

## THE ROLE OF SPOTLIGHTING PROCEDURES IN PROMOTING CITIZEN PARTICIPATION, TRANSPARENCY, AND ACCOUNTABILITY

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Theories abound as to how we should organize ourselves to deal effectively with contemporary governance challenges.<sup>1</sup> There is a great deal of interest in “new governance” and other similar approaches, which tout the benefits of increasing citizen participation and government transparency and accountability.<sup>2</sup> As one scholar colorfully puts it, today there is “nearly universal veneration of open government as a political idea,” making transparency “the sweet elixir of contemporary governance.”<sup>3</sup> President Obama’s rhetoric certainly embraces these objectives. As a candidate, Obama supported “creat[ing] a new level of

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1. For a thoughtful discussion of contemporary governance challenges and some of the theoretical literature and practical approaches that have emerged to address them, see J.B. Ruhl & James Salzman, *Massive Problems in the Administrative State: Strategies for Whittling Away*, 98 CAL. L. REV. 59 (2010).

2. See Neil Gunningham, *The New Collaborative Environmental Governance: The Localization of Regulation*, 36 J.L.S. 145, 146, 150 (2009) (U.K.) (suggesting that “the term [“new governance”] is defined more by what it is not, than by what it is,” but noting nonetheless that common features include a commitment to transparency, a greater role for nonstate actors, and a “soft-law” orientation).

3. Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 GOVERNANCE 529, 530 (2009) (describing contemporary enthusiasm about citizen participation and open and accountable government). *But see* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 1–2, 7 (2002) (arguing based on their empirical results that citizens do not want to participate actively in governance in many circumstances and that, instead, what is most important to them is that political decision makers be neutral).

transparency, accountability and participation for America's citizens."<sup>4</sup> On his first day in office, he signed a series of memos extolling and embracing the themes of citizen participation and government transparency and accountability.<sup>5</sup>

This Article examines an innovative governance mechanism—the North American Commission for Environmental Cooperation (“CEC”) citizen submissions process—which incorporates “new governance”-type features that many theorists believe will assist in the effort to “break the logjam” in environmental policy and implementation.<sup>6</sup> The process expands opportunities for public involvement in governance by creating a new mechanism that citizens may use to raise concerns about the effectiveness of government enforcement policies and practices. It operates as a “soft-law,” “spotlighting” instrument that is intended to enhance government accountability and transparency. Thus, lessons gleaned from studying this process can potentially inform discussions about central features of governance, including the appropriate roles for different actors and instrument choice.<sup>7</sup> In short, the successes and

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4. Coglianese, *supra* note 3, at 553.

5. See, e.g., Memorandum on Freedom of Information Act, Jan. 21, 2009, 74 Fed. Reg. 4683 (Jan. 26, 2009). Additionally, the White House issued an “Open Government Directive” to promote government transparency, participation, and collaboration. See Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to Heads of Executive Dep'ts & Agencies (Dec. 8, 2009), available at [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf). The Environmental Protection Agency (“EPA”) has echoed the President's call for greater transparency and citizen participation and taken several steps to work toward these goals. See, e.g., Memorandum from Lisa Jackson, Administrator, Env'tl. Prot. Agency, to EPA Employees (Jan. 23, 2009), available at <http://www.epa.gov/Administrator/memotoemployees.html> [hereinafter EPA Memo] (discussing transparency in the EPA's operations).

6. See Symposium, *Breaking the Logjam: Environmental Reform for the New Congress and Administration*, 17 N.Y.U. ENVTL. L.J. 1 (2008) (identifying guiding principles for environmental-law reform, including the adoption of new information tools to assist in the regulatory scheme). The United States, Canada, and Mexico established the citizen submissions process in the North American Agreement on Environmental Cooperation (“NAAEC”). North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., arts. 14–15, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC]. This agreement is commonly referred to as the “environmental side agreement” to the North American Free Trade Agreement (“NAFTA”). See, e.g., Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 203 (2008). NAFTA, the NAAEC, and a labor side agreement, the North American Agreement on Labor Cooperation (“NAALC”), went into effect simultaneously in the early 1990s. See NAAEC, *supra*; North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1499; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 605 (1993).

7. For recent commentary addressing the appropriate roles of different actors and instrument choice in regulatory schemes, see David E. Adelman & Kristen H. Engel, *Adaptive Federalism: The Case Against Reallocating*

challenges<sup>8</sup> of the process should be of special interest to those interested in governance mechanisms intended to advance government transparency and accountability and opportunities for citizen involvement.<sup>9</sup>

The CEC process also deserves careful study because, as a practical matter, the procedure “continues to be a model” for U.S. regional trade agreements.<sup>10</sup> Thus, insights from the experience with the procedure promise to contribute to “on the ground” formulation of policy and process design.

In addition, some sophisticated observers have characterized the process as “very popular” with environmental advocates and citizen groups.<sup>11</sup> Study of the process therefore would seem particularly likely to yield important insights about what works, in addition to lessons about ways to improve.

As a former Director of the CEC citizen submissions process,<sup>12</sup> I would be pleased to be able to laud the process as an innovative experiment to enhance citizen participation, “reasoned transparency,” and accountability in the operation of government, especially since many observers have hailed the process as the most important feature of the CEC and as a model for other agreements.<sup>13</sup>

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*Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008) (discussing “adaptive federalism”), and Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 432 (2004) (focusing on “new governance”).

8. See Coglianese, *supra* note 3, at 536 (recognizing that “too much” transparency could detract from an official’s ability to make good decisions and diminish the likelihood that private actors would divulge useful information to government officials).

9. See *id.* at 537 (contrasting “reasoned transparency” in which “government officials offer explicit explanations for their actions,” with “fishbowl transparency,” which seeks to “expand the release of information that can document how government officials actually behave”). Professor Coglianese touts the promise of “reasoned transparency” approaches for their potential to improve governance by encouraging officials to explain their actions. *Id.*

10. See Sanford E. Gaines, *Environmental Protection in Regional Trade Agreements: Realizing Potential*, 28 ST. LOUIS U. PUB. L. REV. 253, 268 (2008); see also Comm’n for Env’tl. Cooperation [CEC], *Ten-Year Review & Assessment Comm.*, *Ten Years of North American Environmental Cooperation*, at 4 (June 15, 2004), available at [http://www.cec.org/files/PDF/ABOUTUS/TRAC-Report2004\\_en.pdf](http://www.cec.org/files/PDF/ABOUTUS/TRAC-Report2004_en.pdf) [hereinafter CEC, *Ten Years*] (noting that the citizen submissions provisions, among others, make the CEC an “international model for providing new avenues of public participation for civil society”).

11. See Gaines, *supra* note 10, at 269.

12. I served in that capacity from 1998–2000. The CEC Secretariat received citizen submissions well before 1998, with the first filed in 1995, but the Secretariat first created a discrete unit to focus on these submissions and appointed a Director to head that unit in 1998.

13. See CEC, *Ten Years*, *supra* note 10, at 43 (citing various advocates highlighting the importance of the citizen submissions process); Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT’L & COMP. L. REV. 389, 395 (2004) (arguing that the submissions process was the NAAEC’s

But while I think the process has produced some successes,<sup>14</sup> I am not so sanguine about the process—particularly its track record (or reception) to date; its prospects for the future (unless adjustments are made of the type I discuss below); or its value as a model for other citizen-driven “reasoned transparency” and accountability processes.<sup>15</sup> In part, this Article is intended as a cautionary note about challenges in creating new governance structures that empower citizens and make government more transparent and accountable. I also offer specific “fixes” to strengthen the CEC process in the short term as well as a conceptual framework for reconsidering the appropriate focus and structure of citizen submissions processes to enhance their effectiveness. My hope is that this relatively in-depth review of the CEC experience, in tandem with my specific fixes and proposed conceptual framework, will advance discourse about central issues concerning the role for citizens in government, government transparency, and government accountability.

Part I provides a brief overview of the CEC and its governing Agreement, the North American Agreement on Environmental Cooperation (“NAAEC”).<sup>16</sup> It describes the purposes and the structure of the citizen submissions process and identifies some of the mechanism’s features that I believe make it potentially attractive for citizens. Part II provides an empirically based assessment of the track record of the citizen submissions process to date and summarizes why the process has not realized its promise.

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“centerpiece”); Wold, *supra* note 6, at 227 (“The citizen submission process, in many ways, was the centerpiece of NAAEC.”).

14. For example, it seems clear that the process has produced helpful results in some situations. See CEC, Joint Pub. Advisory Comm., *Lessons Learned: Citizen Submissions Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, at 5–9 (June 6, 2001), available at [http://www.cec.org/files/pdf/ABOUTUS/rep11-e-final\\_EN.PDF](http://www.cec.org/files/pdf/ABOUTUS/rep11-e-final_EN.PDF) [hereinafter CEC, *Lessons Learned*] (describing the value added by the first two factual records); Randy Christensen, *The Citizen Submission Process Under NAFTA: Observations After 10 Years*, 14 J. ENVTL. L. & PRAC. 165, 165 (2004) (Can.) (recognizing that the citizen submissions process has been successful in highlighting environmental problems, provoking governmental debate about environmental enforcement, and ushering change through independent factual investigations).

15. Despite my concerns, I believe that the process still has potential, both in its own right and as a model, although I expressed a greater sense of optimism in an earlier piece. See David L. Markell, *The Citizen Spotlight Process*, 18 ENVTL. F. 32, 32 (2001). Some other commentators share my skepticism about the future success of the process. See Geoff Garver, *Tooth Decay*, 25 ENVTL. F. 34, 34; Wold, *supra* note 6, at 228–33.

16. I include a very brief overview of the NAAEC and the citizen submissions process to provide context for the rest of this Article. For a more in-depth treatment, see GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (David L. Markell & John H. Knox eds., 2003) [hereinafter GREENING NAFTA].

Part III contains my effort to contribute some constructive commentary about options for improving the present CEC citizen submissions process. In this Part, I also propose a conceptual framework for revamping citizen submissions processes to make them more attractive and effective.

#### I. THE NAAEC'S PURPOSES AND THE GOALS, PROMISE, AND STRUCTURE OF ITS CITIZEN SUBMISSIONS PROCESS

One of the primary purposes of the NAAEC and the institution it created—the CEC—was to ameliorate concerns that enhanced trade under the North American Free Trade Agreement (“NAFTA”) would adversely affect the North American environment.<sup>17</sup> But the objectives outlined in the NAAEC extend far beyond mitigating adverse environmental effects associated with trade. For example, the first objective listed in the NAAEC is extraordinarily far-reaching—to “foster the protection and improvement of the environment in the [three member countries] for the well-being of present and future generations.”<sup>18</sup> To further this objective, the NAAEC empowers the CEC Council (the institution’s governing body, comprised of the environmental ministers for the three countries) to address such “matters as it may decide.”<sup>19</sup> Thus, the NAAEC grants the Council the power to consider “virtually any environmental issue” affecting North America.<sup>20</sup>

Promoting civic engagement in order to enhance environmental protection was an overarching objective of the NAAEC’s drafters.<sup>21</sup> The Agreement is replete with references to the value of citizen participation.<sup>22</sup> Further, it includes several innovative mechanisms intended to facilitate such participation both regionally and domestically.<sup>23</sup> The CEC citizen submissions process, which

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17. See John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 *ECOLOGY L.Q.* 1, 53–54 (2001).

18. NAAEC, *supra* note 6, art. 1(a); accord John H. Knox & David L. Markell, *The Innovative North American Commission for Environmental Cooperation*, in *GREENING NAFTA*, *supra* note 16, at 1, 10–11 (noting the broad scope of NAAEC). In adopting such a broad objective, the NAFTA parties were careful to note that each member state ultimately retains the right to establish its own “levels of domestic environmental protection and environmental development policies and priorities.” NAAEC, *supra* note 6, art. 3.

19. NAAEC, *supra* note 6, art. 10, para. 2. The three key actors in the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (“JPAC”). See David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 *ENVTL. L.* 651, 659–60 (2006) (discussing these actors).

20. Knox & Markell, *supra* note 18, at 11.

21. See CEC, *Ten Years*, *supra* note 10, at 4 (suggesting that the NAAEC “stands out for its provisions for public participation”).

22. See NAAEC, *supra* note 6, pmb., art. 1(h).

23. See *id.* arts. 4, 6–7, 14, 16–17.

empowers a citizen of any of the three member countries to file a complaint alleging that one of the three countries is failing to effectively enforce its environmental laws,<sup>24</sup> is only one of several innovative features intended to promote citizen participation.<sup>25</sup> Several observers have characterized the CEC citizen submissions process as the most important type of citizen participation promoted by the NAAEC.<sup>26</sup> Indeed, as noted above, many commentators have called the process the centerpiece of the entire agreement.<sup>27</sup>

The NAAEC countries agreed that the CEC citizen submissions process would focus on domestic enforcement, specifically on “failures to effectively enforce environmental laws,” rather than on the adequacy of the environmental laws themselves.<sup>28</sup> The negotiators’ view was that the legal regimes of the countries were relatively strong (or at least relatively comparable); however, there was a significant gap between the laws and their implementation due to less-than-effective enforcement, especially in Mexico.<sup>29</sup> As a result, the hope was that attention generated by the CEC citizen submissions process would motivate the parties to bolster their domestic enforcement capacity and performance.

The citizen submissions process is an example of a “fire alarm” mechanism in that citizens initiate the process through the filing of a submission with the CEC Secretariat.<sup>30</sup> When it receives a

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24. *Id.* art. 14, para. 1.

25. Another very innovative public-participation mechanism involves the creation of the JPAC as part of the institutional framework for the CEC to bring citizens into the administration of the Agreement. See John D. Wirth, *Perspectives on the Joint Public Advisory Committee*, in GREENING NAFTA, *supra* note 16, at 199, 199.

26. See, e.g., Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT’L & COMP. L. REV. 415, 416 (2004) (“The Citizen Submission Process is widely regarded as the most innovative and closely-watched aspect of the NAFTA environmental side agreement.”).

27. See CEC, *Ten Years*, *supra* note 10, at 43; ENVTL. LAW INST., FINAL REPORT: ISSUES RELATED TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION V (2003), available at <http://www.unece.org/env/pp/ppif/ELI%20CEC%20Report.pdf>; Markell, *supra* note 19, at 661–62; Wold, *supra* note 6, at 227.

