

**THE CEC'S CITIZEN SUBMISSION PROCEDURE:
INNOVATIVE MODEL INSTITUTION OR TOOTHLESS TIGER?**

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I. Introduction

When the North American Free Trade Agreement went into effect in 1994 between Mexico, the U.S. and Canada, the North American Agreement on Environmental Cooperation (“NAAEC”) also went into effect. The NAAEC was a side agreement between the parties intended to address the concerns of environmentalists, particularly in the US, that increased trade would cause additional environmental problems not easily remedied by existing environmental laws in the three member states. The NAAEC agreement created the Commission on Environmental Cooperation (“CEC”) and endowed it with certain powers to gather information on environmental issues, to investigate problems brought to its attention, and to put pressure on the member states to effectively enforce their own substantive environmental laws.

One of these powers is the Citizen Submission Procedure established by Articles 14 and 15 of the NAAEC. Under this unique and innovative procedure, a citizen of any of the three parties may bring a claim before the CEC alleging that a member state is failing to effectively enforce its environmental laws. If such a claim meets basic admissibility requirements and appears to allege an enforcement failure, the CEC Secretariat may request the CEC Council to authorize the preparation of a “Factual Record” on the situation. This factual record, which has no binding legal force, is not intended to conclude whether an enforcement failure genuinely exists. Nonetheless, it may be published with Council approval and may have the effect of at least shining a light on alleged enforcement problems and perhaps even shaming the nation involved into changing its practices.

This paper sets forth the achievements and short-comings of the Citizen Submission Procedure generally and places it in context. The scholarship on this procedure is quite varied. Some authors' discussions focus on its qualities as a post-Westphalian international legal innovation, its place in the larger NAFTA regime, its efficacy in promoting environmental protection, or its unique structure. This paper briefly addresses all of these matters, and seeks to add to the literature a practical and realistic assessment of the procedure's present and future utility as a tool for protecting the environment of the NAFTA states and as a potential model for other international coalitions.

After surveying the history of the procedure and touching on some of the critiques and appraisals of it, I conclude that, despite its limitations, the procedure can be an important tool in the North American environmentalists' toolbox. For Canadians and Mexicans, it provides a venue for claims that might otherwise not be brought, since Mexican and Canadian environmental laws do not provide for citizen-generated claims as often as American environmental laws do. Even for Americans, who generally have access to binding domestic citizen suit procedures, the Art. 14/15 procedure fills an important niche, since it covers situations in which there is a broad pattern of enforcement failure that stretches across multiple states and regions. It is also useful where the environmental effects may be felt by our Canadian or Mexican neighbors. Furthermore, despite the non-judgmental, non-punitive character of the factual record that is the end product of the procedure, there is reason to believe that the "sun-lighting" or "shaming" function does produce positive results. Also, along the way, the procedure encourages cooperation and dialogue between the environmental communities of the three member states, which furthers the overall goal of the CEC. Ultimately, although it

is the product of a unique confluence of circumstances, the procedure could potentially serve as a model for future agreements.

II. Background: What Makes the Procedure Unique

a. Nuts and Bolts of a Citizen Submission

Any description of the Citizen Submission procedure must begin with an overview of the CEC, which is composed of three main bodies. These three bodies are the Council, the Secretariat, and the Joint Public Advisory Committee (“JPAC”). The Council consists of the top administrator of the national environmental agency of each of the three parties. It is the governing arm of the CEC and is endowed with a broad mandate under the NAAEC¹. The Secretariat is composed of qualified professionals and is the operational, technical and administrative arm of the CEC². JPAC consists of fifteen private citizens from various backgrounds, five of whom represent each of the three member parties. The role of JPAC is to act as the voice of the public and to give advice to the Council and support to the Secretariat³. Although the two bodies involved in the Citizen Submission procedure are the Secretariat and the Council, the JPAC has played an important role in protecting the integrity of the procedure by mediating between these two bodies, as will be explained in detail later.

The Citizen Submission Procedure begins when some entity, usually an environmental non-governmental organization (“ENGO”) or a group of ENGO’s, sends a submission to the CEC Secretariat in Montreal, Canada. The Secretariat then

¹ See NAAEC Article 10, *available at*: http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/.

² See NAAEC Article 11, *available at*: http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/.

³ See NAAEC Article 16, *available at*: http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/.

acknowledges the submission in writing, generally within a few days⁴, and begins to assess whether the submission meets the criteria set forth in Article 14(1) which states:

The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.⁵

These requirements are intended to prevent the CEC from being overwhelmed with frivolous claims and to focus the Citizen Submission procedure on failures by states to enforce, rather than on failure of industry or other private actors to comply.⁶ If the Secretariat finds that the submission does not meet all the criteria set forth in Art. 14(1), (for instance for inadequate factual support or a claim that challenges the standards set by the law, rather than the enforcement practices of the implementing government), then the Secretariat will inform the submitter and provide thirty days to cure the defects in the submission⁷. Otherwise, a submission that meets the requirement will then be considered

⁴ For a complete list of submissions and their current status and timeline, please see the “status” portion of the Citizen Submissions on Enforcement Matters section of the CEC’s website *available at*: www.cec.org/citizen/status.

⁵ NAAEC, *available at*: http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/.

⁶ See COMMISSION ON ENVIRONMENTAL COOPERATION, BRINGING THE FACTS TO LIGHT: A GUIDE TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 13 (2002) (“Submission Guidelines”) *available at*: http://www.cec.org/files/PDF/SEM/BringingFacts-Jun02_en.pdf.

⁷ *Id.* at 14

to determine whether the matter warrants a response from the nation concerned⁸. If the Secretariat decides that it does, a request for a response will be sent to the allegedly offending nation. Nations have invariably complied with these requests.⁹ Next, the Secretariat may determine that the response is adequate to address the alleged enforcement failure, for instance when the government concerned has acknowledged the failure and promised to remedy it, or if the matter is already the subject of ongoing domestic legal proceedings¹⁰. If this is the case, the matter is dropped by the CEC. If, on the other hand, the Secretariat determines that there are outstanding legal or factual matters that the response does not adequately address, it may request that the Council authorize it to prepare a factual record. To do so, the Council must pass a resolution by a two-thirds vote authorizing the Secretariat to solicit information, investigate, and compile a factual record on the alleged enforcement failure¹¹. Upon completion of the factual record, the Council must again vote by a two-thirds majority on whether or not to make the record public.¹² So far, the Council has always voted to publish completed factual records.¹³ The publication of the factual record represents the product and outcome of the submission.

