisory Committee (JPAC) acknowledged the limiting effect of the Resolutions:

[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.<sup>67</sup>

The CEC's final Factual Record for each of the submissions echoes the conclusion that the Council Resolutions dramatically narrowed the scope of broad "pattern-type" submissions by authorizing factual records focused on isolated instances of alleged ineffectual enforcement. Each Factual Record contains the following language: "In light of this instruction [from the Council, in the Resolution authorizing the preparation of a Factual Record], the scope of this factual record is different from the scope in the submission and the factual record that the Secretariat considered to warrant development in its Article 15(1) notification."<sup>68</sup>

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submissions discussed in the text uniformly opposed the Council's decision to narrow the factual records. *See, e.g.*, Letter from Sierra Legal Defense Fund to Joint Public Advisory Committee (Sept. 8, 2003), *reprinted in* ENVTL. L. INST., *supra* note 6; *see also* WOLD ET AL., INT'L. ENVTL. L. PROJECT, COMMENTS ON ISSUES RELATING TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN COMMISSION ON ENVIRONMENTAL COOPERATION 3-7 (Oct. 2, 2003), *reprinted in* ENVTL. L. INST., *supra* note 6.

<sup>65</sup> *See supra* note 63, and accompanying text.

<sup>66</sup> *See infra* notes 72-74, and accompanying text.

<sup>67</sup> Memorandum from Geoffrey Garver, Director of Submissions on Enforcement Matters Unit, to Jon Plaut, Chair of Joint Public Advisory Committee (Feb. 15, 2002), *available at* <http://www.cec.org/files/pdf/SEM/Memo-Garver-e.pdf>.

<sup>68</sup> *See* Factual Record: BC Mining Submission (SEM-98-004), at 17, *available at* [http://www.cec.org/files/pdf/sem/98-4-FFR\\_en.pdf](http://www.cec.org/files/pdf/sem/98-4-FFR_en.pdf); Factual Record: BC Logging



In its 2003 report, ELI similarly concludes that in each of the four Resolutions, the Council significantly limited the scope of the factual records that the Secretariat was to prepare, compared to the scope requested in the submissions and recommended in the Secretariat Recommendations:

In each of these [*BC Mining*, *BC Logging*, *Migratory Birds*, and *Oldman River II*] cases, the Secretariat recommended to the Council that a factual record be developed to investigate alleged widespread, systematic failures of a Party to effectively enforce its environmental law. Although 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 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. This represented the first time the CEC Council had used its approval authority under the NAAEC to narrow the substantive scope of the factual records.<sup>69</sup>

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Submission (SEM-00-004), at 21, *available at* [http://www.cec.org/files/pdf/sem/00-4-FFR\\_en.pdf](http://www.cec.org/files/pdf/sem/00-4-FFR_en.pdf); Final Factual Record: Migratory Birds Submission (SEM 99-002), at 18, *available at* [http://www.cec.org/files/pdf/sem/MigratoryBirds-FFR\\_EN.pdf](http://www.cec.org/files/pdf/sem/MigratoryBirds-FFR_EN.pdf); Factual Record: Oldman River II Submission (SEM 97-006), at 17, *available at* [http://www.cec.org/files/pdf/sem/97-6-FFR\\_en.pdf](http://www.cec.org/files/pdf/sem/97-6-FFR_en.pdf). The submitters registered the same criticisms concerning the narrowing of the scope of the Factual Records. *See, e.g.*, *infra* notes 70-75. The submitter of the Oldman River II Submission, Martha Kostuch, echoed the CEC's description of the Council Resolution as a significant modification of the type of factual record sought by the submitters and recommended by the Secretariat:

The Secretariat [in its Recommendation] also understood that [Friends of the Oldman River's] submission dealt with the general failure of the Government of Canada to enforce the Fisheries Act and CEAA and not a specific case. FOR's submission alleges a general failure to enforce the Fisheries Act and CEAA, not a failure in relation to any specific case.

COMM'N FOR ENVTL. COOPERATION, WRITTEN COMMENTS ON THE PUBLIC HISTORY OF SUBMISSIONS MADE UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (Nov. 14, 2000).

<sup>69</sup> ENVTL. L. INST., *supra* note 6. For summaries of the ways in which the Council Resolutions narrowed the scope of the Submissions and Recommendations, see *id.* at 5-8; *see also* Markell, *supra* note 51, at 277-80. The TRAC similarly notes that the Council has "adopted a series of measures over the years to narrow the process's scope" and cites specifically to "disallowing examination of allegations of a broad pattern of ineffective enforcement in several factual records" and "limiting the scope of factual

The Council's Resolutions have at least three important implications for the factual record process and for the division of authority for its implementation. First, the practical reality of the Council Resolutions is that by authorizing factual records that are limited to specific alleged failures to effectively enforce, the Council dramatically changed the types of alleged enforcement failures to be addressed in the factual records. ELI makes the point that the Council's narrowing of the scope of the factual records dramatically changed the nature of the Factual Records the Secretariat was able to develop for the four submissions for which the Council issued its November 2001 Resolutions by excluding various issues from the Secretariat's consideration. ELI states:

[T]he submissions were largely prompted by the concerns about broad enforcement issues—such as the allocation of staff and resources for enforcement, use and effectiveness of compliance assistance programs, use and effectiveness of traditional enforcement tools, and policies regarding when state or provincial enforcement action may preclude federal enforcement. Although the Secretariat... identified these issues as “central questions” in its determinations, it is precisely these issues that have been excluded by the Council from the scope of the factual record[s].<sup>70</sup>

A second important aspect of the Council's actions in its Resolutions is that it is by no means clear for any of the submissions that the Secretariat would have recommended a factual record if the submission only involved the isolated examples for which the Council authorized development of factual records. It appears undisputed at this point that the Council limited the scope of the factual records the Secretariat recommended be prepared and that the submitters in each case had sought. It is unclear whether the Secretariat would have

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records . . . .” TEN-YEAR REV. & ASSESSMENT COMM'N, *supra* note 3. The TRAC also notes that “JPAC, the NACs, US GAC, academics, independent observers and NGOs have widely and repeatedly criticized the Council for these actions.” *Id.*

<sup>70</sup> ENVTL. L. INST. *supra* note 6, at 10. As ELI notes, the submitters held the view that the Council Resolutions limited the scope of the factual records and, accordingly, significantly limited their value. *Id.* ELI put it a bit more strongly: “Submitters have openly and vociferously expressed frustration that the factual records do not adequately address the concerns that prompted their submission.” *Id.*; *see also* Wold et al., *supra* note 18, at 427-29.

recommended development of factual records of such limited scope. The Factual Records themselves make this clear. Each Factual Record provides that:

It should not be assumed that the Secretariat's Article 15(1) Notification to Council recommending a factual record for [X] was intended to include a recommendation to prepare a factual record of the scope set out in Council Resolution [X], or that the Secretariat would have recommended a factual record of this scope.<sup>71</sup>

Thus, there is a possibility that the Resolutions may require the Secretariat to develop factual records on matters for which the Secretariat believes a factual record is not warranted or is warranted only if part of a larger inquiry.