28. See NAAEC, *supra* note 6, art. 14, para. 1.

29. See Knox, *supra* note 17, at 54, 81–82 (highlighting the negotiators’ concern about Mexico’s enforcement of its environmental laws and the Agreement’s subsequent focus on enforcing existing environmental standards rather than creating new ones); see also CEC, Indep. Review Comm., *Four-Year Review of the North American Agreement on Environmental Cooperation*, at 19 (June 1998), available at [http://www.cec.org/files/pdf/NAAEC-4-year-review\\_en.pdf](http://www.cec.org/files/pdf/NAAEC-4-year-review_en.pdf) [hereinafter CEC, *Four-Year Review*] (recognizing that the agreement, in part, was adopted to address the “Mexican [enforcement] problem”).

30. See NAAEC, *supra* note 6, art. 14, para. 1. A “fire alarm” mechanism is a mechanism that empowers citizens and interest groups to monitor government compliance with various obligations and objectives. See Mathew D.

submission, the Secretariat conducts an initial review based on the factors listed in the NAAEC.<sup>31</sup> The Secretariat may dismiss a submission if it is deficient or ask the targeted party to respond if the submission meets the submission criteria.<sup>32</sup>

Following receipt of the party's response, the Secretariat decides whether to recommend to the Council that a "factual record" be developed to investigate the citizen's claims about ineffective enforcement.<sup>33</sup> If the Secretariat so recommends, the Council may agree and the Secretariat would then develop a draft factual record.<sup>34</sup> On the other hand, the Council may reject the recommendation; the Secretariat would then dismiss the submission.<sup>35</sup> When the Secretariat develops a draft factual record, it is made available to the parties for comment.<sup>36</sup> The Secretariat then finalizes the factual record and provides it to the Council, which decides whether to release the factual record to the public.<sup>37</sup>

As the preceding brief summary reflects, the citizen submissions process is intended to serve as a regional spotlight on domestic enforcement. By engaging citizens and using a "softer," transparency-oriented approach, the procedure incorporates features that are characteristic of "new governance" approaches.<sup>38</sup>

One final contextual point about the citizen submissions process relates to its likely appeal. Given citizen skepticism about the enforcement of environmental laws in the United States,<sup>39</sup> one would expect citizens to be hopeful and enthusiastic about any new mechanism intended to focus attention on deficient enforcement practices. This seemingly would be particularly true for processes that empower citizens to decide which government enforcement practices deserve special scrutiny. In addition, the CEC citizen submissions process incorporates several features that should make it an attractive tool. For example, the process may be available when others are not—citizens who cannot meet standing and other threshold requirements for accessing the court system may use the

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McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984); see also Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC*, in GREENING NAFTA, *supra* note 16, at 256, 258 ("Fire alarms are procedures that private actors trigger to signal that a violation or problem has occurred.").

31. NAAEC, *supra* note 6, art. 14, paras. 1–2.

32. *Id.* para. 2.

33. *Id.* art. 15, para. 1.

34. *Id.* para. 2.

35. *Id.*

36. *Id.* para. 5.

37. *Id.* paras. 6–7.

38. See Gunningham, *supra* note 2, at 146, 150.

39. See, e.g., CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP 2 (2003) (describing criticisms lodged against government environmental law enforcement).

CEC process.<sup>40</sup> Further, the process helps to fill a gap in domestic enforcement by empowering citizens to challenge broad agency failures to enforce environmental laws, something that is difficult under domestic law.<sup>41</sup> The process also provides a regional stage for raising concerns about governance—a stage that might be helpful in some circumstances to citizens interested in fomenting change.<sup>42</sup> Additionally, the process, in theory, is intended to be a relatively non-resource-intensive “fire alarm” mechanism (no discovery costs, no litigation costs, etc.) that citizens can engage to trigger a government response and, ultimately, a quasi-independent investigation of the practices that concern citizen submitters.<sup>43</sup>

Balanced against these attractive features, a likely downside for some citizens is that the process limits the Secretariat’s authority in important ways that make it far less powerful than a domestic judicial body. The process does not include traditional judicial authorities—for example, the Secretariat lacks the authority to issue subpoenas or to impose punitive sanctions or remedial relief.<sup>44</sup> Even its spotlighting capacity is limited because the Secretariat is

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40. See Knox, *supra* note 17, at 93–96 (discussing the broad availability of the process). Issues have arisen concerning the accessibility of the submissions process. See, e.g., CEC, Joint Pub. Advisory Comm., *Advice to Council No: 08-01: Submissions on Enforcement Matters: From Lessons Learned to Following Up Factual Records* (Feb. 27, 2008), available at [http://www.cec.org/files/pdf/ABOUTUS/JPACAdvice-08-01\\_SEM\\_en.pdf](http://www.cec.org/files/pdf/ABOUTUS/JPACAdvice-08-01_SEM_en.pdf) [hereinafter CEC, *Advice to Council*] (noting that the process is confusing to newcomers and that it is costly and time-consuming to prepare submissions); see also Letter from David McGovern, Alternate Representative for Can., Comm’n for Env’tl. Cooperation, to Jane Gardner, Chair, Joint Pub. Advisory Comm., Comm’n for Env’tl. Cooperation (Aug. 14, 2008), available at [http://www.cec.org/files/PDF/ABOUTUS/Response%20to%2008-01\\_en.pdf](http://www.cec.org/files/PDF/ABOUTUS/Response%20to%2008-01_en.pdf) [hereinafter David McGovern Letter] (acknowledging a need to address “accessibility”). However, direct discussion of these issues is outside the scope of this Article.

41. See Wold et al., *supra* note 26, at 423; see also Markell, *supra* note 19, at 702; Marirose J. Pratt, Comment, *The Citizen Submission Process of the NAAEC: Filling the Gap in Judicial Review of Federal Agency Failures to Enforce Environmental Laws*, 20 EMORY INT’L L. REV. 741, 790 (2006). In addition, in *Heckler v. Chaney* the Supreme Court held that citizens generally cannot challenge government nonenforcement decisions. *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985). The CEC mechanism is available for such challenges.

42. See Markell, *supra* note 15, at 37; see also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 283 (1997) (referring to the ability of regional tribunals to change the “dimension and scope of the political bargaining space”).

43. See Raustiala, *supra* note 30, at 263–66; see also Knox, *supra* note 17, at 57 (discussing the quasi-independent character of the Secretariat). Obviously, the greater the barriers to meaningful participation, the less likely it is that such participation will occur, other things being equal. See *id.* at 19.

44. Whether this is a “downside” to the process depends in part on one’s preference for “managerial” or “adjudication” approaches. Further, at least one commentator has characterized the Secretariat’s independent fact-finding capacity as relatively good. See, e.g., Knox, *supra* note 17, at 83–84.

not supposed to offer conclusions about the ineffectiveness of government enforcement or recommendations about how a government might improve its approaches.<sup>45</sup>

One important piece of evidence concerning the attractiveness (or lack thereof) of the process relates to its use. The following Part reviews citizens' use of the process between 1995 and 2009.

## II. THE EMPIRICAL STORY ABOUT CITIZENS' USE OF THE CEC CITIZEN SUBMISSIONS PROCESS AND SOME POSSIBLE EXPLANATIONS

### A. *The Track Record Itself: Citizens' Use of the Process*

There are three major actors in the citizen submissions process: (1) residents of any North American country, including nongovernmental organizations ("NGOs") established in any of the countries; (2) the CEC Secretariat; and (3) the CEC Council.<sup>46</sup> As I have argued before, one good metric for evaluating a governance mechanism, like the CEC process, that is based on citizen use, is the extent to which citizens use it (the "voting with their feet" metric).<sup>47</sup> This Part reviews citizens' use of the process from its inception to the end of October 2009.<sup>48</sup>

In total, citizens have filed seventy-two submissions through October 31, 2009.<sup>49</sup> As Figure 1 reflects, trends in overall use show that while there has been some ebb and flow in the annual number of submissions, the number has stayed reasonably stable between 1995 and 2009. Figure 1 further shows that the number of submissions has been relatively stable over the course of each of the three five-year periods that span the life of the process (twenty-two submissions from 1995 to 1999, twenty-seven from 2000 to 2004, and twenty-three from 2005 to 2009).

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45. NAAEC, *supra* note 6, art. 13, para. 1. Nonetheless, some commentators have been quite positive in their reviews of the transparency of the CEC process. See Knox, *supra* note 17, at 88; Donald McRae, *The Issue of Transparency, in GREENING NAFTA*, *supra* note 16, at 237, 245–46, 249–50.

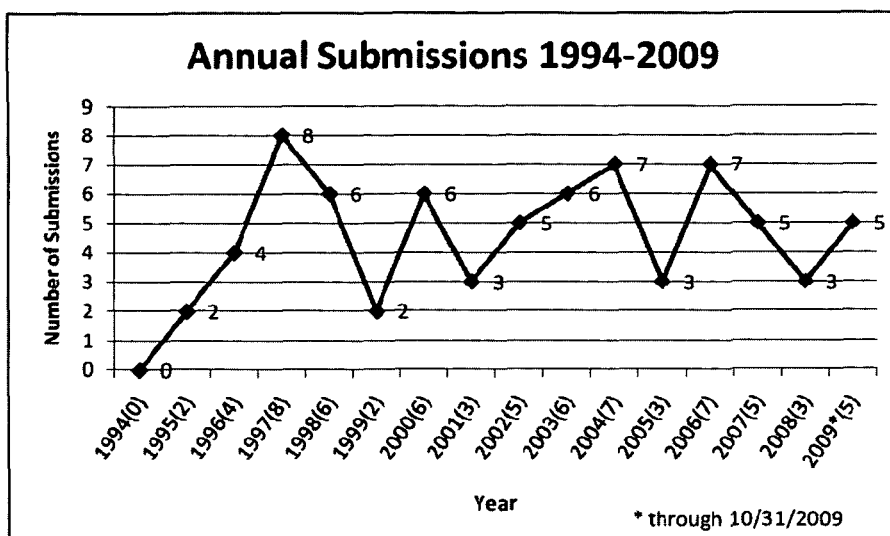
46. See NAAEC, *supra* note 6, arts. 14–15; see also David L. Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545, 550 (2000) (explaining the citizen submissions process and its various actors).

47. See Markell, *supra* note 19, at 665–66.

48. Some of the analysis in this Part updates an analysis of the CEC track record I provided in an earlier article. See *id.* at 665–76.

49. See CEC, Registry of Citizen Submissions, <http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250> (last visited Apr. 26, 2010) [hereinafter CEC, Registry].

FIGURE 1



It is also possible to consider the CEC submissions process track record in comparison to that of other processes.<sup>50</sup> Some citizen-driven procedures created around the same time as the CEC citizen submissions process have received less use. For example, a total of thirty-four submissions have been filed under the NAFTA labor side agreement, the North American Agreement on Labor Cooperation (“NAALC”),<sup>51</sup> and forty citizen petitions have been filed under NAFTA Chapter 11.<sup>52</sup> Other citizen-driven procedures have

50. I have previously done some comparative analyses of the use of the CEC citizen submissions process. See Markell, *supra* note 19, at 666–71. Others have done comparative analyses of various other citizen-driven processes, including procedures of the World Bank and other financial institutions, human-rights-oriented procedures, and environmental processes. See Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT’L L. 403, 453–62 (2005); James L. Cavallaro & Stephanie E. Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768 (2008); John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AM. J. INT’L L. 429 (2005).

51. U.S. Dep’t of Labor, Bureau of Int’l Affairs, Status of Submissions Under the North American Agreement on Labor Cooperation (NAALC), <http://www.dol.gov/ilab/programs/nao/status.htm#iia1> (last visited Apr. 26, 2010). The U.S. Department of Labor website lists a single submission in 2006 and none after that. *Id.* There have been a total of thirty-four submissions under the NAALC, with none during the past several years. Telephone Interview with John Mondejar, Senior Economist & Info. Officer, U.S. Dep’t of Labor (Nov. 25, 2009).

52. See U.S. Dep’t of State, NAFTA Investor-State Arbitrations, <http://www.state.gov/s/lc3439.htm> (visited Apr. 26, 2010) (containing

received far more use.<sup>53</sup> Perhaps the main, limited conclusion from this data is that citizens have neither embraced the process wholeheartedly and increased their use of it dramatically,<sup>54</sup> nor abandoned it. Instead, their use has been relatively modest and relatively steady.

A more nuanced look at citizens' use of the process raises several potential red flags. First, in terms of overall citizen usage, as Figure 2 reflects, Mexico has been the subject of more than half of the submissions filed (thirty-seven of seventy-two or 51%).<sup>55</sup> Twenty-five submissions, or 35%, have targeted Canada.<sup>56</sup> The United States has been the target of the fewest submissions—ten, or 14%.<sup>57</sup> Since a key reason for focusing the process on enforcement was concern about the efficacy of Mexico's performance in this arena,<sup>58</sup> it is perhaps not entirely surprising that Mexico has received a large proportion of the submissions filed. Nevertheless, some commentators have suggested that a significant disparity in the use of the process to target parties' enforcement practices and policies would raise concerns about the long-term viability of the process, particularly in terms of party support.<sup>59</sup>

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hyperlinks to lists of the cases filed against the United States (sixteen), Canada (twelve), Mexico (twelve) for a total number of forty cases).

53. For example, under Canada's environmental petitions process, citizens may petition various federal departments and agencies to ask questions or express concerns related to environmental issues. OFFICE OF THE AUDITOR GEN. OF CAN., REPORT OF THE COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT TO THE HOUSE OF COMMONS ch. 4, at 3 (2009), available at [http://www.oag-bvg.gc.ca/internet/docs/parl\\_cesd\\_200911\\_04\\_e.pdf](http://www.oag-bvg.gc.ca/internet/docs/parl_cesd_200911_04_e.pdf). To date, over 330 petitions have been filed since the process was created in 1995. *Id.*

54. Citizens' use of domestic citizen-suit provisions in the United States, for example, dwarfs their use of the CEC process. See Markell, *supra* note 19, at 670 n.104.