⁸ In deciding whether to request a response from the accused party, Article 14(2) provides that: “In deciding whether to request a response, the Secretariat shall be guided by whether: (a) the submission alleges harm to the person or organization making the submission; (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement; (c) private remedies available under the Party’s law have been pursued; and (d) the submission is drawn exclusively from mass media reports;” See NAAEC Art. 14 available at http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/.

⁹ For information on the status and history of all submissions ever made to the CEC, see “status” link on CEC website, *supra* note 4.

¹⁰ Submission Guidelines at 15-16, *supra* note 6.

¹¹ NAAEC Article 15(2) available at: http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/.

¹² *Id.* at Article 15(7).

¹³ See “status” link on CEC website, *supra* note 4.

Several aspects of this process warrant further comment. First, the threshold requirement in Article 14(1)(e) only requires that the targeted state be contacted and given some opportunity to respond to the allegations of the ENGO. Thus, where the submitters predict that domestic legal remedies will be inadequate, unreasonably difficult to pursue, or simply do not exist, they are not required to pursue any before making a submission to the CEC. Furthermore, where ENGO's do opt to use the domestic legal system, the Secretariat does not require that they obtain an adverse judgment in the highest judicial body possible. Instead, the Secretariat will refuse any further action on a claim that is the subject of pending or ongoing judicial proceedings. This is important because, on the one hand, it encourages ENGO's to make full use of local remedies for local problems.¹⁴ On the other, it ensures that submitters with a legitimate grievance are not thwarted by a lengthy, expensive, and possibly futile appeals process.¹⁵ Thus, the requirement leaves ENGO's free to strategize as they see fit.

Second, the Secretariat enjoys a broad mandate to seek information from any source once a factual record has been authorized¹⁶. However, the scope of the factual record is limited in that the intention is not to produce a judicial-type determination or accusation that a party is or is not effectively enforcing its environmental law, but rather to organize and present all the pertinent information on the subject so that all interested may make that determination. Thus far, the production and publication of a factual record has been the end point of the procedure. Theoretically, a party who persistently fails to remedy an apparent enforcement failure could be subject to sanctions, but no party has ever sought

¹⁴ John Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 *ECOLOGY L.Q.* 1, 64 (2001).

¹⁵ *Id.* at 63.

¹⁶ NAAEC Article 15(4), available at: http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/.

to sanction another to date¹⁷. Aside from this dormant procedure, there is no follow up with the submitters and no provisions for ongoing monitoring.

Also, a glance at the “Status” link on the CEC’s website for the Citizen Submission procedure shows that it can take as many as six years between the filing of a submission and the publication of a final factual record.¹⁸ Thus, the procedure does not produce quick results, though one might argue that its ‘shaming function’ begins to have an effect before the factual record is even published, since the party concerned is, at the least, presented with the possibility of further scrutiny, and may self-correct simply because it was not aware of the alleged enforcement problem.

Finally, the credibility of the CEC both as a resource for ENGO’s and as a legitimate forum for member states to engage each other on environmental matters depends on the degree of its independence, (or at least perceived independence), from any and all of the member state governments.¹⁹ (If, for example, if officials of one state believe that the CEC is effectively a puppet of another, or is being used by another state to implement policy goals unrelated to the goals of the NAAEC, then it will not seek to cooperate with CEC projects in good faith.) To maintain this critical independence, the NAAEC includes several provisions intended to ensure that the Council members are the sole spokespersons on the CEC for the states they represent.²⁰

¹⁷ NAAEC Article 5(2) sets forth effective enforcement of environmental laws as one of the obligations of the member states which, if broken, could be grounds for sanctions. *See* NAAEC Art. 5(2) *available at*: http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/.

¹⁸ *See* “status” link on CEC website, *supra* note 4.

¹⁹ Knox, *supra* note 14 at 90.

²⁰ *See e.g.* NAAEC Article 11(4), which states: “In the performance of their duties, the Executive Director and the staff [of the Secretariat] shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities;” *available at*: http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/.

Furthermore, the Council members themselves have an interest in protecting their own agencies from the scrutiny of an independent and international body. To limit or counteract the self-serving motivations of the members of the Council, the NAAEC structures the CEC and the Citizen Submissions Procedure so as to limit Council involvement in the day-to-day operations of the CEC.²¹ For instance, although power to determine the agenda of the CEC is generally left to the Council, the Secretariat generally retains a significant amount of discretion in *how* to do what the Council has authorized it to do. In the context of the Citizen Submission procedure, the Council is not even involved in the process until the Secretariat requests authorization to prepare a formal factual record. At that point, it may refuse or grant the request and then the actual compilation of the factual record is left to the Secretariat, who may seek and include information from virtually any sources it deems appropriate including private persons, experts, and the governments of the parties themselves. This balance of power and division of labor between the Secretariat and the Council has been highly controversial, as a brief history of the procedure will show.

b. Origin of the Citizen Submission Procedure

To a great degree, the Citizen Submission procedure, and the NAAEC in general, are the unique products of a particular era and set of circumstances. At the time that the NAFTA was being negotiated between the parties and debated in the U.S. Congress, environmental groups raised various concerns about the possible negative effects that increased trade could have on the environment. Of particular concern was the theory that Mexico would become a “pollution haven.” Although Mexican law set acceptable

²¹ See generally NAAEC Articles 14 and 15, available at: http://www.cec.org/pubs_info_resources/law_treat_agree/naaec.

standards for environmental protection, there was a pervasive problem of lax enforcement and implementation.²² Moreover, the Mexican legal regime, as a civil law system, does not provide for citizen suit to challenge enforcement practices, which are viewed as discretionary functions of the Executive.²³ Thus, ENGO's feared that polluting businesses would be drawn to Mexico by the possibility of saving money by avoiding regulatory obligations. This in turn could encourage a regulatory "race-to-the-bottom" between the member states, resulting in weakened environmental protection throughout North America.

