Designed for Distrust: Revitalizing NAFTA's Environmental Submissions Process

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Abstract

Among its many important achievements as a side agreement to the North American Free Trade Agreement ("NAFTA"), the North American Agreement for Environmental Cooperation ("NAAEC") established a unique process to allow private citizens and non-governmental organizations to initiate a review of alleged failures by the United States, Mexico, or Canada to enforce their own environmental laws. That process, called the Submittal on Enforcement Matters ("SEM") procedure, has fallen into an increasingly bitter impasse that has brought the entire SEM framework to a virtual halt and threatens its future viability.

Why have the NAFTA Parties challenged the SEM process they created through their own treaty commitments, and how can it be revitalized? While the SEM procedure can work effectively as designed under the right circumstances, NAAEC's drafters did not craft it broadly enough to respond to a fundamental realignment of interests of the NAFTA Parties. In particular, the SEM process requires a base level of constructive distrust between the three nations; failure by one nation to enforce its environmental laws damages the commercial self-interests of the other two. Absent the conviction that one nation's neglect can actually hurt the others' competitiveness, the SEM process becomes vulnerable to procedural challenges from individual nations as well as tandem voting by at least two nations in NAAEC's governing Council for Environmental Cooperation ("CEC").

The prospects for reopening NAAEC for substantive amendments are dim at best, and the alignment of interests among the Parties may shift again as their economic and political circumstances evolve. To provide a more flexible framework for responding to this fluid situation, this article proposes several internal

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and procedural modifications that the Council and the Council's Secretariat can adopt. The modifications proposed below would revitalize the SEM process and fulfill NAAEC's promise for equitable environmental enforcement among the NAFTA Parties. Some of these suggested reforms would refocus the SEM process on the types of issues and disputes driven by the three nations' shared economic self-interests and hopefully energize their renewed participation in NAAEC and the submittal process.

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I. INTRODUCTION

The iconic North American Free Trade Agreement has governed one of the world's largest free market zones for more than twenty years.[1] Despite NAFTA's achievements and prominence, however, fears over its environmental impacts nearly derailed the agreement's adoption and spurred the simultaneous ratification of its less famous sibling, the North American Agreement on Environmental Cooperation (NAAEC).[2] While often overlooked, NAAEC's lack of celebrity should not mask its importance. Without NAAEC's protection and procedures, NAFTA might not have obtained ratification in the United States. Alternatively, untrammeled free trade and inadequate environmental enforcement under NAFTA without NAAEC might have caused unacceptable environmental damage throughout North America. NAAEC continues to play an important role in the coordination of environmental activities between the three nations at a high level.[3]

By most accounts, one key aspect of NAAEC's protective framework has now fallen into disarray: its Submissions on Enforcement Matters (SEM) process. The Parties developed NAAEC to prevent environmental degradation that may result from changes in trade. To do so, they devised a mechanism to provide for joint action and investigation of transboundary environmental concerns through the SEM process.[4] NAAEC's three Parties[5] created this entirely new process to give

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. *See* John H. Knox, *The Neglected Lessons of the NAFTA Environmental Regime,* 45 WAKE FOREST L. REV. 391, 392 (2010) (explaining that although its environmental provisions were originally innovative, "NAFTA . . . has since become a cornerstone of U.S. trade policy."). For extensive discussions about the history and purposes underlying NAFTA's negotiation, *see* Ignacia Moreno et al., *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TULANE ENVTL. L. J. 405, 409–15 (1999).

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

3. Comm'n for Envtl. Cooperation [hereinafter CEC], Ministerial Statement of 17 July 2014, http://www.cec.org/about-us/council-statements/cec-ministerial-statement-2014. At the twentieth anniversary celebration of NAAEC's adoption and the creation of the CEC, all three Parties' federal environmental leaders declared that the CEC:

> is a unique institution, and its accomplishments are something of which we can all be proud. The CEC has allowed us to leverage our collective knowledge, resources and expertise to enhance collaboration amongst our three governments, engage with the public, and promote partnerships with communities as we join efforts to protect and enhance our shared environment.

Id. The ministers also recognized the importance of the CEC's continuing work by setting new annual priorities that emphasized the Commission's efforts on climate change mitigation and adaptation, traditional ecological knowledge, and continued work on its enforcement submittal process. *Id.*

4. NAAEC, *supra* note 2, at art. 2.1 (General Commitments); *id.* at art. 3 ("[r]ecognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations"); *id.* at art. 20.4 (Cooperation).

5. This article refers henceforth to the three NAAEC Parties as "Parties." While the same three nations also joined NAFTA, "Parties" will specifically refer to the obligations and commitments of the three nations under NAAEC, rather than under its surrounding free trade agreement.

the public a voice in international environmental oversight through establishing a novel international "soft" enforcement mechanism. The new SEM process enables any person or nongovernmental organization[6] to request an investigation by the Commission for Environmental Cooperation's Secretariat[7] into an alleged failure by one of the Parties to enforce its environmental laws. If the request meets the procedural and substantive requirements of NAAEC Article 14, the Secretariat then prepares a factual record that describes the steps that a Party took—or not—to enforce those laws and requirements. Under this approach, the Secretariat lacks any power to compel a Party to undertake enforcement or change its behavior, but the glare of public scrutiny in theory would encourage a recalcitrant Party to remedy any shortfall.[8] Most notably, this process does not require the Secretariat to affirmatively state or deny whether a Party has failed to enforce its own laws; the bare information contained in the factual record should allow the public to draw its own conclusions.[9]

Despite its legal and historical importance, NAAEC has drawn a steady stream of criticism since its creation. The SEM process in particular has fallen into an increasingly bitter impasse. A series of jurisprudential and procedural challenges to the SEM process by the same Parties that oversee it—and respond to it—has now raised doubts about the viability of this approach to international environmental protection. While the Parties recently clarified their guidelines for developing factual records,[10] these measures have not prevented some of the Parties from posing fundamental jurisdictional challenges to key portions of the SEM process. In some steps, the newly amended guidance and clarification arguably may have even created new barriers to effective and speedy use of the SEM process.[11]

The results of the current gridlock are stark. The Secretariat had six active matters in the SEM process in 2014 when the Council approved its amended Guidelines. Since then, the Council has dismissed outright four of those matters without allowing the development of a factual record, and most of those

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6. Under Article 14.1, "any non-governmental organization or person" may submit an assertion of non-enforcement by a NAAEC Party. NAAEC then defines a "non-governmental organization" as "any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government." NAAEC, *supra* note 2, at art. 45.1. The agreement does not define "person," but it does require that the nongovernmental organization or person is "residing or established in the territory of a Party." *Id.* at art. 14.1(f).

7. *Id.* at art. 14.1 ("[t]he Secretariat may consider a submission from any non-governmental organization or person . . .").

8. *See, e.g.*, Tseming Yang, *The Effectiveness of the NAFTA Environmental Side Agreement's Citizen Submission Process: A Case Study of Metales y Derivados*, 76 U. COLO. L. REV. 443, 456–57 (2005) ("[w]ith greater public awareness, public pressure might even shame Mexican government officials into acting. Overall environmental quality should be improved.").

9. Many other trade agreements struck after NAFTA now include similar investigation and factual record development mechanisms. *See* discussion *infra* Part IV.B. (other international trade agreements that include submissions procedures for allegations of non-enforcement of a Party's own domestic environmental laws).

10. *See* discussion *infra* Part III.A.1 (development and outcome of SEM Guideline Reform Initiative).

11. *See* discussion *infra* Part III.B.2.

dismissals occurred on split two-one votes between the Parties.[12] The Secretariat consequently has only two active submissions still undergoing development of a factual record—and the Council has already materially restricted the scope of both of those investigations.[13] The Secretariat last received a SEM submission in 2013, and (with two minor exceptions) the United States has not been the subject of a submissions request since 2006.[14] Past surveys of applicants who used the SEM process found high levels of dissatisfaction with the process' effectiveness, and one applicant took the high-profile and rare step of withdrawing its application after the Council severely truncated the scope of its submission.[15]

All of these factors point to the need for reassessment and change in the current implementation of the SEM process under NAAEC's terms. This article updates the array of recent challenges to the SEM process and assesses how they arose. In short, the legality and appropriateness of tactics to limit the scope and degree of the SEM process appears highly questionable under the NAAEC, NAFTA, and general principles of international law. The current direct challenges to the SEM process reflect a deeper dysfunction: when the NAFTA Parties designed NAAEC, they relied on certain alignments in their economic and sovereign interests that current economic realities have left far behind. As a result, NAAEC's narrow choice architecture lacks the flexibility to respond to tandem behavior by its Parties that effectively constrains and frustrates the SEM process. Reopening NAAEC to substantive amendment or revision is likely unrealistic at this time. Yet, as detailed below, there is a suite of self-imposed "small ball" measures that may ease SEM's gridlock.

Because prior articles comprehensively describe the SEM process, this article provides a summary overview of the treaty framework and implementation for the NAAEC. It then details the growing challenges to the SEM process arising on multiple fronts, such as efforts by the Parties to hem the scope of SEM inquiries, claims that a Party's naked assertion that it has undertaken domestic enforcement action deprives the Secretariat of authority to proceed, and narrow interpretations of key jurisdictional terms in NAAEC.

II. NAAEC'S BACKGROUND AND GENESIS

While the geopolitical storm surrounding the enactment of NAFTA riveted political and public attention when the United States, Mexico, and Canada ratified the treaty in 1994, that same discourse also gave birth to a quieter—but similarly important—accomplishment. To answer fears that the new free trade

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12. *See* discussion *infra* Part III.B.3 (dismissal of *Protection of Polar Bears*, *Alberta Tailings*, *BC Salmon*, and *Tourism Development in the Gulf of California* matters).

13. *See* discussion *infra* Part III.B.1 (Council limitations on scope of *Sumidero Canyon II* and *Wetlands in Manzanillo* matters).

14. *See* discussion *infra* Part III.A.

15. *See* discussion *infra* Parts III.B.1, IV.B.

agreement would encourage U.S. and Canadian businesses to migrate south to Mexico's putatively laxer environmental and labor standards, the three nations negotiated two side agreements.[16] One of those agreements, the North American Agreement on Environmental Cooperation (NAAEC), created a new and unique international body—the Commission on Environmental Cooperation (CEC)—and established a submissions process that brought nongovernmental parties into the international trade and environmental legal framework as actors for the first time. Rather than solely bind the three nations to a compulsory dispute resolution mechanism,[17] the submissions process relied on the novel strategy of information collection and disclosure as a "soft" enforcement tool to encourage each nation to address its environmental challenges.

A. NAAEC AND THE CEC

NAFTA established a trade bloc between the United States, Canada, and Mexico to ease the sale and transfer of goods and services between each country.[18] To address concerns that the reduction of trade impediments would encourage the relocation of manufacturing operations to areas with weaker environmental protection laws, the Parties entered into NAAEC in 1994.[19] As a side agreement to NAFTA, NAAEC would increase the Parties' cooperation "to better conserve, protect, and enhance the environment" and strengthen their efforts to develop and improve their environmental laws.[20] NAAEC expressly aims to enhance the protection of human health and the environment, the promotion of sound environmental practices, and the creation of effective international institutions between the Parties to achieve those goals.[21]

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16. In addition to NAAEC, the Parties also entered into the North American Agreement on Labor Cooperation in conjunction with NAFTA. North American Agreement on Labor Cooperation, Can.-Mex.-U.S., Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC]. NAALC entered into force on January 1, 1994. *See* 19 U.S.C. § 3311(b)(2) (2014) (authorizing the U.S. President to exchange notes with other Parties to bring NAFTA into force upon additional exchanges of notes that the NAAEC and NAALC have entered into force for such Party).

17. NAAEC, notably, included this type of traditional dispute resolution process as well. *See* discussion *infra* Part V.D.

18. NAFTA, *supra* note 1.

19. NAAEC formally took effect on January 1, 1994 pursuant to its own terms after ratification by each Party. NAAEC, *supra* note 2, at art. 47.

20. *See, e.g.*, Lawrence Organ and John Williams, *NAFTA and the Environment: The "Greening" of Mexico*, 4 DUKE ENVTL. L. & POL'Y F. 62, 70–72 (1994) (discussing historical controversy over environmental provisions of NAFTA and decision by the Clinton Administration to seek NAAEC side agreement).

21. Article 1 of NAAEC provides a fuller statement of the Parties' environmental goals:

> The objectives of this Agreement are to:
> (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
> (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;

To implement these treaty commitments, NAAEC established the CEC as the primary entity to carry out actions on behalf of the Parties. The CEC consists of three entities: the Council, the Secretariat, and the Joint Public Advisory Committee.[22] The Council serves as the primary governance body for the CEC and consists of the highest-level environmental officials of each Party.[23] The Council members (or their alternates) meet at least annually to consider any actions required by NAAEC's terms or requested by a Party.[24]

In addition to the Council, NAAEC created an independent Secretariat based in Montreal to follow and administer the Council's directives and NAAEC's obligations[25] as well as manage the SEM process. While the Council sets the fundamental direction of the Commission and makes policy decisions, the Secretariat assures the daily implementation of the Council's direction and retains some independence and discretion to carry out decisions without interference by the Parties.[26] The Secretariat's functions are largely enumerated in NAAEC Articles 11-15, 21, and Part V on dispute resolution. Lastly, NAAEC created the Joint Public Advisory Committee (JPAC). The JPAC, which consists of fifteen citizens (five appointed by each Party), advises the Council on any matter within the scope of the Agreement and provides various types of information to the Secretariat.[27]

(c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
(d) support the environmental goals and objectives of the NAFTA;
(e) avoid creating trade distortions or new trade barriers;
(f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
(g) enhance compliance with, and enforcement of, environmental laws and regulations;
(h) promote transparency and public participation in the development of environmental laws, regulations and policies;
(i) promote economically efficient and effective environmental measures; and
(j) promote pollution prevention policies and practices.

NAAEC, *supra* note 2, at art. 1.

22. *Id.* at art. 8.2.

23. *Id.* at arts. 9–10. More specifically, the current Council consists of Gina McCarthy, the Administrator of the U.S. Environmental Protection Agency; Juan José Garza, Mexico's Minister of Environmental and Natural Resources and the Secretary of Mexico's Secretaría del Medio Ambiente y Recursos Naturales (SEMARNAT); and Leona Aglukkaq, Canada's Minister of the Environment. CEC, *Council Members*, (Jan. 31, 2014), http://www.cec.org/about-us/council/council-members.

24. NAAEC, *supra* note 2, at art. 9.3 ("The Council shall convene . . . at least once a year in regular session"). The Council may also meet more frequently at the request of any Party. *Id.*

25. *Id.* at arts. 11–15. As discussed *infra*, the Secretariat's duties include preparing and submitting reports to the Council, *id*. at art. 13, responding to submissions of enforcement matters, *id*. at art. 14, and preparation of factual records, *id*. at art. 15.

26. The independence and separate jurisdictional status of the Secretariat apart from the Commission and Parties underlies many of the concerns over the Council's decisions to constrain the Secretariat's discretion and independent judgment in the SEM process. *See* discussion *infra* note 69.

27. NAAEC, *supra* note 2, at art. 16.

B. THE SEM PROCESS: CREATING A NEW TYPE OF INTERNATIONAL ENVIRONMENTAL FORUM

The CEC's main responsibilities include implementation of a citizen submission process under NAAEC Articles 14 and 15. This process, unprecedented when NAAEC first established it, allows residents of the Parties—including individuals and nongovernmental organizations—to allege that any one (or more) of the three Parties was not effectively enforcing its environmental laws. Article 14 sets out a clearly defined process for the Secretariat to follow upon receiving a submission. First, the Secretariat must determine that the submission meets the substantive and procedural criteria of Article 14(1)(a)-(f).[28] If it meets all six criteria, the Secretariat then must consider the factors in Article 14(2)(a)-(d) and decide whether to ask the Party named in the submission to provide a response. After reviewing the Party's response, the Secretariat next concludes whether to recommend to the Council that a factual record be prepared.[29] The Council may then instruct the Secretariat to prepare a factual record on the submission, and the Council can make the final factual record publicly available upon a two-thirds vote.[30]

Article 14(1) states that "[t]he Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law." This language limits the scope of the SEM process in three ways: (1) the submission must involve one or more "environmental law[s]"; (2) the submission must allege failures to "effectively enforce" such environmental laws; and (3) those failures must appear to be ongoing in nature. Because NAAEC established the SEM process as a case-by-case factual inquiry that does not result in a compulsory legal judgment, the Secretariat is not bound by its earlier determinations and the SEM process produces no binding precedent on the Parties or submitters. Nevertheless, the Secretariat has developed a body of practice that tends to show predictable results for similar fact-patterns at various stages of the process. The Secretariat has also

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28. *Id.* at art. 14.1. These substantive criteria include 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."