55. See CEC, Registry, *supra* note 49.

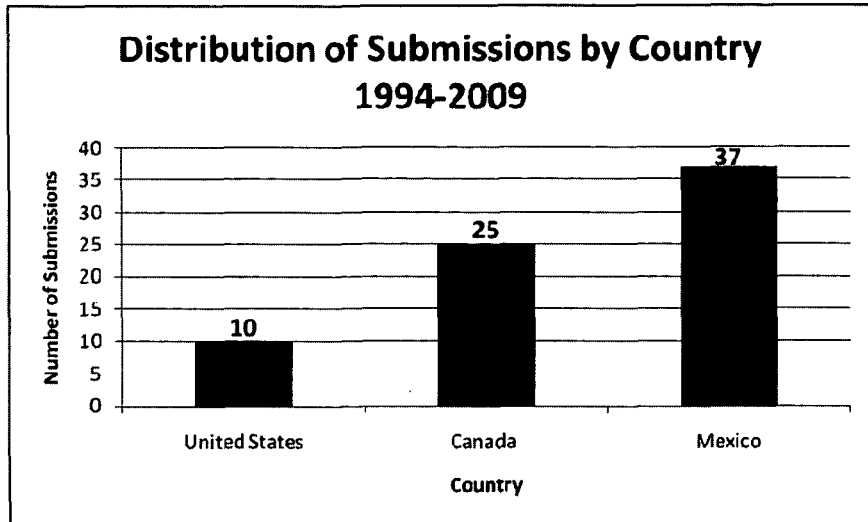
56. *Id.*

57. *Id.*

58. See *supra* note 29 and accompanying text.

59. See Knox, *supra* note 17, at 105–06, 106 n.458 (suggesting that “if the procedure comes to be seen as primarily directed against Canada and Mexico, they may resist supporting the procedure and instead look for ways to increase their control over it or otherwise weaken it” and that Mexico may be “particularly sensitive to the possibility of an imbalance”); see also CEC, *Four-Year Review*, *supra* note 29, at 8–9.

FIGURE 2



Compounding the concern about a disparity in the distribution of submissions, use of the process has changed significantly over the years so that the imbalance in distribution of submissions among countries has become much more pronounced. Figure 3 depicts the use of the process during each of the three five-year periods following filing of the first submission in 1995. This Figure shows that the distribution of submissions in terms of the country targeted has changed dramatically during the history of use of the process. During the first five years of use of the process, the distributions were relatively evenly distributed by country: United States, 27%; Canada, 36%; and Mexico, 36%.<sup>60</sup> During the second five years, the distribution is less balanced: United States, 11%; Canada, 33%; and Mexico, 56%.<sup>61</sup> For the most recent five-year period, the distribution is even more skewed: the United States, 4%; Canada, 35%; and Mexico, 61%.<sup>62</sup> Again, at least some commentators suggest that this increasing imbalance has the potential to undermine support for the process.<sup>63</sup>

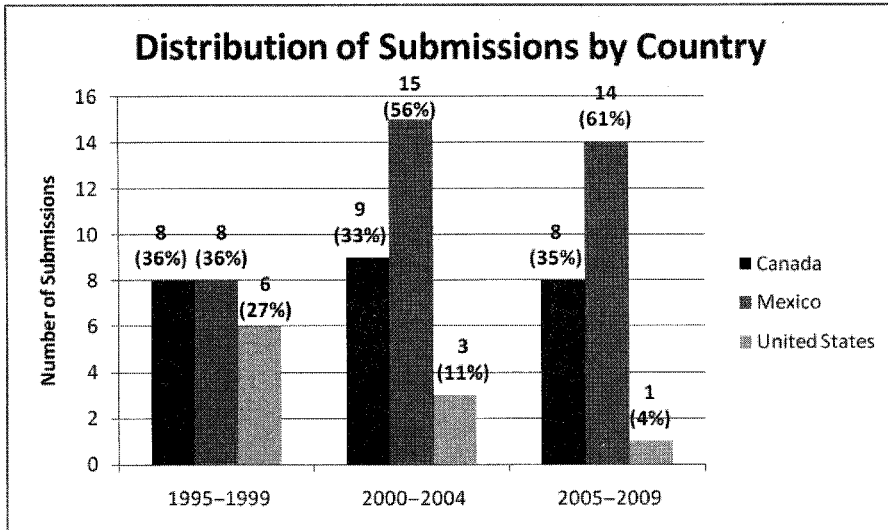
60. See CEC, Registry, *supra* note 49.

61. *Id.*

62. *Id.*

63. See *supra* note 59 and accompanying text.

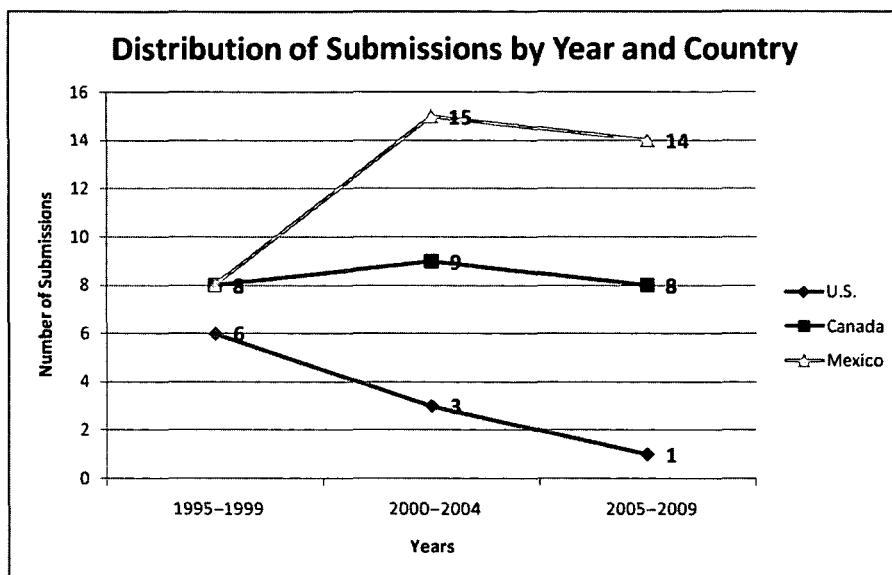
FIGURE 3



A third and related red flag involves the trend in use of the process in each target country. Since its inception, use of the process to target Mexican enforcement policies and practices has grown substantially, use of the process to challenge Canadian enforcement practices has remained comparatively stable, and use of the process to challenge U.S. enforcement has declined dramatically. Figure 4 shows not only how the distribution of submissions among the countries has changed, but also the trend in submissions for each country. As this figure shows, use of the process to challenge U.S. enforcement has dried up to the extent that only a single submission has been filed during the past five years.<sup>64</sup>

64. See CEC, Registry, *supra* note 49.

FIGURE 4



The obvious insight from the level of citizens' use of the citizen submissions process is that citizens' embrace of the process as a tool to spotlight domestic enforcement has varied significantly by country. The increasing use of the process to target Mexican enforcement practices suggests that citizens have found the process valuable for that purpose.<sup>65</sup> For Canada, citizen reactions have been ambivalent; experience with the process has neither inspired citizens to increase their use of it nor led citizens to throw up their hands in frustration and give up on the process.<sup>66</sup> For the United States, citizens do not seem to have found the process helpful and have largely abandoned it.<sup>67</sup>

The empirical data concerning citizens' use of the citizen

65. There have been several anecdotal accounts of the value the process has added to domestic Mexican environmental practices. See, e.g., Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 516 (2003); Beatriz Bugada, *Is NAFTA Up to Its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591, 1605-15 (1999); Jonathan G. Dorn, *NAAEC Citizen Submissions Against Mexico: An Analysis of the Effectiveness of a Participatory Approach to Environmental Law Enforcement*, 20 GEO. INT'L ENVTL. L. REV. 129, 142-45 (2007).

66. Some Canadian NGOs have shared their perceptions concerning the process and have articulated problems as well as some successes. See, e.g., Christensen, *supra* note 14, at 180-85. Mr. Christensen has filed several submissions as a lawyer with the Sierra Legal Defense Fund. *Id.* at 165 n.\*.

67. See *infra* Part II.B (discussing some of the concerns citizens have expressed about the process and its use to date, especially involving the United States).

submissions process raises at least two concerns in terms of future prospects for the process. The increasing imbalance in the use of the process to target the effectiveness of each party's enforcement raises concerns about continuing party support for the process. In addition, the data raise significant issues concerning citizens' perceptions of the value of the process as a check or spotlight on U.S. environmental enforcement. Citizens gingerly experimented with using the process in its formative years (the first five-year period) to challenge domestic U.S. enforcement, but since then use has dropped precipitously.<sup>68</sup>

This track record raises the obvious question of whether there are ways to revamp the process so that citizens want to use it, particularly to challenge U.S. enforcement. To answer this question, it is important to assess why citizens have abandoned the process as a tool to challenge U.S. enforcement.<sup>69</sup> I now turn to that issue.

*B. Why Has Citizens' Use of the Citizen Submissions Process to Challenge U.S. Enforcement Declined So Dramatically?*

Three reasons seem especially plausible to explain why citizens have not taken more advantage of the CEC process to challenge U.S. enforcement practices and policies, its fairness (or potential lack thereof), its pace, and its "toothless" character.<sup>70</sup>

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68. See *supra* p. 438 fig.4, note 64 and accompanying text.

69. As part of any overall effort to assess the process and identify possible alternatives, it certainly would be relevant to explore why the process seems to be popular in Mexico and why the process has enjoyed continued attention in Canada. It is worth emphasizing that the problems with the procedure I review in the next Subpart do not seem to be preventing the Canadian and Mexican NGOs from using it. This may be because the issues I discuss are all relative in the sense that the fairness, slowness, and toothlessness concerns I highlight concerning the CEC process must be considered in the context of domestic alternatives. My speculation is that, if the concerns in the text are addressed, citizen use of the process is likely to increase in other counties as well as in the United States. However, I do not explore these issues in this Article.

70. There is limited empirical data on citizens' views about the process and the reasons for their disaffection. I focus on the three reasons discussed in this Article based on my experience and my review of the literature. A recent survey that Professor Tom Tyler and I completed concerning the CEC process suggests considerable skepticism on the part of citizens toward the process. See David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1, 35 (2008). Respondents ranked the process last in terms of desirability among the eleven options we presented for participating in environmental law enforcement. *Id.* Respondents also indicated that they were less likely to use the citizen submissions process than any of the other processes we listed. *Id.*

1. *Concerns About the Fairness or Neutrality of the Process*<sup>71</sup>

Professor Chris Wold (a one-time submitter) and others have noted on numerous occasions that significant concerns exist about the fairness of the process, especially with respect to the role the Council plays.<sup>72</sup> Wold suggests that several Council actions and decisions “have eroded public confidence in the process.”<sup>73</sup> Numerous other commentators have expressed concern that the Council’s performance has raised questions about the neutrality of the process and diminished citizens’ trust in it.<sup>74</sup> The procedural-justice literature documents that the perceived fairness or justness of a process influences perceptions of the acceptability of the process and its legitimacy.<sup>75</sup> Domestic courts and legislatures have insisted that administrative and judicial adjudication be conducted with neutral decision makers and fair processes in order to enhance the legitimacy and integrity of decision-making procedures.<sup>76</sup> Based on the anecdotal information, and in the view of many close observers, citizens’ concerns about the fairness of the procedure—especially the Council’s performance—likely have contributed to their disenchantment with the process and diminishing use of it.<sup>77</sup>

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71. I have discussed concerns about the fairness of the CEC process in several earlier articles. See, e.g., Markell, *supra* note 19, at 688–707. This Subpart is intended to complement and update that earlier work.

72. See Wold, *supra* note 6, at 206 (suggesting a need to “mend[ ] the inherent structural problems that allow the Parties to change the scope and nature of a citizen submission concerning its own enforcement failure”); Wold et al., *supra* note 26, at 417–18 (criticizing the Council).

73. Wold, *supra* note 6, at 228; accord CEC, *Ten Years*, *supra* note 10, at 44–46; Markell, *supra* note 19, at 699–707. Professor Sanford Gaines suggests that the parties’ governments have been embarrassed by the citizen submissions, and, as a result, the parties have “sharply reduce[d]” their political support for the process. Gaines, *supra* note 10, at 269.

74. See Letter from Randy L. Christensen, Staff Lawyer, Sierra Legal Def. Fund, to Members of the CEC Council (Mar. 6, 2002), available at [http://www.cec.org/files/pdf/ABOUTUS/Sierra\\_to\\_Council-BCMining.pdf](http://www.cec.org/files/pdf/ABOUTUS/Sierra_to_Council-BCMining.pdf) (stating that the Council’s actions could “threaten[ ] to strip the citizen submission process of its integrity, utility and legitimacy”); see also Garver, *supra* note 15, at 35. For a discussion of several such sources, see Markell, *supra* note 19, at 688–707.

75. I discuss the CEC process in considerable depth in light of the procedural-justice literature in two recent articles. See Markell, *supra* note 19, at 677–707; Markell & Tyler, *supra* note 70, at 22–34.

76. See 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.8, at 67–68 (3d ed. 1994).

77. As noted *supra* note 69, considering why use has only diminished in the United States is beyond the scope of this Article.

## 2. *The Slow, and Slower, Pace of the CEC Handling of Submissions*

Frustration with the pace of the process likely contributes to citizen skepticism.<sup>78</sup> In this Subpart, I review the pace of the CEC treatment of the submissions that have made it the furthest in the process. I first review the treatment of the submissions that have led to the fifteen factual records released as of October 31, 2009.<sup>79</sup>

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78. Several CEC documents recognize the slow pace of the process. See CEC, *Four-Year Review*, *supra* note 29, at 21 (noting that delays “place at risk the public credibility of the process”); CEC, *Advice to Council*, *supra* note 40 (“The procedure is too slow.”); CEC, *Lessons Learned*, *supra* note 14, at 9–10.