Because of these and many other concerns, many powerful environmental groups in the U.S. opposed NAFTA. Thus, the Clinton Administration negotiated the NAAEC as a means of including and responding to these groups, because there was reason to believe that without their support, Congress would not approve the NAFTA.²⁴ Thus, one can look at the NAAEC as what environmental NGO's in the U.S. wanted, not necessarily what the parties wanted. In this context, the primary purpose of the Citizen Submission procedure was presumably to create a mechanism for U.S. ENGO's to challenge Mexico's enforcement practices.²⁵

c. History of the Procedure

In the early years of the procedure between 1995 and November 2001, a total of 31 submissions were filed, of which thirteen concerned Mexico, eight concerned the U.S.

²² Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 246 (1997). See also Kal Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 394-95 (2004).

²³ Katherine M. Bailey, *Citizen Participation in Environmental Enforcement in Mexico and the United States: A Comparative Study*, 16 GEO. INT'L ENVTL L. REV. 323, 339.

²⁴ See Raustiala, *supra* note 22 at 395.

²⁵ Knox, *supra* note 14 at 54.

and ten concerned Canada.²⁶ During this period, the Council only voted to authorize the production of three factual records, two of which concerned Mexico and one of which concerned Canada.²⁷ The comparatively few claims against the U.S. were all dismissed at one stage or another, generally for some form of failure to meet the admissibility requirements of Article 14(1).²⁸ The fact that there were fewer successful submissions concerning the U.S. is not entirely surprising, since U.S. law contains a variety of provisions for citizen suit that are generally better-known and more appealing to American environmental groups. Since the Secretariat had not yet requested a factual record concerning the U.S., it was not clear what the Bush Administration's new EPA head would do when asked to authorize a factual record challenging U.S. enforcement practices, although the U.S. had never yet voted against a factual record.²⁹

Meanwhile, as Canada became the target of almost as many submissions as Mexico, Canadian officials evidently began to withdraw their support for the procedure.³⁰ It is not clear whether the number of submissions involving Canada should be attributed to the strong Canadian environmentalist movement, to the fact that Canadian law

²⁶ See "Status" section of CEC website, available at: <http://www.cec.org/citizen/status>.

²⁷ These first factual records dealt with the Metales Y Derivados Submission (SEM-98-007), Cozumel Submission (SEM-96-001), B.C. Hydro Submission (SEM-97-001); see "status" link on CEC website, *supra* note 4.

²⁸ See e.g. Secretariat of the North American Commission on Environmental Cooperation, DETERMINATION PURSUANT TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION; (SEM-95-002) ("Logging Rider") (wherein Secretariat found that the challenged logging rider was a subsequently enacted law and therefore represented a new standard, and therefore a factual record on the subject would impermissibly duplicate the legislative process within the U.S.) available at: <http://www.cec.org/files/pdf/sem/95-2-DET-OE.pdf>; Secretariat of the North American Commission on Environmental Cooperation, DETERMINATION PURSUANT TO ARTICLE 14(3) OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION; (SEM-99-001/ SEM-00-002) ("Methanex") (wherein Secretariat found, after requesting and receiving a response from the U.S., that the matter was the subject of pending judicial proceedings in the U.S.) available at: <http://www.cec.org/files/pdf/sem/99-1-DET-E1.pdf>.

²⁹ 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, 769 (2005).

³⁰ Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 178-80 (2002).

contains fewer provisions (compared to the U.S.) for civil remedies of this type, which makes it easier and more attractive to bring an Article 14 submission, or to an actual pervasive enforcement problem. Whatever the reason, the Canadian policy in the Council tended increasingly to seek to limit the scope and independence of the Secretariat's role in preparing factual records, such as by seeking to impose limitations on the fact-gathering activities of the Secretariat.³¹

That there should be pressure from the parties to limit the efficacy of the Citizen Submission procedure is hardly surprising, considering that the NAAEC was essentially imposed on the parties through the political power of ENGO's in the United States. David Markell, the first Director of the CEC Submissions on Enforcement Matters Unit and a leading scholar on the subject, observed that:

[T]he inclusion of the citizen submission process does not necessarily reflect a significant investment by the Parties in the process or a significant Party commitment to its successful operation. ...Virtually since the inception of the citizen submission process there has been considerable criticism that the Council has overplayed its role by limiting the independence and authority of the Secretariat, thereby weakening the process.³²

A pivotal moment in the history of the procedure occurred when these tensions came to head in November 2001. At a meeting, the Council passed a series of resolutions responding to requests by the Secretariat for authorization to prepare factual records. For four out of the five factual records authorized, the Council instructed the Secretariat to limit the scope of the factual records substantially, which "dramatically changed the focus of the factual records that the submitters requested and that the Secretariat recommended."³³ Whereas the submitters alleged a general pattern or policy of failures to effectively enforce a given environmental law and the Secretariat agreed that there

³¹ Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas* 33 ENVTL. L. 501, 518 (2003).

³² Markell, *supra* note 29 at 782.

³³ *Id.* at 770.

should be a broad inquiry, the Council instructed the Secretariat to focus the factual records on a few specific incidents of enforcement failure.³⁴ As a result, the Secretariat was forced to produce four factual records that were much narrower in scope than what the submitters and the members of the Secretariat intended to pursue. Three of these submission concerned Canada and one concerned the U.S.³⁵ The Council's actions regarding these four factual records sparked a flurry of commentary and controversy for several reasons.

