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LESSONS FROM THE CITIZEN SUBMISSIONS ON ENFORCEMENT MATTERS (CSEM) TO THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION (NACEC)

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Introduction

In an era when citizen participation and democracy are inextricably interwoven, the need to make the voices of concerned stakeholders heard is urgent. The rise of the concept of “civil society” as a way of strengthening democracy has led to increased academic research on the subject. Several questions remain unanswered, however. How can environmental non-governmental organizations (ENGOS) best achieve their aims? What are the challenges facing them in the international arena? And, more importantly, where is it that NGOs can best catalyze actions and influence change?

This chapter assesses the effectiveness of a multilateral public institution created in response to ENGOS, in part to serve as an interface with them. Created during the North American Free Trade Agreement (NAFTA) debate in response to concerns about the enforcement of national environmental laws, the Citizen Submission on Enforcement Matters mechanism (CSEM) of the North American Commission for Environmental Cooperation (NACEC or CEC) is a device that domestic and transnational ENGOS (and ENGO coalitions) are using to increase government accountability.¹

This study is guided by an overarching interest in the politics of North American integration. The research goal is to develop an empirical basis on which to explore the theoretical and applied aspects of civil society involvement in environmental governance. We focus on how ENGOS use a trinational policy reform (the CSEM) designed to interface with civil society organizations. Built into the North American Agreement on Environmental Cooperation, the CSEM was fashioned to encourage compliance with existing national environmental laws, and thereby avoid “races to the bottom” and “pollution havens.” In theory, this type of institutional reform should empower civil society organizations to hold nation-states accountable.

We are particularly interested in undertaking an independent assessment of three key dimensions of the CSEM’s track record:

1. Which ENGOS have made use of this process and why?
2. Does this mechanism provide an opportunity for ENGOS to come together and form transnational advocacy networks?

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¹ For a definition of accountability, see Fox (2003).

3. What —if any— are the tangible impacts of the CSEM mechanism?

This chapter offers a longitudinal analysis of the evolution of citizen submissions, analyzed in the context of the existing literature on the CSEM. The empirical findings are analyzed in terms of their relevance for understanding issues of transparency, accountability, and coalition dynamics.

Background: The Citizen Submission on Enforcement Matters Mechanism (CSEM)

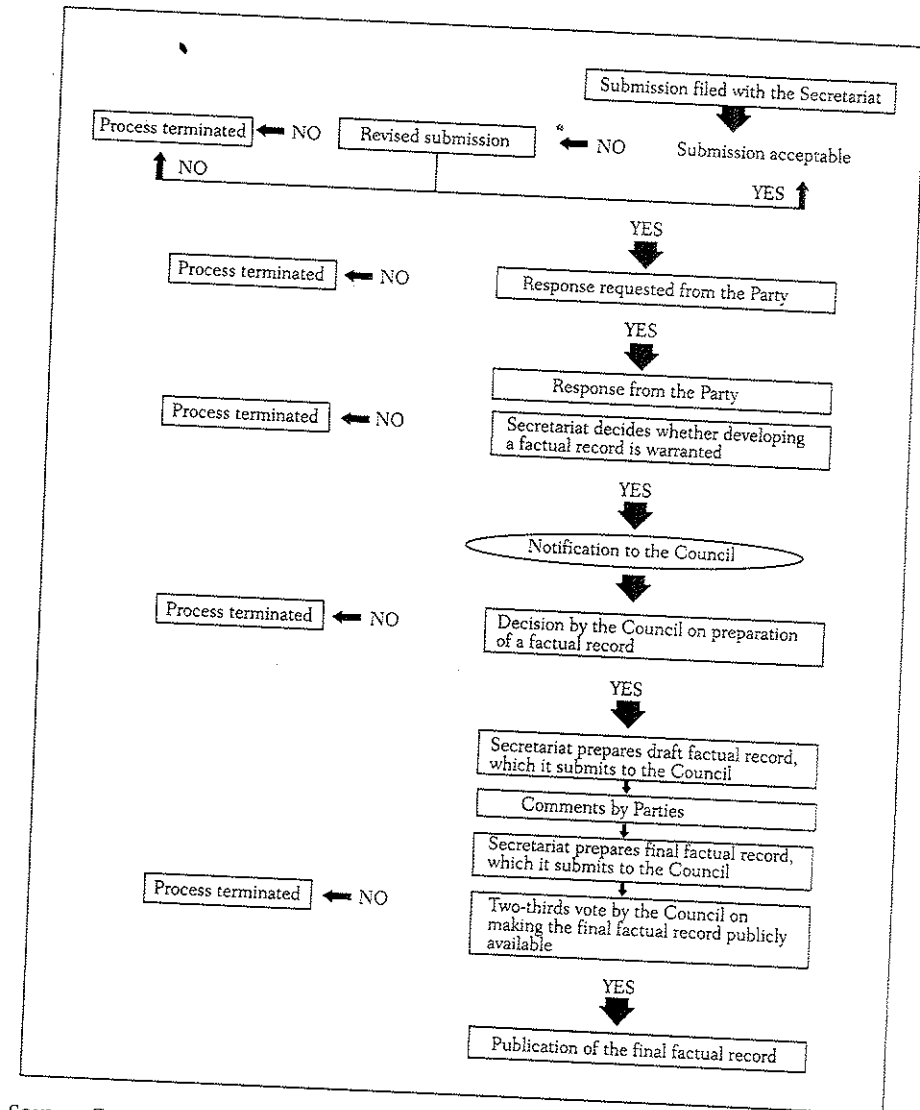
Citizen participation in North American environmental governance has ebbed and flowed over the more than 15 years since NAFTA created institutional channels for policy engagement (Pacheco and Vega, 2003). Two mechanisms were specifically designed to allow for citizen participation within the CEC: the first is the Joint Public Advisory Committee (JPAC), a trinational advisory board comprised of citizens from all three countries and from varied backgrounds (industry, academia, non-governmental organizations). The second civil society interface is the Citizen Submission on Enforcement Matters mechanisms (CSEM), based on Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), NAFTA's environmental side agreement. This mechanism provides civil society organizations with the opportunity to play a "whistleblower" role. Any concerned citizen from any of the three countries can prepare and present a submission to the CEC Secretariat denouncing a country for failing to comply with its own environmental laws (CEC, 2001). The CEC Secretariat's Office of Submissions on Enforcement Matters reviews the submission and assesses whether it actually warrants a response from the concerned country.² Figure 1 outlines the process.