Finally, the limitations on the scope of the factual record that the Council imposed in each of the four Resolutions create a distinct possibility that the Council directed the development of factual records for asserted failures to effectively enforce that the submitters themselves would not have considered worth pursuing through the CEC process. In other words, the submitters would not have filed submissions that raised such asserted failures to effectively enforce except as part of more broad-based submissions that targeted, in the submitters' views, more significant government enforcement failures. Indeed, a lawyer for the submitters of one of the four submissions addressed in the November Council 2001 Resolutions has made precisely this claim. Chris Wold, an attorney for the submitters of the *Migratory Birds* submission, states in a recent article that:

Without question, the submitters would never have prepared *Migratory Birds* if they had known that the Council would, in an arbitrary and capricious fashion, limit the record to two specific instances cited only as examples of widespread government enforcement. The *Migratory Birds* submitters found the Citizen Submissions Process attractive *only* because of its capacity to investigate the United States' broad pattern of non-enforcement of the MBTA.<sup>72</sup>

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<sup>71</sup> See the sources cited *supra* note 68.

<sup>72</sup> Wold et al., *supra* note 18, at 426. See also Wold et al., *supra* note 64, at 9 ("By modifying the scope of factual records and attempting to limit the kind of information the Secretariat can consider, Council is calling for the preparation of factual records that no one (except Council) wants. Surely the Citizen Submission Process was not designed

Wold describes the Council's Resolution concerning the *Migratory Birds* submission as "direct[ing] the Secretariat to develop a factual record... that resembled neither the issues presented by the submitters nor those recommended for study by the Secretariat."<sup>73</sup> His colorful characterization is that, for the *Migratory Birds* submission, the Factual Record "is the factual record that nobody wanted."<sup>74</sup> Randy Christensen, an attorney for the submitters in the *B.C. Mining* and *B.C. Logging* submissions has raised this issue as well, though not as directly.<sup>75</sup>

The "question of law" that the Council Resolutions raise involves whether the Council has the legal authority to issue Resolutions that: (1) dramatically change the focus of the factual records that the submitters proposed or the Secretariat recommended; (2) direct the preparation of factual records on matters for which the Secretariat may believe a factual record is not warranted or is warranted only if part of a larger inquiry; and (3) direct the preparation of factual records on matters for which the submitters appear to believe a factual record is not warranted or is warranted only if part of a larger inquiry. What conclusions may be drawn about the legitimacy of the Resolutions in light of the jurisdictional boundaries the NAAEC has established to demarcate the parameters for action by each of these actors? Are the Council's actions in issuing the four November 2001 Resolutions consistent with the NAAEC's jurisdictional boundaries, or do these actions involve inappropriate Council encroachment onto the terrain reserved for citizen submitters and the Secretariat?<sup>76</sup>

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to achieve this absurd outcome.")

<sup>73</sup> *Id.* at 427.

<sup>74</sup> *Id.*; see also WOLD ET AL., *supra* note 64 at 5.

<sup>75</sup> See, e.g., Letter from Randy Christensen & Jerry DeMarco, Sierra Legal Defense Fund, to Joint Public Advisory Committee 5 (Sept. 8, 2003), reprinted in ENVTL. L. INST., *supra* note 6, app. (noting that "the effect of the Council resolution [on the B.C. Logging submission] was to direct the Secretariat's attention away from the concerns of the submitters, and, we believe, the concerns of greatest environmental significance").

<sup>76</sup> The Resolutions raise other concerns not addressed in this article. Perhaps of greatest importance, the Resolutions potentially signal the Council's view that the citizen submissions process should be confined to allegations of specific instances of failures to effectively enforce and exclude allegations of widespread failures to effectively enforce. Because in many situations widespread failures seem particularly suited to attention on a regional stage, a move to limit the process in this way would be unfortunate from a

The Council appears to have taken the position that its retention of ultimate authority to oversee the NAAEC encompasses the authority to make decisions about any issue relating to implementation of the Agreement.<sup>77</sup> In Resolution 00-09, for example, the Council noted that “countries that are parties to international agreements are solely competent to interpret such instruments.”<sup>78</sup> More specifically, at least one high-ranking Canadian official appears to hold the view that the NAAEC “is very clear that the Council is the ultimate authority for determining the scope of a Factual Record....”<sup>79</sup>

By contrast, other commentators have asserted that the text of

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public policy standpoint. There also is a strong argument that such a limitation would represent an inappropriate limitation in the coverage of the process. The Secretariat’s recommendation concerning the Migratory Birds submission raises this issue, and there have been several criticisms of the Resolutions on the ground that they inappropriately narrow the scope of the process. *See, e.g.,* ENVTL. L. INST., *supra* note 6, at v (noting that:

By defining the scope of the Secretariat’s investigations in each of the four factual records examined, the Council jeopardized the ability of those 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);

Environmental Policy Alert, EPA Backs Narrow NAFTA Inquiry to Resolve Environmental Dispute (Oct. 3, 2001), at <http://www.InsideEPA.com>; Environmental Policy Alert, Parties Vote to Limit NAFTA Environmental Citizens’ Suit Process (Nov. 28, 2001), available at <http://www.InsideEPA.com>. Similarly, ELI suggests that the Council’s Resolutions “appear to require submitters to allege specific violations in order to support the development of a factual record,” and ELI notes that this is likely to be “burdensome” to submitters. ENVTL. L. INST., *supra* note 6, at v, 13 (noting that narrowing the scope of the factual record will require submitters to “detail every specific violation to be included in the Secretariat’s investigation”). A third concern is that the Resolutions are less transparent than they should be because of the limited Council explanation of why it rejected the Secretariat’s recommendations that broad-based factual records be developed, and instead opted for narrowly-focused factual records. *See supra* note 50. Fourth, the Council’s decision to direct the Secretariat to prepare and share work plans for the factual records, and to allow comment on them, also raises questions about the appropriate allocation of responsibility to administer the factual record process. ENVTL. L. INST., *supra* note 6, at v.