First, by limiting the scope of the factual records to be prepared, the Council worked a fundamental change in the nature of those factual reports. David Markell, the first Director of the Citizen Submissions program within the Secretariat, points out that the factual records that were authorized were not at all those that the submitters or the Secretariat requested.³⁶ If the submitters had known that the inquiry would be thus limited, they might not have brought the claim in the first place, and likewise, the Secretariat might not have found that these narrow sets of examples warranted preparation of a factual record in the absence of allegations of a broader pattern of

³⁴ See Sierra Club of British Columbia Et Al., THE GOVERNMENT OF CANADA'S FAILURE TO ENFORCE THE FISHERIES ACT AGAINST MINING COMPANIES IN BRITISH COLUMBIA: A SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL COOPERATION (A14/SEM/98-004/01/SUB) ("B.C. Mining Submission") available at: <http://www.cec.org/files/pdf/sem/98-4-SUB-E.pdf>; David Suzuki Foundation Et Al., SUBMISSION PURSUANT TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (A14/SEM/00-004/01/SUB) ("B.C. Logging") available at: <http://www.cec.org/files/pdf/sem/00-4-SUB-E.pdf>; The Friends of the Oldman River Et Al., NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION ARTICLE 14 SUBMISSION (A14/SEM/96-006/01/SUB) ("Oldman River II") available at: <http://www.cec.org/files/pdf/sem/97-6-SUB-E.pdf>; (all alleging that Canada systematically failed to enforce applicable environmental laws against certain industries); see also Alliance for the World Rockies Et Al., SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL COOPERATION PURSUANT TO ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION ("Migratory Birds") available at: <http://www.cec.org/files/pdf/sem/99-2-SUB-E.pdf>; (alleging that the Migratory Bird Act, which implemented an international treaty intended to protect migratory birds, was being systematically under-enforced by the United States).

³⁵ Markell, *supra* note 29 at 769.

³⁶ Markell, *supra* note 29 at 772-773.

enforcement failure.³⁷ For instance, Chris Wold, one of a authors of the Migratory Birds submission stated that, “Without question, the submitters would never have prepared Migratory Birds if they had known that the Council would, in an arbitrary and unexplained fashion, limit the record to two specific instances cited only as examples of widespread government non-enforcement.”³⁸ Likewise, according to Mr. Markell, “the Council may well have directed the Secretariat to prepare a factual record even though the Secretariat itself would have determined that a factual record focused only on these isolated incidents was not warranted.”³⁹ Thus, the factual records produced in the end were narrower and less responsive to the underlying concerns of the submitters than earlier factual records had been.

Following the issuance of these four factual records, ENGO’s could not be sure that their submissions would lead to factual records that answered the environmental problems they sought to solve, since the Council could apparently limit them even to the point of uselessness. Thus, the reliability and predictability of the procedure was greatly reduced, which might have discouraged submissions in recent years.

Also, the Council’s actions sparked confusion and disagreement over the proper roles and balance of power between the Council and the Secretariat. According to John Knox, who participated in the negotiations of the NAAEC, micromanagement of the procedure by the Council would defeat its efficacy completely.⁴⁰ Similarly, other scholars, former Secretariat members, and submitters have suggested that the Council

³⁷ See Markell, *supra* note 29 at 771-773, *see generally*: Chris Wold, *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation* 26 LOY. L.A. INT’L & COMP. L. REV. 415 (2004).

³⁸ Wold, *supra* note 37 at 426.

³⁹ Markell, *supra* note 29 at 772.

⁴⁰ Knox, *supra* note 14 at 91.

acted outside its powers in fundamentally changing the nature of the factual records that the Secretariat proposed.⁴¹ Although the Council is the directorial branch of the CEC and generally has veto power, the Secretariat is the full-time work horse of the CEC, and the degree of its independence from the control of the Council is crucial to the credibility of the Citizen Submission procedure and the CEC's work in general.⁴²

In short, the Council's actions were almost universally described as a usurpation of the Secretariat's proper role and a threat to the legitimacy of the procedure. In response to the tensions created by the Council's actions, the JPAC stepped in and strongly recommended that the Council refrain in the future from narrowing the scope of factual records.⁴³ Similarly, in their analysis of the Citizen Submission procedure, an Environmental Law Institute report prepared for the CEC criticized the Council's actions, concluding that, "[b]y precluding the Secretariat from fully considering a government's overall enforcement policy and its implementation, the Council's resolutions prevent the factual record from fully shedding light on potential government abuse of prosecutorial discretion."⁴⁴

What has happened since these 2001 resolutions helps to indicate what the future direction of the Citizen Submission will be, though it is probably too soon to draw any conclusions. It appears, however, that the Council has heeded the criticisms of the JPAC and others. For one thing, it has authorized factual records that allege a broad pattern of non-enforcement without attempting to narrow them. One of these submissions is

⁴¹ See generally: Markell, *supra* note 29; Wold, *supra* note 37; and Tollefson, *supra* note 30.

⁴² Tollefson, *supra* note 30 at 182.

⁴³ JPAC, ADVICE TO COUNCIL NO. 03-05, available at: http://www.cec.org/files/pdf/JPAC/Advice03-05_EN.pdf

⁴⁴ Environmental Law Institute, FINAL REPORT: ISSUES RELATED TO ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 16 (2003).

directed against the United States, which is an important step, since no new submissions had been filed concerning the U.S. for several years.⁴⁵ Also, in a letter to the JPAC in June 2004, the Council intentionally pointed out its recent decisions foster broad-scope factual records.⁴⁶ Although the tensions and issues raised above are probably inherent in the structure of the CEC, these recent actions by the Council may signal a renewed commitment to allowing the Citizen Submission Procedure to do its job.

Recently, however, a different point of contention appears to have arisen between the Secretariat and the Council. Some of the Council's recent resolutions have challenged the sufficiency of the information provided in the submission to meet the admissibility requirements in Article 14(1).⁴⁷ One submitter feared that this represented a new attack by the Council on the effectiveness of the Citizen Submission procedure and the Secretariat's independence, since the NAAEC seems to assign the role of determining admissibility deliberately to the Secretariat.⁴⁸ In his view, "[t]he Council's strategy may entirely derail environmental benefits of the Citizen Submission Process, because it has the effect of rejecting the entire submission rather than just narrowing it." However, this view seems unduly pessimistic, given that the Secretariat extends submitters thirty days to improve an inadequate submission and is also free to simply invite them to resubmit once they have more information available. Although the sufficiency of the submission seems to be designated to the Secretariat by the treaty, and increased scrutiny may place

⁴⁵ See Friends of the Earth Canada Et Al, SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL COOPERATION PURSUANT TO ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (A14/SEM/04-005/01/SUB) ("Coal-fired Power Plants") (alleging that US EPA is failing to enforce the Clean Water Act by allowing coal-burning power plants to continue producing mercury emissions that effect water quality across many states and several regions) available at: http://www.cec.org/files/pdf/sem/04-5-SUB_en.pdf.