79. See CEC, *Factual Record: ALCA-Iztapalapa II (SEM-03-004)* (Nov. 16, 2007), available at [http://www.cec.org/Storage/73/6757\\_Alca-Iztapalapa-II\\_en.pdf](http://www.cec.org/Storage/73/6757_Alca-Iztapalapa-II_en.pdf) [hereinafter CEC, *ALCA-Iztapalapa II Factual Record*]; CEC, *Factual Record: Aquanova Submission (SEM-98-006)* (May 5, 2003), available at [http://www.cec.org/Storage/71/6550\\_98-6-FR-E.pdf](http://www.cec.org/Storage/71/6550_98-6-FR-E.pdf) [hereinafter CEC, *Aquanova Factual Record*]; CEC, *Factual Record: BC Logging Submission (SEM-00-004)* (June 27, 2003), available at [http://www.cec.org/Storage/70/6361\\_00-4-FFR\\_en.pdf](http://www.cec.org/Storage/70/6361_00-4-FFR_en.pdf) [hereinafter CEC, *BC Logging Factual Record*]; CEC, *Factual Record: BC Mining Submission (SEM-98-004)* (June 27, 2003), available at [http://www.cec.org/Storage/68/6172\\_98-4-FFR\\_en.pdf](http://www.cec.org/Storage/68/6172_98-4-FFR_en.pdf) [hereinafter CEC, *BC Mining Factual Record*]; CEC, *Factual Record: Molymex II Submission (SEM-00-005)* (Aug. 25, 2008), available at [http://www.cec.org/Storage/70/6391\\_00-5-FR\\_en.pdf](http://www.cec.org/Storage/70/6391_00-5-FR_en.pdf) [hereinafter CEC, *Molymex II Factual Record*]; CEC, *Factual Record: Montreal Technoparc Submission (SEM-03-005)* (Mar. 28, 2008), available at [http://www.cec.org/Storage/74/6784\\_TechnoparcFR\\_en.pdf](http://www.cec.org/Storage/74/6784_TechnoparcFR_en.pdf) [hereinafter CEC, *Montreal Technoparc Factual Record*]; CEC, *Factual Record: Oldman River II Submission (SEM-97-006)* (June 27, 2003), available at [http://www.cec.org/Storage/69/6250\\_97-6-FFR\\_en.pdf](http://www.cec.org/Storage/69/6250_97-6-FFR_en.pdf) [hereinafter CEC, *Oldman River II Factual Record*]; CEC, *Factual Record: Ontario Logging Submissions (SEM-02-001) and (SEM-04-006)* (June 20, 2006), available at [http://www.cec.org/Storage/72/6583\\_CCE\\_21\\_english.pdf](http://www.cec.org/Storage/72/6583_CCE_21_english.pdf) [hereinafter CEC, *Ontario Logging Factual Record*]; CEC, *Factual Record: Pulp and Paper Submission (SEM-02-003)* (June 28, 2006), available at [http://www.cec.org/Storage/72/6649\\_SEM-02-003-FR\\_en.pdf](http://www.cec.org/Storage/72/6649_SEM-02-003-FR_en.pdf) [hereinafter CEC, *Pulp and Paper Factual Record*]; CEC, *Factual Record: Río Magdalena Submission (SEM-97-002)* (Oct. 24, 2003), available at [http://www.cec.org/Storage/67/6076\\_97-2-FFR\\_en.pdf](http://www.cec.org/Storage/67/6076_97-2-FFR_en.pdf) [hereinafter CEC, *Río Magdalena Factual Record*]; CEC, *Final Factual Record: Cruise Ship Pier Project in Cozumel, Quintana Roo (SEM-96-001)* (Oct. 24, 1997), available at [http://www.cec.org/Storage/66/5989\\_ACF17D1.PDF](http://www.cec.org/Storage/66/5989_ACF17D1.PDF) [hereinafter CEC, *Cozumel Factual Record*]; CEC, *Final Factual Record for Submission SEM-97-001 (BC Aboriginal Fisheries Commission et al.)* (May 30, 2000), available at [http://www.cec.org/Storage/68/6220\\_BC-Hydr-Fact-record\\_en.pdf](http://www.cec.org/Storage/68/6220_BC-Hydr-Fact-record_en.pdf) [hereinafter CEC, *BC Hydro Factual Record*]; CEC, *Final Factual Record for Submission SEM-99-002 (Migratory Birds)* (Apr. 22, 2003), available at [http://www.cec.org/Storage/71/6478\\_MigratoryBirds-FFR\\_EN.pdf](http://www.cec.org/Storage/71/6478_MigratoryBirds-FFR_EN.pdf) [hereinafter CEC, *Migratory Birds Factual Record*]; CEC, *Final Factual Record: Tarahumara Submission (SEM-00-006)* (July 26, 2005), available at [http://www.cec.org/Storage/70/6424\\_TarahumaraFR\\_en.pdf](http://www.cec.org/Storage/70/6424_TarahumaraFR_en.pdf) [hereinafter CEC, *Tarahumara Factual Record*]; CEC, *Metales y Derivados Final Factual Record (SEM-98-007)* (Feb. 7, 2002), available at [http://www.cec.org/Storage/84/7955\\_98-7-FFR-e.pdf](http://www.cec.org/Storage/84/7955_98-7-FFR-e.pdf) [hereinafter CEC, *Metales y Derivados Factual Record*]. These fifteen Factual Records arose

These are “closed files” in the sense that the CEC has completed its work on them. I then turn to the six “open files” that have made it through the Secretariat-recommendation stage, but have not been completed.

a. “*Closed Files.*” The average length of time from the filing of a submission to the issuance of a factual record for the fifteen factual records the CEC has issued is 1645 days, or approximately 4.5 years.<sup>80</sup> Based on two recent reports about the domestic U.S. court system, it appears that the citizen submissions process takes far longer from start to finish than does a case brought before the U.S. courts. A 2008 comparison of civil jury-trial litigation in U.S. state and federal courts found that the median case-processing time from filing to verdict was twenty-three months in state courts and

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out of sixteen submissions. Two submissions involving Ontario Logging were consolidated prior to development of a factual record. I focus on the submissions that led to development of factual records because these tend to be the most significant submissions in terms of number of CEC actions required and amount of CEC attention received. This also provides a more manageable number of submissions to review—fifteen versus the total of seventy-two submissions filed as of October 31, 2009. See CEC, Registry, *supra* note 49.

80. See CEC, ALCA-Iztapalapa II, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2383&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2383&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1910 days); CEC, Aquanova, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2373&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2373&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1735 days); CEC, BC Hydro, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2358&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2358&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1166 days); CEC, BC Logging, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2365&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2365&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1244 days); CEC, BC Mining, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2355&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2355&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1870 days); CEC, Cozumel, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2346&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2346&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (646 days); CEC, Metales y Derivados, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2372&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2372&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1207 days); CEC, Migratory Birds, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1254 days); CEC, Molymex II, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2366&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2366&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1652 days); CEC, Montreal Technoparc, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2384&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2384&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1776 days); CEC, Oldman River II, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2359&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2359&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (2137 days); CEC, Ontario Logging, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2375&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2375&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1827 days); CEC, Pulp and Paper, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2377&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2377&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (1736 days); CEC, Río Magdalena, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2350&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2350&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (2462 days); CEC, Tarahumara, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2367&SiteNodeID=545&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2367&SiteNodeID=545&BL_ExpandID=) (last visited Apr. 26, 2010) (2049 days).

eighteen months in federal district courts.<sup>81</sup> The 2008 annual report for the U.S. courts found that, for 2008, the “national median time from filing to disposition for civil cases was 8.1 months.”<sup>82</sup> Thus, it seems likely that U.S. citizens and others view the CEC timetable to be frustratingly slow.

Further, the pace has slowed considerably in recent years. To assess whether the CEC pace in handling submissions has varied over time, I grouped the submissions that have led to issuance of factual records into three categories: (1) “early” factual records (there are three of these, issued in 1997, 2000, and 2002);<sup>83</sup> (2) “the 2003” factual records (six of these);<sup>84</sup> and (3) more recent factual records (six of these as well).<sup>85</sup> For the three factual records issued during the earlier years of the process, the average number of days between when the submission was filed and the factual record was released was 1006.<sup>86</sup> For the six factual records released in 2003, the average number of days from submission to release was 1784.<sup>87</sup> For the remaining six factual records released since 2003 (one in 2004, zero in 2005, two in 2006, one in 2007, and two in 2008<sup>88</sup>), the average number of days from submission to release was 1825.<sup>89</sup>

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81. Thomas H. Cohen, *General Civil Jury Trial Litigation in State and Federal Courts: A Statistical Portrait*, 5 J. EMPIRICAL LEGAL STUD. 593, 606–07 (2008). The article explains the methodology Professor Cohen used in compiling this information, including the time frames studied, limits on the types of cases involved, and the particular courts studied. *Id.* at 595–99.

82. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 19 (2008), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf>.

83. CEC, *Cozumel Factual Record*, *supra* note 79; CEC, *BC Hydro Factual Record*, *supra* note 79; CEC, *Metales y Derivados Factual Record*, *supra* note 79.

84. CEC, *Aquanova Factual Record*, *supra* note 79; CEC, *BC Logging Factual Record*, *supra* note 79; CEC, *BC Mining Factual Record*, *supra* note 79; CEC, *Oldman River II Factual Record*, *supra* note 79; CEC, *Río Magdalena Factual Record*, *supra* note 79; CEC, *Migratory Birds Factual Record*, *supra* note 79.

85. CEC, *ALCA-Iztapalapa II Factual Record*, *supra* note 79; CEC, *Molymex II Factual Record*, *supra* note 79; CEC, *Montreal Technoparc Factual Record*, *supra* note 79; CEC, *Ontario Logging Factual Record*, *supra* note 79; CEC, *Pulp and Paper Factual Record*, *supra* note 79; CEC, *Tarahumara Factual Record*, *supra* note 79.

86. *See* CEC, *BC Hydro*, *supra* note 80 (1166 days); CEC, *Cozumel*, *supra* note 80 (646 days); CEC, *Metales y Derivados*, *supra* note 80 (1207 days).

87. *See* CEC, *Aquanova*, *supra* note 80 (1737 days); CEC, *BC Logging*, *supra* note 80 (1244 days); CEC, *BC Mining*, *supra* note 80 (1870 days); CEC, *Migratory Birds*, *supra* note 80 (1254 days); CEC, *Oldman River II*, *supra* note 80 (2137 days); CEC, *Río Magdalena*, *supra* note 80 (2462 days).

88. *See supra* note 85.

89. *See* CEC, *ALCA-Iztapalapa II*, *supra* note 80 (1910 days); CEC, *Molymex II*, *supra* note 80 (1652 days); CEC, *Montreal Technoparc*, *supra* note 80 (1776 days); CEC, *Ontario Logging*, *supra* note 80 (1827 days); CEC, *Pulp and Paper*, *supra* note 80 (1736 days); CEC, *Tarahumara*, *supra* note 80 (2049 days).

Thus, the CEC is taking much longer to complete and issue factual records for the more recent submissions than it did earlier in the process (an average of approximately two years longer for the 2003 and later factual records than for the first three records).<sup>90</sup>

b. “Open Files.” To further assess the pace of recent CEC activity, I reviewed the six currently active submissions for which the Secretariat has recommended preparation of a factual record.<sup>91</sup>

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90. The amount of time it takes the Council to approve public release of factual records has nearly tripled. For the first three factual records the Council took an average of fifty-eight days to vote to release the record. See CEC, BC Hydro, *supra* note 80 (12 days); CEC, Cozumel, *supra* note 80 (91 days); CEC, Metales y Derivados, *supra* note 80 (70 days). For the six factual records it issued in 2003, the Council took an average of forty-six days to vote to release the factual record. See CEC, Aquanova, *supra* note 80 (49 days); CEC, BC Logging, *supra* note 80 (41 days); CEC, BC Mining, *supra* note 80 (41 days); CEC, Migratory Birds, *supra* note 80 (60 days); CEC, Oldman River II, *supra* note 80 (41 days); CEC, Río Magdalena, *supra* note 80 (42 days). For the most recent six factual records, the Council has taken an average of 151 days. See CEC, ALCA-Izatapalapa II, *supra* note 80 (196 days); CEC, Molymex II, *supra* note 80 (30 days); CEC, Montreal Technoparc, *supra* note 80 (87 days); CEC, Ontario Logging, *supra* note 80 (225 days); CEC, Pulp and Paper, *supra* note 80 (217 days); CEC, Tarahumara, *supra* note 80 (148 days). Public release of the factual record is largely a ministerial decision. See Knox, *supra* note 17, at 67 (noting that “it seems unlikely that the Council would ever decline to make a factual record public”). Yet it has taken the Council an average of approximately five months to make the decision for the last six factual records. Thus, the Council routinely exceeds the NAAEC’s recommended time frame for action. See NAAEC, *supra* note 6, art. 15, para. 7 (stating that the Council may “make the final factual record publicly available, normally within 60 days following its submission”).

91. CEC, *Coal-Fired Power Plants—Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, CEC Doc. A14/SEM/04-005/48/ADV (Dec. 5, 2005), available at [http://www.cec.org/Storage/75/6868\\_04-5-ADV\\_en.pdf](http://www.cec.org/Storage/75/6868_04-5-ADV_en.pdf); CEC, *Environmental Pollution in Hermosillo II—Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, CEC Doc. A14/SEM/05-003/39/ADV (Apr. 4, 2007), available at [http://www.cec.org/Storage/76/6979\\_05-3-ADV\\_en.pdf](http://www.cec.org/Storage/76/6979_05-3-ADV_en.pdf); CEC, *Ex Hacienda El Hospital II and Ex Hacienda El Hospital III (Consolidated)—Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, CEC Doc. A14/SEM-06-003 & SEM-06-004/54/ADV (May 7, 2008), available at [http://www.cec.org/Storage/76/7027\\_06-3-4-ADV-e.pdf](http://www.cec.org/Storage/76/7027_06-3-4-ADV-e.pdf); CEC, *Lake Chapala II—Article 15(1) Notification to Council that Development of a Factual Record is Warranted*, CEC Doc. A14/SEM/03-003/45/ADV (May 18, 2005), available at [http://www.cec.org/Storage/73/6724\\_03-3-ADV\\_en.pdf](http://www.cec.org/Storage/73/6724_03-3-ADV_en.pdf); CEC, *Quebec Automobiles—Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, CEC Doc. A14/SEM/04-007/19/ADV (May 5, 2005), available at [http://www.cec.org/Storage/75/6925\\_04-7-ADV\\_en.pdf](http://www.cec.org/Storage/75/6925_04-7-ADV_en.pdf); CEC, *Species at Risk—Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, CEC Doc. A14/SEM/06-005/30/ADV (Sept. 10, 2007), available at [http://www.cec.org/Storage/76/7051\\_06-5-ADV\\_en.pdf](http://www.cec.org/Storage/76/7051_06-5-ADV_en.pdf). Note that Ex Hacienda El Hospital III (SEM-06-004) was consolidated with Ex Hacienda El Hospital II (SEM-06-003). These two submissions are treated as a single submission for purposes of this analysis.