<sup>77</sup> ENVTL. L. INST., *supra* note 6, at 15, n. 120.

<sup>78</sup> Article 10(1)(c) and (d) authorizes the Council to “oversee the Secretariat” and to “address questions and differences that may arise between the Parties regarding the interpretation of [the] Agreement.”

<sup>79</sup> ENVTL. L. INST., *supra* note 6, at 15, n. 120.

the NAAEC evinces an intent on the part of the Parties only to reserve certain powers to administer the citizen submissions process and an intent to assign certain powers to citizens and to the Secretariat. These commentators raise the possibility that the Council's actions in the form of the four Resolutions may be, or are, beyond its authority under the NAAEC. For example, in its 2003 study, ELI concluded that the Council's narrowing of the scope of factual records "appears to violate the spirit and purpose of the Agreement."<sup>80</sup> ELI continues that "[t]he Council's resolutions, in interfering with the Secretariat's fact-finding process by deciding where to shine the spotlight, undermine the independence of the Secretariat and the ability of the process to enhance transparent and accountable environmental governance practices."<sup>81</sup> Attorneys for various submitters have reached the same conclusion. Chris Wold, for example, one of the lawyers for the U.S. submitters in the *Migratory Birds* submission,<sup>82</sup> has argued that the Council Resolutions "den[y] the Secretariat its proper role established by the CEC."<sup>83</sup> Randy Christensen, one of the lead attorneys for the Sierra Legal Defence Fund (SLDF), similarly has stated that the Resolutions "contradict the spirit and intent of the NAAEC."<sup>84</sup> These observers of and participants in the process argue that the Parties intended to give the Secretariat a significant degree of independence and to delegate to it authority for certain decisions, that the Parties have given submitters certain powers as well,<sup>85</sup> and that the Resolutions inappropriately

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<sup>80</sup> *Id.* at 14.

<sup>81</sup> *Id.* at 16.

<sup>82</sup> ALLIANCE FOR THE WORLD ROCKIES ET AL., *supra* note 54, at 11-12 (identifying Chris Wold as one of the attorneys and law clerks who prepared the submission).

<sup>83</sup> Wold et al., *supra* note 18, at 426.

<sup>84</sup> Letter from Randy Christensen & Jerry DeMarco, *supra* note 75, at 3. SLDF's lawyers have served as legal counsel for submitters in at least five submissions to date: *BC Hydro*, *BC Mining*, *BC Logging*, *Pulp and Paper*, and *Ontario Logging*. *Id.* at 1. As noted above, two of the four November 2001 Council Resolutions (*BC Mining* and *BC Logging*) addressed submissions for which SLDF served as legal counsel.

<sup>85</sup> *See Id.* ("[T]he Secretariat must . . . have . . . the independence to exercise its best professional judgment with respect to Submissions, the adequacy of Party responses, recommendations to Council and development of factual records") (citing JPAC report); TEN-YEAR REV. AND ASSESSMENT COMM'N, *supra* note 3, at 45 (noting that "[t]he NAAEC gives the Secretariat a central role to play in the administration of the process"). Wold et al., *supra* note 18, at 426 ("The NAAEC . . . grant[s] the Council and

encroach on the roles the NAAEC cedes to these other key participants in the citizen submissions process.<sup>86</sup>

Without purporting to resolve this issue definitively, it seems indisputable that, at this juncture at least, three years after the issuance of the Resolutions, there is considerable skepticism, particularly in the NGO community, concerning the legality and legitimacy of the Council's Resolutions. The final Part of this Article considers some of the possible ramifications of this skepticism.

#### IV. Observations and Conclusions

Conceptually, the structure of the citizen submissions process

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Secretariat distinct roles and clear boundaries.”).

<sup>86</sup> ENVTL. L. INST., *supra* note 6, at 15-16. This author previously raised the question of whether the Council's actions were entirely within its authority under the NAAEC. See Markell, *supra* note 51, at 208-85. Given the space limitations of that chapter, the author's purpose was to highlight that the Resolutions raised this issue, which the author viewed to be an important one for the future of the citizen submissions process, and to leave a comprehensive analysis or definitive conclusion for a different forum. See *id.* at 285. The author did, however, suggest that the NAAEC does not allow the Council to act *sua sponte* to direct the Secretariat to develop a factual record about an enforcement policy or practice of the Council's own choosing:

The limited conclusion offered here is that the Council lacks the authority under the NAAEC to act *sua sponte* to direct the Secretariat to develop a factual record. The Council does not have the authority, for example, to direct the Secretariat to prepare a factual record on a particular alleged enforcement failure, such as an asserted failure to effectively enforce the U.S. Clean Water Act against a particular facility regulated under that law, unless a submitter first raises this issue as one warranting such treatment and the Secretariat concurs in a recommendation to the Council. Instead, the Council only is empowered to order the Secretariat to develop a factual record concerning particular enforcement practices and/or policies if a submitter identifies them in a submission and if the Secretariat determines that development of a factual record concerning them is appropriate and makes a recommendation to that effect to the Council.

In short, . . . [it appears that, under the NAAEC], while the Council retains the authority to veto shining the spotlight in particular directions, the Council cannot decide on its own where the spotlight should shine. For that affirmative decision, the Council must follow the lead of civil society, as reflected in the submissions, and the lead of the independent Secretariat created to administer the process in a neutral way. A Council failure to respect this limit in the Agreement on its authority risks serious intrusion into the independent roles that the Agreement creates for the Secretariat and submitters.

*Id.* at 284.

makes it virtually inevitable that a key flashpoint during “regime implementation” would involve the boundaries of authority of the different actors.<sup>87</sup> In creating the process, the Parties agreed to serve as the targets of this new international spotlight. At the same time, they reserved considerable authority over its operation.<sup>88</sup> It seems predictable that the evolution of the spotlight would be characterized by Party efforts to narrow its scope and by NGO efforts to extend its reach.

The CEC’s Ten-Year Review and Assessment Committee (TRAC) noted that the CEC’s “unique” effort among intergovernmental organizations to combine the Secretariat’s “traditional service role to the governments that created it” with “responsibilities where the Secretariat has certain autonomy... “ had led a former CEC executive director to conclude that “the independent authority on these issues granted by the Agreement to the Secretariat creates a significant natural tension between the Secretariat and the Parties.”<sup>89</sup> Professor Kal Raustiala similarly has suggested that the existence of such tension should not be surprising. Countries do not often embrace “fire alarm” review mechanisms such as the CEC citizen submissions process, in which they invest authority to review performance in actors they cannot control, in part because of concerns about the implications for state sovereignty as well as the prospect for embarrassment.<sup>90</sup>

Professor Raustiala also explains that in the particular context of the NAAEC, the Parties did not embrace a “fire alarm” approach because of an abiding desire for an international mechanism intended to invigorate domestic enforcement by

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<sup>87</sup> NGO participation in international regimes has received considerable attention in recent years, as opportunities for NGO involvement have increased. See e.g., Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL. L. REV. 537 (1997).