29. *Id.* at art. 14.2.

30. The Secretariat must prepare a factual record if the Council instructs it to do so by at least a two-thirds vote. Notably, NAAEC does not expressly bar the Secretariat from developing a factual record on its own initiative even if the Council cannot muster the requisite two-thirds vote. *Id.* at arts. 15.2, 15.7.

often stated that "[a]rticle 14(1) is not intended to be an insurmountable screening device. This premise means that the Secretariat will interpret every Submission in accordance with the NAAEC and the Guidelines, yet without an unreasonably narrow interpretation and application of those Article 14(1) criteria."[31]

III. OBSTACLES TO SEM SUBMISSIONS

A. GROWING PROBLEMS WITH THE SEM PROCESS

While the NAAEC and the citizen submission process initially inspired widespread praise and optimism as a significant new method to protect environmental resources,[32] its actual implementation by the Parties over the past twenty years now evokes growing concern. The criticism has focused on several shortfalls identified by persons who participated in the SEM process as well as observers of the Secretariat's processing of submissions and development of factual records.

Scholarly research also exhaustively describes these shortfalls.[33] The JPAC has submitted its own reports to highlight the growing dissatisfaction with the

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31. CEC, *Determination in accordance with Article 14(1) of the North American Agreement on Environmental Cooperation*, at 3, SEM Doc. 13–003 (Refinery Releases in Shreveport Louisiana) (Aug. 14, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/17775_13-3-detn_141_en.pdf. The Secretariat has made the same statement in numerous other determinations. *See, e.g.*, CEC *Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation*, at 2–3, SEM Doc. 97–005 (Biodiversity) (May 26, 1998), http://www.cec.org/sites/default/files/submissions/1995_2000/6133_97-5-det-e.pdf; CEC, *Agreement on Environmental Cooperation*, at 2–3, SEM Doc. 98–003 (Great Lakes) (Sept. 8, 1999), http://www.cec.org/sites/default/files/submissions/1995_2000/6310_acf1786.pdf.

32. The SEM process reflected the growing acceptance at that time of the use of information and citizen participation as supplemental means to promote compliance with and enforcement of domestic environmental requirements. The adoption of these tools at the international level, however, was unprecedented. David L. Markell, *The Citizen Spotlight Process*, 18 ENVTL. F. 32, 33–34, Mar.–Apr. 2001. Skeptics contended that reliance on simple informational disclosure without any coercive mechanisms or judicial review would render the SEM process ineffectual and toothless. Beatriz Bugeda, *Is NAFTA Up to Its Green Expectations? Effective Law Enforcement Under the North American Agreement on Environmental Cooperation*, 32 U. RICH. L. REV. 1591, 1603 (1999); Marirose J. Pratt, *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, 743–44 (2006).

33. North American Consortium on Legal Education ("NACLE") research members produced two other papers that summarized participant concerns about the operation and transparency of the SEM process. N. Am. Consortium on Legal Educ. Research Members, Summary Research Papers (unpublished manuscripts) (on file with author). In addition, the NACLE investigation yielded independent research papers by students on the adequacy and fairness of the CEC's procedures as well as the legality of scoping practices by the Commission. Giselle Davidian, *Should Citizens Expect Procedural Justice in Non-Adversarial Processes? Spotlighting the Regression of the Citizen Process from NAAEC to CAFTA-DR*, NACLE (Dec. 9, 2011), http://nacle.org/sites/default/files/Gisele%20Davidian.%20Should%20citizens%20expect%20procedural%20justice%20%281%29_0.pdf; Lucas Gifuni, *The CEC Council's Discretionary Decision Making Under Article 15 of the NAAEC and Its Legality at International Law*, NACLE (June 14, 2011), http://nacle.org/sites/default/files/NACLEpaper%20Lucas%20Gifuni.pdf; Ana Emilia Poienaru, *The Importance of Being Procedurally Just in NAAEC's Citizen Submission Process*, NACLE (Apr. 22, 2011), http://nacle.org/sites/default/files/Ana%20Poienaru.%20Procedural%20Due%20Process%20in%20the%20Citizen%20Submission%20Process-%20Final%20%281%29.pdf.

latest SEM policies and practices.[34] These reports collectively identified numerous concerns with the SEM process, including excessive delays in the authorization and publication of factual records,[35] procedural and structural unfairness,[36] lack of transparency,[37] and anemic funding.[38] Critics have pointed to three main objections to the SEM process: first, the inherent conflict of interest created when the Parties, as Council members, review Secretariat requests to develop or release factual records that pertain to their own enforcement records; second, the lack of any ability to follow up on whether a Party has corrected matters identified in a factual record; and, third, the inability to compel a Party to comply with NAAEC's procedural and substantive requirements.[39]

The combination of these systemic concerns and objections has led to a serious decline in the use of the SEM process since 2008.[40] With two exceptions, no one

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34. Most notably, the JPAC recently marked the twentieth anniversary of NAFTA's implementation by undergoing a public consultation and submitting a review of the SEM process to reflect accomplishments and needed improvements. Joint Pub. Advisory Comm'n to the CEC [hereinafter JPAC], *JPAC Advice to Council 13–04* (Dec. 6, 2013), http://www.cec.org/sites/default/files/documents/jpac_advice_council/18241_JPAC_Advice_13-04-Final_en.pdf.

35. While never quick, the SEM process has slowed in recent years to a virtual standstill. The average length of time required for the Secretariat to progress from initial submission to publication of a final record totals four and a half years, with recent submissions languishing for more than seven years. Much of the delay apparently has resulted from the Council's slow pace in deciding whether to authorize development of a factual record or to publish a factual record after its development. John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons From an Analysis of the NAFTA Environmental Commission,* 47 TEX. INT'L L.J. 505, 522–24 (2012); John Knox, *Comments to Joint Public Advisory Council of SEM Modernization Task Force Draft Negotiation Text*, at 1–2 (May 2, 2012), http://www.cec.org/sites/default/files/public_commentary/16172_SEM-Modernization-JKnox-cmmts.pdf.

36. These concerns arise from the structural advantage enjoyed by Parties who effectively hear and respond to complaints about their own practices—which effectively renders them their own judge and jury on the scope and fate of SEM submissions. As noted legal scholars have pointed out, "[t]he process is structurally biased in favor of the governments" because of the Parties' ability to comment on draft factual records before they are finalized, to deny publication of factual records, and to foreclose the initiation of a factual record in the first place. Knox & Markell, *supra* note 35, at 524–27.

37. One of NACLE's submissions to the CEC noted that the SEM process had done a "good job" on assuring visibility of citizen submissions through thorough disclosure on the CEC's website, but the SEM process still lacked transparency in regard to the Council's decisions to approve factual records, the lack of information during the period between the Secretariat's recommendation and the Council vote, and the lack of visibility after the Council approved a factual record but before publication of the record. Submission by George Washington University School of Law to the CEC III.B 16–18 (2012) (unpublished report) (on file with author). *See also* Yang, *supra* note 8, at 444–47 (examining of *Metales y Derivados* matter indicates that increased transparency "failed to bring about substantive environmental improvements, enhance enforcement activities, and improve public participation in environmental governance").

38. Pursuant to NAAEC, the Secretariat receives equal annual contributions from each Party to support its operations. NAAEC, *supra* note 2, at art. 43. Because the Parties have not increased their annual payments to reflect annual inflation during the past twenty years of NAAEC's implementation, the Secretariat effectively has received only a fixed stipend with steadily eroding purchasing power. The most recent financial contribution from each Party has totaled only $3 million. CEC, *Commission for Environmental Cooperation—2014 Budget*, (Dec. 20, 2013), http://www.cec.org/content/commission-environmental-cooperation-2014-budget.

39. *See* discussion *infra* Part V.C.

40. While the SEM Unit received an average of four-and-a-half submissions annually until 2008, it has received only ten submissions since 2011 for an average of two submissions annually. *See* CEC, *All Submissions*, http://www.cec.org/sem-submissions/all-submissions.

has submitted a request for development of a factual record about U.S. environmental enforcement practices since 2006.[41] Submittals on Canadian and Mexican matters have witnessed similar recent declines,[42] and environmental advocacy groups and individuals have lodged public comments about their experiences with the growing infirmities in the SEM process.[43] One submitter took the rare step of withdrawing its own submittal because the Council's extensive limitation

41. The Secretariat received two submissions in 2013 from the Louisiana Bucket Brigade and the Residents for Air Neutralization that alleged the United States had failed to enforce its environmental laws to prevent the release of hazardous air pollutants from refineries located in Louisiana. CEC, *La. Bucket Brigade, Submission on Enforcement Matters*, SEM–13–002 (Louisiana Refinery Releases) (Jul. 1, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/17671_13-2-sub_en.pdf; CEC, *Residents for Air Neutralization, NGO petition to the North American Commission for Environmental Cooperation for an Investigation and a Creation of a Factual Record*, SEM–13–003 (Refinery Releases in Shreveport, Louisiana) (Jul. 8, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/17697_13-3-sub_en.pdf. Because the Secretariat concluded that the submissions failed to identify specific instances or actions where the United States had failed to enforce its environmental laws on a continuing basis, it found that the submittal failed to meet the requirements of NAAEC Article 14.1 and the SEM Guidelines at 5.1. CEC, *Secretariat, Determination in accordance with Article 14(1) of the North American Agreement on Environmental Cooperation* SEM–13–002 (Louisiana Refinery Releases) (Aug. 12, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/17765_13-2-detn_en.pdf; CEC, *Secretariat, Determination in accordance with Article 14(1) of the North American Agreement on Environmental Cooperation*, SEM–13–003 (Refinery Releases in Shreveport, Louisiana) (Aug. 12, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/17775_13-3-detn_141_en.pdf. The submitters declined to modify their submissions to cure the fault, and consequently the Secretariat terminated both submissions in 2013. CEC, SEM–13–002 (Louisiana Refinery Releases), [Submission Timeline entry of Nov. 5, 2013], http://www.cec.org/sem-submissions/louisiana-refinery-releases; CEC, SEM–13–003 (Refinery Releases in Shreveport, Louisiana), [Submission Timeline entry of Nov. 14, 2013], http://www.cec.org/sem-submissions/refinery-releases-shreveport-louisiana. Prior to those filings, the last submission naming the United States as an offending party occurred in 2006. CEC, *Sierra Legal Def. Fund, Submission to the Commission for Environmental Cooperation*, SEM–06–002 (Devils Lake), 12–13 (Mar. 24, 2006), http://www.cec.org/sites/default/files/submissions/2006_2010/7866_06-2-sub_en.pdf (alleging that the United States failed to enforce its environmental laws to halt the diversion of water from Devil's Lake into the Cheyenne River). The availability of citizen suits under federal and state environmental laws in the United States, of course, can also dampen the potential demand for public submittals to the SEM process. Citizen suits offer the prospect of binding legal determinations, injunctive relief, and attorney's fees that the SEM process explicitly cannot provide.

As this article was undergoing review for publication, the Secretariat received a new submission regarding the enforcement of U.S. environmental laws. In 2015, an individual U.S. resident filed a submission contending that the United States had failed to use the Safe Drinking Water Act to regulate sewer "drop shafts" in municipal wastewater systems as underground injection wells. The Secretariat has begun a preliminary analysis of the submission under its guidelines. CEC, *Municipal Wastewater*, SEM–15–003 (Municipal Wastewater Drop Shafts) Contaminates Aquifers (March 11, 2015) http://www.cec.org/sites/default/files/submissions/2011_2015/15-3-sub_en.pdf.

42. Knox & Markell, *supra* note 35, at 521.

43. As part of its twenty-year anniversary review of the effectiveness of the SEM process, JPAC distributed a questionnaire to persons and groups who had previously made submissions to request a factual record. CEC, *JPAC Questionnaire on Submitters' Experience with the Citizen Submission Process under NAAEC Articles 14 and 15*, (2014) http://www.cec.org/public-commentary/jpac-questionnaire-submitters%E2%80%99-experience-citizen-submission-process-under-naaec-articles-14-and-15. Many of them responded that the SEM process had become too slow, unfair and ineffective for the reasons discussed above. *Id*.

of the factual record's scope led it to reject the credibility and usefulness of any resulting report from the Secretariat.[44]

1. The SEM Modernization Task Force

As these objections persisted, the Parties assembled a SEM Modernization Task Force in 2011 as part of their overall discussion of governance that began in 2009. The Task Force sought to investigate potential shortfalls in the SEM process and identify potential reforms. These efforts culminated in a set of incremental improvements to the SEM Guidelines[45] in 2012. These reforms included timelines for milestone actions that affected pending SEM submittals, a commitment by the Parties to explain decisions to alter the scope of submissions, and numerous improvements to the transparency and visibility of the SEM process. The Parties also worked with the Secretariat to produce a SEM Portal that provided access to key documents for past and pending SEM proceedings in relatively clear and non-technical terms.

As the SEM Modernization Task Force proceeded, JPAC conducted its own review of the SEM process, soliciting input from citizens and participants about the process' effectiveness and suggesting areas for improvement. JPAC relied on input from public hearings in Toronto, Ontario and El Paso, Texas[46] to prepare comments on the draft negotiation text of suggested improvements from the Task Force. JPAC's comments applauded several features of the proposed reforms,[47] but it ultimately raised fundamental concerns that the proposed guideline amendments would reinforce barriers to the public's ability to use the SEM process. For example, JPAC criticized the amended Guidelines' silence on the Parties' ability to limit the scope of submitted requests for development of factual records. In particular, JPAC objected that this lacuna could constitute an implied endorsement

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44. *See* discussion *infra* Part III.B.1 (EcoJustice's withdrawal of its submission in the *Species at Risk* matter). Prior to *Species at Risk*, three other applicants had withdrawn their submissions for varying reasons unrelated to scoping concerns. *See* discussion *infra* note 60.

45. The SEM Guidelines provide supplemental information to submitters about the process, timing, and content of the Secretariat's and Council's review of submitted environmental enforcement matters. CEC, *Council Resolution 12–06*, (Jul. 11, 2012), http://www.cec.org/about-us/council/council-resolutions/council-resolution-12-06. While they do not constitute formal or binding determinations by the Parties, the SEM Guidelines offer important clarifications about the SEM process and the Parties have stated their intent to comply with the Guidelines' timelines and requirements. *Id.* The Parties formally approved revisions to the SEM Guidelines by unanimous vote on July 11, 2012. *Id.*

46. Press Release, CEC, JPAC Invites the Public to Participate in the Process of Revising the Citizen Submissions on Enforcement Matters Guidelines (Apr. 17, 2012), http://www.cec.org/content/jpac-invites-public-participate-process-revising-citizen-submissions-enforcement-matters-guidelines.

47. In particular, JPAC applauded the Task Force's proposed use of time goals to drive speedier action by the Secretariat and the Parties, and it endorsed the Task Force recommendation that the Parties dedicate greater funding to support the SEM process. CEC, *JPAC Advice to Council 12–041, SEM Task Force Proposals for Changes to the Guidelines for Submissions on Enforcement Matters*, at 2 (May 23, 2012), http://www.cec.org/sites/default/files/documents/jpac_advice_council/16238_JPAC_Advice_12-01-Final-en.pdf [hereinafter JPAC Advice to Council on SEM Task Force].

of the continued use of scoping on future requests.[48]

JPAC raised other fundamental concerns about the updated Guidelines. Their comments pointed out the risk that the new Guidelines would impose an exhaustion requirement on submittals because of their reference to "private remedies" in Article 14(2) under Guidelines 5.6, 7.3, and 7.5. The commenters also objected that the changed Guidelines could require individuals and the Secretariat to suspend any activity during any "pending judicial or administrative proceeding" under Guideline 9.6.[49] As a final issue, the comments raised concerns that the revised Guidelines might mandate translations of materials prior to action by the Secretariat, which JPAC viewed as a potential bottleneck for action if the Parties failed to provide sufficient resources for the Secretariat to support timely translations.[50]

2. Persistent Criticisms of SEM Submittals under the New Guidelines

JPAC's concerns reflected a growing discontent among other participants in the SEM process. To gauge the effectiveness of the SEM process and the impact of Council directives on specific matters, JPAC undertook a survey in 2012 of every person and nongovernmental organization that used the SEM process since the ratification of NAAEC. JPAC ultimately received responses for one-third of the seventy-six submissions that the Secretariat had received up to that time.[51] According to JPAC, the survey responses confirmed a welling dissatisfaction among submitters over the SEM process' long delays, limited effect, lack of follow up, and vulnerability to manipulation by the Parties.[52]

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48. *Id.* at 4.

49. This risk may have now materialized in recent submissions under the updated Guidelines. *See* discussion *infra* Part III.A.1.