Unlike the fifteen factual records I discuss in the previous Subpart, which are “closed files” in the sense that the CEC has completed its work on them, these six are “open files” in that CEC work is currently ongoing.<sup>92</sup>

On the plus side, things have gone relatively smoothly for the more recent submissions during the early stages of the process, at least in the sense that the amount of time each stage has taken, on average, is comparable to the amount of time each such stage took for the closed files. Thus, the amount of time for (1) the Secretariat to request a response (98 days for the six open files versus 164 days for the closed files discussed above),<sup>93</sup> (2) the relevant party to provide a response (86 days for the six open files versus 73 days for the closed files discussed above),<sup>94</sup> and (3) the Secretariat to

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92. I focus on the open files that have made it through more steps in the CEC process than the other open files because one would expect that these files have received the most CEC attention.

93. For the open files, see CEC, Coal-Fired Power Plants, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2390&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2390&SiteNodeID=250&BL_ExpandID=) (last visited Apr. 26, 2010) (161 days); CEC, Environmental Pollution in Hermosillo II, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2395&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2395&SiteNodeID=250&BL_ExpandID=) (last visited Apr. 26, 2010) (75 days); CEC, Ex Hacienda El Hospital II, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2399&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2399&SiteNodeID=250&BL_ExpandID=) (last visited Apr. 26, 2010) (44 days); CEC, Lake Chapala II, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2382&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2382&SiteNodeID=250&BL_ExpandID=) (last visited Apr. 26, 2010) (210 days); CEC, Quebec Automobiles, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2392&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2392&SiteNodeID=250&BL_ExpandID=) (last visited Apr. 26, 2010) (30 days); and CEC, Species at Risk, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2401&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2401&SiteNodeID=250&BL_ExpandID=) (last visited Apr. 26, 2010) (66 days). For the closed files, see CEC, ALCA-Iztapalapa II, *supra* note 80 (182 days); CEC, Aquanova, *supra* note 80 (176 days); CEC, BC Hydro, *supra* note 80 (43 days); CEC, BC Logging, *supra* note 80 (54 days); CEC, BC Mining, *supra* note 80 (361 days); CEC, Cozumel, *supra* note 80 (22 days); CEC, Metales y Derivados, *supra* note 80 (133 days); CEC, Migratory Birds, *supra* note 80 (36 days); CEC, Molyx II, *supra* note 80 (202 days); CEC, Montreal Technoparc, *supra* note 80 (33 days); CEC, Oldman River II, *supra* note 80 (216 days); CEC, Ontario Logging, *supra* note 80 (21 days); CEC, Pulp and Paper, *supra* note 80 (32 days); CEC, Río Magdalena, *supra* note 80 (419 days); and CEC, Tarahumara, *supra* note 80 (524 days).

94. For the open files, see CEC, Coal-Fired Power Plants, *supra* note 93 (60 days); CEC, Environmental Pollution in Hermosillo II, *supra* note 93 (99 days); CEC, Ex Hacienda El Hospital II, *supra* note 93 (133 days); CEC, Lake Chapala II, *supra* note 93 (103 days); CEC, Quebec Automobiles, *supra* note 93 (60 days); and CEC, Species at Risk, *supra* note 93 (59 days). For the closed files, see CEC, ALCA-Iztapalapa II, *supra* note 80 (86 days); CEC, Aquanova, *supra* note 80 (97 days); CEC, BC Hydro, *supra* note 80 (67 days); CEC, BC Logging, *supra* note 80 (63 days); CEC, BC Mining, *supra* note 80 (75 days); CEC, Cozumel, *supra* note 80 (46 days); CEC, Metales y Derivados, *supra* note 80 (88 days); CEC, Migratory Birds, *supra* note 80 (68 days); CEC, Molyx II, *supra* note 80 (91 days); CEC, Montreal Technoparc, *supra* note 80 (60 days); CEC, Oldman River II, *supra* note 80 (66 days); CEC, Ontario Logging, *supra* note 80 (59 days); CEC, Pulp and Paper, *supra* note 80 (60 days); CEC, Río Magdalena,

recommend development of a factual record (307 days for the six open files versus 372 days for the closed files discussed above)<sup>95</sup> is generally roughly in line with the time these stages took for the closed files discussed above.<sup>96</sup>

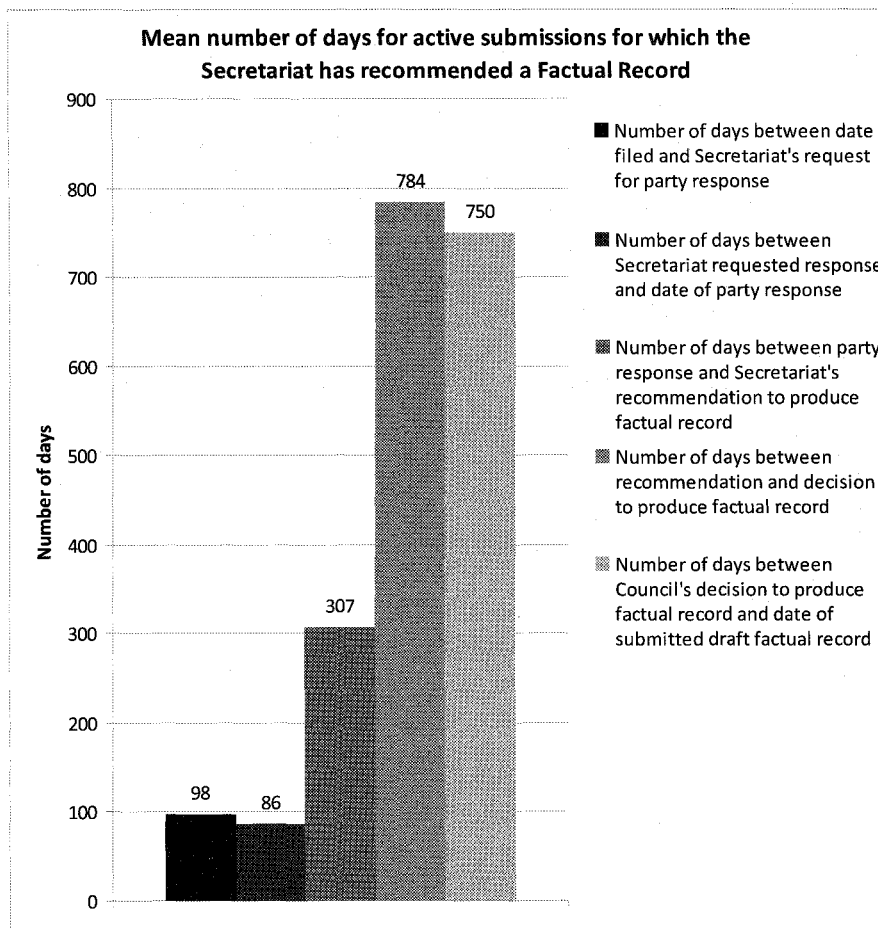
The pace during the latter stages of the citizen submissions process has been much slower for the six currently active submissions that have proceeded to the stage of a Secretariat recommendation than for the earlier submissions that reached this stage. Figure 5 below shows the pace at which these six submissions are proceeding through the citizen submissions process.

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*supra* note 80 (77 days); and CEC, Tarahumara, *supra* note 80 (101 days).

95. For the open files, see CEC, Coal-Fired Power Plants, *supra* note 93 (224 days); CEC, Environmental Pollution in Hermosillo II, *supra* note 93 (412 days); CEC, Ex Hacienda El Hospital II, *supra* note 93 (488 days); CEC, Lake Chapala II, *supra* note 93 (413 days); CEC, Quebec Automobiles, *supra* note 93 (93 days); and CEC, Species at Risk, *supra* note 93 (214 days). For the closed files, see CEC, ALCA-Iztapalapa II, *supra* note 80 (263 days); CEC, Aquanova, *supra* note 80 (409 days); CEC, BC Hydro, *supra* note 80 (280 days); CEC, BC Logging, *supra* note 80 (382 days); CEC, BC Mining, *supra* note 80 (611 days); CEC, Cozumel, *supra* note 80 (79 days); CEC, Metales y Derivados, *supra* note 80 (279 days); CEC, Migratory Birds, *supra* note 80 (290 days); CEC, Molyx II, *supra* note 80 (336 days); CEC, Montreal Technoparc, *supra* note 80 (157 days); CEC, Oldman River II, *supra* note 80 (371 days); CEC, Ontario Logging, *supra* note 80 (201 days); CEC, Pulp and Paper, *supra* note 80 (428 days); CEC, Río Magdalena, *supra* note 80 (1292 days); and CEC, Tarahumara, *supra* note 80 (195 days).

96. My expectation is that most commentators would agree that these early stages have taken far too long for both completed and pending submissions.

FIGURE 5<sup>97</sup>

As Figure 5 shows, for the most recent six such recommendations it took the Council an average of 784 days to make the decision to direct the Secretariat to develop a draft factual record following receipt of a Secretariat recommendation.<sup>98</sup> It took

97. Because the Council has only directed the Secretariat to develop a draft factual record for three submissions (Lake Chapala II, Coal-Fired Power Plants, and Quebec Automobiles), the last column to the right in Figure 5 is based on the Secretariat's work on these three submissions. Because a draft has not yet been submitted, I used October 31, 2009, as the draft-factual-record submission date.

98. See CEC, Coal-Fired Power Plants, *supra* note 93 (931 days); CEC, Environmental Pollution in Hermosillo II, *supra* note 93 (941 days); CEC, Ex Hacienda El Hospital II, *supra* note 93 (537 days); CEC, Lake Chapala II, *supra* note 93 (1108 days); CEC, Quebec Automobiles, *supra* note 93 (405 days); CEC, Species at Risk, *supra* note 93 (782 days). I used October 31, 2009, as a Council decision date on the Secretariat's recommendation if the Council had not yet made a decision. Because the Council had only acted on three of these

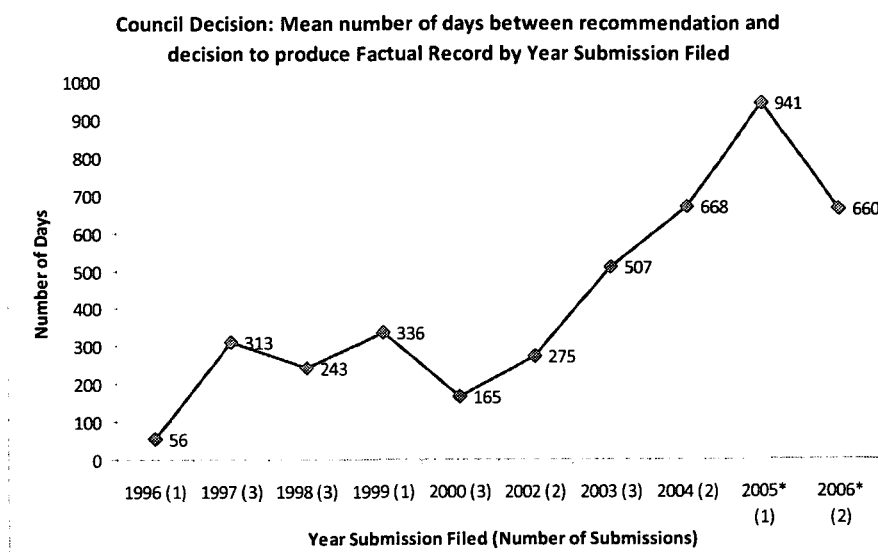
the Council an average of 234 days to make this decision for the first fifteen factual records.<sup>99</sup> Thus, it has taken the Council more than three times as long (and counting) to make a decision on the most recent six Secretariat recommendations as it took the Council to decide on the first fifteen. Figure 6 below shows the amount of time it has taken the Council to decide to authorize preparation of a factual record over the course of the process.

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recommendations by October 31, 2009, the actual average length of time for the Council to make this decision ultimately will be well over 784 days by the time it acts on all six open files.

99. See CEC, ALCA-Iztapalapa II, *supra* note 80 (290 days); CEC, Aquanova, *supra* note 80 (469 days); CEC, BC Hydro, *supra* note 80 (58 days); CEC, BC Logging, *supra* note 80 (112 days); CEC, BC Mining, *supra* note 80 (189 days); CEC, Cozumel, *supra* note 80 (56 days); CEC, Metales y Derivados, *supra* note 80 (71 days); CEC, Migratory Birds, *supra* note 80 (336 days); CEC, Molymex II, *supra* note 80 (148 days); CEC, Montreal Technoparc, *supra* note 80 (123 days); CEC, Oldman River II, *supra* note 80 (851 days); CEC, Ontario Logging, *supra* note 80 (486 days); CEC, Pulp and Paper, *supra* note 80 (64 days); CEC, Río Magdalena, *supra* note 80 (30 days); CEC, Tarahumara, *supra* note 80 (236 days). The Council determined not to authorize a factual record for two submissions, Cytrar II and Quebec Hog Farms. See CEC, Cytrar II, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2368&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2368&SiteNodeID=250&BL_ExpandID=) (last visited Apr. 26, 2010); CEC, Quebec Hog Farms, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2351&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2351&SiteNodeID=250&BL_ExpandID=) (last visited Apr. 26, 2010). There is one submission for which a factual record was authorized but the submission was withdrawn. CEC, El Boludo Project, [http://www.cec.org/Page.asp?PageID=2001&ContentID=2378&SiteNodeID=250&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=2001&ContentID=2378&SiteNodeID=250&BL_ExpandID=) (last visited Apr. 26, 2010). I have not included these three submissions in my analysis.

FIGURE 6\*



\*For the 2005 and 2006 submissions for which the Secretariat has recommended development of a factual record but on which the Council had not acted as of October 31, 2009, I assumed a Council decision date of October 31, 2009.