<sup>88</sup> See *supra* notes 80-86 and accompanying text.

<sup>89</sup> TEN-YEAR REV. AND ASSESSMENT COMM’N, *supra* note 3, at 32.

<sup>90</sup> See Raustiala, *supra* note 19, at 259. Fire alarms permit private actors to trigger an investigation much as a private individual can pull a fire alarm to trigger a response by the appropriate fire officials. *Id.* at 258. By contrast, a “police patrol” involves investigations by government officials of situations that might warrant government response. *Id.* See Raustiala, *supra* note 9, at 393-94; Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarm*, 28 AM. J. POL. SCI. 165 (1984).



spotlighting ineffectual domestic enforcement practices or policies or due to any sense of conviction that such a strategy would be especially effective in encouraging the Parties to enforce their environmental laws effectively.<sup>91</sup> Instead, they were forced into it as the price for treaty enactment because of the power of domestic environmental NGOs, particularly in the United States.<sup>92</sup> Thus, the inclusion of the citizen submissions process does not necessarily reflect a significant investment by the Parties in the process or a significant Party commitment to its successful operation.<sup>93</sup>

The Resolutions are by no means the first Council forays into territory that some observers claim is ceded in the Agreement to other actors. Virtually since the inception of the citizen submissions process there has been considerable criticism that the Council has overplayed its role by limiting the independence and authority of the Secretariat, thereby weakening the process. The four CEC-sponsored reviews of the citizen submissions process have raised concerns about the Parties' performances.<sup>94</sup> The JPAC

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<sup>91</sup> Raustiala, *supra* note 19, at 260, 262.

<sup>92</sup> *Id.* at 262.

<sup>93</sup> See *supra* note 46. The Council frequently has expressed its support for the process. See e.g., Resolution 04-03 (noting that the Council is "supportive of the [citizen submissions] process. . . .")

<sup>94</sup> Two reviews covered the entire CEC operations. One was commissioned concerning the first four years of the CEC's operation, "Four Year Review," Independent Review Committee, FOUR-YEAR REV. OF THE N. AM. AGREEMENT ON ENVTL. COOPERATION (1998). The NAAEC had directed that the Parties undertake such a review. North American Agreement on Environmental Cooperation, *supra* note 1, art. 10(1)(b). In 2003, the CEC Council created a Ten-Year Review and Assessment Committee on the Commission for Environmental Cooperation, which submitted its report in June 2004. TEN-YEAR REV. AND ASSESSMENT COMM'N, *supra* note 3. The TRAC also concluded that the Secretariat had "contributed to the development of an adversarial relationship between the Parties and the Secretariat" through its administration of the process, "particularly at the beginning. . . ." *Id.* at 45. But the TRAC, curiously, does not cite to any sources to support this conclusion. Instead, its only cite after this statement is to a September 2003 letter to JPAC from the Forest Products Association of Canada which argues for limiting the scope of factual records. *Id.* at 45 n.47. JPAC also has undertaken two reviews of the citizen submissions process. It published the results of the first, which it undertook at the request of the Council, in 2001. Joint Public Advisory Committee, *Citizen Submissions Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (2001); Matters Related to Articles 14 and 15 of the Agreement, C/00-00/RES/09/Rev.2, June 13, 2000, para. 5(a), available at [http://www.cec.org/files/pdf/COUNCIL/00-09e\\_EN.pdf](http://www.cec.org/files/pdf/COUNCIL/00-09e_EN.pdf); TEN-

also has expressed concerns about the Council's conduct in a series of "Advices" it has issued to the Secretariat over the years.<sup>95</sup> Other advisory bodies, such as the National Advisory Committees (NACs)<sup>96</sup> and the Governmental Advisory Committee (GAC),<sup>97</sup> which the Parties have established under the Agreement to advise them on the implementation of the NAAEC, have also made known their discomfort with the Parties' actions in performing their responsibilities under the process.<sup>98</sup> Civil society,<sup>99</sup> including

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YEAR REV. AND ASSESSMENT COMM'N, *supra* note 3, at 44. JPAC commissioned the Environmental Law Institute to prepare a second such report in 2003. ENVTL. L. INST., ISSUES RELATING TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (2003). For more background on the genesis of this report, and on the process ELI followed in developing it, see ENVTL. L. INST., *supra* note 6, at v.1.

<sup>95</sup> See, e.g., JPAC, Advice to Council no. 99-01, Mar. 25, 1999. The JPAC has expressed frustration with the Council's performance of its responsibilities in connection with the citizen submissions process on numerous occasions, raising a variety of concerns. See, e.g., Regina Barba, JPAC Chair, to the Council Members, Mar. 24, 2000; Regina Barba, JPAC Chair, to the Council Members, May 2, 2000 (indicating that the JPAC is communicating with the Council, "once again," about "our frustration and growing unease with how matters relating to Articles 14 & 15 are being managed"). More recent JPAC Advices evince this frustration concerning the Council's actions relating to the specific issues discussed here, among others. Advice 01-09, for example, requested that the Council authorize a public review concerning the "matter of limiting the scope of factual records," among other issues. JPAC, Advice to Council no. 01-09, Nov. 30, 2001. Additionally, Advice 03-05 "strongly recommends that Council refrain in the future from limiting the scope of factual records presented for decision by Secretariat." JPAC, Advice to Council no. 03-05, Dec. 17, 2003, *available at* [http://www.cec.org/files/pdf/JPAC/Advice03-05\\_EN.pdf](http://www.cec.org/files/pdf/JPAC/Advice03-05_EN.pdf). See generally John D. Wirth, *supra* note 22, at 199. The TRAC, in describing the JPAC's role, noted that "some members have . . . interpreted their role to include 'keeping Council honest' and 'helping maintain Secretariat's independence.'" TEN-YEAR REV. AND ASSESSMENT COMM'N, *supra* note 3, at 34.

<sup>96</sup> Article 17 authorizes each Party to create such a body. North American Assessment on Environmental Cooperation, *supra* note 1, art. 17.