While NACEC does not have supra-national regulatory authority, factual records provide a thorough investigation of alleged failures to enforce national environmental laws. Seen from a transparency and accountability perspective, the thoroughness and due diligence required in generating a factual record helps establish a dialogue among non-state actors, governments, and the intergovernmental authority in the hope that regulations and compliance may be improved.

An interesting feature of the CSEM mechanism is that citizens from any country can present a submission against any country. A Mexican citizen can denounce incomppliance with environmental regulation in Mexico, Canada, or the U.S., and the same opportunity is afforded to American and Canadian citizens. This differs from the labor side agreement, which requires complaints to be filed outside the country concerned. Some submissions against Mexico have actually come from Canadian and/or American ENGOS, and very recently, a submission against Canada was brought by two Mexican ENGOS (SEM-07-003 Seal Hunting), although in September 2007 it was dismissed (CEC, 2007a). This behavior may sound reasonable,

² At the time of writing (March 2006), Geoffrey Garver headed this office.

FIGURE 1
THE PROCESS FOR THE CITIZEN SUBMISSION ENFORCEMENT MECHANISM (CSEM)
UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT
ON ENVIRONMENTAL COOPERATION



SOURCE: Commission for Environmental Cooperation (2007b), 9.

as the perception appears to be that Mexican environmental standards are the weakest of all three countries.

The CEC has been subject to substantial scrutiny particularly in the English-language literature (Johnson and Beaulieu, 1996; Audley, 1997; Esty and Deere, eds., 2002; Allen, 2003; Markell and Knox, eds., 2003; Gallagher, 2004). The Citizen Submission on Enforcement Matters mechanism has also been fairly popular among scholars of international law, international relations, and global environmental politics (MacCallum, 1997; Wyrick, 1999; Markell, 2000; Powell, 2000; Tollefson, 2000; Kibel, 2001; Knox, 2001; Mahant, 2001; Goldschmidt, 2002; Kibel, 2002; Environmental Law Institute, 2003; Fitzmaurice, 2003; Markell, 2003; Wilson, 2003; Wold et al., 2004; Yang, 2005; Markell, 2006; Lewis, 2007; Graubart, 2004, 2008). However, despite the relatively sizeable amount of research that has been produced around CSEM, little independent empirical analysis has been done.

Research Strategy and Methodology

The empirical basis for our research is comprised of data gathered from several sources. Primary data is from one-on-one semi-structured interviews with representatives of environmental non-governmental organizations, government officials, and other relevant stakeholders in Mexico, the United States, and Canada. Two of the three researchers conducted team interviews at the NACEC office in Montreal in the fall of 2004. Pacheco-Vega conducted additional interviews with NACEC officials in August 2007. Our primary data comes from phone interviews mainly with Mexican and Canadian ENGOS, although we also used data from e-mail communications from U.S. ENGOS and academics. These interviews were transcribed and in the case of Spanish-speaking interviewees, translated into English.

One analytical element should be discussed. Given the number of claims submitted to NACEC from its launch in 1995 to 2007 (63), we first chose to examine in more detail the ones that led to the publication of a factual record, in other words, that went through the entire process of NACEC scrutiny (13). We conducted a longitudinal analysis of the annual number of submissions in their various stages (closed, submitted, active, factual record) and then proceeded to examine 10 years of data based on these different stages. All 13 of the cases that reached the final stage of producing a factual record were analyzed in depth, seeking evidence of coalitional dynamics, transparency—or lack thereof—and accountability.

Theoretical Frameworks Applied to the Empirical Evidence

The CSEM is a trilateral version of an approach that now has a long track record at national levels: the use of demand-driven public information disclosure policies to encourage non-governmental actors to engage in policy implementation oversight (e.g. Fung, Graham, and Weil, 2007). One of the most popular environmental policy

instruments aimed at devolving power to citizens through information disclosure is the pollutant release and transfer registry (NGO).