⁴⁶ Markell, *supra* note 29 at 791.

⁴⁷ Wold, *supra* note 37 at 429-30.

⁴⁸ *Id.* at 430.

more of a burden on submitters, it is not clear that this will function as a bar for claims that would otherwise be admissible.

Furthermore, in at least one case, the Secretariat has asked for more specific information to supplement a submission long before it reached the Council.⁴⁹ In September 2004, a group of American and Canadian ENGO's submitted a claim regarding the U.S.'s failure to stop coal-burning power plants from pollution U.S. and Canadian waterways with mercury in contravention of the Clean Water Act.⁵⁰ In December, the Secretariat requested that the submitters augment their submission with broader sample of incidents of mercury pollution allegedly contrary to Clean Water Act standards.⁵¹ This may have been a deliberate means of retaining control of the procedure by preemptively removing any cause for complaint that the Council could find later on, or the Secretariat may have genuinely felt that the submission needed additional detail. Whatever the reasons, the Secretariat purposefully requested a broader and richer record and then recommended in December of 2005 that the Council authorize preparation of a factual record.⁵²

III. Analysis: Evaluating the Citizen Submission Procedure

a. Defining Success

⁴⁹ Telephone interview with Scott Edwards, Esq., Legal Director, Waterkeeper Alliance (Mar. 10, 2006); (Mr. Edwards co-authored the Coal-Fired Power Plant submission, and has been involved in two other submissions to the CEC.)

⁵⁰ Coal-Fired Power Plants submission, *supra* note 45.

⁵¹ Telephone interview with Scott Edwards, *supra* note 49; *see also* Secretariat of the Commission on Environmental Cooperation, DETERMINATION IN ACCORDANCE WITH ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (A14/SEM/04-005/10/14(1)) *available at*: http://www.cec.org/files/pdf/sem/04-5-DET14_1__en.pdf.

⁵² *See* Secretariat of the Commission on Environmental Cooperation, ARTICLE 15(2) NOTIFICATION TO COUNCIL THAT DEVELOPMENT OF A FACTUAL RECORD IS WARRANTED (A14/SEM/04-005/48/ADV) *available at*: http://www.cec.org/files/pdf/sem/04-5-ADV_en.pdf.

Defining an approach to evaluating the performance of the Citizen Submission procedure is problematic for several reasons. First and most obviously, it has only been in operation for a little more than a decade, and as with any unique innovation, it will take time to resolve implementation issues, such as the ongoing tension between the roles of the Council and Secretariat. As one commentator described the problem, “there is not yet enough information to forecast the conclusion to the citizen submission story with any great degree of confidence.”⁵³ Also, the lack of a follow-up procedure after a factual record has been developed makes it difficult to compile hard evidence of effects on environmental protection. However, the following section sketches several possible criteria by which to examine the effectiveness of the procedure in achieving the goals of the NAAEC. These include the procedure’s effects on environmental protection, ability to attract submissions, ability to promote cooperation on environmental issues, its role in provoking reform within national environmental agencies, and its role in “shaming” national agencies by exposing them to international scrutiny.

b. Positive Effects on Environmental Protection

If the goal of the submission procedure is to improve environmental protection, then determining whether there have been improvements in the levels of environmental protection of three North American member states would be one way to judge success. However, attributing improved or degraded environmental conditions to the procedure, or even to the actions of the CEC in general, is difficult and perhaps misguided, since the goal of the procedure is focused on catching lax enforcement practices, not directly improving standards. Greg Block, the original head of the Legal Division responsible for

⁵³ Markell, *supra* note 29 at 787.

the Citizen Submission procedure, described the problem in a comment on the larger mandate of the CEC as a whole:

Not only is it difficult to assess the environmental effects of free trade, but it is also an arduous task to determine the counterfactual proposition—estimating how much worse (or better) things would be in the absence of free trade or NAFTA’s environmental side accord. In the case of the NAAEC, assessments are even murkier respecting the many CEC initiatives that have little or nothing to do with trade.⁵⁴

Taking these concerns into account, it is clear that in some cases, the procedure has the power to provoke governments to react to alleged enforcement short-comings, as illustrated in the recent Ontario Power Generation submission. The submission, filed in 2003 by forty-nine U.S. and Canadian NGO’s, alleged that Canada was failing to enforce laws limiting emissions of various pollutants including mercury and acid-rain-causing compounds that damaged the nearby Canadian areas and also downwind areas of New York and New England against a number of coal-fired power plants in Ontario.⁵⁵ The Secretariat requested a response by Canadian authorities, who promptly promised to close down the offending coal-fired plants without going any further into the Citizen Submission process.⁵⁶ The Secretariat, satisfied with this response, declined to request the preparation of a factual record.⁵⁷

The Cozumel submission, one of the earliest, provides another example. The submission alleged that a project for the building of a large cruise ship pier represented a failure by Mexico to enforce applicable environmental laws, because the pier project was initiated without any environmental impact analysis of much of the development

⁵⁴ Block, *supra* note 31 at 514.

⁵⁵ See Waterkeeper Alliance Et Al, SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL COOPERATION PURSUANT TO ARTICLE 14, NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (A14/03-001/01/SUB) available at: http://www.cec.org/files/pdf/sem/03-1-Rev-SUB_en.pdf.