50. JPAC Advice to Council on SEM Task Force, *supra* note 47, at 3–5.

51. CEC, JPAC Advice to Council 11–04, *Submissions on Enforcement Matters (SEM) and Cross Border Movements of Chemicals in North America* ¶ 2 (Dec. 7, 2011), http://www.cec.org/about-us/jpac-advice-council/advice-council-11-04.

52. *See id*. According to JPAC,

> [C]itizens who have taken part in SEM submissions overwhelmingly voiced concern that the SEM process is not being administered consistent with the spirit and intent of the NAAEC. The prevailing public perception is that the credibility of this valued opportunity to contribute positively to the North American environment has been seriously eroded, primarily because of untimely action and resistance to full transparency and independent review by the Council and the Parties . . . . Feedback from the El Paso forum strongly suggests that citizens and environmental groups who have tried to put the process to good use are finding it increasingly difficult to justify using the process because the considerable effort required to prepare submissions does not reliably lead to timely and useful information.

Id. JPAC added that ninety-two percent of the responders stated that the SEM process needed improvement. *Id.* A parallel analysis of survey responses of Canadian submitters conducted by the North American Conference of Legal Educators reached similar conclusions. E. HJERTAAS, NACLE, REPORT ON THE CEC CITIZEN SUBMISSIONS PROCESS–CANADA 1, 4–10 (2012) (on file with author).

These fears have resurged as the independence and effectiveness of the SEM process continues to deteriorate. On May 8, 2015, JPAC submitted a new advice letter to the Parties pointing out that the SEM process remained underfunded, mired in procedural obstacles, and subject to manipulation by the Parties through restrictions on the scope of submitted matters.[53] The Council has not yet responded to the new JPAC missive, and JPAC raised its concerns again with the Council at its annual meeting in Boston in July 2015. The Council's response simply noted that it still placed great value on the SEM process and had already approved and implemented procedural reforms to improve the process' effectiveness.

B. SEM ROADBLOCKS

The SEM process now faces difficulties on multiple fronts. Most of these challenges arise from narrow interpretations of the procedural and jurisdictional bases that submissions must satisfy before either the Secretariat or the Commission will take further action. As a result, they present a series of choke points for the process where submitters can only succeed if they surmount every obstacle. If any one of these attacks succeeds, the submission cannot continue through the SEM process until that challenge is resolved.

The most important recent roadblocks that the Parties have raised to SEM submissions raised by the Parties fall into the following categories:

i. narrowing the scope of the submission ("scoping"), usually as a unilateral action by the Council without the participation or consent of the citizen submitter or the Secretariat;
ii. suspending or dismissing a submission because one of the Parties alleges that a legal or administrative proceeding pending in its domestic system already addresses the same concerns;
iii. outright rejection of determinations or recommendations by the Secretariat as a matter of unilateral discretion by the Council; and
iv. stated confusion over whether the Secretariat applied (or should apply) current or prior versions of the Guidelines governing SEM submissions, and insistence by the Parties that the Secretariat prepare more detailed workplans to govern the preparation of factual records and the investigation supporting those records.

The Council has raised other jurisdictional and procedural obstacles to SEM submissions in the past, and those challenges have already received extensive analysis by scholars and practitioners—as well as strong criticism. This analysis

53. CEC, JPAC Advice to Council 15–02, *JPAC Advice and Recommendations Regarding Submission on Environmental Matters,* J/15-02/ADV/Final, at 1–4 (May 8, 2015), http://www.cec.org/sites/default/files/documents/jpac_advice_council/advice_15-02.pdf.

focuses on the recent array of attacks on pending submissions because they threaten the future integrity of the SEM process.

1. Unilateral Narrowing of the Scope of Submissions

While the SEM process offers several opportunities for the Council to restrict or dilute the effectiveness of a submission,[54] one of the most powerful tactics is to unilaterally change the submission's scope before the Secretariat can begin developing a factual record. While the Council rarely denies outright a request by the Secretariat to develop a factual record, it has increasingly chosen to narrow the scope of the factual record in pending matters.[55] For example, through 2011, the Council had approved nineteen requests by the Secretariat to develop factual records and denied only two—but it narrowed the scope of more than half of the approved requests.[56] While the severity of these alterations varied, the Council notably imposed drastic restrictions on several requests and, as a result, vitiated the credibility and usefulness of any factual records that could have resulted from them.

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54. For example, the Parties can also deny publication of a factual record once the Secretariat completes it. A Party can additionally offer comments on a draft factual record at a point where the submitter lacks an opportunity to respond to the Party's allegations. *See* discussion *supra* note 30.

55. Knox & Markell, *supra* note 35, at 525. In its detailed comments in response to JPAC's questionnaire as part of JPAC's public review process on the citizen submissions process, Ecojustice provided a detailed overview of the Council's scoping actions and its effect on pending submissions. Ecojustice Survey Response, CEC, *JPAC Questionnaire on Submitters' Experience with the Citizen Submission Process under NAAEC Articles 14 and 15*, (2014), http://www.cec.org/public-commentary/jpac-questionnaire-submitters%E2%80%99-experience-citizen-submission-process-under-naaec-articles-14-and-15.

56. The Council has narrowed the scope of authorized factual records in numerous cases. *See, e.g.*, CEC, Council Res. 12–03 (Ex Hacienda El Hospital II & III), at 2, C/C.01/12/RES/03/Final (June 15, 2012), http://www.cec.org/content/council-resolution-12-03 (submission lists seventeen actions and omissions that, according to the Submitters, constitute a failure to enforce or effectively enforce various federal laws, including the General Law for Waste Prevention and Comprehensive Management. The Council excluded preparation of a factual record in regards to the "*Ley General para la Provención y Gestión Integral de los Residuous*" as this statute prohibits its application to "facts and actions pre-dating the entry-into-force of the legislation as well as any ongoing consequences of such actions"); CEC, Council Res. 10–05 (Species at Risk), at 1–2, C/C.01/10/RES/05/Final (Dec. 20, 2010), http://www.cec.org/about-us/council/council-resolutions/council-resolution-10-05 (the Secretariat recommended development of a factual record in response to a submission alleging the Canadian government had failed to enforce the Species at Risk Act for at least 197 of 529 species identified as "at risk" in Canada, but the Council instructed the Secretariat to prepare a factual record only with respect to two allegations and limited the overall scope of the factual record) [hereinafter Species at Risk]; CEC, Council Res. 14–05 (Sumidero Canyon II), at 1–2, C/C.01/14/RES/05/Final (June 10, 2014), http://www.cec.org/about-us/council/council-resolutions/council-resolution-14-05 (the Submitter asserts that Mexico is failing to effectively enforce its environmental laws with respect to the operations of a limestone quarry, which is allegedly causing damage to the Sumidero Canyon in Chiapas, Mexico. The Secretariat recommended the preparation of a factual record in regards to a submission alleging that the Mexican government had failed to enforce eighteen articles of numerous environmental statutes and regulations. The Council approved the preparation of a factual record in regards to three articles contained in two Statutes). A comprehensive list of scoped submissions is available from the author.

One of the most striking examples of the Council's use of scoping to eviscerate development of a factual record occurred with its decision in the *Migratory Birds* matter. Ecojustice Canada and other environmental groups submitted a request for a factual record to assess whether Canada had improperly failed to enforce its environmental laws to protect a large number of migratory birds allegedly threatened by logging practices permitted by Canada. When the Secretariat sought to develop a full factual record in response to the request, the Council only authorized an investigation into two instances of bird deaths caused by logging that the submittal mentioned in a footnote.[57] While the Council's Resolution approving the investigation did not explain why it curtailed the scope so drastically, the Council noted that the Secretariat should focus on whether Canada had failed to effectively enforce its Species at Risk Act and not "the effectiveness of the law in question" itself.[58] The resulting factual record would have required the Secretariat to spend an inordinate amount of time and resources to investigate a relatively small incident with minor environmental impact.[59]

The pattern continued with a subsequent filing by Ecojustice to request development of a factual record on Canada's purported failure to enforce its laws to protect endangered species. After the Council drastically restricted the issues that the Secretariat could investigate, Ecojustice took the striking action of withdrawing its own submission.[60] In its withdrawal letter, Ecojustice pointed out that the narrowing of the scope of its submittal cast serious doubt on the viability and credibility of the entire SEM process.[61]

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57. Species at Risk*, supra* note 56, at 2; 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, 426–27 (2004).

58. Species at Risk, *supra* note 56, at 1.

59. Of course, the petitioners' request to withdraw their request for development of a factual record spared the Secretariat from developing such a truncated investigation. CEC, Council Res. 11–02 (Species at Risk), at 1, C/C.01/11/RES/02/Final (Apr. 8, 2011), http://www.cec.org/about-us/council/council-resolutions/council-resolution-11-02 (rescinding earlier Resolution to create restricted factual record and instructing the Secretariat to proceed no further).

60. Prior to Ecojustice's action, only three submittals had been withdrawn for varying reasons unrelated to actions by the Council. CEC, *Fort Huachuca Submission Withdrawal,* SEM–96–004 (Fort Huachuca) (June 5, 1997), http://www.cec.org/sites/default/files/submissions/1995_2000/6040_96-4-wit-e.pdf (withdrawn on June 5, 1997 because the Secretariat decided to investigate similar issues through a report under NAAEC Article 13); CEC, *El Boludo Project Submission Withdrawal*, SEM–02–004 (El Boludo Project) (June 10, 2004), http://www.cec.org/sites/default/files/submissions/2001_2005/6674_02-4-not_es.pdf (withdrawn on June 10, 2004 because a mine operator had undertaken environmental response actions); CEC, *Ex Hacienda El Hospital I Submission Withdrawal,* SEM–06–001 (Ex Hacienda El Hospital I) (May 16, 2006), http://www.cec.org/sem-submissions/ex-hacienda-el-hospital (withdrawn on May 16, 2006 for similar reasons).

61. CEC, *Letter from Devon Page, Executive Director of Ecojustice (Vancouver office) to E. Lloyd, Executive Director of Commission for Environmental Cooperation*, SEM–06–005 (Species at Risk), at 4–5 (Jan. 17, 2011), http://www.cec.org/sites/default/files/submissions/2006_2010/9489_06-5-not_en.pdf.

The Council's forays into scoping have drawn loud and consistent criticism,[62] and the Council has occasionally chosen to step back from its practice on individual matters that attract attention.[63] But the Council has not formally or explicitly relinquished its ability to narrow the scope of any submittal, and—once attention has shifted or lapsed—it has typically returned to its practice of scoping of subsequent submittals.[64]

The Questionable Legality of Scoping. The most powerful critiques of the use of scoping fall into three categories: challenges to the legality of the practice under the plain language of NAAEC itself; emphasis on the implied legal duty of the Parties under NAAEC to support the effective implementation of their treaty obligations; and recourse to the general precepts of international law.

NAAEC Article 15(2) simply states that "[t]he Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so."[65] The ordinary meaning[66] of this provision is that the Council can only vote on whether to instruct the Secretariat to prepare a factual record—not modify or alter the scope of a record that the Secretariat recommends. Indeed, the Council used to simply vote "yes" or "no" on developing factual records for those requests that the Secretariat recommended.[67] By instructing the Secretariat to alter the scope of factual records, the Council is now effectively voting "yes" and "no" on different portions of the same request. There is no hint in the plain language of Article 15(2) that the Parties could reserve this power to themselves.[68]

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62. For a compilation of criticism of scoping practices by the Council, *see* Knox & Markell, *supra* note 35, at 525–27 (including academic criticism and harsh commentary during the JPAC review process).

63. *Id.* at 525–26.

64. *Id.* at 526.

65. NAAEC, *supra* note 2, at art. 15.2.

66. Under the Vienna Convention on the Law of Treaties, parties to a treaty must interpret it in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. This provision, as well as other articles of the Vienna Convention that address treaty interpretation, embodies existing customary international law on treaty interpretation. *Id.* at arts. 31–33; SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 153 (2d ed. 1984) ("[t]here is no doubt that Articles 31 to 33 of the Convention constitute a general expression of the principles of customary international law relating to treaty interpretation"). In addition to the dictates of customary international law, Canada has acceded to, the United States has signed (but not ratified), and Mexico has ratified the Vienna Convention.

67. The Council first engaged in scoping in its resolution directing the Secretariat to develop a factual record in the *BC Hydro* matter on June 24, 1998. CEC, Council Res. 98–07*, Instruction to Prepare a Factual Record Regarding SEM 97–001 (BC Hydro)* (June 24, 1998), http://www.cec.org/about-us/council/council-resolutions/council-resolution-98-07. While the Council observed that the excluded matters were within the scope of a judicial proceeding, the Secretariat had previously remarked that the legal proceeding was no longer pending. The Council neither noted nor explained why it had decided for the first time to change the scope of a factual record from the original scope proposed by the Secretariat. *Id.*

68. In its assessment of the SEM process, the Environmental Law Institute reached a similar conclusion. ENVTL. LAW INST., RESEARCH REPORT: ISSUES RELATING TO ARTICLES 14 AND 16 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION 14–16 (2003) (the practice of scoping "appears to violate the spirit and purpose of [NAAEC]" and "undermine the independence of the Secretariat and the ability of the process to enhance transparent and accountable environmental governance practices.") [hereinafter ELI Report].

Proponents of scoping may also seek to evade the plain meaning of Article 15(2) by pointing to its dual language that allows the Council members to "instruct" the Secretariat in addition to "vote" to authorize development of a factual record. This interpretation of Article 15(2) grants the Council the implied authority to "instruct" the Secretariat by controlling the scope of its investigation and development of a particular factual record.

Such an interpretation acknowledges the Council as the supreme governing body in the NAAEC procedural hierarchy and prevents the word "instruct" from degenerating into mere surplusage. More importantly, this interpretation respects some of the Parties' deep concerns that the SEM process should not limit their respective enforcement agencies' discretion, which is deeply rooted in the Parties' sovereignty and constitutional allocation of powers. Scoping proponents also note that changes to the scope of submittals, or outright dismissals, would occur without prejudice to the ability of the public to re-file their submittals at a future date.

Nevertheless, this interpretation runs afoul of larger and more important aspects of NAAEC. First, it reads too much meaning into an absence of language and supporting materials. NAAEC contains no definition or further explanation of the scope of "instruct" within Article 15(2), and no other provision within NAAEC or its supporting drafting documentation confers authority on the Parties to substantively narrow the breadth of the submittal process in general or in particular matters. Second, the interpretation effectively allows the inclusion of a single word—"instruct"—to constrain entire sections and other portions of NAAEC that emphasize the importance of the integrity of the submittal process, the independence of the Secretariat, and the intentionally limited ability of one Party to defeat or constrain development of factual records that address its own enforcement of its environmental laws (or lack thereof).[69] If the Parties had intended for the term "instruct" to have such a sweeping effect, they presumably would have included clearer and more direct language to that effect in NAAEC.[70]

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69. *See* discussion *infra* Parts III.B.2, IV.B (structural features of NAAEC, independence of Secretariat and integrity of SEM process from interference from interested Party). As Prof. Markell has noted, the Council's assertion of plenary power over the contents of submissions conflicts with NAAEC's requirement that the SEM process must begin with a submission that sets out the issues which the Secretariat must review. For example, the Council's rationale would arguably allow it to direct the Secretariat to develop a factual record without submission of a submission at all—which would conflict with the facial requirements of NAAEC. David L. Markell, *The CEC Citizen Submissions Process*, *in* GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 284 (David L. Markell & John H. Knox eds., 2003) ("[t]he limited conclusion offered here is that the Council lacks the authority under the NAAEC to act *sua sponte* to direct the Secretariat to develop a factual record. The Council does not have the authority, for example, to direct the Secretariat to prepare a factual record on a particular alleged enforcement failure . . . unless a submitter first raises this issue as one warranting such treatment and the Secretariat concurs in a recommendation to the Council.").

70. ELI Report, *supra* note 68, at 14 ("[i]n other words, it is logical to assume that if the Parties had intended this kind of limitation, they would have included it in the Agreement.").

The structure and purpose of NAAEC also support a stricter interpretation of Article 15(2) that forbids the practice of scoping. From a narrow perspective, the Parties' decision to alter the operation of the SEM process by allowing scoping circumvents NAAEC's express provisions for modifying or amending the Parties' obligations under the agreement.[71] The decision to modify the Secretariat's capacity to develop factual records effectively amends a key portion of NAAEC without undergoing the formal process of a modification or amendment required by NAAEC itself.[72] It also imbues the Council with a broad power to modify and recraft a submission without providing any guidance or express standard for exercising that power. Such a broad power would conflict with NAAEC's carefully drafted independent review process for the development of factual records.[73]

More broadly, the practice of scoping conflicts with the SEM process' fundamental purpose and the independent role of the Secretariat under NAAEC. The SEM process seeks to identify facts and practices to clarify or confirm a submitter's allegations about a Party's enforcement of its environmental laws. By doing so, the SEM process ultimately aspires to improve a Party's environmental enforcement through disclosure and public discourse rather than a coercive or punitive mechanism.[74] When the Council alters the scope of a factual record to exclude damaging or embarrassing issues, cherry-pick issues that favor only one Party, or add irrelevant or extraneous issues not raised in the submission,[75] it risks undermining the overall credibility and effectiveness of the SEM process in addition to the specific factual record in question.