The long and short of this record is that, for the three pending submissions that are furthest along (i.e., the submissions for which the Secretariat is currently drafting a factual record), the average amount of time from submission until preparation of the draft factual record is 2016 days<sup>100</sup> (assuming a draft-factual-record submittal date of October 31, 2009).<sup>101</sup> This is an average of almost

100. See CEC, Coal-Fired Power Plants, *supra* note 93 (1871 days); CEC, Lake Chapala II, *supra* note 93 (2353 days); CEC, Quebec Automobiles, *supra* note 93 (1823 days).

101. Like the Council, the Secretariat has contributed to the drawing out of the process for more recent submissions. The Secretariat seems to have slowed down in its performance of its responsibility to develop draft factual records for the most recent submissions. The Secretariat is currently in the process of developing factual records for three submissions per the Council's directions. See CEC, Coal-Fired Power Plants, *supra* note 93; CEC, Lake Chapala II, *supra* note 93; CEC, Quebec Automobiles, *supra* note 93. Again using October 31, 2009, as a cut-off date, the Secretariat had spent an average of 750 days to prepare a draft record for each of these three submissions, compared to the average of 621 days it took the Secretariat to prepare drafts for the fifteen factual records that are already completed. Compare CEC, Coal-Fired Power Plants, *supra* note 93 (495 days), CEC, Lake Chapala II, *supra* note 93 (519 days), and CEC, Quebec Automobiles, *supra* note 93 (1235 days), with CEC, ALCA-Iztapalapa II, *supra* note 80 (788 days), CEC, Aquanova, *supra* note 80 (476 days), CEC, BC Hydro, *supra* note 80 (643 days), CEC, BC Logging, *supra*

five and a half years for each submission and already longer than it took the CEC to issue the vast majority of its first fifteen factual records. Yet each of the three submissions still has several stages to go—the Secretariat's submission of its draft factual record to the parties for comment, the parties' submission of their comments on the draft to the Secretariat, the Secretariat's finalization of the factual record and submission of it to the Council, and the Council's decision to release the factual record.<sup>102</sup> Thus, it is likely to take the CEC more than six years to complete the factual record process for each of these submissions, an average of approximately two years longer than it took for the first fifteen factual records.

For what is intended to be a relatively straightforward, spotlighting mechanism, the process increasingly might remind one of the children's song "The Song that Never Ends."<sup>103</sup> The delays in developing and releasing a factual record may impact citizens' views of the distributive justice of the process, since the delays mean the process takes a long time even to shine the limited spotlight contemplated.<sup>104</sup> Similarly, the Council's delays conceivably may influence citizens' sense of the procedural justice of the process if they believe delays are due, at least in part, to the Council's lack of commitment to the process.<sup>105</sup> I treat the delays as an independent source of concern because they do not, without more, fit neatly into either traditional category. Further, my sense is that the slow (and

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note 80 (515 days), CEC, BC Mining, *supra* note 80 (497 days), CEC, Cozumel, *supra* note 80 (264 days), CEC, Metales y Derivados, *supra* note 80 (503 days), CEC, Migratory Birds, *supra* note 80 (377 days), CEC, Molymex II, *supra* note 80 (731 days), CEC, Montreal Technoparc, *supra* note 80 (1200 days), CEC, Oldman River II, *supra* note 80 (517 days), CEC, Ontario Logging, *supra* note 80 (749 days), CEC, Pulp and Paper, *supra* note 80 (838 days), CEC, Río Magdalena, *supra* note 80 (509 days), and CEC, Tarahumara, *supra* note 80 (715 days). The Secretariat does not completely control progress in developing factual records, since it is dependent on submissions of information from the parties and others.

102. See NAAEC, *supra* note 6, art. 15.

103. Norman Martin, *The Song that Never Ends* (lyrics on file with author).

104. See Markell & Tyler, *supra* note 70, at 4 ("The concept of 'distributive justice' focuses on the fairness or appropriateness of the procedure's outcome."). A factual record is the end product of the process and likely the brightest spotlight the process creates. See NAAEC, *supra* note 6, art. 15. But the entire process operates quite transparently and, as a result, the submission of information by submitters, parties, and others, and the analyses and information provided by the Secretariat, all contribute to the spotlighting effect of the process. See Knox, *supra* note 17, at 88 ("On the whole, the NACEC submissions procedure receives high marks for transparency.").

105. See Markell & Tyler, *supra* note 70, at 4 ("[P]rocedural justice' involves the extent to which citizens value a process because of its procedural features."); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988) (defining "procedural justice" as involving participants' satisfaction with the decision-making processes).

slower) pace that has characterized the process deserves special attention because it offers a rare opportunity for policy makers to improve the process and their credibility with little downside and deserves to be “teed up” as such.

### 3. *The “Toothless” Character of the Mechanism.*

The CEC process likely appears remarkably toothless to domestic U.S. environmental lawyers and environmental nongovernmental organizations compared to domestic environmental enforcement mechanisms. Three features stand out as contributing to the “toothless” character of the process.

First, unlike domestic litigation, no remedial relief or punitive sanctions are available.<sup>106</sup> Thus, even if it is clear that a party’s enforcement practices are flawed, there is no provision for injunctive relief directing the party to improve. Similarly, there is no provision for monetary sanctions as an incentive to upgrade enforcement policies and practices.<sup>107</sup> Instead, the process ultimately is solely a reflexive, information-gathering, and spotlighting mechanism that lacks the remedial or punitive capacity to make any party take any action.<sup>108</sup>

Second, the process is limited even as a spotlighting mechanism. At the end of the day, the Secretariat provides information about the effectiveness of a party’s enforcement policies and practices. But the Secretariat is not supposed to include ultimate conclusions as to whether a party has failed to enforce its environmental laws effectively or recommendations for how a party might improve.<sup>109</sup> As Professor Raustiala has suggested, “A recurring critique of the current procedure is that the Secretariat may not make any explicit recommendations, nor does it have the

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106. See David S. Baron, *NAFTA and the Environment—Making the Side Agreement Work*, 12 ARIZ. J. INT’L & COMP. L. 603, 606 (1995) (noting that “the factual record itself does not bring with it any legal consequences”).

107. While Part V of the NAAEC creates a party-to-party process for persistent failures to effectively enforce environmental laws—a process that incorporates the possibility of monetary sanctions—see NAAEC, *supra* note 6, arts. 22–36, this process has never been used. In fact, in its 2004 report on the CEC, the Ten-Year Review and Assessment Committee recommended “that the Parties publicly commit to refrain from invoking Part Five [of the NAAEC] for a period of 10 years” because of the concern that such a sanctions process would prove counterproductive to cooperative environmental protection. CEC, *Ten Years*, *supra* note 10, at 55.

108. See Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1232 (1995) (describing “reflexive law” as using mechanisms like public disclosure and scrutiny to influence social and legal change).

109. See Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 542 (2003) (noting that “factual records are not to include conclusions or recommendations”).

power to reach affirmative conclusions as to whether the party in question is in fact 'failing to effectively enforce' its law."<sup>110</sup>

Third, again in contrast to judicial mechanisms, the CEC forum does not retain any sort of continuing jurisdiction over the matters at issue in a submission. There is, in other words, no follow-through capacity. Even if a party's enforcement practices are palpably problematic, the process ends with the issuance of a factual record.<sup>111</sup> As Chris Wold—the lawyer for the only U.S. submission to have produced a factual record—explained, the factual record is the “dead end” of the process because “the NAAEC does not require governments to address issues raised in the factual record.”<sup>112</sup> Wold indicates that the submission he prepared “resulted in no changes” in the way the relevant government agency (the U.S. Fish & Wildlife Service) implemented the statute the submission charged it with implementing ineffectually (the Migratory Bird Treaty Act).<sup>113</sup>

Exacerbating the situation, the Council recently rejected the Joint Public Advisory Committee's (“JPAC”) plan to review the progress made with regard to issues raised in published factual records.<sup>114</sup> The Council informed the JPAC that the NAAEC does not contemplate follow-up<sup>115</sup> and that JPAC's contemplated review “would be beyond the scope of the NAAEC.”<sup>116</sup> In short, the Council has been dismissive of the idea of incorporating any type of auditing function to assess the nature of a party's actions or to address the concerns raised by a submission.<sup>117</sup>

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110. Raustiala, *supra* note 13, at 397. Professor Knox similarly recognizes that the Secretariat is not permitted to make legal conclusions about environmental enforcement and may solely make factual findings but he argues that the distinction between factual findings and legal conclusions is likely to be “irrelevant to the effectiveness of the procedure,” in part because “[i]f the factual record is well-prepared, its readers will be able to draw their own conclusions as to that ultimate question.” See Knox, *supra* note 17, at 85–87.

111. See Knox, *supra* note 17, at 85.

112. Wold, *supra* note 6, at 231.

113. *Id.*

114. See David McGovern Letter, *supra* note 40.

115. *Id.* (noting that the submissions process “does not contemplate any action by the Secretariat or the Council after the publication of a factual record”).

116. *Id.*

117. Other features weaken the process beyond those described in the text. For example, the Secretariat lacks subpoena authority. Wold et al., *supra* note 26, at 421. In addition, there are limits on citizens' opportunities to participate in the process. See Markell, *supra* note 19, at 683–88. Another possible drawback for prospective U.S. submitters that does not fit neatly into either the distributive- or procedural-justice category is that there is no provision for recouping costs expended in investigating and pursuing a submission. See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 1037 (5th ed. 2007) (“The ability of public interest groups to recover their attorneys' fees and court costs can be an important inducement to initiate citizen suits.”).

In sum, it is clear that the process is limited in several important respects. Some of the features the CEC process lacks have been touted as important features in the success of other citizen-triggered processes and their absence may well be undermining the prospects of the process.<sup>118</sup> Yet there also is the possibility that spotlighting processes may be effective without coercive power.<sup>119</sup> Further study is warranted to learn how much the “toothless” character of the process has influenced citizens’ interest in using it. Frustration with the limited benefits the process has yielded has, in my view, likely dampened NGOs’ enthusiasm for using the process. It is not clear, however, to what degree these limited benefits flow from the limited powers inherent in the process or from the perceptions that the process has not been administered fairly or in a timely way (the concerns I discuss in the preceding Subparts).

### C. *Some Concluding Thoughts*

Of course, the past is not necessarily a prologue for the future of the citizen submissions process or any other mechanism. Citizens’ use of the process to challenge U.S. enforcement policies and practices may pick up. For example, issuance of the factual record for the one submission involving the United States for which such a record is currently being developed could conceivably contribute to a change in perception and persuade U.S. NGOs that the process is worth another look for its possible value to challenge U.S. enforcement policies and practices.<sup>120</sup> Further, shifts in domestic politics, such as the 2008 U.S. presidential election, may influence citizens’ perceptions concerning the possible value of the process and could engender increased NGO attention to the CEC mechanism.<sup>121</sup>

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118. See, e.g., Helfer & Slaughter, *supra* note 42, at 307 (suggesting, in reviewing the European Court of Justice and European Court of Human Rights, that “the effectiveness of a supranational tribunal is enhanced where states make its decisions legally binding”). Thus, Professors Helfer and Slaughter would likely not characterize the CEC process as a truly effective form of adjudication because of its inability to bind. However, they acknowledge that variation in context may affect the transferability of the experience of different models. See *id.* at 276.

119. See Knox, *supra* note 17, at 121 (suggesting that the CEC process has the potential to succeed despite its lack of binding effect). For an interesting recent review of a variety of mechanisms that incorporate different degrees of cooperation and coercion, see, for example, Gunningham, *supra* note 2.

120. Currently, the Secretariat is in the process of creating a factual record for one submission involving the United States. See CEC, Coal-Fired Power Plants, *supra* note 93.

121. The idea here is that citizens will perceive that the new administration is more receptive to citizen complaints, which will motivate citizens to submit complaints. On the other hand, there has been a loud citizen outcry about perceived problems with U.S. domestic environmental enforcement over the past eight years. See, e.g., ROBERT F. KENNEDY, JR., *CRIMES AGAINST NATURE*:

But it is indisputable that, while use of the process to challenge U.S. practices has never been particularly active, interest has declined significantly in more recent years.<sup>122</sup> The results from the recent survey Professor Tom Tyler and I conducted represent another set of data points that show this mechanism faces significant challenges in winning public support from the prospective submitter community.<sup>123</sup> This Part identifies some likely reasons for this disaffection and diminished use. At a minimum, if the goal is to have a citizen submissions process that citizens want to use and a process whose work product citizens would be willing to accept, this track record and our findings suggest the value of considering refinements and alternatives, at least as far as the United States is concerned. I now turn to that challenge and a more general exploration of citizen spotlighting processes.

### III. REINVIGORATING THE CEC CITIZEN SUBMISSIONS PROCESS IN PARTICULAR AND SOME MORE GENERAL OBSERVATIONS ABOUT CITIZEN-LAUNCHED PROCESSES

I begin this Part with specific suggestions that I think could significantly improve the procedural justice of the CEC citizen submissions process and its attractiveness to citizens, at little cost to the parties. I then step back to explore more generally the promise of citizen-based “fire alarm” mechanisms, some of the more important societal needs in the environmental arena, and how such mechanisms might be reconfigured given this context.<sup>124</sup>

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HOW GEORGE BUSH AND HIS CORPORATE PALS ARE PLUNDERING THE COUNTRY AND HIJACKING OUR DEMOCRACY (2004). Some citizens are likely to believe that the new administration will do better and not require as much outside prodding. Obviously, we will have to see how this turns out.

122. A number of political scientists have made the point that assessments of the value of the citizen submissions process should not focus only on the use of the process. Instead, they have suggested that the process is best viewed as part of a multilayered process to mobilize public pressure for a particular issue. See, e.g., Jeremy Wilson, *The Commission for Environmental Cooperation and North American Migratory Bird Conservation: The Potential of the NAAEC Citizen Submission Procedure*, 6 J. INT'L WILDLIFE L. & POL'Y 205, 227–29 (2003).

123. See Markell & Tyler, *supra* note 70, at 25–26 (highlighting desirable procedural elements that could lead to increased use of the CEC procedure). As we pointed out, our findings should be considered in light of the limitations of our survey. *Id.* at 15–16. Further, there is support for the notion that lack of familiarity reduces enthusiasm for an approach. Many of the respondents had not used the process before and were not currently involved in a submission. *Id.* at 18–19. As a result, the respondents' lack of familiarity with the CEC process might have influenced our findings.