<sup>97</sup> Article 18 authorizes each Party to create such a body. *Id.* art. 18. As the TRAC reports, only the United States has created a GAC. TEN-YEAR REV. AND ASSESSMENT COMM'N, *supra* note 3, at 36. Canada has created an "Intergovernmental Committee," comprised of the federal Environment Minister and the Ministers of the three Canadian provinces that have signed on to the NAAEC (Alberta, Manitoba, and Quebec). *Id.* at 37.

<sup>98</sup> See, e.g., TEN-YEAR REV. AND ASSESSMENT COMM'N, *supra* note 3, at 36.; see also U.S. Governmental Advisory Committee Letter to Christine Todd Whitman (Oct. 19, 2001) (expressing concern that allowing Parties to define the scope of the factual record will eviscerate the Secretariat's independence and the credibility of the

but not limited to the submitter community, also has weighed in with considerable criticism of the countries' performance of their respective roles under the citizen submissions process. *Business Week* reported in May 2000 that during that spring, more than 100 NGOs from all three countries charged that the governments were "working together to undermine" the process.<sup>100</sup> A June 10, 2000 *Washington Post* editorial entitled "How to Wreck Trade" characterized the submission process as "sound[ing] rather government-controlled" and continued by criticizing the countries for "pushing ideas that might strengthen that bias by allowing governments to intervene in the experts' fact-finding work."<sup>101</sup>

Concerns about the implementation of the citizen submissions process continue to exist.<sup>102</sup> In its 2004 Report, the TRAC noted that "[t]oday, the relationships among the Parties, the Secretariat and the JPAC are often strained."<sup>103</sup> The TRAC ascribes some of this strain to the Council's role in the citizen submissions process, noting that many have "expressed concern about the Council exercising [sic] too much discretion on the administration of Articles 14/15 where the Secretariat has specific responsibilities under the NAAEC.... This issue has been an important source of friction among the Parties, the Secretariat and JPAC and has

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submission process); Letter from U.S. NAC to the U.S. Representative to the CEC (May 15, 2000); NAC Advice no. 2000-2 (expressing concern about, *inter alia*, Council overreaching); Letter from U.S. NAC to U.S. Representatives to the CEC (Apr. 29, 2002) (characterizing recent actions by the Council as "totally unacceptable and contrary to both the spirit and the letter [of the NAAEC]"), *available at* [http://www.epa.gov/ocempage/nac/pdf/2002\\_0429\\_nac\\_cec.pdf](http://www.epa.gov/ocempage/nac/pdf/2002_0429_nac_cec.pdf); Letter from U.S. NAC to U.S. Representatives to the CEC (Oct. 29, 2003) ("The Council should . . . refrain from overruling the Secretariat's recommendations to ensure that the process remains impartial"), *available at* [http://www.epa.gov/ocempage/nac/nac\\_2003\\_10\\_advisoryletter.htm](http://www.epa.gov/ocempage/nac/nac_2003_10_advisoryletter.htm). The TRAC suggests that the NACs "have forced their respective governments to consider issues that they otherwise might not have (e.g., related to Articles 14 and 15)."

<sup>99</sup> See *supra* note 12, for a discussion of the definition of "civil society."

<sup>100</sup> Elizabeth Malkin, *Taking the Green out of NAFTA*, BUS.W., May 29, 2000.

<sup>101</sup> Editorial, *How to Wreck Trade*, WASH. POST, June 10, 2000.

<sup>102</sup> See e.g., Tollefson, *supra* note 47, at 180-81; Wold et al., *supra* note 18.

<sup>103</sup> TEN-YEAR REV. AND ASSESSMENT COMM'N, *supra* note 3, at 30. The TRAC notes that "the Secretariat complains that the Parties are micromanaging its activities and inappropriately circumscribing its autonomy (e.g., on Articles 14 and 15)." *Id.*

colored their relationships.”<sup>104</sup>

It appears that the Council’s November 2001 Resolutions have contributed significantly to this unease and frustration.<sup>105</sup> For

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<sup>104</sup> *Id.* at 32, 45 (indicating that the Parties “believe that the Secretariat has at times both extended the process beyond what had been contemplated . . . and overstepped its authority. . .”). For the most part, the Secretariat has received positive marks. *Id.* (noting that “Submitters and outside observers by and large believe that the Secretariat has performed its obligations well”); cf. Jay Tutchton, *The Citizen Petition Process Under NAFTA’s Environmental Side Agreement: It’s Easy to Use, But Does It Work?*, 26 ENVTL. L. REP. 1003 (1996).

An interesting observation concerning the process is contained in a 2001 CSIS/Yale report:

The issue of citizens’ complaints is presented as both a strength and a weakness for the CEC. It is a weakness only in the sense that the ample opportunity that the NAAEC provides for citizens to file environmental complaints against their governments has proved so contentious in Mexico, and to some extent in Canada, that at times it has stalled progress in other areas of environmental policymaking for North America.

In the early years of NAFTA, the Mexican government lacked experience in making information on government activities available to the public and the country had only a short track record of involving the public in government decision-making. In fact, the first-ever public hearings by a Mexican federal environmental entity occurred only in summer 1991, when the Mexican environmental agency of that period held hearings jointly with the U.S. Environmental Protection Agency on a planned environmental improvement program for the U.S.-Mexican border area.

Many government officials in all three countries agree that this lack of experience has created political problems for the CEC’s secretariat, making it difficult to implement the transparency and citizens’ participation components of NAFTA’s environmental side agreement, particularly the provisions of Articles 14 and 15 of the NAAEC.

JAN GILBREATH, ENVIRONMENT AND TRADE: PREDICTING A COURSE FOR THE WESTERN HEMISPHERE USING THE NORTH AMERICAN EXPERIENCE 37-38 (June 2001).

<sup>105</sup> One question, for example, involves which entity decides whether information provided by the submitter is “sufficient” to pass muster under the process. North American Agreement on Environmental Cooperation, *supra* note 1, art. 14 (1)(c); see e.g., TEN-YEAR REV. AND ASSESSMENT COMM’N, *supra* note 3, at 45 (noting that “[w]hat burden of proof a submitter must meet before the Council agrees to the preparation of a factual record remains an issue for several observers”). Part of this issue involves the respective roles of the Secretariat and Council in deciding whether the submitter has met its burden. The Ten-Year Review found that “[t]he Parties need to clarify the roles and responsibilities of the CEC’s three main bodies . . . as they relate to the cooperative agenda and the citizens’ submissions process. . . .” *Id.* at x. The charge of the TRAC was to “undertake a retrospective of the implementation of the NAAEC over the past ten years and . . . provide recommendations to the Council for charting a path for the CEC

example, lawyers with SLDF, which has represented submitters for several submissions, have stated that “the actions of the Council... have dramatically reduced the effectiveness and utility of the process.”<sup>106</sup> In a letter to the Canadian NAC, the SLDF lawyers characterized the Resolutions as a “clear infringement on the independence of the Secretariat” and suggested that they “threaten to strip the citizen submission process of its integrity, utility and legitimacy.”<sup>107</sup> Similarly, the submitter for the U.S. submission that was the subject of one of the Council’s November 2001 Resolutions, the Center for International Environmental Law (CIEL), sent a letter to JPAC that characterized the narrowing of the factual records as an “attempt to limit the utility of the citizen submission process.”<sup>108</sup>

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over the next decade.” *Id.* at 1. The TRAC is the CEC’s second official review. *Id.* at 2.