Modifying the scope of factual records also runs counter to the Parties' obligation under public international law and customary international legal

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71. NAAEC, *supra* note 2, at art. 48 ("Amendments"). Article 48 provides that the Parties may agree to any amendment or modification of NAAEC, but that each Party must first comply with their own "applicable legal procedure." *Id.* at art. 48.2. The United States, for example, presumably would need to obtain the Senate's consent for major modifications of its obligations under NAAEC in any substantive manner.

72. *But cf.* Vienna Convention, *supra* note 66, at art. 31(3)(a)–(c) (subsequent practice between the parties regarding interpretation of application of a treaty's provisions can form part of the context relevant to interpreting that agreement). That subsequent practice, however, must still comport with the parties' general duty to implement the treaty in good faith. Anne-Marie Slaughter & Annecoos Wiersema, *The Scope of the Secretariat's Powers Regarding the Submission Procedure of the North American Agreement on Environmental Cooperation under General Principles of International Law*, 27 NORTH AM. ENVTL. L. & POL'Y 1, 9 (2009).

73. ELI Report, *supra* note 68, at 14.

74. Knox & Markell, *supra* note 35, at 507; Markell, *supra* note 32, at 33 (using transparency and an "international spotlight" through the citizen submission process was designed to promote domestic enforcement of environmental laws); CEC, INDICATORS OF EFFECTIVE ENVIRONMENTAL ENFORCEMENT: PROCEEDINGS OF A NORTH AMERICAN DIALOGUE v (1999).

75. *See* discussion *infra* note 56 (*Quebec Automobiles* submission scope expanded). The Council took a similar step in the *Hermosillo II* submission when it added a different law not raised by the submitters as *ratione materiae* of the factual record. CEC, Council Res. 12–04 (Environmental Pollution in Hermosillo II), at 1–2, C/C.01/12/RES/04/Final (June 15, 2012), http://www.cec.org/about-us/council/council-resolutions/council-resolution-12-04 (instructing Secretariat to use Mexico's new *Ley del Equilibrio Ecológico y Protección al Ambiente del Estado de Sonora* when developing the factual record).

precepts to interpret their international agreements in a fashion that promotes their effective implementation. Under the Vienna Convention on the Law of Treaties, the object and purpose of a treaty (as reflected in its terms) constitute part of the "context" within which a party must interpret its obligations.[76] This context does not serve simply as a fallback to clarify ambiguous treaty terms, but instead provides a key factor when determining the ordinary meaning of those terms.[77] Given NAAEC's express purpose and goal to verify the effectiveness of each Party's enforcement of its environmental laws through public disclosure and investigation pursuant to citizen submissions,[78] the Council's current practice of limiting the scope of factual records that the Secretariat can prepare undermines the SEM process' effectiveness and credibility.

Scoping also conflicts with the structure of the SEM process and the Secretariat as dictated by NAAEC. While NAAEC does not expressly state that the Secretariat retains an independent function in preparing factual records in response to submissions,[79] the Parties have repeatedly stated that the SEM process is non-adversarial and that they support the Secretariat's independent assessment of allegations contained in citizen submissions.[80] Scoping overrules that independent function and limits the Secretariat's ability to develop full factual records on alleged failures by any Party to effectively enforce its

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76. Vienna Convention, *supra* note 66, at art. 31(2)(a). Notably, NAAEC itself also requires consideration of the purposes of the agreement when the Secretariat reviews submissions. NAAEC, *supra* note 2, at art. 14.2 (Secretariat must assess whether a submission merits a response from the Party by determining if it "raises matters whose further study would advance the goals of this Agreement."). *See also* ELI Report, *supra* note 68, at 14.

77. Slaughter & Wiersema, *supra* note 72, at 8 ("[t]he object and purpose are not regarded as distinct from the ordinary meaning of a treaty's terms, to be referred to only in cases of ambiguity, but are, rather, a key factor in determining what that ordinary meaning is. The object and purpose of a treaty thus inform and condition the interpretation of that treaty from the outset.") (footnote omitted).

78. NAAEC, *supra* note 2, at art. 1(f)–(h) (Objectives).

79. *Id.* Art. 11(4), however, does state that "[e]ach 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." *Id.* at art. 11.4.

80. *See, e.g.*, CEC, *Guidelines for Submissions on Environmental Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* 2 (July 11, 2012), http://www3.cec.org/islandora/en/item/10838-guidelines-submissions-enforcement-matters-under-articles-14-and-15-north-en.pdf (describing the SEM process as a "fact-finding, non-adversarial procedure") [hereinafter SEM Guidelines]. Council members have expressly stated in other circumstances, however, that they retain the sole authority to dictate the release of factual records to the public and to determine whether a submission raises an allegation under "environmental laws" as defined by NAAEC. *See, e.g.*, CEC, *Factual Record for BC Logging Submission,* at 189, SEM–00–004 (BC Logging) (June 27, 2003), http://www.cec.org/sem-submissions/bc-logging ("[t]he NAAEC is very clear that the Council is the ultimate authority for determining the scope of a Factual Record, and the treaty does not, either explicitly or implicitly, contemplate providing submitters with an opportunity for a rebuttal on this issue."). While this article does not analyze those corollary issues, the Council's assertions must nonetheless comport with the Parties' duties under the Vienna Convention and customary international law to interpret NAAEC in good faith and in a way that assures the agreement's effectiveness.

environmental laws.[81] The practice of scoping also has created the perception that some citizen submissions cannot yield a credible factual record after the Council has severely modified the scope of the request.[82] Additionally, the ability of Parties to add or remove issues from a submission prior to development of a factual record—without an opportunity for response or comment from the original submitter—may impose unfair procedural disadvantages on citizens who wish to use the SEM process.[83] Given many submitters' relative lack of resources to prepare submissions, the Council can undermine the transparency and public participation objectives of the SEM process when it excludes certain assertions that the Secretariat has already deemed valid and worthy of further review or otherwise diverts the course of the Secretariat's investigation in ways that serve the interests of the affected Party.

The Limited Effect of the 2012 SEM Guidelines Reforms on Scoping Practices. Despite voluminous comments and requests during the SEM Modernization effort to restrict or halt the use of scoping,[84] the Council did not swerve.

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81. The Secretariat itself has noted the difficulties posed to its institutional role by the practice of scoping. In the *Migratory Birds* submission, the Secretariat responded to the United States' request to limit the scope of the proposed factual record by noting:

> [t]he larger the scale of the asserted failure, the more likely it may warrant the development of a factual record, other things being equal. If the citizen submission process were construed to bar consideration of alleged widespread enforcement failures, the failures that potentially pose the greatest threats to accomplishment of [NAAEC's] objectives, and the most serious and far-reaching threats of harm to the environment, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC. The Secretariat declines to adopt a reading of the Agreement that would yield such a result.

CEC, *SEM Article 15(1) Notification to Council that Development of a Factual Record Is Warranted,* SEM–99–002 (Migratory Birds), at 10 (Dec. 15, 2000), http://www.cec.org/sites/default/files/submissions/1995_2000/6466_acfa30.pdf.

82. *See* discussion *supra* note 61 on EcoJustice's withdrawal of the Migratory Bird submittal.

83. Article 15.2 does not provide an opportunity for citizens to object or respond to decisions by the Council to limit or expand the scope of factual records that it authorizes the Secretariat to develop in response to a submission. As a result, citizen submitters may have to object to their own submissions after the Secretariat has fully developed and released a final factual record. NAAEC, *supra* note 2, at art. 15.2. While NAAEC includes a dispute resolution process that includes possible binding arbitration between the Parties, that process only applies to complaints by one Party against another Party for failure to enforce its environmental laws in certain circumstances. Citizen submitters cannot invoke that process to object to actions by the Council or Parties during the SEM process. The Joint Public Advisory Committee has often been the only CEC forum in which submitters can air their concerns. *Id.* at Part 5, arts. 22–36.

84. JPAC, in particular, objected strongly to the amended SEM Guidelines failure to restrict scoping of submissions. CEC, JPAC Advice to Council 99–01, J/99-01/ADV/Rev.1 (Mar. 25, 1999), http://webdev/drupalcec/sites/default/files/documents/jpac_advice_council/Revised-Guidelines-SEM-1999.pdf. It subsequently condemned the practice outright. CEC, JPAC Advice to Council 03–05, J/03-05/ADV/Final (Dec. 21, 2003), http://www.cec.org/about-us/jpac-advice-council/advice-council-03-05 (finding that "on the matter of limiting the scope of factual records, JPAC strongly recommends that Council refrain in the future from limiting the scope of factual records presented for decision by the Secretariat"). The Council has adopted a resolution to express its commitment to provide a justification on the record for any decision to refuse creation of a factual record. CEC, Council Res. 01–06, C/01-00/RES/06/Rev.4 (June 29, 2001), http://www.cec.org/about-us/council/council-resolutions/council-resolution-01-06. Yet the CEC notably has not passed a similar resolution to limit or

Numerous commenters to the draft Guidelines asked the Council to eschew future scoping of factual records, but the final revised Guidelines only state that the Council will explain any future decisions to limit or alter the scope of a factual record.[85] While it is unclear whether the Council believes that this obligation only applies prospectively to future citizen submittals after July 2012,[86] it has not moved to review or disclose its rationale for any of its decisions before 2012 to restrict or modify factual record requests. The amended SEM Guidelines therefore implicitly endorse the Council's authority to alter the scope of citizen submissions so long as the Council merely provides an explanation for its actions.[87] The revised Guidelines also do not provide any remedy or avenue for response if a citizen objects to such explanations.[88]

Because the amended SEM Guidelines have been in effect for only three years, the Council has taken relatively few actions that fall under the new Guidelines.[89] Yet, the initial results do not reflect any significant change in the Parties' use of scoping or other tactics to constrain the development of factual records (other than the publication of an explanation for the Council's decision).[90] Under the amended Guidelines' new timelines for the Council to take action on pending citizen submissions, the Council has taken action on the six submissions pending when it modified the Guidelines. Of those submissions, the Council has now limited the scope of two and outright denied the development of factual records in the other four.[91]

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constrain its ability to modify the scope of a factual record beyond its approval of the voluntary commitment to provide an explanation for scoping decisions through its approval of the amended SEM Guidelines.

85. SEM Guidelines, *supra* note 80, at 10 ("[i]f the Council, by at least a two-thirds vote, instructs it do so, the Secretariat will prepare a factual record in accordance with those instructions. The Council will provide its reason(s) for the instructions in writing and they will be posted on the public registry.").

86. *See* discussion *infra* note 100 (Council's refusal to act on Secretariat's recommendation for a factual record in the *Wetlands in Manzanillo* matter because the submission arguably failed to clarify which version of the SEM Guidelines that the Secretariat used to review the submission).

87. *See* discussion *infra* note 96 (delays caused by amended SEM Guidelines obligation to disclose reasons for Commission decisions).

88. SEM Guidelines, *supra* note 80, at 10 (no reference to additional review or reconsideration available to persons who provided the submission).

89. The lack of activity under the new Guidelines resulted in part from the Council's own actions, of course, because of its initial refusal to consider three submittals due to disputes over the applicability of the new Guidelines to matters submitted when the old Guidelines were in effect. *See* discussion *infra* Part III.B.4.

90. *See* John H. Knox, *Fixing the CEC Submissions Procedure: Are the 2012 Revisions Up to the Task?*, 7 GOLDEN GATE U. ENVTL. L.J. 81, 98–103 (2014) (concluding that the 2012 revisions would—if followed—help with excessive delays in consideration of submittals, but that they still included provisions that gave the Parties greater control over the SEM process by restricting the admissibility of submissions, allowing Parties to terminate the process prematurely, limiting the scope of factual records, and limited transparency).

91. The Council limited the scope of submittals in the *Sumidero Canyon II* and *Wetlands in Manzanillo* matters. It refused to authorize development of factual records in the *Polar Bear Protection*, *Alberta Tailings Ponds*, *BC Salmon Farms*, and *Tourism Development in the Gulf of California* matters. CEC, *Welcome to the Submissions on Enforcement Matters Compliance Tracker*, http://www4.cec.org/sem-tracker/tracker.html (last visited Dec. 13, 2015).

The *Sumidero Canyon II* decision, for example, substantially limited the scope of the requested factual record. This submittal focused on Mexico's alleged failure to enforce its environmental laws to control air emissions, noise, and natural resource damages from a large limestone quarry in Chiapas. The submitters also contended that Mexico failed to prepare an environmental impact statement, failed to issue emergency measures to prevent damage to natural resources and public health, and refused to issue a management program for Sumidero Canyon National Park. The Council, by a two-thirds vote, authorized the development of a factual record limited solely to allegations of noise pollution, a limited assessment of Mexico's definition of acceptable rates and carrying capacities of the Park, and the extent to which the mining company's activities generated benefits for local inhabitants compatible with protections for Mexico's Regulation respecting Protected Natural Areas.[92] In explaining their votes, Mexico and Canada claimed that the submittal request sought consideration of wholly past failures to enforce environmental laws, focused on matters that Mexico had notified the Secretariat were subject to pending judicial and administrative proceedings under NAAEC Article 45(3)(a), and sought redundant information on matters not previously identified by the submittal.[93] The United States, by contrast, stated that it "would have also supported a broader scope for the factual record" beyond the few items remaining after the Council truncated the scope of the submittal.[94]

Other procedural actions by the Council under the new Guidelines have also not been promising. When the Secretariat notified the Council on August 19, 2013 that development of a factual record was warranted in the *Wetlands in Manzanillo* submittal,[95] the Council avoided the need to decide on the scope of the factual record (and the potential obligation to explain its decision) by instead choosing to postpone its vote. The Council voiced its concern that the Secretariat had not "consistently applied" the updated SEM Guidelines to all aspects of the *Manzanillo* submittal and requested a revised notification from the Secretariat.[96]

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92. CEC, Council Res. 14–05, C/C.01/14/RES/05 (June 10, 2014), http://www.cec.org/about-us/council/council-resolutions/council-resolution-14-05.

93. CEC, *Reasons for Council Instructions Regarding Submission SEM–11–002* (Sumidero Canyon II) (June 10, 2014), http://www.cec.org/sites/default/files/submissions/2011_2015/18639_11-2-council_vote_explanation_en.pdf.

94. *Id.* at 3.

95. CEC, *SEM Article 15(1) Notification to Council that Preparation of a Factual Record Is Warranted*, at 1, SEM–09–002 (Wetlands in Manzanillo) (Aug. 19, 2013), http://www.cec.org/sem-submissions/wetlands-manzanillo.

96. CEC, *Letter from Dan McDougall, Alternative Representative for Canada, to Dr. Irasema Coronado, Executive Director, Comm'n for Envtl. Cooperation*, SEM-09-002 (Wetlands in Manzanillo) (Nov. 15, 2013), http://www.cec.org/sites/default/files/submissions/2006_2010/18122_09-2-pts-memo_from_council_en.pdf.

The Secretariat asserted in response that the strict text of NAAEC Article 15(1) does not authorize the novel additional step of preparing a revised notification.[97]

Instead, the Secretariat offered a detailed explanation of its decision to use both the original and amended Guidelines to consider different aspects of the submittal,[98] and it proposed to meet with the Council's representatives to discuss any legal or policy concerns. It then requested that the Council act on its original notification as soon as possible because the Guidelines do not modify the Agreement, and Article 15(2) provides a remedy if the Council disagrees with the Secretariat's recommendation of a factual record.[99] The Council had stated in its original response, however, that it did not consider itself bound by the suggested timelines of the amended Guidelines because the Secretariat had failed to clarify how it had applied the updated SEM Guidelines.[100] Given the manufactured procedural impasse, the Council likely will not give a clear signal on its planned implementation of the amended SEM Guideline requirements until its consideration of a future submittal. The Council's willingness to halt progress on a pending submittal because of procedural disputes over revisions to a guideline meant to *facilitate* the consideration of submittals is disappointing.