124. It is possible, and important, to consider the citizen submissions process as it is situated in a variety of contexts. In this Article, I focus primarily on the citizen-driven aspect of the process and its focus on environmental concerns. The “regional context” is obviously extremely important as well but not dealt with directly in this Article. For an analysis of

A. *Specific Suggestions for Restoring Public Confidence in the CEC Process*

In the absence of empirical data, it is impossible to know with certainty why the CEC citizen submissions process has failed to trigger more use concerning U.S. enforcement of environmental laws. For the reasons summarized in the preceding Part, my view is that three likely suspects are the procedural-justice concerns associated with the process, the practical issue of delays in processing submissions, and the limited powers the process possesses.<sup>125</sup> It therefore seems logical to look for possible fixes in these arenas.

I focus on the first two here because, in my view, they are the easiest to effect and likely the most valuable.<sup>126</sup> If there is a will, there is an easy, straightforward way for the Council to address both the procedural-justice and timeliness concerns in a way that would resonate strongly with interested citizens. The Council could simply use its power to issue resolutions, a power the Council has exercised 163 times to date, including forty resolutions that have focused on the citizen submissions process (almost one-fourth of those issued).<sup>127</sup>

What would the Council need to include in such a resolution? Two elements would be important. First, the Council should make clear its intent to administer the process in a procedurally just way. The Council routinely incorporates general statements of support for

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the citizen submissions process in the regional context, see Michele M. Betsill, *Regional Governance of Global Climate Change: The North American Commission for Environmental Cooperation*, GLOBAL ENVTL. POL., May 2007, at 11.

125. See *supra* Part II.B.

126. While reconsideration of the “teeth” of the process is certainly worthwhile as part of any reappraisal, it seems at least plausible that the currently limited powers of the Secretariat are not the primary cause of the diminution in interest, given the willingness of citizens to try the process in its early years. See CEC, *Four-Year Review*, *supra* note 29, at 20 (noting that “the fact that the process is not a complete judicial one does not, in our view, make it either useless or ineffective”). Further, it seems unlikely that the parties will renegotiate the Agreement any time soon to change the nature of the process in a fundamental way that makes it more like a form of “supranational adjudication.” See Wold, *supra* note 6, at 249 (contending that “it is clear that governments view the process as adversarial and litigation-based and are ‘more inclined to weaken the procedure rather than strengthen it’” (quoting Raustiala, *supra* note 30, at 269)). As Professor Knox has observed, a managerial model is likely to be much more palatable to states than an adjudication approach. Knox, *supra* note 17, at 21.

127. CEC, Resolutions, [http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=263&BL\\_ExpandID=](http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=263&BL_ExpandID=) (last visited Apr. 26, 2010). The Council (and its constituent members) might want to supplement a resolution with various other actions intended to signal a commitment to the process.

the process in resolutions involving the process,<sup>128</sup> and it could easily incorporate such a general statement in a new resolution. The Council should also resolve to approve Secretariat recommendations to prepare factual records and release such factual records absent exceptional circumstances in order to reaffirm its intention to administer the process in a procedurally just way.<sup>129</sup> Such a resolution would need to be framed particularly carefully because of the Council's reluctance to cede authority in an area that is within its realm, notably the power to veto development of factual records following a Secretariat recommendation.<sup>130</sup> But again, if there is a will, there should be a way to get the semantics right to make this happen. First, as a practical matter the Council would effectively be committing to do what it does already—approve the Secretariat's work in all but exceptional cases. To date, the Council has approved the development of factual records in the vast majority of cases and it has approved release of completed factual records for all fifteen such records.<sup>131</sup> Second, at least one party, the United States, has already unilaterally made such a commitment (via an executive order),<sup>132</sup> so the idea that a party would commit *ex ante* to approve Secretariat recommendations is nothing new.<sup>133</sup> Third, the Council can certainly frame the resolution so that the Council retains the ability to reject a Secretariat document if needed, as the United States has done.<sup>134</sup> Indeed, the Council could make it clear that its approach is a pilot project, thereby putting some pressure on the Secretariat to act responsibly.

Professor Chris Wold has suggested that “the easiest way to transform the citizen submission process would be to eliminate the

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128. See, e.g., CEC, *Council Resolution: 08-03*, CEC Doc. C/C.01/08/RES/03/Final (June 23, 2008), available at [http://www.cec.org/Page.aspx?PageID=122&ContentID=941&SiteNodeID=265&BL\\_ExpandID=](http://www.cec.org/Page.aspx?PageID=122&ContentID=941&SiteNodeID=265&BL_ExpandID=).

129. The two decision points for the Council in the factual-record process are determining whether to (1) approve a Secretariat recommendation to prepare a factual record and (2) release a factual record. NAAEC, *supra* note 6, art. 15, paras. 2, 7.

130. See *id.* para. 2; see also David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submission Process*, 30 N.C. J. INT'L L. & COM. REG. 759, 765–66 (2005) (discussing the Council's veto power).

131. See CEC, *Advice to Council*, *supra* note 40 (“The Council has approved 16 of the 18 recommendations for factual records considered.”); David McGovern Letter, *supra* note 40 (noting that “[f]ifteen factual records have been prepared and published”).

132. Exec. Order No. 12,915, 3 C.F.R. 892 (1995), reprinted in 19 U.S.C. § 3472 (2006) (providing that “[t]o the greatest extent practicable, . . . where the Secretariat . . . informs the Council that a factual record is warranted, the United States shall support the preparation of such factual record”).

133. See Knox, *supra* note 17, at 90–91.

134. See *id.*

governments' role in determining whether a factual record is warranted."<sup>135</sup> A Council resolution of the sort I recommend would not go so far because it reserves this decision to the Council. The resolution, however, would signal the Council's commitment to increasing the "broader public interest" in the process.<sup>136</sup> Of course, any benefit from such a resolution would be short-lived if the Council did not implement it in a way that neutral observers would consider to be fair and neutral.<sup>137</sup> *If* the Council were to issue such a resolution, and *if* the Council implemented it in good faith, I believe there is a reasonable chance such a resolution ultimately would help bolster the procedural justice of the process.

To respond to concerns about delays, the Council should also incorporate time frames for completing different stages of the process in such a resolution. In its Advice to Council No: 08-01, JPAC complained (again) that "[t]he procedure is too slow."<sup>138</sup> JPAC noted that (1) it had previously recommended that the entire process not take more than two years; (2) while delays in the preparation of factual records because of Secretariat resource constraints might be understandable, the Council's delays in performing its two responsibilities (deciding whether to approve a recommendation for a factual record and whether to publish a factual record when it is finished) "are not"; and (3) delays "seriously undermine the credibility and usefulness of the CEC."<sup>139</sup> JPAC requested "renewed commitment by the Council" to adhere to timelines for completion of the process.<sup>140</sup>

The increasing length of these delays makes it especially timely for the Council to act to exercise control over a process for which it is ultimately responsible. As Part II establishes, while the process has proceeded painfully slowly for years and has been criticized for that reason, these delays have recently worsened significantly.<sup>141</sup>

Further, the Council has specifically acknowledged delays in the process as a concern and has committed itself to addressing them.

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135. Wold, *supra* note 6, at 249.

136. David McGovern Letter, *supra* note 40.

137. Good-faith implementation would involve routine approval of the development of factual records and their release, as well as a much more hands-off approach to the Secretariat's development of such records. The Council's imposition of various conditions on the development of factual records has triggered criticism by NGOs and others. See Markell, *supra* note 19, at 699-707; Wold et al., *supra* note 26, at 425-30.

138. CEC, *Advice to Council*, *supra* note 40. Many others have raised this concern as well. See, e.g., Garver, *supra* note 15, at 38 (characterizing delays as the "most serious current threat" to the process); Wold, *supra* note 6, at 230 (noting that delays "obviously dampen public enthusiasm for the submission process").

139. CEC, *Advice to Council*, *supra* note 40.

140. *Id.*

141. See *supra* Part II.B.2.

For example, in an August 2008 letter to JPAC on behalf of the Council, Canadian Assistant Deputy Minister for International Affairs David McGovern acknowledged “extended delays” in the process.<sup>142</sup> He indicated in this letter that the Council “look[s] forward to discussions with JPAC and the Secretariat on how to improve timeliness . . . in the [Submission on Enforcement Matters] process.”<sup>143</sup>

In short, delays are a highly visible but correctible problem that the Council can act to address at little cost, and by doing so it can earn credibility with the public. Although even the two years from submission to factual record that JPAC recommends is a long time, it would be an enormous improvement over the six-plus years the CEC is currently on track to take to complete its work on open files.<sup>144</sup> The parties have generally come reasonably close to meeting their obligation to file responses to submissions within thirty days (with an additional thirty days available under some circumstances), so no adjustment is needed in this area.<sup>145</sup> However, the time it takes the Secretariat to draft factual records has lengthened considerably in recent years, and the same is true for the time it takes the Council to approve development and release of factual records.<sup>146</sup>

Particularly as part of a resolution in which it commits to accede to Secretariat recommendations to develop factual records in most instances and to release factual records, the Council should establish time limits for each stage. The Council would be lauded for taking steps to expedite its own work. Further, the Council could use the occasion to set deadlines for the Secretariat to develop its recommendations and to prepare draft factual records, two other stages of the process that take a long time. In my view, a Council resolution in which the Council commits to approve recommendations and to release factual records except in extraordinary circumstances and further commits to complete the process in a much more timely fashion would, at relatively little cost to the parties or Council, signal a commitment to the process that would have the potential to rekindle citizen interest in using it.

Another relatively easy “fix” that would bolster public confidence and the credibility of the parties (and Council) would be for the Council to allow for, and indeed encourage, follow-up to factual records. The lack of follow-up has long been a source of frustration to citizens. JPAC expressed this frustration in its 2008

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142. David McGovern Letter, *supra* note 40.

143. *Id.*

144. *See supra* Part II.B.2.b.

145. *See* NAAEC, *supra* note 6, art. 14, para. 3.

146. *See supra* Part II.B.2.

## Advice:

The enforcement issues that have been highlighted through factual records have **not** been followed up by the CEC, by decision of the Council dated June 14, 2002. This has meant that the CEC, after the release of factual records, has not been able to:

- a. engage those affected by a failure of a Party to effectively enforce its environmental law to determine the impact of preparation of a factual record on ongoing enforcement,
- b. ascertain any improvements in a Party's approach to protecting and restoring the health and integrity of the environment through improved enforcement of its environmental laws; or
- c. suggest improvements to the implementation of the Article 14/15 process through analysis of that process in specific situations involving the preparation and release of a factual record.<sup>147</sup>

Follow-up of this sort is an essential part of competent management and performance measurement.<sup>148</sup> Further, allowing and even encouraging such follow-up is consistent with President Obama and Environmental Protection Agency Administrator Lisa Jackson's commitment to transparency and accountability.<sup>149</sup> The Council has a wide array of options for conducting such follow-up depending on its desire for control and concerns about costs. JPAC has expressed its interest in and willingness to do such work,<sup>150</sup> the CEC cooperative-work program could incorporate such work into its program,<sup>151</sup> or the CEC Submissions on Enforcement Matters Unit or its special legal advisors<sup>152</sup> could be directed to do so. Alternatively, the governments could task their own officials with developing follow-up reports at some reasonable point following

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147. CEC, *Advice to Council*, *supra* note 40.

148. *Id.* (indicating that it is a "basic precept" of governance to include follow-up evaluations of performance).

149. *See, e.g.*, Memorandum on Transparency and Open Government, Jan. 21, 2009, 74 Fed. Reg. 4685 (Jan. 26, 2009) (explaining the benefits of a transparent and accountable government); EPA Memo, *supra* note 5 (explaining that the "EPA's actions must be transparent").

150. CEC, *Advice to Council*, *supra* note 40.

151. *See* Knox, *supra* note 17, at 119–20.

152. The CEC Secretariat has convened a group of distinguished experts to serve as special legal advisors to the citizen submissions process. *See* CEC, *Ten Years*, *supra* note 10, at 45. These advisors were extraordinarily generous with their time during my tenure at the CEC and very helpful.

issuance of a factual record.<sup>153</sup> Regardless of the mechanism the Council prefers, a Council resolution that endorses follow-up of the sort JPAC describes is likely to make citizens more confident about the value of the process and more willing to use it.

### *B. More Far-Reaching Options*

Beyond these fixes for the CEC process in particular, the experience of this process suggests it would be appropriate to consider the design of citizen-spotlighting processes using the following three lenses: (1) options for making such processes more procedurally just, (2) the potential for citizen “fire alarm” mechanisms to serve an integrative function in policy development and implementation, and (3) the appropriate or “right” substantive focus for such mechanisms. I discuss each in this concluding Part.

#### *1. Taking a Harder and More Comprehensive Look at Enhancing the Procedural Justice of Citizen Submissions Processes*

Professor Tom Tyler and I recently proposed a five-part conceptual framework for evaluating processes that seek to promote citizen participation.<sup>154</sup> Based on our tentative formulation, an ideal (or relatively promising) procedure would be one (1) that people find acceptable *ex ante*; (2) for which personal experience or familiarity with the procedure bolsters rather than reduces its acceptability; (3) for which a cross-section of relevant stakeholders agrees that the procedure is an acceptable one; (4) with which people are satisfied because of its fairness (its procedurally just character) rather than because they are confident they would “prevail”; and (5) that does well on “non-justice issues” rather than having such issues detract from its acceptability.<sup>155</sup> To elaborate briefly on the fourth element,

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153. There seems to be room for such an approach per the August 2008 letter from Canadian Assistant Deputy Minister for International Affairs David McGovern on behalf of the Council in which, at least implicitly, Minister McGovern seems to leave open the possibility that parties might voluntarily conduct such follow-up on their own, noting that “the NAAEC does not contemplate any action by the Secretariat or the Council after the publication of a factual record” and “any type of action by the Parties to follow up on factual records is a matter of domestic policy as opposed to a requirement of the NAAEC.” See David McGovern Letter, *supra* note 40. While such an approach arguably would be less appealing to citizens than an independent follow-up mechanism, see Knox, *supra* note 17, at 28–36, it would almost certainly be considered an improvement to the current system.