<sup>106</sup> Letter from Randy Christensen & Jerry DeMarco, *supra* note 75.

<sup>107</sup> See also Environmental Policy Alert, EPA Backs Narrow NAFTA Inquiry to Resolve Environmental Dispute, *supra* note 76.

<sup>108</sup> Letter from CIEL to JPAC, U.S. Position on Migratory Bird Submission (Oct. 17, 2001), available at [http://www.ciel.org/Announce/CEC\\_JPAC\\_Letter.html](http://www.ciel.org/Announce/CEC_JPAC_Letter.html). The TRAC summarizes other submitter criticisms of the Council as follows: “[S]ubmitters have also criticized the Parties for not providing information requested by the Secretariat, for delaying the process, for pre-empting CEC review by engaging in desultory enforcement actions and for not responding to submitters’ letters.” *Id.* TEN-YEAR REV. AND ASSESSMENT COMM’N, *supra* note 3, at 46. ELI reached the same conclusion. ENVTL. L. INST., *supra* note 6, at v.

A related question concerns the effect of Council actions on citizens’ interest in the process. For example, on the “scope” issue that was an important focus of concern with respect to the Council’s actions regarding the four Resolutions discussed previously, the CEC’s special legal advisors noted that Council limiting actions of this sort had the potential to undermine the process and thereby diminish citizen interest in it:

[I]f the scope of factual records continues to be limited to specific alleged failures to enforce- e.g., a destroyed nest here or a damaged stream bed there- the result is likely to seriously limit the effectiveness of the Article 14-15 process. Moreover, such limitations of factual record scope has the potential to permanently undermine the integrity of the process to the point where it is of limited interest to potential submitters. 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.

TEN-YEAR REV. AND ASSESSMENT COMM’N, *supra* note 3, at 45. TRAC notes that:

Some observers have argued . . . that the actions of the Council have eroded the credibility of the process and are directly responsible for the fact that no new submissions have been brought against the United States Government in the last

The experience to date, in short, suggests that the tension that might have been anticipated for the process has manifested itself as the process has been implemented and that the Council's November 2001 Resolutions have added considerably to the level of tension and have significantly raised the level of NGO apprehension about the utility of, and prospects for, the process.<sup>109</sup>

What are the possible consequences of the Resolutions for the vigor and viability of the citizen submissions process? The Resolutions represent another chapter in this ongoing tug and pull,<sup>110</sup> but there is not yet enough information to forecast the conclusion to the citizen submission story with any great degree of confidence. It is not yet clear whether the Resolutions signal an invigorated Council initiative to circumscribe the citizen spotlight,<sup>111</sup> or whether they more accurately should be

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four years and that the large environmental NGOs are not using the process.

*Id.* at 46. Even the TRAC itself felt constrained to conclude that "the Council's constraining actions have upset the balance set out in the NAAEC and undermined the Secretariat's roles in ways that could compromise the process's effectiveness and credibility." *Id.* Further, "[t]he public sees the Parties as neither supporting the citizens' submission process nor the values underlying it." *Id.* ELI similarly concluded that the Resolutions may reduce the use of the process for enforcement concerns involving the United States, and to some extent Canada, and instead "tilt the distribution overwhelmingly towards submissions against Mexico," because the former two countries have much better domestic processes for handling case-specific enforcement failures. ENVTL. L. INST., *supra* note 6, at 12. ELI's prognosis: "As a result, the large majority of factual records will be about site-specific failures to enforce in Mexico, thus defeating the tri-national nature of the Agreement." *Id.*

<sup>109</sup> TEN-YEAR REV. AND ASSESSMENT COMM'N, *supra* note 3, at 40 (noting that, among other things, the CEC today "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. . . . U.S. NGO dissatisfaction with what they see as the Council weakening the citizens' submission process . . . has contributed to the detachment"). TRAC found that, in contrast, "Canadian and Mexican NGOs . . . have valued the increased transparency that the citizens' submissions process has brought to specific issues in each of these countries." TEN-YEAR REV. AND ASSESSMENT COMM'N, *supra* note 3, at 40. It is not clear why the TRAC failed to mention Canadian NGO dissatisfaction with the Council's actions under the Article 14/15 process.

<sup>110</sup> ENVTL. L. INST., *supra* note 6, at v, 13 (noting that "[m]any commentators expressed the view that, by intervening in the fact-finding process, the Council is undermining the independence of the Secretariat and the credibility of the process").

<sup>111</sup> It is, of course, possible that Council initiatives and predilections will be influenced by domestic policy developments. Jonathan Graubart suggests that the current U.S. administration may be less supportive of the process than previous administrations, particularly of an independent Secretariat. Jonathan Graubart, *Giving*

characterized as opportunistic actions of the Council that respond to a flurry of Secretariat Recommendations. Gauging the extent and efficacy of civil society's response to the Council's actions similarly must await future developments.<sup>112</sup> Since the inception of the process, NGOs have given considerable support to it as a highly innovative feature of international law that has the potential to enhance domestic governance and accountability.<sup>113</sup> In recent years, several NGO participants, among others, have begun to offer anecdotal evidence that the process is producing dividends by triggering improvements in domestic environmental governance.<sup>114</sup> Thus, there appears to be some level of NGO

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*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, 460 (2001-2002). This could be significant, since the United States long has been considered the primary defender of the process among the parties. See Wirth, *supra* note 22, at 199. On the other hand, some commentators suggest that the current Mexican administration is more favorably disposed to support the process than its predecessor. Graubart, *supra* at 460.

<sup>112</sup> ELI concluded from its study that citizen confidence in the process is tied closely to the independence of the Secretariat, and that Council actions of the sort represented by the Resolutions might undermine such confidence:

Interviews with submitters, academic experts, and others have consistently revealed that the credibility of the citizens' submissions process stems from the independence of the Secretariat. There is widespread concern that allowing the Council to set the terms of the Secretariat's fact-finding process will undercut this independence. [I]t is . . . as effective as "the fox guarding the chicken coop."