2. Halting Submissions Because They Are Allegedly Subject to "Pending Proceedings"

The SEM process also faces a more serious challenge arising from aggressive challenges to its jurisdiction to hear matters that a Party claims is already subject to a "pending proceeding." For example, in the *Alberta Tailings Ponds* matter, Canada requested that the Secretariat immediately terminate any consideration of the submission because a private citizen had submitted a handwritten "information" alleging that Suncor Energy, Inc. allowed "the deposit of deleterious substances into the Athabasca River" in violation of the Fisheries Act. Canada demanded that the Secretariat immediately dismiss the SEM submittal without prejudice because a Canadian judge had scheduled an initial process hearing on whether to proceed with the matter. Canada's request did not discuss or analyze how consideration of the SEM submission would in any way risk frustration or duplication of the citizen complaint action under Article 14(3).[101] Notably, the court dismissed the citizen complaint at the process hearing, and the action has

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97. CEC, *Letter from Dr. Irasema Coronado, Executive Director, Secretariat of the Comm'n for Envtl. Cooperation, to Dan McDougall, Alternate Representative Chair*, SEM-09-002 (Wetlands in Manzanillo) (Jan. 29, 2014), http://www.cec.org/sites/default/files/submissions/2006_2010/18301_09-2-stc_en.pdf.

98. *Id.*

99. *Id*.

100. Letter from Dan McDougall, *supra* note 96.

101. CEC, *Letter from Dan McDougall, Assistant Deputy Minister, International Affairs Branch, to Dr. Irasema Coronado*, SEM–10–002 (Jan. 31, 2014), http://www.cec.org/sites/default/files/submissions/2006_2010/18316_10-2-rsp_en.pdf.

now terminated.[102]

Despite these developments, the Council recently rejected the Secretariat's recommendation to develop a factual record in *Alberta Tailings*.[103] Pursuant to the new SEM Guidelines, the Council provided an explanation for its decision that reflected a division between the Parties. Canada and Mexico took the position that Canada's notification alone satisfied Article 14(3)'s requirements and required the Secretariat to terminate the submission.[104] By contrast, the United States did not conclude that the citizen information filing would constitute a "pending proceeding" under Article 14(3), but rather that the Secretariat should not have proceeded out of a spirit of caution to avoid any possible conflict with a potential criminal inquiry. The United States added that the citizens could have resubmitted their submission for development of a factual record in the future if the Secretariat chose not to further process the current request.[105]

The same Party dynamic surfaced in the Council's decision to halt development of a factual record in *British Columbia Salmon Farms,* which objected to Canada's issuance of an aquaculture license. Canada notified the Secretariat that two pending legal proceedings merited termination of the submittal.[106] Canada's notice simply attached copies of the initial filings for each matter, but it did not provide further information or an explanation of how these legal actions overlapped with the subject matter of the SEM submission.[107] The Secretariat responded that Canada's filing did not include sufficient information to confirm that NAAEC Article 14(3) and SEM Guideline 9.2 would require termination of the submittal.[108] The Secretariat requested that Canada provide a "reasoned explanation" under Article 21 on how the two cases met the Article 45(3) definition of a "judicial or administrative proceeding" that would be duplicated or interfered with by any additional action on the SEM submittal.[109]

Canada answered that Article 14(3) was "unambiguous" in requiring the Secretariat to "proceed no further" when informed by a Party of a pending

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102. Margo McDiarmid, *NAFTA Probe of Alberta Tailings Ponds Blocked by Canada*, CBS NEWS (Jan. 28, 2015), http://www.cbc.ca/news/politics/nafta-probe-of-alberta-s-tailings-ponds-blocked-by-canada-1.2935004.

103. CEC, Council Res. 15–01, C/C.01/15/RES/01 (Jan. 27, 2015), http://www.cec.org/Storage/160/18921_10-2-CR_15-01_en.pdf.

104. CEC, *Reasons for Council Instructions Regarding Submission SEM–10–002*, SEM-10-002 (Alberta Tailings Ponds) (Jan. 27, 2015), http://www.cec.org/sites/default/files/submissions/2006_2010/18924_10-2-reasons-canada_and_mexico-united_states_en.pdf.

105. *Id.*

106. CEC, *Letter from Dan McDougall, Assistant Deputy Minister, Int'l. Affairs Branch, to Dr. Irasema Coronado, Executive Director, Secretariat for the Comm'n for Envtl. Cooperation*, at 1, SEM–12–001 (BC Salmon Farms) (Oct. 4, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/18002_12-1-rsp_en_1.pdf.

107. *Id.*

108. CEC, *Memorandum from I. Coronado to D. McDougall re SEM-12-001 (BC Salmon Farms) Article 21 Request for Information*, at 3, SEM–12–001 (BC Salmon Farms) (Nov. 4th, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/18013_12-1-req_en.pdf.

109. *Id.*

judicial or administrative proceeding, directly challenging the Secretariat's discretionary powers under Article 14(3). This treaty obligation, according to Canada, did not require any further guidance from the Party to the Secretariat on the nature or extent of the underlying legal actions.[110] Canada's reply concluded with an ominous observation that it would raise the matter with other Parties and provide "a general explanation" that would be "helpful" to the Secretariat in future communications with submitters and the public.[111] The existence of the updated Guidance did not lead Canada to provide a fuller or more reasoned explanation of its actions.[112] In fact, Canada suggested modifying the Guidelines to remove any suggestion that the Party must "explain" its notification about other pending domestic legal matters (rather than simply "advising" the Secretariat of their existence).[113]

After Canada's objections, the Council decided to halt development of a factual record. In their separate statement outlining the decision's rationale, Canada and Mexico explained that the separate lawsuit allegedly raised similar concerns about Canada's failure to enforce environmental laws against pollution created by commercial salmon farms, and they contended that Canada's simple notification to the Secretariat about the existence of the judicial action mandated the termination of the factual record.[114] The United States took a stronger dissenting stance than it had in *Alberta Tailings*. It pointed out that the action identified by Canada did not address the same provision of the Fisheries Act, and that the action arose from private individuals rather than "a Party," as required by Article 14(3).[115] The United States stressed, however, that its support for developing a factual record did not reflect any judgment on its part that Canada had failed to effectively enforce its own environmental laws.[116]

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110. CEC, *Letter from Dan McDougall, Assistant Deputy Minister, Int'l Affairs Branch, to Dr. Irasema Coronado, Executive Director, Comm'n for Envtl. Cooperation*, at 4–5, SEM–12–001 (BC Salmon Farms) (Dec. 17, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/18263_12-48-rsp_en.pdf.

111. *Id.* at 4 ("[n]evertheless, as this seems to be a general request not exclusively associated with the *BC Salmon Farms* submission, I will raise this matter with my Alternative Representative colleagues and discuss if there are things we or Council can do to provide the Secretariat greater guidance in fulfilling its mandate under the treaty. It may be, for example, that if Council were to provide a general explanation of why that provision exists, that would be helpful to the Secretariat when it is communicating with submitters or the public at large.").

112. *Id.* at 5.

113. *Id.*

114. CEC, *Reasons for Council Instructions, by a Two-Thirds Vote, regarding Submission SEM–12–001 (British Columbia (BC) Salmon Farms)*, at 1–4, SEM–12–001 (BC Salmon Farms) (Dec. 9, 2014), http://www.cec.org/sem-submissions/bc-salmon-farms.

115. CEC, *Statement of the United States of America Explaining Its Position and the Reasons for Its Vote Regarding Submission SEM–12–001 (British Columbia (BC) Salmon Farms)* SEM–12–001 (BC Salmon Farms) (Dec. 9, 2014), http://www.cec.org/sem-submissions/bc-salmon-farms.

116. *Id.* The United States added that "long-standing U.S. policy" as reflected in Executive Order 12915 (May 13, 1994) required the United States, to the greatest extent practicable, to support development of a factual record if the Secretariat recommended one.

Canada and Mexico's narrow interpretation of Article 14(3) and the SEM Guidelines pose a serious threat to the integrity of the SEM submittal process.[117] By informal estimates, a substantial number of matters pending before the Secretariat are also the subject of some form of domestic litigation or administrative proceeding.[118] The relevance of these legal actions to the SEM submittal, however, depends heavily upon the specific allegations of the submittal and the breadth of the domestic proceeding. In the past, the Secretariat has undertaken a substantive review of pending actions in a large number of submittals made over a twenty-year period.[119] By contrast, instituting a simple per se rule that allows a Party to terminate actions by advising the Secretariat of allegedly pending domestic actions—without any further substantive input or review by the Secretariat—risks self-serving manipulation of the SEM process by an interested Party and a sweeping restriction of the scope of possible submittals.

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117. As noted above, Canada is not the only Party who views the simple alleged existence of a legal action as sufficient grounds to terminate consideration of a submission. Mexico recently filed Party responses in the *Desarrollo Turistico en el Golfo de California* and the *Sumidero Canyon* matters that reflected a similar belief that Article 14(3) required dismissal of a submission because of the presence of domestic litigation without a substantive evaluation by the Secretariat. Mexico nonetheless also provided fulsome responses regarding the submitters' assertions. *See, e.g.*, CEC, *Respuesta de Parte del Gobierno de los Estados Unidos Mexicanos*, at 1, SEM–13–001 (Tourism Development in the Gulf of California) (Feb. 14, 2014), http://www.cec.org/sites/default/files/submissions/2011_2015/18390_13-1-rsp_es.pdf.

118. While the Secretariat has not compiled any authoritative figures on the percentage of submittals that have evoked claims of pending actions under Article 14(3), a review of submittals from 2008 through 2013 indicates one of the Parties moved to dismiss half of the submissions because of parallel enforcement activity in the affected Party's jurisdiction (i.e., ten out of twenty submittals during that time period). *See* CEC, *Respuesta de Parte del Gobierno de los Estados Unidos Mexicanos*, at 1, SEM–13–001 (Tourism Development in the Gulf of California) (Feb. 14, 2014) (proceeding still open), http://www.cec.org/sites/default/files/submissions/2011_2015/18390_13-1-rsp_es.pdf; CEC, *Letter from D. McDougall to Dr. I. Coronado*, at 1–2, SEM–12–001 (BC Salmon Farms) (Oct. 4, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/18002_12-1-rsp_en_1.pdf; CEC, *Environment Canada Response to Submission SEM 11-003*, at 10–11, SEM–11–003 (Protection of Polar Bears) (Jan. 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/16874_11-3-rsp_en.pdf (proceeding still open); CEC, *Letter from D. McDougal to I. Coronado*, SEM–10–002 (Alberta Tailings Ponds), at 1–2 (Jan. 31, 2014), http://www.cec.org/sites/default/files/submissions/2006_2010/18316_10-2-rsp_en.pdf; CEC, *Environmental Canada Response to Submission SEM 10-003*, at 17–20, SEM–10–002 (Iona Wastewater Treatment) (Feb. 2012), http://www.cec.org/sites/default/files/submissions/2006_2010/15831_10-3-rsp_en.pdf; CEC, *Party Response of the Mexican Ministry of the Environment and Natural Resources* (unofficial translation), at 2, SEM–09–001 (Transgenic Maize in Chihuahua) (May 3, 2010), http://www.cec.org/sites/default/files/submissions/2006_2010/17748_09-1-rsp-unofficial_translation_en.pdf; CEC, *Party Response to submission SEM–09–002* (unofficial translation), at 1–4, SEM–09–002 (Wetlands in Manzanillo) (Oct. 11, 2010), http://www.cec.org/sites/default/files/submissions/2006_2010/17092_09-2-rsp-publica_en.pdf; CEC, *Party Response of the Mexican Ministry of the Environment and Natural Resources*, at 2, SEM–09–003 (Los Remedios National Park II) (Dec. 20, 2010), http://www.cec.org/sites/default/files/submissions/2006_2010/9625_09-3-rsp-public_es.pdf; CEC, *Environment Canada Response to Submission SEM 09-005*, at 10–12, 16–18, SEM–09–005 (Skeena River Fishery) (July 30, 2010), http://www.cec.org/sites/default/files/submissions/2006_2010/8868_09-5-rsp_en.pdf; CEC, *Party Response of the Mexican Ministry of the Environment and Natural Resources*, at 4, SEM–08–001 (La Ciudadela Project) (Sep. 26, 2008), http://www.cec.org/sites/default/files/submissions/2006_2010/7156_08-1-rsp-es.pdf.

119. *See supra* note 118.

Notably, until Canada's recent opposition, none of the Parties had ever objected to the Secretariat's substantive review of alleged domestic actions that required dismissal of submittals. The Secretariat has separately "emphasize[d] that it has always analyzed Party responses in accordance with Article 14(3) and that 'the commitment to the principle of transparency pervading the NAAEC [means that] the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect.'"[120] In addition, the Secretariat has substantively assessed arguably conflicting domestic actions in Article 15(1) determinations for numerous prior submittals.[121]

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120. CEC, *Article 14(3) Determination*, at 5, SEM–01–001 (Cytrar II) (June 13, 2001), http://www.cec.org/sites/default/files/submissions/2001_2005/6436_01-1-det14_3-e.pdf; CEC, *Notification to Council that Development of a Factual Record Is Warranted*, SEM–97–001 (BC Hydro) (Apr. 27, 1998), http://www.cec.org/sites/default/files/submissions/1995_2000/6208_97-1-adv-e.pdf; CEC, *Notification to Council that Development of a Factual Record Is Warranted*, at 15, SEM–03–003 (Lake Chapala II) (May 18, 2005), http://www.cec.org/sites/default/files/submissions/2001_2005/6724_03-3-adv_en.pdf; CEC, *Notification to Council that Development of a Factual Record Is Warranted*, at 1, SEM–04–005 (Coal-fired Power Plants) (Dec. 5, 2005), http://www.cec.org/sites/default/files/submissions/2001_2005/6868_04-5-adv_en.pdf; CEC, *Article 15(1) Determination*, at 24, SEM–09–001 (Transgenic Maize in Chihuahua) (Dec. 20, 2010), http://www.cec.org/sites/default/files/submissions/2006_2010/17101_09-1-det_15_1_public_en.pdf.

121. CEC, Council Res. 01–08 (Oldman River II), at 1, C/C.01/01-06/RES/03/Rev.1 (Nov. 16, 2001), http://www.cec.org/about-us/council/council-resolutions/council-resolution-01-08 (although the Secretariat recommended development of a broad factual record, *see* CEC, *Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, at 21, SEM–97–006 (Oldman River II) (July 19, 1999), http://www.cec.org/sites/default/files/submissions/1995_2000/6235_97-6-adv-e.pdf, the Council limited the scope of the factual record to Canada's enforcement of environmental laws solely with respect to the Sunpine Forest Products Access Road); CEC, *Article 14(3) Determination*, at 6, SEM–99–001 (Methanex) (June 30, 2000), http://www.cec.org/sites/default/files/submissions/1995_2000/6493_99-1-det-e1.pdf; CEC, Council Res. 01–10, at 2, C/C.01/01-06/RES/02/Rev.3 (BC Logging) (Nov. 16, 2001), http://www.cec.org/about-us/council/council-resolutions/council-resolution-01-10; CEC, *Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, at 16, SEM–98–004 (BC Mining) (May 11, 2001), http://www.cec.org/sites/default/files/submissions/1995_2000/6160_acf11.pdf; CEC, *Notification to Council*, at 12–13, SEM–00–006 (Tarahumara) (Aug. 29, 2002), http://www.cec.org/sites/default/files/submissions/1995_2000/8398_00-6-adv-e.pdf; CEC, *Notification to Council*, at 2, SEM–05–002 (Coronado Islands) (Jan. 18, 2007), http://www.cec.org/sites/default/files/submissions/2001_2005/6958_05-2-adv_en.pdf; CEC, *Notification to Council*, at 17, SEM–02–003 (Pulp and Paper) (Oct. 8, 2003), http://www.cec.org/sites/default/files/submissions/2001_2005/6637_02-3-adv_en.pdf; CEC, *Determinación art. 14(2)*, at X, SEM–04–002 (Environmental Pollution in Hermosillo) (Jan. 27, 2005), http://www.cec.org/sites/default/files/submissions/2001_2005/6841_04-2-detn2_es.pdf; CEC, *Notification to Council*, at 1–2, SEM–06–005 (Species at Risk) (Sept. 10, 2007), http://www.cec.org/sites/default/files/submissions/2006_2010/7051_06-5-adv_en.pdf; CEC, *Notification to Council*, at 2, SEM-05-003 (Environmental Pollution in Hermosillo II) (Apr. 4, 2007), http://www.cec.org/sites/default/files/submissions/2001_2005/6979_05-3-adv_en.pdf; CEC, *Notification to Council,* at 1–15, SEM–06–003 and SEM–06–004 (Ex Hacienda El Hospital II and Ex Hacienda El Hospital III) (May 12, 2008), http://www.cec.org/sites/default/files/submissions/2006_2010/7039_06-3-4-adv-e.pdf; CEC, *Determination pursuant to Article 15(1) of the NAAEC*, at 1, SEM–07–001 (Minera San Xavier) (July 15, 2009), http://www.cec.org/sites/default/files/submissions/2006_2010/7102_07-1-detn_15-1_en.pdf; CEC, *Determination under Article 15(1) of NAAEC*, at 12, SEM–08–001 (La Ciudadela Project) (Aug. 12, 2010), http://www.cec.org/sites/default/files/submissions/2006_2010/8895_08-1-det_151_public_en.pdf; CEC, *Determination pursuant to Article 15(1) of the NAAEC*, at 1, SEM–10–004 (Puente Bicentenario) (Feb. 28, 2011), http://www.cec.org/sites/default/files/submissions/2006_2010/9636_10-

3. Outright Discretionary Disapproval by the Council of the Secretariat's Recommendations and Conclusions

Even when the Secretariat concludes that a submission warrants development of a factual record, the Parties sometimes simply refuse to accept the Secretariat's recommendation. NAAEC grants them that power by authorizing the Council to accept or reject the Secretariat's proposal by majority vote.[122] Notably, NAAEC does not require the Parties to provide an explanation for their decision or satisfy any express legal standard in rejecting the Secretariat's recommendation.[123] While NAAEC gives the Council the power to reject proposals, that authority—if used broadly, capriciously, and without clear justification—can erode the public's confidence in the SEM process and damage the Secretariat's independence and credibility.