These information-based environmental policy instruments are designed to promote citizen activism through public dissemination of pollutant release information. Concerned citizens can make use of these data to exert pressure on polluters to reduce their emissions (Jobe, 1999; Howes, 2001; Pacheco and Nemetz, 2001; Antweiler and Harrison, 2003; Harrison and Antweiler, 2003; Harrison, Pacheco-Vega, and Winfield, 2003; Hamilton, 2005; Pacheco-Vega, 2005a, 2005b, 2006).

This decentralized, actor-driven approach to oversight is qualitatively distinct from the more traditional command-and-control, centralized approach. In the U.S. political science literature, this distinction is referred to as “fire alarms” (decentralized, relying on citizen initiative) versus “police patrols” (centrally controlled) (McCubbins and Schwartz, 1984; Siavelis, 2000). The CSEM can be considered one type of fire alarm (McCubbins and Schwartz, 1984; Lupla and McCubbins, 1994; Siavelis, 2000; Raustiala, 2004) that is initiated by either individual citizens or interest groups (e.g. ENGOS).³

To undertake an empirical assessment of the CSEM mechanism, we build on the theoretical and empirical literature on accountability and transparency (Fox and Brown, eds., 1998; Clark, Fox, and Treacle, 2003; Fox, 2003; Treacle, Fox, and Clark, 2003). We also bring insights from the pollutant release and transfer registries body of work (Jobe, 1999; Howes, 2001; Antweiler and Harrison, 2003; Harrison and Antweiler, 2003; Harrison, Pacheco-Vega, and Winfield, 2003).

“Accountability” can be understood as “the process of holding actors responsible for their actions” (Fox, 2003). Transparency is a necessary but insufficient condition for accountability. “Answerability” is a key dimension of any definition of the inherently contested concept of accountability. This goes beyond conventional information disclosure, insofar as it suggests official processes of inquiry, in which those actors responsible answer to a third-party oversight body for their actions. Whether this third party has the power to do anything else still remains undefined, though the capacity to make its findings public is certainly key for allowing transparency to actually change the incentive structure actors face. The idea of answerability, therefore, falls somewhere in between a limited notion of transparency (making existing information public) and a stronger definition of accountability (which would include sanctions for those responsible for non-compliance or poor performance) (Fox, 2007b).

Non-state actors can play a role in holding governments accountable by executing monitoring activities (e.g., ensuring transparency) and demanding the answerability of governmental actors. Margaret Keck and Kathryn Sikkink argue that transnational coalitions of non-governmental activists may attempt to influence an intermediate actor to attempt to put pressure on their own governments (a model dubbed “the boomerang effect”) (1998). They write that “when channels between

³ Although in a forthcoming book chapter, Fox questions this particular framework.

the state and its domestic actors are blocked, the boomerang pattern of influence characteristic of transnational networks may occur: domestic NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside" (1998).

In contrast to a boomerang effect (Risse-Kappen, 1995; Keck and Sikkink, 1998, 1999), Weibust (2006) dubs the domestic civil society hypothesis *faute de mieux*, French for "for want of anything better." *Faute de mieux* argues that local and national environmental groups use the CSEM as an accountability tool against their own national governments, because of a lack of access to or the unresponsiveness of national political institutions. Where activists have access to effective domestic remedies, they will not use the international process. Domestic actors for whom a toothless international forum is better than nothing will use the international process.⁴

Weibust argues that the domestic legal or administrative remedies in place best explain the pattern of use of the CSEM process. The small number of cases against the U.S. reflects the range and power of legal remedies available to U.S. citizens and NGOs, in particular legal provisions for citizens' enforcement of almost all environmental statutes. Conversely, the relatively higher rate of use by Canadians and Mexicans reflects limited domestic recourse on issues of enforcement and environmental law in general (2006). The *faute de mieux* framework is also comparable to the theoretical model of a second-order pressure transmission mechanism as proposed by Pacheco-Vega, whereby ENGOS would use international institutions as a "round-about" strategy to put pressure on individual actors (2005b). However, in Pacheco-Vega's model, pressure transmission is more specific to individual actors rather than complete nations.

What Does the Literature Say about the Citizen Submission On Enforcement Matters?

The CSEM is frequently viewed as a model institution for citizen participation in North American environmental policy, although other CEC-related programs are also considered part and parcel of the public participation toolkit available to ENGOS (Hogenboom, 1996; Rugman, Kirton et al., 1999; Wyrick, 1999; Hufbauer, Esty et al., eds., 2000; Goldschmidt, 2002; Kirton and Maclaren, eds., 2002; Sanchez, 2002; Fitzmaurice, 2003; Wilson, 2003; Yang, 2005).

The CSEM's public participation mechanism can be compared to the 1998 Aarhus Convention on Access to Information and Environmental Justice (Fitzmaurice, 2003).

⁴ Boomerang and *faute de mieux* are distinct, in that boomerang works through shaming before an international audience. *Faute de mieux* does not assume an international audience, and ascribes no role to transnational publics. The mechanism is one whereby domestic groups, without involvement of transnational groups, turn to an international forum because of the inadequacy of domestic measures. There is no boomerang here, because there is no assumption of a transnational shaming process.