ENVTL. L. INST., *supra* note 6, at 13.

On the other hand, see Markell, *supra* note 8 (noting that a group of submitters has filed a similarly broad-based submission concerning mercury emissions from coal-fired power plants in the United States). Further, the Council has authorized preparation of a broad Factual Record in connection with the *Ontario Logging* submission. See *supra* Part III.

<sup>113</sup> Wold et al., *supra* note 18, at 416. There also have been claims that the citizen submissions process was not likely to have much effect because of its lack of sanctioning authority, among other perceived weaknesses in the mechanism, and there have been criticisms of its performance and impacts. See, e.g., JOHNSON & BEAULIEU, *supra* note 2, at 34; Kibel, *supra* note 47, at 474-77; John Kirton, *The Commission for Environmental Cooperation and Canada-U.S. Environmental Governance in the NAFTA Era*, 27 AM. REV. CANADIAN STUD. 459 (1997); Tutchton, *supra* note 104, at 1003.

<sup>114</sup> A real need for systematic research in this area exists, and the JPAC, among others, has called for incorporating follow-up as a part of the citizen submissions process. See *Lessons Learned: Citizen Submissions under Articles 14 and 15 of the North American Agreement on Environmental Cooperation 16 (2001)*; Markell, *supra* note 17, at 545. Providing a positive gloss is a June 2001 study, GILBREATH, *supra* note

investment in and commitment to the process, which makes it more likely that NGOs will seek through various strategies to reform the process rather than rush to abandon it as a result of the Council Resolutions.<sup>115</sup> JPAC's numerous Advices to the Council

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104, at 5, 12, 14, 34. At an anecdotal level, evidence is mounting that the process is adding value in a variety of ways. The process appears to be yielding considerable information on domestic enforcement practices that might not be developed otherwise. Further, even for information that already exists, the process is serving as a mechanism that facilitates organizing this information in a way that is more responsive to citizens' interests. In addition, there is some evidence that the process has been at least a partial contributor to more "environmentally-protective" behavior on the part of governments. See, e.g., ENVTL. L. INST., *supra* note 6, at 11 (noting that "in spite of the narrowed scope, the factual records examined in this report have proved valuable to a certain extent" by, *inter alia*, (1) likely prompting enforcement efforts "in the particular cases investigated;" (2) "spotlight[ing] problems and generat[ing] negative publicity in the context of specific cases, sometimes leading the government to address the broader enforcement concerns giving rise to the specific cases;" (3) "generat[ing] information about government policies raised in the context of a specific case that may be useful to submitters in assessing or bringing other cases;" and (4) "put[ting] the public on notice of the broader enforcement problems alleged by the submitters"). ENVIRONMENTAL MANAGEMENT ON NORTH AMERICA'S BORDERS 252 (Richard Kiy & John D. Wirth eds., 1998); Kibel, *supra* note 47, at 469-70; Paul Kibel, *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission*, 32 ENVTL. L. REP. 10769, 10774, 10775 (2002); Geoff Garver, *Factual Record Helped in Cozumel Pier Case, Says Submitter*, TRIO Newsletter of the NAAEC (Summer 2001), available at <http://www.cec.org/trio/stories/index.cfm?varlan=english&ed=4&ID=50>; Jamie Bowman, *Citizen Submission Process Proves Valuable in BC Hydro Case*, TRIO Newsletter of the NAAEC (Fall 2001), available at <http://www.cec.org/trio/stories/index.cfm?ed=5&ID=70&varlan=english>.

<sup>115</sup> As an example, any number of possible mechanisms potentially could be developed for addressing disagreements between the Council and the Secretariat about the appropriate scope of factual records or ambiguities in Secretariat Recommendations. One option is that the Council simply must approve or reject a Secretariat recommendation. See ENVTL. L. INST., *supra* note 6, at 14 (suggesting this as a possible option). A second would be for the Council to "remand" a recommendation for further explanation if the Council is not persuaded that a factual record is warranted, at least on the terms provided in the recommendation. Guideline 10.1 already provides authority for the Council to make such a request. Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, Council Res. 99-06, at No. 10.1. For either approach, one issue involves the appropriate standard for the Council's review of the Secretariat's recommendations. See, e.g., ENVTL. L. INST., *supra* note 6, at 15, n.117. (indicating that one commentator recommends the Council use an "arbitrary and capricious" standard, while another suggests a "patently unreasonable" standard). Finally, the Secretariat unilaterally could seek to address some of the issues discussed in the text by proactively specifying in considerable detail in its recommendations the types of factual records it believes are



expressing dissatisfaction with the Council's actions,<sup>116</sup> and submitters' continued submission of comments concerning the process,<sup>117</sup> suggest at least some level of ongoing engagement.<sup>118</sup> The post-November 2001 filing of several "pattern-based" submissions, including one involving the United States, is additional evidence of at least some level of continued "buy-in" by the NGO community.

Assuming civil society is sufficiently invested to challenge the Council in situations in which it potentially reduces the value of the citizen submissions process through actions such as the November 2001 Resolutions, the "efficacy question" remains, notably the extent to which civil society will have sufficient leverage to influence the Parties. As Professor Raustiala has pointed out, NGO leverage likely was greater prior to the adoption of NAFTA than it is now, at the implementation stage.<sup>119</sup> Thus, an outstanding question involves the extent to which an engaged civil society has the leverage to forestall Party actions that potentially operate to curtail the citizen submissions process.<sup>120</sup>

Optimists and pessimists alike can find support in the CEC's experience for their views about the likely prospects for the citizen submissions process. On the pessimist's side, JPAC, among others, suggests the Council's actions have produced a loss of credibility for the process. JPAC has urged the Council to "re-establish public confidence" in the citizen submissions process,<sup>121</sup> including by making "every effort to ensure that the independence of the Secretariat is maintained."<sup>122</sup> There also is the dramatic lack

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warranted in connection with particular submissions, and the types that are not. Fuller treatment and consideration of such mechanisms is warranted.

<sup>116</sup> See, e.g., JPAC, Advice to Counsel, Nov. 30, 2001, *supra* note 95.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (concerning the recent filing of a submission that asserts a widespread failure to effectively enforce in the United States). See also *supra* note 112.

<sup>119</sup> See Raustiala, *supra* note 19.

<sup>120</sup> The Council's Resolution authorizing the Secretariat to develop a broad-based Factual Record for the *Ontario Logging* submission might be considered a signal for optimists. Pessimists might point to Council concerns about "sufficiency of information" as a predicate for development of Factual Records. See, e.g., Wold et al., *supra* note 18; Letter from Randy Christensen & Jerry DeMarco, *supra* note 75.