This dynamic came starkly into play with the Council's decision to reject the Secretariat's recommendation for development of a factual record in the *Polar Bears* submission. On November 30, 2011, the Center for Biological Diversity submitted a submission alleging that Canada failed to adequately enforce its Species at Risk Act to protect its polar bear population.[124] On November 7, 2013, the Secretariat agreed that the submitters had raised issues that satisfied the requirements of NAAEC and recommended to the Council that the Secretariat proceed with development of a full factual record.[125]

The Council disagreed. On May 11, 2014, it rejected the Secretariat's recommendation by a two-thirds vote and terminated any further consideration of the *Polar Bears* submittal.[126] Pursuant to the new Amended Guidelines, the Council also directed the Secretariat to publish a separate explanation for its decision to terminate any further consideration of the submission.[127] The Council provided its rationale in an accompanying explanation that the Secretariat has now

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4-detn_14_1_2_es.pdf; CEC, *Parque Nacional Los Remedios II - Determinación conforme al artículo 15(1) del ACAAN*, at X, SEM–09–003 (Los Remedios National Park II) (July 27, 2011), http://www.cec.org/sites/default/files/submissions/2006_2010/15190_09-3-detn_15_1_es.pdf; CEC, *Notification to Council*, at 1, SEM–09–002 (Wetlands in Manzanillo) (Aug. 19, 2013), http://www.cec.org/sites/default/files/submissions/2006_2010/17782_09-2-adv-en_public.pdf; CEC, *Notification to Council*, at 1, SEM–11–002 (Sumidero Canyon II) (Nov. 15, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/18198_11-2-adv-public_en.pdf.

122. Under Article 15.2, the Secretariat shall prepare a factual record "if the Council, by a two-thirds vote, instructs it to do so." NAAEC, *supra* note 2, at art. 15.2.

123. *Id.*

124. CEC, Citizen Petition Submitted to the CEC Pursuant to Article 14 of NAAEC, at 2, SEM–11–003 (Protection of Polar Bears) (Nov. 30, 2011), http://www.cec.org/sites/default/files/submissions/2011_2015/17115_11-3-sub_en.pdf.

125. CEC, *Article 15(1) Notification to Council that Development of a Factual Record Is Warranted*, at 12, SEM–11–003 (Protection of Polar Bears) (Nov. 7, 2013), http://www.cec.org/sites/default/files/submissions/2011_2015/18138_38-adv-e_polar_bears.pdf [hereinafter Protection of Polar Bears Recommendation].

126. CEC, Council Res. 14–04 (Protection of Polar Bears) at 1, C/C.01/14/RES/04/Final (June 5, 2014), http://www.cec.org/sites/default/files/submissions/2011_2015/18627_11-3-cr-14-04_en.pdf.

127. *Id.* at 2.

included in the record.[128]

The Council's explanation essentially amounts to a blanket repudiation of the Secretariat's conclusion that Canada's prior responses failed to adequately answer the submitters' concerns. The submitters alleged that Canada inadequately enforced its Species at Risk statute because it listed polar bears only as a species of concern rather than according them the full degree of protection provided by an endangered species listing. In its response to the submission, Canada argued that its prior responses, combined with publicly available information, fully documented the reasoning behind Canada's exercise of enforcement discretion, and it demanded that the Secretariat dismiss the submission. The Secretariat answered by pointing out that the information Canada identified failed to fully respond to the concerns raised in the original submittal.[129] When it rejected the Secretariat's recommendation by a two-to-one vote, the Council simply listed publicly available information and repeated Canada's contention that the Secretariat had failed to adequately defer to Canada's discretionary enforcement deliberations as provided by NAAEC.[130] While the United States noted its objections to the Council's decision,[131] it could not override Canada and Mexico's joint decision to terminate development of the factual record.

4. Bureaucratic Challenges: Budgetary Manipulations, Funding Starvation, and Delayed Decisions

The erosion of the SEM process has occurred on several other fronts beyond the scoping procedure, "pending proceedings" challenges, and discretionary disapprovals problem. Rather than occurring at a strictly legal level, however, these additional influences also take place at the procedural and bureaucratic levels. For example, the Council has expressed interest in exercising greater control over the Secretariat's operations by insisting on more detailed workplans and budgets for development of specific factual records. Under this approach, the

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128. CEC, *Reasons for Council Instructions, by a Two-Thirds Vote, Regarding Submission SEM-11-003 (Protection of Polar Bears)*, SEM–11–003 (Protection of Polar Bears) (May 11, 2014), http://www.cec.org/sites/default/files/submissions/2011_2015/18630_11-3-council_vote_explanation_en.pdf.

129. Protection of Polar Bears Recommendation, *supra* note 125, at 2.

130. Protection of Polar Bears Recommendation, *supra* note 125, at 1–5.

131. CEC, *Statement by the United States of America Explaining Its Position on the Notification by the Secretariat of the CEC Concerning a Factual Record with Regard to Submission SEM-11-003 (Protection of Polar Bears)*, at 1, SEM–11–003 (Protection of Polar Bears) (May 30, 2014), http://www.cec.org/sites/default/files/submissions/2011_2015/18633_11-3-us_explanation_for_fr_vote_en.pdf. The United States took pains to note that its dissenting vote arose from its "longstanding U.S. policy [. . .] reflected in Executive Order 12915 of May 13, 1994, which requires the United States, to the greatest extent practicable, to vote in favor of a factual record being prepared whenever such preparation is recommended by the CEC Secretariat." The United States also stressed that "its vote in this instance does not reflect any judgment on the part of the United States as to whether Canada is failing to effectively enforce its environmental law, nor does it constitute or reflect a decision on the part of the United States concerning whether, or under what circumstances, potential climate change impacts on species or habitat in the United States must be assessed under U.S. law."

Secretariat would provide a detailed listing of the expected sources, witnesses, and experts prior to undertaking its development of a factual record or a response to a submission.[132] The Council, presumably, would then have an opportunity to express its approval or disagreement with the specific actions and expenditures identified in the Secretariat's proposed approach.

In addition, the Council has presided over a gradual starvation of funds needed for the Secretariat's operations. When the Parties originally entered into NAAEC in 1994, the agreement committed each Party to provide $3 million apiece to finance the full operations of the Secretariat. This original $3 million allotment has steadily eroded under inflationary pressures, and the Parties have refused to increase the amount needed for the Commission's operations.[133] While the Parties have recently reconfirmed their commitment to keep total funding for the Secretariat to its original $9 million allotment under NAAEC,[134] more than twenty years of inflation and cost increases have severely eroded the power of that sum.

Lastly, the Council has pointed to purported confusion over the applicability of the new Guidelines to existing actions. As a result, the combination of a specific deadline for the Council to act at various stages of the submissions process and the need for explanation of specific actions (such as modification of a submittal's scope) ironically has led to additional unanticipated delays in the SEM process. In the *Wetlands in Manzanillo* submittal, for example, the Council postponed any further action on the Secretariat's request to develop a factual record because the amended Guidelines allegedly require an explanation for any alteration of the original submittal request. When the Secretariat declined to modify its recommendation to develop a factual record so that it specified which portions of the request fell under the amended Guidelines, the Council noted that it was not bound by the amended Guidelines' deadlines for action until the Secretariat provided the disputed revised request.[135] This procedural impasse has led to substantial

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132. While the Council has not formally directed the Secretariat to provide more detailed workplans through a Council resolution or directive, the Secretariat has noted the Council's desires in its public presentations and its most recent workplan.

133. Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS PUBLIC L.J. 201, 204 (2008) ("[n]onetheless, the CEC remains woefully underfunded at $9 million per triennium, limiting cooperation among the Parties."). Interestingly, Article 43 ("Funding of the Commission") provides only that the Parties shall each "contribute an equal share of the annual budget of the Commission, subject to the availability of appropriated funds in accordance with the Part's legal procedures. No Party shall be obligated to pay more than any other Party in respect of an annual budget." NAAEC, *supra* note 2, at art. 43. *See* discussion *supra* Part III.A.

134. CEC, CEC OPERATIONAL PLAN 2015–2016—DRAFT PROJECT DESCRIPTIONS 4 (Feb. 18, 2015), http://www.cec.org/Storage/161/18963_OP2015-16_Projects_Draft-18Feb2015_en.pdf (reflecting contributions from the three Parties at a collective amount of $8,338,500 (Canadian) each year for 2015 and 2016).

135. *See* discussion *supra* Part III.B.1.

additional delays in the process because of a procedural step expressly designed to avoid and minimize delays by the Council.

Each of these actions reflects a growing willingness by some of the Parties at different times to respond aggressively to submissions that concern their specific laws and enforcement. This confrontational ethos has in turn led the Council to more frequently control or override the Secretariat's decisions.

IV. SOURCES OF RESISTANCE TO THE SEM PROCESS

Given its current difficulties, the SEM process' critics portray it as hobbled by intractable conflicts of interest, a lack of compulsory power to engage in the process, an absence of follow-up to factual records, and cumbersome procedural and substantive requirements that dilute its appeal to citizens and nongovernmental organizations. These criticisms overlook a key point: given the right circumstances, the SEM process can actually work well. NAAEC's design shortfall lies in its failure to anticipate the broad range of possible future fluctuations in the Parties' alignment of interests. The SEM process initially operated well given the rough alignment of the Parties' interests at the time of NAAEC's passage. However, it has not responded effectively or flexibly given that the Parties have grown to no longer view the threat of economic competitive disadvantage from anemic environmental enforcement as a substantial commercial or sovereign risk.

The missing ingredient, ironically, is distrust. NAAEC passed as a response to heated political objections and fears that NAFTA's ratification would create a drain on jobs and encourage companies to relocate to other countries (namely, Mexico) that would entice them with weaker environmental standards and enforcement. When the Parties drafted NAAEC to answer that concern, they designed the SEM process so that no single Party could unilaterally frustrate the approval, development, or release of a factual record. This procedural structure, however, does not allow one Party to insist on the development of a factual record if the other two Parties decline or resist. By requiring at least two Parties to effectively agree on a matter before the SEM process can proceed over the third Party's objection, this voting structure presupposes that the other two Parties will share a significant and material common interest in joint action to encourage effective environmental enforcement by the third Party.

While this alignment made sense during NAAEC's passage, when most concerns centered on the effects of Mexico's poor environmental regulatory standards and enforcement of the competitive economic positions of the United States and Canada, the situation has changed. Trade between the three NAFTA nations has expanded enormously since 1994, and multiple studies and assessments have not identified any significant environmental damage arising from unequal environmental standards and laws between them or from ineffective enforcement of environmental laws by a particular nation. Rather than fears of lost jobs and widespread contamination arising from wholesale relocations of

U.S. and Canadian manufacturers to Mexican maquiladoras, Canada has experienced a boom in energy and mining activities that has reshaped its political stance on environmental standards for extractive industries. Mexico has amended its Constitution and federal statutes to open its energy sector to foreign investment and expanded operations, and the United States has become more focused on transatlantic and Asia-Pacific trade concerns than concerns about Mexican environmental enforcement. These economic retrenchments have in turn caused a realignment of national economic priorities among the Parties that has altered their perspectives on participation in the SEM process and acceptance of the Secretariat's conclusions during assessment and responses to citizen submissions.

A. INDIVIDUAL AND COLLECTIVE ACTIONS BY THE SEM PARTIES TO FRUSTRATE SEM INQUIRIES

Without the inchoate threat of economic disadvantage from uneven environmental protection to motivate active engagement with the SEM process, the Parties' participation in SEM has now devolved into a narrower policy perspective on how they can manage the process to their best individual advantage. This realpolitik has led to two levels of engagement. First, each individual Party shapes its own participation in NAAEC through the lens of national self-interest and sovereignty. Because the SEM process rests, to some degree, on a willingness of the challenged Party to provide requested information and cooperate with the Secretariat's recommendations, the agreement's lack of a compulsory mechanism can give a Party sufficient autonomy to frustrate the process through recalcitrance, repeated obstruction on procedural or jurisdictional grounds, or outright rejection of the Secretariat's conclusions or recommendations.

In its current incarnation, the SEM process allows a single Party to effectively stymie the submissions process because it lacks any enforcement mechanism open to persons or nongovernmental organizations that make submittals. One of the NAAEC Parties could invoke the dispute resolution procedures provided in Part V if another Party overtly fails to meet certain types of obligations under the agreement.[136] But at the same time, a non-Party submitter cannot invoke the agreement's dispute procedures.[137] A recalcitrant Party could therefore stonewall its obligations under the SEM process to answer information requests from the Secretariat, respond to submittals, or simply participate further in the Secretariat's consideration of a submission if the Party alleges a jurisdictional or procedural defect.[138] Other than public opprobrium or criticism, such a recalci-

136. *See* discussion *infra* Part V.D.

137. NAAEC, *supra* note 2, at art. 23.1 (only Party can initiate binding dispute resolution under NAAEC); art. 24(2) (a third Party can join in a proceeding initiated by another Party).

138. *See, e.g.*, discussion *supra* Part III.B.2 (use of facial "pending proceeding" objections to seek immediate termination of submittals).

trant Party would not face any direct consequence or enforcement risks under NAAEC unless another Party invoked dispute resolution mechanisms on a citizen's or nongovernmental organization's behalf—an extremely unlikely prospect.

Second, beyond their individual actions, Parties can take collective action at the Council level that serves their individual interests while frustrating NAAEC's larger goals of environmental disclosure and transparency. If one Party does not feel that another Party's failure to effectively enforce its environmental laws poses a material economic threat (and vice versa), those two Parties may support Council votes that constrain SEM determinations even over the objection of the remaining Party. While these votes may not reflect any active collusion or open coordination, they nonetheless can give rise to the appearance of "tandem votes" that undermine the viability of the overall process. In effect, it does not matter whether the two Parties actively and openly coordinate their votes or simply share a common perspective on the limited role of the SEM process: the final crabbed result is the same. This outcome does not necessarily demonstrate bad faith, but simply reflects the institutional design choices for NAAEC that did not foresee the full range of future developments in the alignments of economic interests among the Parties.[139]

The voting records of the Council do not (and likely cannot) capture any overt markings of collusion or vote-swapping. But it is notable that the Council has split on two-to-one votes in the majority of its recent decisions to significantly modify the scope of submittals, terminate factual record development due to pending proceedings, or outright refuse to authorize the Secretariat to proceed with a factual record. Notably, two of the Parties have consistently voted in parallel to limit the development of factual records since 2014.[140] This pattern of Party voting behavior reflects a breakdown in the SEM process, rather than an expected and anticipated outcome of its normal operation. NAAEC undeniably requires a two-vote majority for action by the Council on a pending

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139. Notably, NAAEC Part V and NAFTA arguably could offer additional more coercive remedies. While NAAEC allows Parties to invoke its compulsory dispute resolution procedures in certain instances when a Party fails to effectively enforce its environmental laws, those failures must relate to companies or workplaces that produce goods or services traded between the Parties. *See* discussion *infra* Part V.D. *Cf.* NAAEC art. 10.6(b) ("[t]he Council shall cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA by . . . providing assistance in consultations under Article 1114 of the NAFTA where a Party considers that another Party is waiving or derogating from, or offering to waive or otherwise derogate from, an environmental measure as an encouragement to establish, acquire, expand or retain an investment of an investor, with a view to avoiding any such encouragement.").

140. Canada and Mexico both began to vote against the development of factual records with the *Protection of Polar Bears* decision on June 5, 2014. Since that vote, the two Parties have voted together to reject the Secretariat's recommendation to develop factual records in three other matters involving claims regarding their enforcement records. The United States voted either to develop factual records in each case or offered alternative rationales that would have allowed the Secretariat the discretionary power to proceed. *See* discussion *supra* note 91.