⁵⁶ Secretariat of the Commission on Environmental Cooperation, DETERMINATION IN ACCORDANCE WITH ARTICLE 15(1) OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 10-11 (A14/SEM/03-001/39/15(1)) available at: http://www.cec.org/files/pdf/sem/03-1-DET15_1__en.pdf

⁵⁷ *Id.* at 12

necessary to support the pier, and because it was to be built in an allegedly protected area.⁵⁸ A factual record was developed, and in the end the pier project was suspended for further review and the submitters reported felt the procedure to have been a success, since most parts of the pier project that they objected to were ultimately left out or altered.⁵⁹

These are just two examples of the positive effects that the Citizen Submission procedure has had on concrete environmental protection in the member states. However, given the variety of factors involved in regulatory decision-making, it may not be possible to predict the persuasive effect that a submission will have in any particular case.

c. Ability to Attract Submissions

Perhaps the most important method for evaluating a legal tool is whether potential complaining parties use it and regard it as a useful means of attaining their goals. So far, a total of fifty-five submissions have been filed. The following table demonstrates the breakdown of submissions concerning each of the three parties.

⁵⁸ For explanation in English of this submission (original authored in Spanish), please see Summary of Submission (SEM-96-001) *available at*: <http://www.cec.org/citizen/submissions/details/index.cfm?>

⁵⁹ *See* Geoff Garver, “Factual Record Helped in Cozumel Pier Case, Submitters Say” TRIO: The Newsletter of the North American Commission on Environmental Cooperation 1-2 Summer 2001; *available at*: <http://www.cec.org/trio/stories/index.cfm?ed=4&ID=50> *see also* Raustiala, *supra* note 22 at 398.

Table: Citizen Submissions and Factual Records to Date⁶⁰

Member State Concerned	Total Submissions Filed	Submissions Filed 1995-November 2001	Submissions Filed November 2001-Present	Factual Records Prepared and Published (Files Now Closed)	Current Active Files (In Various Stages)	Factual Records Currently Underway
Canada	18	10	8	4	6	4
U.S.A.	10	8	2	1	2	-
Mexico	27	13	14	6	5	1
Total:	55⁶¹	31	24	11	13	5

This distribution shows several trends. First, submitters are still using the procedure, especially in Mexico and Canada, which suggests that NGO's have continued to believe in the utility and credibility of the procedure even after the Council's attempts to narrow it in late 2001. Of course, it would be very difficult to assess exactly what the effects of the Council's actions on the procedure's reputation were or to determine whether potential submitters were dissuaded from bringing claims. As discussed above, the fact that submitters have continued to bring broad, pattern-based claims that have been authorized by the Council suggests that any harm done by the 2001 Resolutions is not permanent.

⁶⁰ This information is current as of 5/08/06 as derived from the "Status" link on the CEC website, *supra* note 4.

⁶¹ The "Devils Lake" submission, filed March 24, 2006, alleges that both Canada and the U.S. are in violation of their obligations under the 1909 International Boundary Waters Treaty for, essentially, failing to resolve the contamination of several rivers, Lake Winnipeg, and ultimately the Hudson Bay drainage system by biological pollutants draining from Devil's Lake in N. Dakota. Thus, this is essentially one submission, bisected into two, so I have counted it as one submission against Canada and one submission against the U.S, although it is not always counted this way on the CEC website. *See* Friends of the Earth Canada, Et Al., Submission to the Commission on Environmental Cooperation Pursuant to Article 14, North American Agreement on Environmental Cooperation (A14/SEM/06-002/01/SUB) *available at*: http://www.cec.org/files/pdf/sem/06-2-SUB_en.pdf.

Second, the fact that there are once again claims involving the United States is important. If the procedure is, or appears to be, utilized only against Canadian and Mexican authorities while the U.S. escapes scrutiny, then Mexico and Canada can be expected to oppose and defy a procedure that turned out to be not at all what they bargained for.⁶² John Knox, who is currently chair of the EPA National Advisory Committee of the CEC, and who participated in the negotiations of the NAAEC as an attorney-adviser at the U.S. State Department, felt that “[t]he biggest problem currently facing the CEC submissions procedure is that recent submissions have been directed only against Canada and Mexico.”⁶³ This statement was made before the Coal-fired Power Plants submission was filed against the United States in 2004, and the Secretariat has recently requested authorization for a factual record. Thus, assuming that the Council will authorize this broad-in-scope factual record, this submission marks an important turning point for the legitimacy of the procedure in the eyes of the parties and the public.

However, it is equally important to keep in mind that the fact that the U.S. enforcement has been the subject of disproportionately few submissions is not surprising. Given the same resources and facts, NGO’s will typically seek a remedy under domestic laws in the U.S. for reasons that have nothing to do with whether they view the Citizen Submission procedure as credible, fair, or useful. Scott Edwards, co-author of the Coal-fired Power Plants submission opined that most American NGO’s don’t have much use for the procedure, because U.S. litigators generally want binding legal determinations that lead to definite and enforceable results and set precedents.⁶⁴ Also, many NGO’s simply

⁶² Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT’L & COMP. L. REV. 359, 385 (2004).

⁶³ *Id.* at 385.

⁶⁴ Telephone interview with Scott Edwards, *supra* note 49.

may not know about the procedure. For example, Mr. Edwards said he had first heard of the procedure from Eliot Spitzer, the Attorney General for the State of New York, who wanted to bring a submission to the CEC but could not because he was not a private citizen.⁶⁵

The procedure is most useful to U.S. ENGO's when there is a reason, such as admissibility or jurisdictional complications, that the claim is inconvenient or impossible to bring within the U.S. judicial system. The Coal-fired Power Plants submission is a good example of such a situation. Because the alleged failure to properly enforce mercury emissions standards against coal-burning facilities took place across several states and had effects in many states, a claim of a generalized pattern of enforcement failure would have been very difficult to bring because of jurisdictional rules.⁶⁶ Furthermore, the claim was centered on a unique legal theory that sought to bridge the gap between the Clean Air and Clean Water Acts, ("CAA" and "CWA") and the EPA had already rejected the argument that air-born mercury emissions could be covered by the CWA.⁶⁷ The submitters believed that the courts would be equally unreceptive to the idea of blurring the line between the CAA and CWA.