This convention is the primary legal framework linking issues of intergenerational justice and the right to access to environmental information with citizen participation, and is frequently considered the foundational international agreement for encouraging the international replication of pollutant release and transfer registries (Pacheco and Nemetz, 2001; Harrison, Pacheco-Vega, and Winfield, 2003; Pacheco-Vega, 2005a, 2005b).

So far, evaluations of the CSEM process have been limited to assessments of institutional design, without the use of any field-based empirical data (except for Graubart, 2008). Different authors propose a variety of evaluation criteria depending on whether the CSEM is successful at achieving the objectives set out in the NAAEC, whether it is actually improving the environment, or whether it is empowering citizens of all three countries. Paquin, Mayrand, and Sbert (2004) propose two criteria for evaluation. The first indicator would be the impact of the citizen submission on levels of environmental enforcement by Canada, U.S., and Mexico. We argue that this would be basically impossible to do in Canada because of the very limited information available on enforcement, particularly over time. The second criterion would take into account the level of satisfaction of its main stakeholders. From an empirical perspective, this criterion could be more easily tested (using surveys, in-depth interviews, and other qualitative methods).

Markell (2006) uses the procedural justice framework to examine the citizen submissions mechanism; his work is primarily theoretical, though he calls for a systematic, empirical analysis of the CSEM process. In this research, we follow up on Markell's suggestion by examining two of his questions: first, why have more U.S. ENGOS not used the CSEM mechanism, and why have Canada or Mexico's submissions not declined in the same fashion?

Another theoretical analysis uses a "basic needs" versus "postmaterialist values" framework to examine citizen submissions from 1995 to 2001, where "basic needs" refers to issues of pollution, whereas climate change is seen as a postmaterialist value (the distinction offered seems a bit overdone) (Mahant, 2001). Fitzmaurice finds that the effectiveness of the CSEM as a public participation mechanism is limited due to the narrow scope of its mandate.

NAFTA Chapter 11 Investment Provisions provide for an interesting contrast with CSEM. While these two NAFTA dispute resolution processes are actually mirror images, CSEM generates public information. However, the CSEM mechanism has no actual regulatory compliance implications, while Chapter 11 is largely secret but does have regulatory implications. Studies of NAFTA's Chapter 11 include Arturo Borja-Tamayo's two-level game analysis of the Metalclad case in Guadalcázar, San Luis Potosí, Mexico (2001) and Fernando Bejarano González's assessment of the relevance of NAFTA's Chapter 11 for environmental issues (2003).

Most studies of the CSEM mechanism have been primarily cross-sectional. For example, Kibel's early work focused primarily on the earliest case of citizen submissions, the Cozumel reef case (SEM-96-001, filed January 17, 1996, with the factual record released October 24, 1997). This case is also popular in the literature as it is highly touted as the most successful (and effective) case of a citizen submission. The

submission led to the creation of a management plan for the coral reef. Furthermore, the scope of the project proposed was substantially narrowed (Wyrick, 1999; Markell, 2000; Tollefson, 2000; Kibel, 2001; Knox, 2001; Kibel, 2002; Kirton and Maclaren, eds., 2002; Markell, 2003; Markell and Knox, eds., 2003).⁵

Graubart's study (2004) was based on a rather small number of phone interviews with key informants. His article offers an important contribution by using the notion of quasi-judiciary transnational activities. The fields of international relations and international law rarely overlap, and his analysis offers a stepping stone toward an interdisciplinary view of CSEM from both perspectives.

Graubart's analysis (2004, Table 1, 333), while rather subjective (qualifying degrees of political effort, CEC support, and results without providing an independent empirical basis for evaluation), is still very interesting. He expanded his analysis in a 2008 book, although the empirical evidence does not prove very compelling.

Wold, Ritchie, et al. argue that the CSEM process has been weakened by the CEC Secretariat and the United States government's role in limiting its reach, leading to a reduced frequency in the use of citizen submissions by U.S. ENGOS (Wold, Ritchie et al., 2004).⁶ The authors blame two main factors: first, that in some cases, the Secretariat has very narrowly defined the scope of citizen submissions. And second, the Submission on Enforcement Matters or SEM unit is not supposed to investigate broad patterns of non-enforcement (also called systematic failure to enforce). We could think that both these elements are part and parcel of a broader issue: the Secretariat's inability to provide an authoritative opinion on whether national environmental law enforcement is failing. If the scope of investigation is too narrow, then there is no way the Secretariat's SEM unit can investigate broad patterns of non-enforcement.

Mitchell analyzes the CEC process from what he terms an actor-based and results-based perspective (2006). Using data from 55 submissions (from 1995 to May 23, 2006), he divides his analysis in demographic categories (submission location, environmental issue, and submitter) and a more in-depth examination of two submissions: SEM-97-002 (Rfo Magdalena) and SEM-98-007 (Metales y Derivados). He chooses these submissions arbitrarily to assess "whether procedural efficiency has been obtained... and whether the outcome has been satisfactory" (2006: 306).