SEM submittal.[141]

B. POSSIBLE JUSTIFICATIONS FOR THE PARTIES' NARROW OVERSIGHT OF THE SEM PROCESS AND WHY THEY FALL SHORT

Defenders of current Council practices may challenge this pessimistic view of the health of the SEM process. Simply put, a Party could argue that the reduction in submissions results naturally from improved environmental enforcement by all three Parties, rather than a flaw in the SEM process' design and application. The jurisdictional challenges and scoping decisions by the Parties would then merely reflect an appropriately active management of the SEM process that flows from NAAEC's textual respect for the national sovereignty and interests of all three Parties. From this perspective, the drought of submittals is simply a self-moderating response to an improved situation and better management by the Parties.[142]

Despite its appeal, this argument ultimately overlooks the text and structure of NAAEC, its historical origins, and the factual circumstances surrounding the reduction in SEM submittals. As discussed earlier, NAAEC expressly states that the Secretariat should maintain an independent role and operation from the three Parties, and NAAEC's structure and language repeatedly note that the Secretariat can undertake numerous actions and initiatives subject only to a majority vote of the Council. The importance and number of environmental challenges and questions over each Party's domestic enforcement priorities and practices certainly remain salient for all three Parties as well.[143] The environmental community and individuals that previously relied on the SEM process did not halt their filings because they approve of the Parties' current environmental enforcement practices; instead, earlier surveys reveal that they have stopped making submissions because of doubts about the independence and integrity of the process.[144]

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141. David Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation's Citizen Submissions Process*, 30 N.C. J. INT'L L. & COM. REG. 759, 765–66 (2005) ("[a] potentially important feature of this check is that only a two-thirds vote of the Parties is required to go forward with the preparation of such a record. Thus, the Party that is the focus of the submission cannot unilaterally terminate the process at this stage.").

142. For an illuminating assessment of the SEM process from a Party's perspective, *see* Chris Tollefson & Anthony Ho, *Understanding Canada's Responses to Citizen Submissions Under the NAAEC*, 7 GOLDEN GATE U. ENVTL. L.J. 55, 78 (2013) (concluding that Canada's responses to SEM submittals reflected its attempts to recast "enforcement activity" in broad terms to include policy initiatives, and that Canada had adopted an adversarial stance in response to institutional rules for SEM that mirror typical litigation procedures).

143. For example, the Mexican government's recent amendments to its Constitution to open its energy sector to foreign investment and development has already spurred a significant increase in interest and activity in oil and gas exploration that will evoke concerns similar to the controversy over hydraulic fracturing in the United States. Canada's ongoing, aggressive development of petroleum resources in its oil sands and its construction of domestic and international pipeline infrastructure have also stirred storms of controversy. Notably, none of these environmental disputes have led to the submission of requests for development of factual records by the CEC.

144. *See* discussion *supra* Part III.B. Isabel Studer, *The NAFTA Side Agreements: Towards a More Cooperative Approach?*, 45 WAKE FOREST L. REV. 469, 476 (2010) ("NAFTA citizens have come to the

Although Parties or commentators might conservatively read NAAEC's language to prioritize Party sovereignty and active management of the SEM process, the numbers tell a different story. Citizen submittals have withered to only three in 2013, and none in 2014 or 2015 (so far).[145] Since the Council outright rejected the Secretariat's recommendations to develop factual records on four submissions and narrowed the scope of the remaining two, the Secretariat currently has only two factual records under development and no pending submittals under consideration for future factual records. Upon the issuance of these two remaining factual records, the SEM process will grind to a halt unless other citizens or nongovernmental organizations make new submittals. Because of perceived procedural and substantive unfairness and the lack of effective results in comparison to the time and resources required to pursue a submittal, the public appears disinclined to step forward without significant reforms to the SEM process or changes in behavior by the Parties.[146]

These systemic challenges to the SEM process have implications far outside North America. The current situation offers sobering lessons for extending SEM's model of soft informational enforcement by individuals and nongovernmental organizations to other international trade agreements. While they have not duplicated the SEM process in all respects, other free trade agreements have already incorporated similar approaches that bring public attention and scrutiny to a member State's failure to enforce its own environmental laws.[147] To the

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disappointing but realistic conclusion that a trip to the CEC will not generate enough policy payoff to justify the time and energy required") (quoting GARY CLYDE HOFBAUER & JEFFREY SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 179 (2005)).

145. As noted earlier, the Secretariat has recently received new submissions while this article was under review for publication. See discussion *supra* note 41.

146. Recent empirical work reveals that citizens value the SEM process for different reasons than their views of the utility of litigation. In particular, they would favor the SEM process because it gives them voice and respect and allows them to contest broad practices of non-compliance or a general failure to enforce laws. By contrast, they believe litigation would offer procedural fairness and an ability to target individual and discrete violations. David Markell & Tom 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, 25–27 (2008). The current practices of some of the Parties—narrowing the scope of submissions, vigorously objecting to the jurisdictional basis for submissions, and taking actions at stages in the SEM processes when citizens and non-governmental organizations cannot respond or object—undermine exactly the values of respect and the voices that would attract future participants in the SEM process. Other commentators, however, have a less bleak outlook on the SEM process' effectiveness and future. *See, e.g.*, Knox, *supra* note 90, at 88; Knox & Markell, *supra* note 35, at 507, 514–17 (characterizing the CEC submissions procedure as "robust" in comparison with other dispute-resolution procedures established by NAFTA and its side agreements). *But see* Knox, *supra* note 90, at 91–92 ("[w]e warned that if the problems are not addressed, they will continue to erode the strengths of the submission procedure. Indeed, they may threaten its very existence . . . There are also signs that potential submitters interested in Canada and Mexico may be losing interest in the SEM procedure.").

147. For example, the Central American Free Trade Agreement—Dominican Republic (CAFTA–DR) contains a SEM process that operates in a fashion similar to the NAAEC SEM procedure. Agreement Establishing a Secretariat for Environmental Matters Under the Dominican Republic—Central America—United States Free Trade Agreement at art. 17, 2006, http://www.state.gov/documents/organization/142890.pdf, http://www.oas.org/dsd/Tool-kit/Documentos/MOduleII/CAFTA%20-%20Agreement%20to%20Establish%20

extent that NAAEC's initial deployment of the concept ultimately fails, it casts a pall on the prospects for using this type of innovative approach in other major free trade agreements currently under consideration or negotiation.[148]

V. CHARTING POSSIBLE NEXT STEPS FOR SEM

These concerns and objections over NAAEC's institutional design and the operation of the SEM process are, in one sense, nothing new. Scholarly praise and criticism surfaced swiftly after NAAEC's passage, and SEM's flaws have sparked a virtual cottage industry of analysis and suggested amendments and revisions to NAAEC to address them.[149] Most commentators agree that the SEM process' structure introduces damaging conflicts of interest. Because the Parties oversee investigations of their own conduct, the process bars the Secretariat from offering any legal conclusions or opinions on whether a Party has actually failed to effectively enforce its own laws. Another flaw in NAAEC's structure lies in its lack of any power to follow up on findings from the SEM process. Specifically, NAAEC fails to give the Secretariat any express ability under Article 14 to follow up on whether a Party has taken corrective enforcement action after the Secretariat issues a factual record. Addressing all of these shortfalls would require amendments to the organic language of NAAEC.[150]

Secretariat.pdf (including Honduras, El Salvador, Dominican Republic, Guatemala, and Nicaragua in SEM process); *see also* David A. Gantz, *Labor Rights and Environmental Protection under NAFTA and Other U.S. Trade Agreements*, 42 U. MIAMI INTER-AMERICAN L. REV. 297 (2011) (generally summarizing inclusion of environmental provisions in U.S. free trade agreements that reflect original NAAEC concepts); Wold, *supra* note 133, at 205–06 (despite cautions raised against unthinking adoption of NAAEC's procedures, "the United states has negotiated subsequent free trade agreements (FTAs) such as the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA–DR) and the free trade agreements with Colombia and Peru, without having evaluated the strengths and weaknesses of the NAAEC or the valuable contributions of the CEC to understanding competitiveness effects") (citations omitted); Sanford E. Gaines, *Environmental Protection in Regional Trade Agreements: Realizing Potential*, 28 ST. LOUIS U. PUBLIC L. REV. 253, 268–69 (2008).

148. Because their negotiation texts were released to the public shortly before publication of this article, it is unclear whether environmental protection provisions in the recently approved Trans-Pacific Partnership or the pending Trans-Atlantic Trade and Partnership free trade agreements will use a citizen submittal process or adopt other measures that might affect NAAEC or the SEM process. *See* discussion *infra* note 152. The U.S. Trade Representative and the U.S. Department of State now routinely include environmental chapters in free trade agreements to assure adequate enforcement of environmental laws and to build capacity among the trade partners. The State Department also conducts environmental reviews of all free trade agreements as well. U.S. Dep't of State, *Supporting Free Trade and Environmental Protection,* http://www.state.gov/e/oes/eqt/trade/ (last verified June 27, 2015).

149. *See, e.g.*, John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1, 74 (2001); Bugeda, *supra* note 32; Joseph DiMento and Pamela Doughman, *Soft Teeth in the Back of the Mouth: The NAFTA Side Agreement Implemented*, 10 GEO. INT'L ENVTL. L. REV. 651, 653 (1998); Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treatymaking*, 8 TEMP. INT'L & COMP. L.J. 257, 278–79 (1994).

150. *See, e.g.*, David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 455 n.126 (2010) ("[f]urther, it seems unlikely

In reality, however, a broad or substantive revision to NAAEC almost certainly will not happen soon. Because such a change to NAAEC's terms and obligations would require reopening the treaty and obtaining ratification and consent from the Parties, the political risks and potentially damaging changes to NAAEC will discourage any efforts to repair it.[151] Given the practical unavailability of structural remedies to the treaty itself, possible remedies must arise from the resolutions, guidelines, protocols, and commitments of the Parties themselves and the Secretariat's independent implementation of those dictates.[152]

The Parties and the Commission can undertake several initiatives to increase the effectiveness of the SEM process that would not require a revision or reopening of NAAEC.[153] In general, each of these approaches seeks to enhance the independence of the Commission and allow it to take actions without undue control or interference from any (or all) of the Parties. Notably, these suggested reforms do not envision amendments or revisions to the underlying provisions of NAAEC.[154]

A. REDEFINE SUCCESS OF THE SEM PROCESS

Many of the criticisms of the SEM process focus on its failure to result in full-fledged factual records on the complete original scope of the submittal. In fact, a dismissed or restricted-scope submittal arguably can still result in a substantial environmental benefit or change in policy or behavior by a Party. For example, when the Secretariat dismissed the Louisiana Bucket Brigade's submittal challenging the United States' enforcement of air emission regulations for petroleum refineries, the petitioner elected not to re-file its petition because the

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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.'").

151. *Id.* Prof. Markell instead suggests that the Council adopt a resolution that explicitly commits the Parties to approve development of factual records and their subsequent release absent "exceptional circumstances," and he notes that at least one of the Parties (the United States) has already made a unilateral commitment to do so via an executive order. *Id.* at 456.

152. The Parties' conduct may also open the door to future disruption of economic relations between them. For example, the practice by any Party of actively hobbling SEM submittals for factual records to shield its alleged failures to enforce its environmental laws may arguably, in narrow circumstances, constitute "a persistent pattern of failure" to enforce its environmental laws that would fall within other dispute resolution provisions of NAAEC that would support an action by another Party. NAAEC Part V (dispute resolution and arbitral procedures).

153. The Parties, of course, could always reopen NAAEC and renegotiate updated terms for the SEM process that would address persistent criticisms of its past operations. This approach, however, would likely face severe obstacles in the negotiation and ratification of terms acceptable to any one Party because of continuing controversy and objections to expanded free trade arrangements that might damage the environment. *See, e.g.*, Lisa Mascaro and Don Lee, *Obama Suffers Big Loss as Trade Bill Is Defeated at Hands of Democrats*, L.A. TIMES, June 12, 2015, at A1 (political difficulties facing passage of fast track authority in the United States for negotiation of the Trans-Pacific Partnership trade agreement).

154. *See, e.g.*, Yang, *supra* note 8, at 492 ("[e]ven if such reforms are politically infeasible, the proposal is relevant to ongoing negotiations to expand NAFTA to the rest of the Americas.").

U.S. Environmental Protection Agency had taken several aggressive steps to respond to their concerns outside of the SEM process. While the Louisiana Bucket Brigade's submittal almost certainly spurred the United States to action, the lack of visibility for informal resolution of SEM submittals paints an incomplete and unduly negative view of the SEM process' effectiveness. To the extent that a Party takes action to resolve informally any concerns raised in a submittal to the SEM process, the Secretariat could enable and encourage them to provide a voluntary report to the docket of the SEM matter that reflects the resolution of those concerns. To maintain an assurance of impartiality and avoid self-serving statements, the Secretariat could require that the submitting citizen co-sign or consent to filing of the statement before it is docketed.

B. INCREASE THE INDEPENDENCE OF THE SECRETARIAT AND RESPECT FOR ITS DETERMINATIONS

If the architectural flaw of NAAEC rests in its investment of power in the three Parties in a way that allows tandem or self-interested actions, then the Secretariat can play an important salutary role in rebalancing those forces within the Commission. For example, if a majority of the Parties declines to allow development of a factual record on a submission that the Secretariat has found to comply with Article 14, the Secretariat may have inherent limited power to pursue the investigation as a separate report under Article 13.[155] Article 14(1) also does not expressly prohibit the Secretariat from making its own submittal *sua sponte* to request a factual record as a "person" under NAAEC.[156] To date, the Secretariat has not made such a request or pursued the development of a factual record without a prior request from a person or nongovernmental organization.[157] Some commentators have called this unexercised power the

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155. Article 13 provides that the Secretariat may prepare a report for the Council "on any matter with in the scope of the annual program." NAAEC, *supra* note 2, at art. 13.1. If the Secretariat wishes to prepare a report on any "other environmental matter related to the cooperative functions of NAAEC," it must notify the Council before proceeding. The Council can then prevent preparation of the report with a two-thirds vote. *Id.* While Article 13.1 provides that "such other environmental matters" cannot include any issues related to whether "a Party has failed to enforce its environmental laws and regulations," Article 13 does not specify whether this limitation would apply as well to the Secretariat's larger authority to prepare a report on any item "within the scope of the annual program." The Parties' ability to halt preparation of an Article 13 report through a majority vote also may only apply to environmental matters "related to the cooperative functions of NAAEC." *Id.* The Secretariat can also draw on a broader range of information and materials for its Section 13 reports than Article 14 allows for the SEM process. NAAEC, *supra* note 2, at art. 13.2 (allowing use of publicly available information, submittals from interested nongovernmental organizations and persons, submittals by JPAC and other information developed independently by the Secretariat or its consultants).

156. As noted earlier, NAAEC does not define "person" for purposes of Article 14. *See* discussion *supra* notes 6–7.

157. Notably, however, the Secretariat has undertaken the development of independent reports in response to "Article 13 Petitions" for factual records, even though Article 13 does not provide an official avenue for the public to petition the Secretariat for development of a report. For example, the Secretariat prepared a report on the environmental concerns raised by the use of transgenic maize after it received formal requests by three

"most innovative institutional aspect" of NAAEC and attribute to it some of the friction between the Parties and the Secretariat.[158]

While the option of reopening NAAEC remains unlikely, the Parties can nonetheless take steps to expressly and overtly commit to maintaining a healthy level of independence for the Secretariat. For example, the Parties could endorse these goals through a Council resolution that clearly restates that they support the Secretariat's authority under Article 13 to initiate independent reports and will not exercise their discretionary authority to overrule or defund such a decision by the Secretariat. While ultimately non-binding because the Council can rescind or modify such a resolution at its discretion, a self-limiting resolution would act as an important public commitment to the SEM process and give the Parties an opportunity to expressly define the limits of their support for independent action by the Secretariat. If the Parties state that their support arises from their commitment under NAAEC to protect their shared environment, coordinate their actions, and prevent ineffective environmental enforcement from creating unfair trade conditions, they could then take limited and direct action if a decision by the Secretariat goes beyond these policy rationales.