The decision to bring the claim to the CEC was therefore a strategic move that allowed the submitters to try out a novel legal theory while saving resources from being spent on duplicative suits in each state where the power plants were located. Furthermore, some of the same submitters had succeeded in shaming the government of Canada into changing its enforcement practices in a past submission by bringing international attention to the matter, and they hoped that the U.S. would likewise be

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

embarrassed into addressing the current problem. Thus, the CEC Citizen Submissions procedure filled an important void in this case and provided a unique forum for this claim of broad, systematic enforcement failures by the U.S. EPA.

Obviously, the bulk of American ENGO's focus on domestic remedies, and according to Scott Edwards, Legal Counsel for the Waterkeeper Alliance, most American ENGO's do not use the CEC procedure simply because they have ample domestic remedies at their disposal and would rather obtain a binding legal decision rather than a factual record. Therefore, the procedure is most useful to U.S. ENGO's under a limited number or combination of circumstances including: 1) when the pattern of enforcement failure and its effects on the environment is widespread or even international; 2) where U.S. courts predictably will not provide a solution; 3) where domestic remedies have already been attempted to no avail; or 4) where there reason to believe that a government may be embarrassed into reforming or at least examining its enforcement practices.

Canadian and Mexican ENGO's have much more use for the Citizen Submission procedure than their American counterparts, largely because Canadian and Mexican law do not provide legal tools for civil society to challenge the enforcement of substantive environmental laws. Mexico has a civil law regime that does not provide many opportunities for questioning enforcement practices, which are essentially treated as discretionary functions of a powerful executive branch.⁶⁸ Canadian law does provide

⁶⁸ See Commission on Environmental Cooperation, Summary of North American Environmental Law, Chapter 6: Public Participation (link for Mexico) *available at*: http://www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication/mx06.cfm?

some opportunities for citizen suit on environmental matters, but not with the frequency and comprehensiveness that American law does.⁶⁹

Furthermore, the procedure provides a forum for examining local and regional enforcement practices and bringing them to the attention of the central government's environmental agency for review and reform.⁷⁰ A discussion of the relationship between the Canadian provinces or Mexican states and their respective central governments is outside the scope of this paper.

d. Promoting Cooperation on Environmental Matters

In addition to the number of submissions the procedure has attracted or the effects on environmental protection, the Citizen Submission procedure is also significant as a truly unique legal innovation in the context of an international trade agreement. As such, it is worthwhile to consider its role as a means of promoting international cooperation on environmental matters, which is the underlying goal of the NAAEC. Although a typical U.S. lawyer may not find the filing of fifty-three submissions and the production of a total of eleven non-binding Factual Records very impressive in terms of concrete environmental protection, this viewpoint does not account for the larger purpose of everything that the CEC does, which is to create a forum for the three parties to engage in “environmental cooperation.” In the context of the citizen submissions procedure “environmental cooperation” can take a variety of forms. For example, it creates a mechanism for dealing with environmental problems that straddle borders. It also provides a forum in which NGO's and citizens from different countries can collaborate, share experience, and combine expertise. The two most recent submissions involving

⁶⁹ *Id.* Chapter 6 (link for Canada) available at: http://www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication/ca06.cfm?

⁷⁰ Block, *supra* note 31 at 518.

transboundary water pollution exemplify this cooperation, as they are the product of collaboration between American and Canadian ENGO's.

e. Promoting of Environmental Agencies Through “Sun-shining” at the Domestic Level

According to the theory of regulatory compliance, businesses that are required to make public disclosures, such as those required by the SEC, are likely to self-correct faulty or negligent practices for several reasons. First and most obviously, public airing of potentially embarrassing or damaging information may result in reputational harm, legal repercussions, and loss of business. Second, being forced to collect and examine the information they must disclose provides an opportunity that might not otherwise exist for managers to notice flaws in how they operate. This “self-reflexive” benefit of mandatory disclosure can lead businesses to reform their practices on their own.

Arguably, a national environmental agency is analogous, in that it has a limited amount of resources and may overlook persistent enforcement failures simply because the agency is unaware of them, or they are not widely known among ENGO's who could pressure the agency to correct them. If this analogy is accepted, then the Citizen Submission procedure can be seen as a form of mandatory disclosure for environmental regulatory agencies.

For example, the submitters of the “Coal-Fired Power Plants” submission, sought to bring a gap between the Clean Water Act and the Clean Air Act to the attention of the EPA and force the EPA to at least acknowledge that the relationship between the two statutes must be examined since mercury contamination of waterways was being caused by air pollution. As one of the submitters reports, “We've forced EPA to make water

quality standards part of the dialogue about Clean Air Act issues. They are at least forced to acknowledge the problem.”⁷¹

Another example of how the increased publicity can help agencies to alter their practices in fundamental ways comes from Mexico. A common criticism of Mexican environmental enforcement practices pre-CEC was that the agency was closed off and shielded from the view and input of civil society.⁷² There is anecdotal evidence that the procedure is having positive effects in changing this. Greg Block reports that:

The CEC’s information policies, decision-making records, citizen submission process, and public Council sessions have helped shape Mexican citizens’ expectations for the conduct of government business for national agencies and public institutions. That the Mexican Environmental Ministry is regarded as one of the more open and transparent Mexican government agencies is in a small, but not inconsequential way, due to its intense interaction with the CEC and civil society.⁷³

Given that the procedure was mainly intended as a means giving civil society a means of bringing Mexican enforcement practices up to the standards of its North American neighbors, this trend toward transparency goes to the heart of the NAAEC’s purpose.

f. Promoting Reform of Environmental Agency Practices Through International “Shaming”

Although the Citizen Submission procedure plays a role in the CEC’s larger goal of fostering cooperation, its more obvious function is adversarial in nature. This function, (sometimes referred to as “sun-shining” or “spotlighting” or even simply “shaming”) is to bring the environmental problems and enforcement failures of a given nation to the attention of its neighbors and closest trading partners and thereby embarrass it into reform.