While several authors have outlined the basic design flaws of the CSEM process, they rarely highlight the inherent evolutionary challenges facing NAAEC. Many would like to believe that NAAEC is barely in its adolescence (13 years after signing the agreement).⁷ However, the truth is that many of the internal challenges facing NAAEC reflect not only inherent design flaws, but also governments' unwillingness to let the

⁵ It should be noted, however, that none of these works is based on actual fieldwork in the Cozumel region.

⁶ As the lead author of the only submission that has led to a factual record against the U.S., Professor Wold has an authoritative, insider view of the process.

⁷ The World Bank Inspection Panel citizen claims process has striking similarities to the CSEM. The mechanism arose from non-governmental pressure to increase World Bank accountability to citizens of borrowing countries (Fox and Brown, eds., 1998; Clark, Fox, and Treakle, 2003).

Secretariat proceed independently and to let the submissions take their course, even within the formal confines of its official mandate. As Blair indicates, "just when it [the citizen submission process] was beginning to perform as it was intended, the parties decided to try to rein it in" (Blair, 2003: 318).

Raustiala's theoretical perspective (1995, 1996, and 2004) (fire-alarms versus police-patrols framework) is perhaps the closest to the frameworks we use for the adoption side of the citizen submissions. However, Raustiala's analyses deal more with the use—and lack of use—of citizen submissions, as opposed to our analysis of coalitional dynamics, transparency, and accountability.⁸

Our Empirical Findings

Our research contributes both empirically and theoretically to the growing literature on the impact of transparency reforms on national policy development. These reforms try to use citizen action and transparency to encourage changes in governmental behavior. We seek to deepen our understanding of the different strategies and tactics that civil society organizations use to exert influence on governments to change their approach to environmental policy-making during different phases of the policy process. We are particularly interested in how transparency reforms such as the CSEM influence enforcement of domestic environmental laws.

In this section, we divide the analysis into four parts. We first look at the CSEM numbers. In doing so, we look at all submissions between 1995 and September 2007. Our longitudinal analysis attempts to discern trends (e.g., behavioral patterns of submitters, processing times, responses by the parties and the Secretariat, etc.). We then proceed to examine evidence of increase in accountability and transparency. Thirdly, we examine instances of potential binational or trinational coalition building in the cases under study. Since one of the most relevant results of our research project is an analysis of potential coalition-building dynamics, we focus primarily on those submissions that have either a binational or a trinational coalition behind it.

Finally, we examine the use of pollutant release and transfer registries and compare it with the use of citizen submissions on enforcement matters. The preliminary framework laid out in this section gave us a starting point to begin analyzing CSEM as a transparency reform. More empirical work remained to be done in this area, which was to be completed in the first half of 2008.

Quantitative Analysis

Our quantitative analysis is mostly longitudinal. We examined all submissions from 1995 to September 30, 2007. Yearly data on the number of submissions, parties concerned, outcomes and current status of each submission was recorded in a

⁸ This being said, we do examine who uses CSEM and why.

dataset. We calculated the average time from the moment a submission is filed to when a final decision is reached.

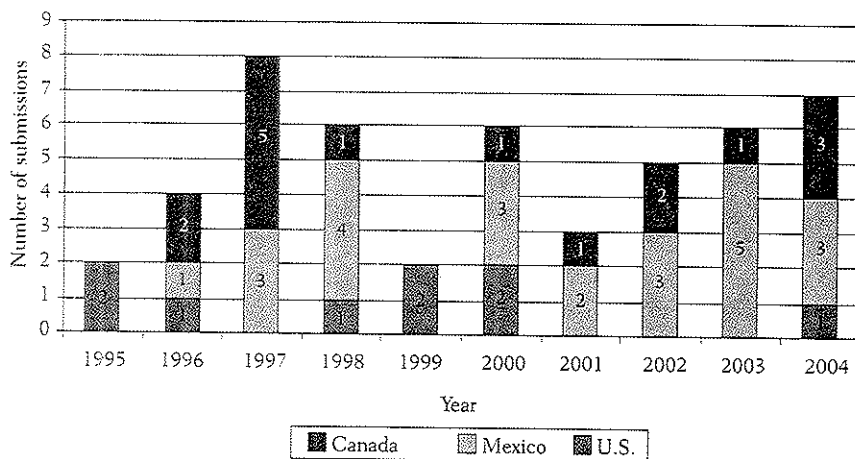
A longitudinal study allows us to try to correlate particular events to specific outcomes. We could expect, for instance, that, over a period of time, the pattern of citizen submissions would follow the lead of transparency reforms. For example, the 2002 General Law on Transparency and Access to Public Information (LGTAIP) in Mexico should have paved the road for ENGOS to use information-dissemination approaches to put pressure on governments and polluters. From another perspective, if the *faute de mieux* hypothesis (Weibust, 2006) held, we would expect that the implementation of Mexico's transparency law (LGTAIP), beginning in 2003, would result in more responses from Mexico being openly discussed.