Any buttressing of the Secretariat's powers and legal authorities would also need to help maintain or increase the independence of the Secretary's budgetary authority and functions. Under the current process used to develop the Commission's Work Plans and Strategic Plans, the Council typically approves budgets that include specific line items for the pursuit of specific functions and tasks. As a result, the Council effectively can wield a line-item veto to muzzle attempts by the Secretariat to act independently under Articles 13 or 14. In fact, the Council recently exercised this low-profile budgetary control when it refused to allow funding for the Secretariat's proposal to initiate an Article 13 report on the environmental effects of hydraulic fracturing taking place within the Parties' territories.[159] Given NAAEC's express goal to create an independent international organization with sufficient powers needed to carry out the mandates of the Parties' formal agreement, the Parties should protect the Secretariat's ability to

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environmental organizations (Greenpeace Mexico, the Mexican Center for Environmental Rights, and the Union of Mexican Environmental Groups) and twenty-one communities in Oxaca on April 24, 2002. CEC, SECRETARIAT'S REPORT, MAIZE AND BIODIVERSITY: THE EFFECT OF TRANSGENIC MAIZE IN MEXICO 1, 4–6 (2004), http://www3.cec.org/islandora/en/item/2152-maize-and-biodiversity-effects-transgenic-maize-in-mexico-key-findings-and-en.pdf.

158. Studer, *supra* note 144, at 477 ("[a]long with the power to review the information necessary to prepare a factual record, this power of independent initiation has been at the center of the conflict between the Secretariat and the Council since the creation of the CEC . . . . The Council's reaction has been to repeatedly accuse the Secretariat of exceeding its authority in matters related to the citizens' submittal process. At the same time, the Council has been criticized for attempting to amend official guidelines in order to control the process.") (citations omitted).

159. *See* CEC, Council Res. 15–04, *Funding of the Commission for Environmental Cooperation for the Financial Year 2016* (July 15, 2015), http://www.cec.org/about-us/council/council-resolutions/council-resolution-15-04.

allocate funds internally as needed to achieve its general goals and mandates.[160]

C. RECAST THE SEM PROCESS AS A LESS FORMAL OR LEGALISTIC PROCEDURE

Many of the Parties' strongest objections to the SEM process arise from its legal nature. For example, the current process relies on persons or nongovernmental organizations preparing a formal submission that, like a legal submission or complaint, meets all of the formal and substantive requirements of Article 14(2). The interested Party can then object to the adequacy of the submission or, at a later stage, essentially move for dismissal or summary judgment based on numerous substantive and procedural obligations imposed by NAAEC. As a result, the SEM process shares numerous unattractive features familiar to any litigator: protracted discovery disputes when a Party refuses to provide information to the Secretariat; skirmishes over procedural and technical compliance with the requirements of Article 14; motions to limit the publication or dissemination of factual records; and the crafting of lengthy and dense factual records with a legal tone that makes them enormously difficult for the general public (and even experts) to decipher.[161] Not surprisingly, the legalistic cast of the SEM process can undermine its effectiveness at highlighting environmental non-enforcement. This creates a competitive advantage for the recalcitrant Party because of crippling delays, procedural limitations on the breadth of an inquiry, and adversarial attacks on the credibility of the resulting factual record.

NAAEC's plain language does not compel the use of legalistic machinery to determine whether a Party has failed to enforce its environmental laws. The Secretariat could choose to prepare a relatively brief and speedy report that provides an accessible synopsis of the Party's environmental laws and actions. If the Party or submitter objects or refuses to provide requested information, the Secretariat can simply note that resistance and draw inferences against the objector's interests. A relatively brief and focused factual record of this nature

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160. NAAEC does not expressly prohibit the Commission or Secretariat from benefiting from the collection and expenditure of separate parallel funds from unaffiliated NGOs that share similar goals and aspirations. The prominent role and enormous financial resources provided to the United Nations through the private United Nations Foundation may offer an instructive and useful role model for this type of supplemental funding and support. *United Nations Foundation*, http://www.unfoundation.org/ (administering $1 billion endowment in support of U.N. activities and objectives).

161. Tollefson & Ho, *supra* note 142, at 77 ("[o]ne of the oft-repeated criticisms of the SEM process is that the Parties have treated the process as an adversarial one . . . . Ultimately, however, the SEM process more closely resembles an adversarial litigation model rather than a more cooperative mediation- or negotiation-based model"); Wold, *supra* note 133, at 205 ("the citizen submission process has become extremely adversarial, with governments whittling away at the Secretariat's discretion to make decisions concerning the scope and eligibility of submissions"); Studer, *supra* note 144, at 474 ("[t]hus the NAAEC and the [NAALC] are both permeated with a hybrid institutional framework that implicitly reflects two contradictory and irreconcilable paradigms: a confrontational or litigious approach, represented by trade sanctions and the citizens' submittal process, and a more cooperative, intergovernmental approach, such as is typically found in other intergovernmental agreements"); Geoff Garver, *Tooth Decay*, 25 ENVTL. F. 34, 34–36 (2008).

could act as a prelude to the development of a fuller, lengthier, and more legal document over a longer time period if the Party or submitter requests it. But that supplemental report would not prevent the issuance of a primary report that the public can understand and access. In a sense, this model would move the SEM procedure away from a courtroom or arbitration setting, and instead render it into an inspector general's report or an ombudsman's assessment. This role, of course, would also require the Parties to allow the Secretariat to operate with greater autonomy and independence in its SEM inquiries and budgeting.[162]

One beneficial effect of a speedier and more informal process may be a greater flexibility for the Secretariat to pursue follow-up investigations on the Parties' responses to earlier factual records.[163] NAAEC does not expressly empower the Secretariat to examine responses to factual records, and the Parties have declined to accept requests to give the Secretariat that power.[164] Nevertheless, citizens and nongovernmental organizations indisputably have the power under NAAEC to submit follow-up requests for development of a factual record on an alleged instance of non-enforcement that the Secretariat had previously investigated. If their requests met the procedural and substantive standards set out by NAAEC for any submittal, the Secretariat could develop a new factual record tailored on the specific issue of any additional actions that the Party might have taken since the original record. Because of the narrower focus on the subsequent investigation, it presumably could proceed much more quickly and efficiently than development of the initial factual record. This practice, however, would require the submitters to take the additional step of preparing and submitting the additional submittal.

A more informal and flexible SEM process may also attract other stakeholders who have stayed away from it so far. In particular, the business community has left the SEM process virtually untouched. Only one commercial business has filed a submission to develop a factual record based (in part) on economic grounds,[165] but NAAEC does not limit SEM applicants to environmental advocates or aggrieved individuals. If a corporation believed that a Party's failure

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162. *See* discussion *supra* Part V.B.

163. A less legalistic approach to SEM matters could also offer substantial cost reductions. For example, the need for precise and demanding translations of legal language into French, Spanish, and English has consumed a substantial portion of the Secretariat's annual budget on a consistent basis. By informal accounts, translation costs account from thirty to forty percent of the SEM Unit's annual budget.

164. Knox, *supra* note 90, at 103–105.

165. CEC, *Bennett Environmental, Inc. Submission Pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation, PCB Treatment in Grande-Piles, Quebec*, SEM–11–01 (PCB Treatment in Grandes-Piles, Quebec) (Jan. 11, 2011), http://www.cec.org/sites/default/files/submissions/2011_2015/9470_11-1-sub_en.pdf (submission by Bennett Environmental, Inc., an environmental services company that specialized in the destruction of polychlorinated biphenyls (PCBs), for development of factual record of Quebec's failure to enforce environmental remediation standards for PCB removal and destruction). Numerous other submissions arose from individuals who do not provide affiliations or commercial interests, so it is difficult to determine whether any of them acted on behalf of commercial interests.

to enforce its environmental laws created an unfair advantage for that corporation's competitors, the corporation could undoubtedly make its own submission to develop a factual record because NAAEC does not exclude corporations from the definition of "person" or "non-governmental organization." The scope and posture of such a submittal would require careful crafting, however, to avoid the risk that the Secretariat would categorize it as impermissible "harassment" of industry prohibited by Article 14(1)(d).[166]

D. INTEGRATE THE NAAEC PROCEDURES AND REMEDIES MORE FULLY WITHIN THE LARGER NAFTA FRAMEWORK

As noted above, NAAEC provides remedies and enforcement mechanisms if one of the Parties believes that another Party has persistently failed to enforce its environmental laws. This procedure includes consultations that permit the participation of interested third parties with a substantial interest in the matter.[167] If consultation fails, NAAEC provides an elaborate dispute resolution procedure that requires the selection of an arbitral panel and formal proceeding.[168] If a Party refuses to satisfy an assessment imposed by an arbitral panel, it risks suspension of its benefits under NAFTA in an amount equal to the panel's assessment.[169] As a result, invoking NAFTA dispute resolution procedures offers a direct match with NAAEC's underlying rationale: to prevent lax environmental enforcement or uncoordinated environmental action from creating unfair economic advantages between the Parties.

None of the Parties has ever invoked the dispute resolution process under NAAEC, although private parties have frequently taken advantage of NAFTA's trade arbitration provisions. Article 24(1) of NAAEC specifies that an arbitral panel can only review alleged failures to enforce environmental laws when they relate to a situation "involving workplaces, firms, companies or sectors that produce goods or provide services" either (a) traded between the territories of the Parties, or (b) "that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party."[170] To the

166. NAAEC, *supra* note 2, at art. 14.1(d) (the Secretariat may consider any submission that "appears to be aimed at promoting enforcement rather than at harassing industry."). To find out whether a submittal improperly harasses industry, the Secretariat often focuses on whether the submitter is a competitor who stands to benefit economically from the submission. *See, e.g.*, *Louisiana Refinery Releases*, *supra* note 41, at 4 ("[t] he Submitter is not a competitor of the company concerned, nor does it stand to benefit economically from the Submission.").

167. NAAEC, *supra* note 2, at art. 22.1 ("[a]ny Party may request in writing consultations with any other Party regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law."); art. 22.3 ("[u]nless the Council otherwise provides in its rules and procedures established under Article 9(2), a third Party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on delivery of written notice to the other Parties and to the Secretariat.").

168. *Id.* at arts. 23–35.

169. *Id.* at art. 36.2.

170. *Id.* at art. 24.1.

extent that a matter previously addressed in a submittal that sought a factual record meets these criteria as well, it may allow one of the Parties to invoke the compulsory machinery of NAAEC when another Party effectively precludes meaningful resort to the SEM process.[171]

This option faces its own challenges. The failure of any Party to invoke the Part V dispute resolution provisions reflects their lack of a vital interest in pursuing enforcement, especially when compared against the risks of harm to relations with the other Party and the possible threat of retaliation.[172] The high burden of proof—namely, that the other Party's failure to enforce its own laws is "persistent"—also weighs against bilateral enforcement absent extraordinary circumstances.[173] And the risk of invocation of NAAEC's enforcement provisions has "cast a long shadow over the cooperative nature of the NAAEC and arguably have made the Parties hypersensitive to the citizen submission procedure for fear that an issue raised by a citizen could become the subject of the more consequential governmental sanctions process."[174] As a result, no Party has initiated any Part V consultations or even threatened to do so.[175]

E. REVIEW THE ROLE OF SEM DETERMINATIONS WITHIN THE FRAMEWORK OF EACH PARTY'S DOMESTIC LAW

One possible countermeasure to the architectural deficits of the SEM process may lie in the domestic laws of each respective Party. NAAEC, of course, does

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171. While the Secretariat could theoretically request or assist a Party as an independent actor within the NAAEC framework, Part V of NAAEC does not provide any authority or express role for the Secretariat to play in an arbitration proceeding between Parties.

172. Yang, *supra* note 8, at 482. *See also* David Markell, *The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance*, 26 LOYOLA L.A. INT'L & COMP. L. REV. 341, 349 (2004); John H. Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOYOLA L.A. INT'L & COMP. L. REV. 359, 387 (2004) (finding that public scrutiny and participation are more influential than "the chimera of government-triggered sanctions" because governments are "secure in the knowledge that they will never be triggered").

173. *Id.* at 482–83. Notably, NAAEC art. 45.1 narrows the definition of a Party's failure to effectively enforce its environmental law as follows:

> A Party has not failed to "effectively enforce its environmental law" or to comply with Article 4(1) in a particular case where the action or inaction in question by agencies or officials of that Party:
>
> (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
> (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities . . .

See also NAAEC, *supra* note 2, at art. 45 ("persistent pattern" means a sustained or recurring course of action or inaction beginning after NAAEC's date of entry into force on Jan. 1, 1994).

174. CHRIS WOLD ET AL., TRADE AND THE ENVIRONMENT: LAW AND POLICY 796 (2005).

175. *Id. See also* 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 (2007) (pointing out that no Party has ever filed an Article 24 submission for an arbitration panel because the challenged Party is always a participant in the decision-making process and they do not "want to face similar appeals when confronted with future challenges").

not provide any enforceable remedy that another Party or individual claimant can invoke in that Party's own courts.[176] But this limitation does not preclude either the Secretariat or a nongovernmental submitter from seeking to enforce a domestic remedy available under that Party's laws and courts as a supplement to the SEM process. For example, the Secretariat or private submitter could seek the production of documents or information from a recalcitrant Party by filing a Freedom of Information Act (FOIA) request under U.S. law and, if necessary, a lawsuit to compel production of the requested information.[177]

This tactic, though, poses enormous risks and likely offers relatively limited benefits. The primary danger arises from NAAEC's bar on the submittal of matters that are already subject to domestic enforcement actions. If a submitter or the Secretariat brings a corollary judicial or administrative action under a Party's domestic laws, that Party may claim that the supplemental action constitutes a pending enforcement proceeding that precludes any further consideration of the SEM submission.[178] In addition, a Party could point to the pending supplemental action or litigation as grounds to delay or limit its responses in a SEM proceeding. For example, when state agencies within the United States did not produce information requested as part of the *Coal-Fired Power Plants* submission, the Secretariat sought to obtain the information through a FOIA request.[179] While the request ultimately succeeded in producing some of the requested documents, it also arguably contributed to protracted additional delays as the Secretariat and the governments sparred over whether to provide the information under FOIA (as well as under NAAEC).

VI. CONCLUSION

The groundbreaking environmental partnership between Canada, Mexico, and the United States embodied in NAAEC set a new standard and model for the protection of environmental values within the larger framework of international trade. That partnership, however, shows signs of wear and dysfunction, and it

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176. NAAEC expressly disclaims any effect on a Party's domestic enforcement of its own environmental laws, and it does not address its effect on the enforcement or implementation of any other domestic laws of a Party. NAAEC, *supra* note 2, at arts. 37, 38, 40. More notably, numerous domestic legal doctrines would likely severely limit or prohibit attempts to directly enforce a treaty obligation that was not self-implementing and expressly made subject to domestic enforcement. *See, e.g.*, Tracy D. Hester, *A New Front Blowing In: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 STAN. ENVTL. L.J. 49 (2012) (discussing jurisdictional barriers of standing, political question doctrine on foreign affairs issues, ripeness, sovereign immunity, and redress in transnational environmental litigation brought in domestic U.S. courts).

177. In fact, the Secretariat has taken exactly that step in at least one case. *See* discussion *infra* note 178 (FOIA requests as part of development of factual record for *Coal-Fired Power Plants*).

178. *See* discussion *supra* Part III.B.2 (NAAEC's bar on SEM submissions regarding matters already subject to pending domestic proceedings).

179. *See, e.g.*, Comm'n for Envtl. Cooperation [CEC], *Coal-Fired Power Plants: Factual Record regarding Submission SEM-04-05* at 2, 11 (2014) (use of FOIA and state information disclosure laws to obtain information to supplement information requested under NAAEC art. 21.1(a)).

needs revising and rethinking in light of the new alignments of interests and circumstances between the Parties. Against the background of new global trade agreements that may rely, in part, on concepts that NAAEC created, such revisions could have global consequences.

Some of the most important steps to revitalize the SEM process are relatively small. By rethinking the role of the Secretariat and the nature of the process within the plain text of NAAEC, the limited reforms and procedural improvements described above can help restore some of the diminished scope and credibility of the SEM process. The Parties can implement these changes through Council resolutions and internal domestic governmental reforms. This would breathe new life into the SEM process and make it more palatable to the Parties, while restoring its effectiveness as a tool of environmental protection.

Yet, to fully realize the potential power of the submissions process and the environmental benefits of transparency and informational disclosure, the Parties likely will ultimately need to reexamine the underlying structure and process for SEM submittals and their consideration by reopening NAAEC for revision and reform. Given the political turmoil and bitter public disputes over the current balance struck between commerce and the environment in current free trade agreements—even after twenty years of experience with NAAEC and NAFTA—the prospects for a full reopening of NAAEC appear dim.[180] Thus, these interim reforms are likely the most pragmatic option that the Parties and the Secretariat can expect to restore SEM participation and efficacy in the immediate future.

180. While a full reopening of NAAEC appears unlikely, a new trade agreement with a broader scope (such as the recently concluded Trans-Pacific Partnership Agreement) may subsume some aspects of NAFTA and NAAEC. If so, the negotiation and ratification of the latter trade agreement could provide a viable platform to revisit or effectively modify some of the practices and obligations set out in NAAEC for the SEM process or other environmental protection provisions.