154. See Tom Tyler & David Markell, *The Public Regulation of Land Use Decisions: Criteria For Evaluating Alternative Procedures*, 7 J. EMPIRICAL LEGAL STUD. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1475378](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1475378).

155. *Id.* (manuscript at 5). Procedural-justice theories contend that there are distinct advantages to procedures that are accepted because of their procedural qualities. Such procedures have a reservoir of support that gives

one typology theorists have suggested is that, in evaluating whether procedures are fair, people consider the quality of decision making (for example, the neutrality of the decision makers and the opportunity to participate) and the quality of the treatment they receive (for example, whether they are treated with courtesy and respect).<sup>156</sup>

It would be worthwhile for policy makers to consider both aspects of procedural justice in revisiting the structure of the CEC process and in considering the structure of citizen-participation processes more generally. For the CEC process, for example, it seems noteworthy that an environmental NGO recently suggested transforming the process into a nonadversarial, cooperative mechanism with the hope that it will help transform a dysfunctional process into one that contributes to addressing environmental challenges.<sup>157</sup> Professor Chris Wold similarly has concluded that “[t]he entire model is wrong” and that a better approach would “facilitate[ ] cooperation rather than encourage[ ] an adversarial process.”<sup>158</sup> These suggested changes relate to the procedurally just character of the process and ways to make it more procedurally just than it is now (or perceived to be). The Council, JPAC, and others might consider options for enhancing the procedurally just quality of the process beyond the suggested changes I offer above. For example, it would be straightforward to incorporate into the process the possibility of more cooperative interactions involving citizens, the Secretariat, and the parties. These process options for enhancing the procedural justice of citizen-driven processes deserve consideration outside of the CEC context as well. As noted above, these types of ideas are very much part of the “new governance” mantra that has won numerous adherents and that President Obama embraced in his day-after-inauguration memorandum urging use of different tools, methods, and systems to foster cooperation.<sup>159</sup>

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their outcomes more credibility or legitimacy than procedures that are acceptable because they are expected to produce desired outcomes. See *id.* (manuscript at 13).

156. See *id.*, (manuscript at 14).

157. See Wold, *supra* note 6, at 250.

158. *Id.*

159. See Memorandum on Transparency and Open Government, *supra* note 149.

2. *Envisioning and Designing Citizen Submissions Mechanisms as “Outside-In” Tools to Promote Integrated Rather than “Silo-Oriented” Government Responses to Significant Challenges*

A great deal has been written about the benefits of citizen participation in governance and about the possible downsides. Benefits include enhancing governance legitimacy by increasing citizens' acceptance of government actions, improving the quality of government decisions through more informed government decision makers, and promoting more accountable government.<sup>160</sup> On the other hand, citizen participation may slow government, divert it from more important pursuits, and make government policy more susceptible to capture by participating individuals and groups.<sup>161</sup>

The one aspect of citizen participation I highlight here is its potential to facilitate more integrated and holistic approaches to environmental protection and, indeed, to sustainable development more generally. Performance-measurement experts and others sometimes refer to “silo” government structures to connote the relatively unconnected and unintegrated governance infrastructure that has evolved to address environmental and other challenges.<sup>162</sup> If properly structured and focused, citizen submissions processes have the potential to facilitate integrative efforts to address contemporary environmental and sustainable-development challenges.<sup>163</sup> This is particularly the case if such processes allow and encourage citizens to pose the kinds of questions that facilitate such efforts.

Canada's experience with its own citizen-petitions process is illustrative. Canada's process, created in 1995, only a year after creation of the CEC process, allows Canadian citizens to file petitions in which they raise questions about whether particular government policies and practices are consistent with sustainable

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

161. See *id.* at 4.

162. See, e.g., Colleen M. Flood et al., *Steering and Rowing in Health Care: The Devolution Option?*, 30 QUEEN'S L.J. 156, 176 (2004) (Can.) (discussing funding “silos” in Canadian health care).

163. Professor Jonathan Wiener has used the phrase “radiative forcing” to suggest that climate policy may “break the logjam in environmental law.” Jonathan B. Wiener, *Radiative Forcing: Climate Policy to Break the Logjam in Environmental Law*, 17 N.Y.U. ENVTL. L.J. 210, 211 (2008). Professor Wiener is referring to the need to revisit how our environmental-protection regime is structured and he suggests that the enormous challenges of climate change may drive fundamental changes in this structure to better equip us to respond. *Id.* at 211–17.

development.<sup>164</sup> A 2007 review of the process found that citizen petitions, by raising issues under the purview of multiple Canadian government agencies, had prompted these agencies to work together to address the issues raised.<sup>165</sup> The report indicated that one petitioner stated that “petitions compel departments to talk to each other about environmental issues—a significant benefit of the petitions process.”<sup>166</sup> Similarly, government officials told the report’s authors that petitions “provide[ ] an opportunity for considering interdepartmental positions” and “point out potential gaps in policies and program delivery.”<sup>167</sup> Thus, petitions helped to break down the silos or facilitate coordination between and among agencies.

The need to promote integrated and interdisciplinary thinking about the major environmental and sustainable-development issues we face, such as climate change, exists across North America (and beyond).<sup>168</sup> There are, of course, other ways to prompt such integrated thinking. For example, top-down approaches in which leaders establish goals and structures may work to move us in this direction. There is some evidence of attention to this issue at both the federal and state levels. In appointing Carol Browner as the Climate Change Czar, President Obama highlighted that it will be important for her to break down bureaucratic barriers and work in an integrated way.<sup>169</sup> Similarly, California’s 2008 law attempting to integrate land-use and climate-change policies stems in part from the insight that integrated approaches are needed.<sup>170</sup> These ongoing efforts simply highlight the need for integration and coordination regardless of how it occurs. In its 1998 report on the CEC, the Independent Review Committee (“IRC”) similarly observed that each Party needs to “seriously address” the need for “coordination of the multiple government agencies with an interest in the subject matter of the NAAEC.”<sup>171</sup>

In short, while the citizen-driven character of the CEC process

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164. OFFICE OF THE AUDITOR GEN. OF CAN., REPORT OF THE COMMISSIONER OF THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT ch. 2, at 67–68 (2007), available at [http://www.oag-bvg.gc.ca/internet/docs/c20071002c\\_e.pdf](http://www.oag-bvg.gc.ca/internet/docs/c20071002c_e.pdf).

165. *Id.* at 75.

166. *Id.* at 77.

167. *Id.* at 79.

168. See ENVTL. LAW INST., AGENDA FOR A SUSTAINABLE AMERICA 6 (John Dernbach ed., 2009); Delight Balducci et al., *Green Jobs in New York: Where the (Green) Economy Meets the (Green) Environment (Part 1 of 2)*, ENVTL. L. N.Y., Mar. 2009, at 35; Wiener, *supra* note 163, at 219–23 (noting the need to develop a multilayered, interconnected approach to address climate change).

169. See David L. Markell, *Greening the Economy Sustainably*, 1 WASH. & LEE J. ENERGY CLIMATE & ENV’T (forthcoming 2010) (manuscript at 13), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1376380](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1376380).

170. *Id.* (manuscript at 2).

171. CEC, *Four-Year Review*, *supra* note 29, at 10.

raises a host of issues for process designers, it strikes me that it would be highly worthwhile for policy makers and others to carefully consider the potential that such citizen-driven processes have to engender more integrated ways of approaching environmental challenges. This is an important possible benefit of citizen-driven mechanisms—to provide an “outside-in” impetus to revisit governance structures and approaches—that has received little attention to date and deserves more.<sup>172</sup>

3. *Reconsidering the Focus of the CEC Citizen Submissions Process and Others, Including a Possible Shift to a Focus on a “Sustainable-Development” Approach*

A third important question concerning citizen-driven processes involves their appropriate focus. In the context of revisiting regional environmental agreements and the NAAEC in particular, it is appropriate to reconsider the current focus of the CEC citizen-submissions process on domestic enforcement failures. For a variety of reasons, it is worth considering shifting (and broadening) the focus to encompass the sustainable-development character of government decisions.

Commentators suggest that the concerns that motivated the NAAEC’s drafters to focus on domestic environmental enforcement—notably, concerns about “competitive effects” (for example, a “race-to-the-bottom” triggered in part by inadequate domestic enforcement)—have not materialized.<sup>173</sup> These findings

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172. There clearly are potential downsides to such an approach that deserve careful consideration as well. For example, as Professor Knox has noted, “Professors Helfer and Slaughter point out that tribunals are more effective at ‘policing modest deviations from a generally settled norm’ than responding to systemic problems requiring large-scale policy changes.” Knox, *supra* note 17, at 104 (quoting Helfer & Slaughter, *supra* note 42, at 330). Thus, policy makers would be well advised to assess the challenges of citizen-driven processes that provide opportunities for enhanced “integrative” thinking, as well as the benefits of these processes.

173. See, e.g., Gaines, *supra* note 10, at 255. The concern during the negotiations was that NAFTA would spawn a “race to the bottom” in which Mexican underenforcement would spur manufacturing and other highly regulated operations to move to Mexico because of the resulting lower cost of doing business. See Wold, *supra* note 6, at 203. The hope was that the CEC citizen submissions spotlight would help to ameliorate this concern. See Knox, *supra* note 17, at 54 (suggesting that the NAAEC was created to help address the Mexican “pollution haven” concern); see also U.S. GEN. ACCOUNTING OFFICE, NORTH AMERICAN FREE TRADE AGREEMENT: ASSESSMENT OF MAJOR ISSUES 114–15 (1993), available at <http://archive.gao.gov/d48t13/149866.pdf> (noting that the NAFTA drafters attempted to provide adequate protection for the environment); Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience*, in GREENING NAFTA, *supra* note 16, at 117, 120–21 (finding that Mexico has not become a “pollution haven” post-NAFTA); Claudia Schatan, *The Environmental Impact of Mexican Manufacturing Exports Under NAFTA*, in GREENING NAFTA, *supra* note 16, at 133, 133.

suggest the value of reassessing whether the CEC would be best served by continuing to have the citizen submissions process focus on enforcement issues (for example, whether enforcement-related issues are the most pressing or of the greatest interest to citizens).<sup>174</sup> In short, if the goal is to have a process that focuses on some of the most significant environmental challenges, it seems appropriate to reconsider whether to confine the process to the enforcement arena.<sup>175</sup>

Beyond this apparent, empirically based reason for reconsidering the focus of the citizen submissions process, a key feature of the CEC is its focus on sustainable development and environmental protection, transcending its roots as the product of trade-agreement negotiations. Thus, the NAAEC articulates a goal of promoting sustainable development that extends well beyond addressing “regulatory effects” or trade and environment connections more generally.<sup>176</sup> In the first official review of the CEC, conducted by the IRC, the IRC concluded that “the long-term value of [the CEC] will be measured . . . by the contribution the CEC makes to . . . sustainable development in North America.”<sup>177</sup> The IRC reported that “the potential for the CEC to play an important role in the achievement of sustainable development as the North American economy becomes increasingly linked is widely recognized and supported.”<sup>178</sup> This more general goal further supports reconsidering whether there are ways to revamp a key NAAEC mechanism—the CEC process—to more closely align it with these goals.

We are early on in understanding how best to reconfigure our governance institutions to promote the unwieldy concept of sustainable development. As suggested above, because of its potential for advancing integrative thinking, a citizen-driven process such as the CEC citizen submissions process would seem to hold potential for facilitating the interdisciplinary thinking that is needed to move towards more sustainable-development approaches—and to do so in a transparent environment that would lead to greater accountability for program direction and

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174. See Wold, *supra* note 6, at 234 (noting that “the empirical evidence does not suggest” that enforcement is a “major worry”).

175. There are other reasons why confining the CEC process to this focus may be ill-advised. See, e.g., Heckler v. Chaney, 470 U.S. 821, 838 (1985) (declining to second-guess an agency enforcement decision because agency enforcement decisions are inherently discretionary and there is no meaningful basis for judicial review).

176. See NAAEC, *supra* note 6, pmb., art. 1(b).

177. CEC, *Four-Year Review*, *supra* note 29, at 5.

178. *Id.* at 9. The IRC notes that the purpose of the process “relates to the . . . broader goal of sustainable development” by minimizing the risk of a “race to the bottom.” *Id.* at 20.

performance.

In short, at least at a framework level, broadening the focus of the CEC citizen submissions process has the potential to align the process more closely with the most significant needs the CEC is intended to address (and presumably this would be true for similar processes in other agreements). It has the further potential to prompt government officials to work in a coordinated way to consider their responsibilities from a sustainable-development perspective in a transparent environment, something that several commentators have urged we pursue and yet a difficult challenge.<sup>179</sup> While there clearly would be significant challenges to reconfiguring the CEC and other processes operating in a similar context in this way, it is, in my view, worth some attention as part of any initiative to revisit the focus of such processes.

#### CONCLUSION

Despite high hopes and some positive feedback, the track record of the CEC citizen submissions process raises several red flags concerning its value as a model for “new governance” strategies that rely upon increased citizen participation and enhanced government transparency and accountability to advance public-policy goals. While a skeptic about the process might feel vindicated by its track record concerning the United States, the Council has power under the NAAEC to exercise responsibility for the process in ways that will address some of the more significant reasons for citizen disaffection.<sup>180</sup> The Council thereby has the capacity to help the process move in a more positive direction. While the Council’s rhetoric over the years has been virtually uniformly supportive of the process, its responses to current challenges concerning the lack of procedural justice that characterizes the operation of the process and the extraordinary “slow and slower” pace of the process are likely to reveal its true level of commitment. Thus, despite (and, paradoxically, perhaps in part because of) the extant track record, I believe the process has the potential to be a valuable complement to domestic “new” and “traditional” governance mechanisms, *if* the Council’s real level of commitment matches its rhetoric.

The track record of the process also offers helpful insights for the design of citizen “fire alarm” processes more generally. Process designers would benefit from close attention to the types of pitfalls the process has experienced and also from close attention to the options for configuring such processes to take maximum advantage of citizen engagement. While some of these issues are unique to the free-trade sphere, others are worth considering more generally in

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179. See, e.g., ENVTL. LAW INST., STUMBLING TOWARDS SUSTAINABILITY 145–46 (John Dernbach ed., 2002).

180. See, e.g., NAAEC, *supra* note 6, art. 10.

exploring options for good governance.