Global Trends

Our initial quantitative assessment of records was undertaken in November 2004, when only 43 submissions had been filed (1995-2004). In a five-year span (1999-2004), U.S. ENGOS filed three submissions against the U.S. government (Pacheco-Vega, 2005a). This raises the question of why so few U.S. ENGOS file submissions. Given that U.S. ENGOS were so vocal about the need to strengthen environmental standards in Mexico and Canada, it would seem natural that they would make more frequent use of a mechanism that was put in place precisely as a response to their concerns. But given that this is not the case, this phenomenon poses a question worth exploring.

FIGURE 2

TOTAL NUMBER OF SUBMISSIONS AGAINST EACH PARTY (1995-NOV. 2004)



SOURCE: Own calculations based on NACEC's SEM data.

Interestingly enough, 20 additional submissions were filed in the three years after we first submitted the proposal to the Inter-institutional Program for Studies of the North American Region (PIERAN). If we consider that this growth in submissions represents an overall increase of almost 50 percent (from 43 to 63), the mechanism appears to have increased in popularity and relevance over the years. The fact that 20 submissions were filed from 2004 to 2007 means that the same number of submissions were filed from 1995 to 1998 and from 1999 to 2003, an average of about 20 every four years or so.

The most recent quantitative assessment we undertook was September 2007 (although we intended to expand with data from September 2007 onward for the final research outputs). While we included all submissions that led to a factual record in subsequent tables, for comparative purposes we limited our analysis of procedures through time to the period August 1, 1997 to September 30, 2006. We looked at how many submissions continued the process, how many were dismissed prior to a response from a Party (e.g. when the submission did not fully comply with Articles 14/15), the number of final factual records completed, and other interesting trends.

It should be borne in mind that it is hard to untangle the two main elements that quantitative data offer. First, data focused on factual records produced can offer insights into the organizational challenges facing NACEC and specifically the SEM unit. If submissions take a long time to process, it may be not only because of the complex nature of the submission but also due to understaffing. Funding has already been discussed as a challenge to the survival of the NACEC Secretariat, so it is not unlikely that the SEM unit staff has been historically overwhelmed with the sheer amount of work required to create a factual record.⁹

Second, the data can offer some degree of insight into ENGO behavior. However, this may be difficult because, while the number of submissions may be associated with ENGOS' abilities to file a complete and strong submission, in some cases, the submission may be robust, but the issue does not warrant further investigation. At any rate, some interesting patterns can be seen here.

By our calculations, 48 submissions were filed in the period under study but only 11 factual records were produced (22 percent). While a vast majority of the submissions continued the process after being filed (38 out of 48, or 79 percent), 24 were dismissed before requiring a Party response and nine after the Party's response. It is a bit worrisome to find that 21 submissions warranted a factual record and only 11 records were produced and published during the period.¹⁰ An independent assessment of the validity of the criteria used to dismiss cases is necessary, but lies beyond the scope of this study.

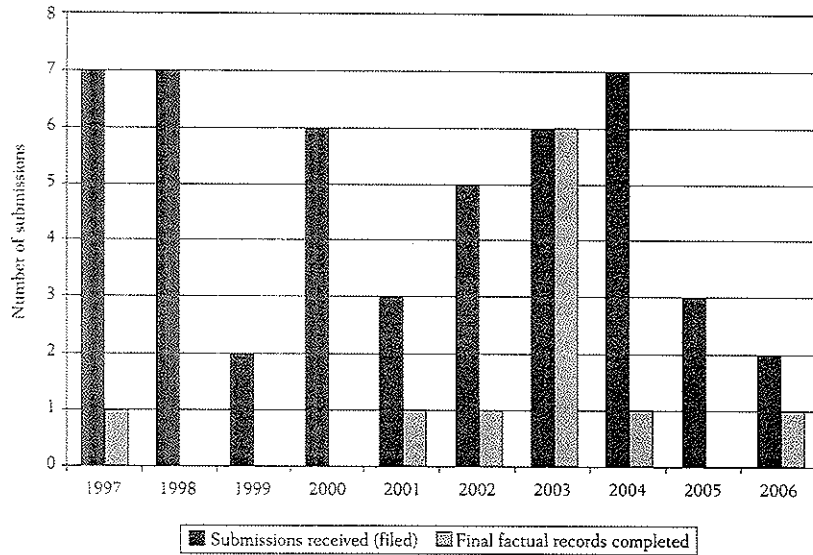
The overall number of submissions declined in 2005 and 2006. However, the average number of submissions filed per year is 4.8.¹¹ Four out of each of those five

⁹ However, we do intend to investigate why delays are so dramatic.

¹⁰ It is noteworthy that some of these factual records are in draft form. However, this issue does speak to the need to increase the institutional capacity of the SEM unit to handle a large number of cases.