⁷¹ Telephone interview with Scott Edwards, *supra* note 49

⁷² Block, *supra* note 31 at 516.

⁷³ Block, *supra* note 31 at 516.

Though it does not result in a binding legal judgment, the mere act of preparing and publishing a factual record has important advantages. As a leading international law scholar put it, “From a domestic law perspective the NAAEC’s review provisions are feeble, but in the context of international law, they are ground-breaking” because they provide a role for individuals to bring claims challenging their own national governments before an international body, thereby challenging the traditional inviolability of state sovereignty in the international law.⁷⁴ This makes sense, since it is the citizens who benefit from increased enforcement of environmental laws, and who are also best situated to know about environmental problems that result from failure to enforce.⁷⁵

Another benefit from allowing citizens to bring a claim to an international body is that it may actually be more effective at producing change than a procedure whereby one nation may obtain a binding legal determination against another and then impose sanctions on the transgressor. For one thing, in the context of a free trade agreement, it seems reasonable to assume that the interests and political goals of the national governments are centered on breaking down trade barriers, not protecting the environment in which their citizens live. Thus, the interests of the state and its citizens are not always aligned. (This is especially obvious in the case of the Citizen Submissions procedure, which is designed specifically as a mechanism for challenging that a government is not protecting its citizen’s interest in a clean environment.) As a result, it would not be politically expedient for nations to bring these sorts of claims against one another and nothing would be accomplished.⁷⁶ This theory seems to be borne out by the

⁷⁴ Raustiala, *supra* note 22 at 392.

⁷⁵ *Id.* at 405.

⁷⁶ Knox, *supra* note 62 at 377.

fact that none of the parties has ever even begun to initiate the sanctions procedure established in Article 5 of the NAAEC.

Even though the end result of the Citizen Submission procedure is a non-binding, non-conclusory Factual Record, this is probably more effective in the international context, even if it was politically feasible to get the parties to agree to a more adversarial, binding type of procedure. John Knox explains that:

The traditional view of compliance... is that to be effective compliance mechanisms must be able to coerce reluctant parties into changing their behavior. ...[T]he traditional view overlooks methods of promoting compliance that rely on persuasion rather than coercion. Such methods may include building the capacity of states to comply, amicably clarifying unclear obligations, and monitoring states' performance. In this respect, nonbinding reports may play a key role by identifying compliance problems... By drawing attention to a state's behavior in violation of its obligations, the 'sunshine' provided by such reports may even directly induce the state to comply in order to avoid public embarrassment.⁷⁷

Thus, according to this analysis, the aspect of the provision that would appear to make it weak actually strengthens its effectiveness. This point was underscored by Scott Edwards, who explained, "I'm an environmental activist. I don't think about just filing a lawsuit, but about how to solve the problem, which might not involve court at all."⁷⁸

IV. Conclusions and Prescriptions for the Future

Although the Citizen Submission procedure is still young, it has been through enough ups and downs to attract criticism, praise, and suggestions for how to make it better. Of particular concern for the future of the procedure are ongoing tensions regarding the appropriate roles of the Secretariat and the Council and questions about the scope of factual records.

⁷⁷ Knox, *supra* note 62 at 377.

⁷⁸ Telephone interview with Scott Edwards, *supra* note 49.

All the experts appear to agree that the independence of the Secretariat is extremely important, and John Knox describes this best:

Governments that agree to submissions procedures only reluctantly, under the pressure of temporary public attention, may be expected to look for ways to undermine them after they begin to operate, especially when the procedures threaten to embarrass the governments. Therefore, institutional support for the procedures, such as an independent secretariat and a committee of experts that can serve as a watchdog over the process, is critically important to their success.⁷⁹

One suggestion to resolve the question of the balance of power between the Secretariat and the Council is that the Secretariat should have the power to decide to make a factual record without the approval of the Council. According to Greg Block,

Permitting the Council to vote on factual records injects an unwelcome political dimension to a mechanism designed to independently assess government action or inaction. Trade tribunals rendering binding decisions on multimillion dollar claims against government by invests face no such hurdle; certainly a non-adjudicative, fact-gathering procedure should not either.⁸⁰

However, it seems unlikely that the parties would have agreed to this arrangement of power. A more plausible suggestion is that the Council agrees to either give an up or down vote on authorization of the preparation of factual records by the Secretariat. This would prevent the Council from directing how the Secretariat performed its work.⁸¹

Another point on which there appears to be generally agreement is that the scope of factual records should not be narrowed or forced to focus too much on a series of specific incidents of alleged non-enforcement. As explained above, the procedure is most useful, especially to U.S. submitters, when it can be used to allege a systemic enforcement problem that is difficult to bring in U.S. courts. Scott Edwards explained that the procedure filled an important “niche” for U.S. environmental groups.

⁷⁹ Knox, *supra* note 62 at 385-86.

⁸⁰ Block, *supra* note 31 at 542.

⁸¹ Wold, *supra* note 37 at 440-441.

Furthermore, the procedure must remain broad enough to accommodate enforcement failures that occur in one nation and have effects in another. Since other parts of the NAAEC agreement and normal diplomatic channels may also fail to correct these harms, it is particularly important that to safeguard the procedure's capacity to force the nations involved to address their own and one another's enforcement practices.

Although the course and impact of the Citizen Submission procedure may not be fully determined, it is reasonable to conclude that there have been significant positive results. Furthermore, the procedure may serve as a model for future multinational free trade agreements. It has demonstrated that bridging the legal gaps and confronting cross-border and regional environmental matters is working for parties seeking to provide a cooperative, non-adversarial forum in which those with the most incentive to do so can bring enforcement failures to light, since free trade agreements sometimes create incentives for a party to turn a blind eye to environmental enforcement. Furthermore, this type of procedure can provide a tool for balancing the interests of the negotiating governments (breaking down trade barriers) and their citizens, particularly those living in border areas or countries with already challenging environmental problems, thereby making it more likely that the FTA will find support. Finally, this type of procedure can promote positive integration by helping nations with historically weak enforcement catch up to the legal standards of their trading partners.