<sup>121</sup> Advice 04-03.

<sup>122</sup> Advice 04-03.

of proportion in submissions, with very few submissions involving the U.S. having been filed in recent years.<sup>123</sup> Finally, there are institutional challenges or impediments to effectiveness, such as the lack of institutionalized follow-up on the information concerning ineffectual enforcement developed as part of the CEC process.<sup>124</sup> These apparent deficiencies in regime design as well as the empirical record of implementation should give pause to analysts predisposed to sing the praises of the process.

Nevertheless, there is support in the CEC's track record for the optimist as well. Submitters have continued to use the citizen submissions process. The trend in submissions has been stable over the past several years. Further, after a several year hiatus, a new submission has been filed concerning the United States, thus suggesting at least some ongoing level of interest in exploring the possible value of the process for focusing attention on domestic enforcement practices and policies in this country. Second, while there is no institutionalized follow-up process, much of the anecdotal feedback on the process has been quite positive. Thus, many of the submitters who have used the process appear to believe that it has helped to engender important changes in government enforcement behavior. Finally, there is some evidence that the Council is somewhat responsive to citizen concerns. Since the issuance of its November 2001 Resolutions, the Council has authorized other factual records that are broad in scope. Further, in its June 3, 2004 letter to JPAC, the Council expressly "[drew] to JPAC's attention Council decisions that provide for broad reviews of enforcement activities."<sup>125</sup> The Council indicated its view that the resulting factual records "will undoubtedly provide the public and Parties with a comprehensive recounting of how enforcement policies are implemented in practice within a sector and across large geographic areas."<sup>126</sup> Even the skeptic seemingly would concede that letters of this sort reflect some degree of effort by the Parties to be responsive to the

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<sup>123</sup> See North American Commission for Environmental Cooperation, *Three Countries Working Together to Protect Our Shared Environment*, at <http://www.cec.org>.

<sup>124</sup> See *supra* note 114.

<sup>125</sup> Letter from Jose Manual Bulas Montroo, Alternate Representative for Mexico, to Ms. Donna Tingley, JPAC Chair for 2004 (June 3, 2004).

<sup>126</sup> *Id.*

concerns that civil society has raised concerning administration of the citizen submissions process.

In short, it is too early to tell whether the Resolutions represent a temporary bump in the road in the emergence of a vibrant citizen submissions process or a more significant derailment – whether NGO pressure and interest, creative approaches, and the responsive instincts of government officials will produce a convergence of views about the appropriate parameters for the process that will enable it to find a place of rough equilibrium, or whether the process will implode either because of Party discomfort or NGO frustration.<sup>127</sup> Because the process is an experiment in regional governance<sup>128</sup> and has the potential to

<sup>127</sup> The June 2004 TRAC report reflects the ongoing tension:

After ten years, the main CEC stakeholders, including the Parties, the Secretariat and the Joint Public Advisory committee (JPAC), have not been able to develop a common vision about the CEC mandate or their respective roles. These differences have led to considerable friction. The NAAEC's most innovative public participation mechanism, the citizens' submission process, has become mired in controversy.

*Id.* at 5.

The TRAC, along the same lines, notes that the citizen submissions process has “dominated” the CEC agenda, and “strained relations among the Council, JPAC, and the Secretariat. . . .” *Id.* at 43. The TRAC found that “[a]t the root of the controversy have been the strikingly different expectations that citizens and the governments have about the process.” Its “advocates” have described the process as “[a] unique and indispensable role in fostering vigorous environmental enforcement” and as the NAAEC’s “centerpiece,” while government officials have “sought to circumscribe” the process for a variety of reasons. TEN-YEAR REV. & ASSESSMENT COMM’N, *supra* note 3, at 43. The process could founder because of other concerns as well. For example, the TRAC noted that the process “has proven more burdensome” than had been “initially anticipated,” and that the process is “relatively inflexible. . . .” *Id.*

TRAC noted the importance of this issue to the future of the CEC, noting that,

[T]he heart of the CEC is its institutions – the Council of Ministers, the Secretariat and the Joint Public Advisory Committee. . . . [T]he lack of clarity as to their respective roles and accountabilities has become increasingly evident. . . . Concerted action is needed to bring greater clarity to these roles in order to ensure efficient and effective governance of the CEC.

*Id.* at 52.

<sup>128</sup> In part because of the process, which TRAC describes as an “unprecedented commitment by the three governments to account internationally for the enforcement of their environmental laws,” TRAC characterized the CEC as an “international model.” *Id.* at ix. It is not the first reviewer to do so. *See, e.g.,* Wold et al., *supra* note 18, at 416 (“Many had regarded the Citizen Submission Process as a potential model for

influence domestic policy choices, the answer to these questions holds considerable interest for those interested in environmental governance issues in North America and beyond.<sup>129</sup>

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accountability and governance for a new breed of international institutions . . . ”). (citations omitted).

<sup>129</sup> A coalition of environmental groups (the Sierra Club, the Natural Resources Defense Council, and others) has developed a document entitled *Principles for Environmentally Responsible Trade* that urges policymakers to “provide a mechanism for citizens to seek review of failures to enforce health and environmental laws.” It is available at <http://www.sierraclub.org/trade/fasttrack/letter.asp>. TRAC reports that “[a]necdotal evidence indicates that the process has helped protect environmental quality,” and it points to several examples of positive impacts of the process, though it notes that lack of mandatory follow-up to factual records means that benefits have not been documented systematically. TEN-YEAR REV. AND ASSESSMENT COMM’N, *supra* note 3, at 46.

Four of the many issues for which the CEC experience may provide insights include: (1) the extent to which Parties are inclined to be “conservative” in applying or interpreting commitments made in international agreements; (2) the extent to which international bureaucracies will be inclined to try to expand their turf over time; (3) how these tendencies, if they exist, are likely to co-exist; and (4) the extent to which NGOs should focus on “regime-building” versus implementation. For background sources on some of these issues, see, e.g., David G. Victor et al., *Introduction and Overview, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 1-2* (David G. Victor et al. eds., 1998) (noting that although “most analysts focus on . . . [treaty] formulation, negotiation, and context[,] . . . it is not legislation alone, but rather the implementation process that determines whether a commitment has any practical influence”) (citations omitted); Raustiala, *supra* note 19, at 570 (1997) (noting that the use of NGOs will vary depending on whether the treaty process is in the negotiation or implementation stage).