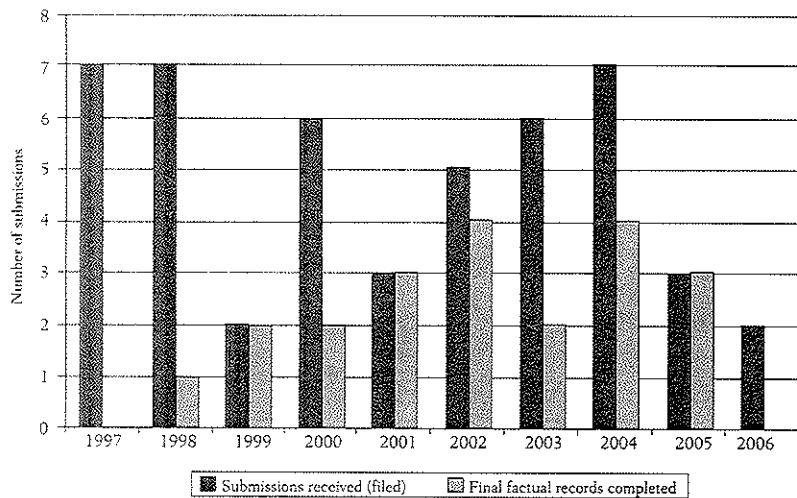
¹¹ These numbers will be rounded up to the next integer for obvious reasons.

FIGURE 3
SUBMISSIONS FILED AGAINST EACH PARTY (AUG. 1997-SEPT. 2006)
AND FACTUAL RECORDS PRODUCED



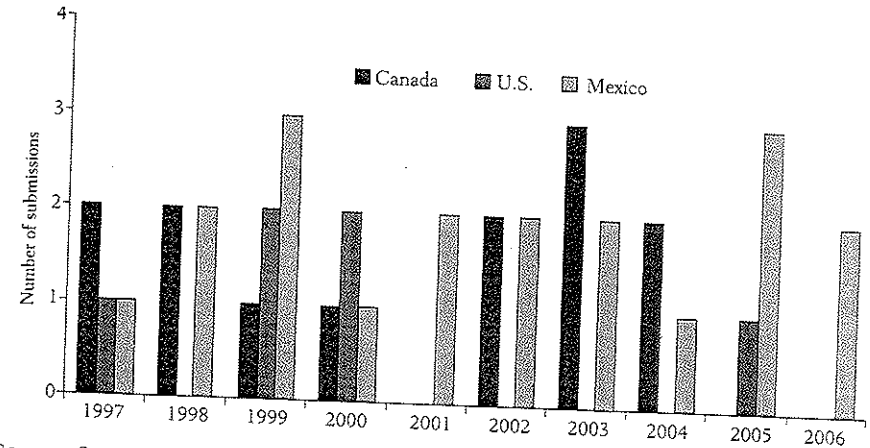
SOURCE: Own calculations based on NACEC's SEM data (NAELP vol. 9, 19 and 23).

FIGURE 4
SUBMISSIONS FILED AGAINST EACH PARTY (AUG. 1997-SEPT. 2006)
AND NUMBER THAT WARRANTED A FACTUAL RECORD



SOURCE: Own calculations based on NACEC's SEM data (NAELP vol. 9, 19 and 23).

FIGURE 5
SUBMISSIONS AGAINST EACH PARTY (AUG. 1997-SEPT. 2006)
THAT CONTINUED THE PROCESS AFTER SUBMISSION



SOURCE: Own calculations based on NACEC's SEM data (NAELP vol. 9, 19 and 23).

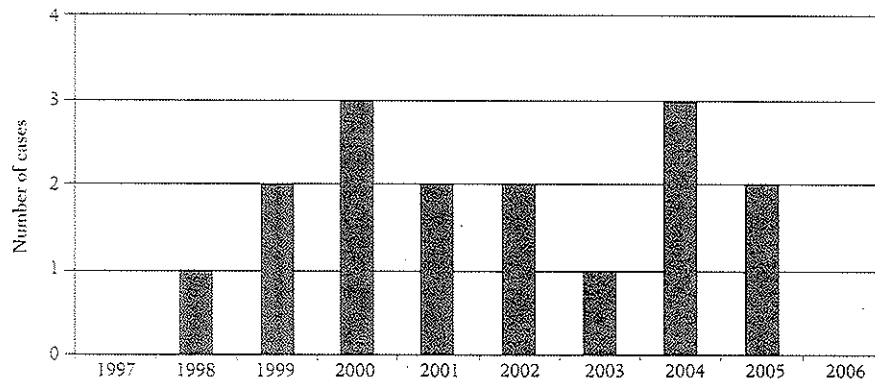
submissions continue the process after being filed, and the Secretariat was able to produce and publicly release at least one factual record per year.

It is interesting to look at years like 1998, when only one out of seven submissions warranted a factual record, whereas in other years, all submissions warranted a factual record (1999, 2001, and 2005). A more detailed examination would be necessary to infer whether these cases were special because of the nature of the issue at stake, the nature of the submitters, or other external factors.

Clearly, if we look at the number of submissions filed, we can see that the majority have been filed against Canada and Mexico. However, out of seven submissions against the United States after 1996 (that is, 1997-2006), three were dismissed after the Party's response and only one factual record concerning the Party was produced and publicly released.

It is somewhat surprising to see how many cases against Mexico were dismissed before the Secretariat even requested a response from the Party. The only years in the period when no file was dismissed were 1997 and 2006, though we find no clear factors that can explain this. Sixteen submissions had been dismissed at this stage. As of this writing, we cannot say whether the ENGOs filing the submission did not fully comply with the requirements of Articles 14/15, whether the matter was subject to judiciary review, or whether other factors played a role.

FIGURE 6
CASES DISMISSED BEFORE MEXICO'S RESPONSE TO THE FILED SUBMISSION
(AUG. 1997-SEPT. 2006)



SOURCE: Own calculations based on NACEC's SEM data (NAELP vol. 9, 19 and 23).

Factual Records

At the time of this writing (September 2007), the NACEC SEM office had released a total of 13 factual records. Our calculations show that six factual records concerned Canada, six concerned Mexico, and only one concerned the United States. We also calculated the time that it took from submission to release of a factual record (Table 1).

Several interesting patterns emerge from closer examination of the case patterns. First, the cases with the shortest and longest time lags are both against Mexico. The Cozumel case took only 1.75 years. However, the Rio Magdalena one took 6.75. The average time for a factual record against Canada is 4.5 years and against Mexico, 4.4 years; whereas, the time for the only U.S. case was 3.41 years. Interestingly, the number of factual records against Canada and Mexico is the same; despite popular concerns that Mexico could be a pollution haven—a hypothesis that led to the creation of NACEC in the first place—we find that cases are just as likely to be brought against Canada as against Mexico. Not surprisingly, and consistent with our hypothesis, we find that only one factual record has been released concerning the United States. This could be also the result of the fact that the domestic political and regulatory environment in the U.S. allows ENGOS to be better positioned to use domestic lobbying strategies rather than a second-order mechanism (Pacheco-Vega, 2005a) or the *faute de mieux* (Weibust, 2006).

If we simultaneously examine both the geographical area of interest in the submission and the issue area at hand, we can discern interesting previously unexplored

TABLE 1
TIME FOR FACTUAL RECORDS TO BE RELEASED
BY NACEC (1995-September 2007)

Title	Case ID	Year filed	Year released	Lag (years)	Target country
Cozumel	SEM-96-001	1996	1997	1.75	Mexico
BC Hydro	SEM-97-001	1997	2000	3.16	Canada
Metales y Derivados	SEM-98-007	1998	2002	3.33	Mexico
BC Logging	SEM-00-004	2000	2003	3.41	Canada
Migratory Birds	SEM-99-002	1999	2003	3.41	U. S.
Molymex II	SEM-00-005	2000	2004	4.5	Mexico
Aquanova	SEM-98-006	1998	2003	4.66	Mexico
Pulp and Paper	SEM-02-003	2002	2007	4.75	Canada
Ontario Logging	SEM-02-001	2002	2007	5.00	Canada
BC Mining	SEM-98-004	1998	2003	5.16	Canada
Tarahumara	SEM-00-006	2000	2006	5.5	Mexico
Oldman River II	SEM-97-006	1997	2003	5.83	Canada
Río Magdalena	SEM-97-002	1997	2003	6.75	Mexico

SOURCE: Our own calculations based on CEC reported data.

patterns. If certain issues are deemed relevant in specific jurisdictions and not in others, we can infer that the number of submissions may increase.

Table 3 shows a breakdown of the factual records to date by issue area. First, of the six submissions against Mexico, three (50 percent) are specifically related to toxic chemicals management, while one (16.6 percent) focuses on wastewater management, one (16.6 percent) emphasizes forest management issues and one (16.6 percent) centers on environmental impact assessments. Coincidentally, the chemicals- and wastewater-focused submissions all come from northern states in Mexico, known for their maquila industries (Sonora and Chihuahua), with three from the industrial state of Sonora.

It is interesting to note that the issues that weigh the most (e.g. that generate both citizen submissions *and* are allowed to advance to the factual record stage) are related to human health. Almost 50 percent of the total factual records are related to issues of industrial pollution (chemicals and wastewater), and if we consider that environmental impact assessment is an activity whose main purpose is to protect humans from negative impacts, then we can clearly see that almost 80 percent of all the factual records are associated with negative effects on human health. This is a very relevant finding, consistent with other empirical studies of ENGO behavior. Issues that galvanize public opinion tend to attract more attention. Toxic chemicals, wastewater, and environmental impact are thus more likely to be

TABLE 2
FACTUAL RECORDS RELEASED BY NACEC (1995-SEPT. 2007)
BY GEOGRAPHICAL AREA OF INFLUENCE AND ISSUE AREA

Title	Party	File ID	Geographical Area	Environmental Issue
BC Logging	Canada	SEM-00-004	BC	Forestry
Ontario Logging	Canada	SEM-02-001	Ontario	Forestry
Pulp and Paper	Canada	SEM-02-003	Several provinces	Chemicals
BC Hydro	Canada	SEM-97-001	BC	Environmental impact
Oldman River II	Canada	SEM-97-006	Alberta	Environmental impact
BC Mining	Canada	SEM-98-004	BC	Chemicals
Molymex II	Mexico	SEM-00-005	Sonora	Chemicals
Tarahumara	Mexico	SEM-00-006	Chihuahua	Forestry
Cozumel	Mexico	SEM-96-001	Quintana Roo	Environmental impact
Río Magdalena	Mexico	SEM-97-002	Sonora	Wastewater
Aquanova	Mexico	SEM-98-006	Sonora	Wastewater
Metales y Derivados	Mexico	SEM-98-007	Tijuana	Chemicals
Migratory Birds	United States	SEM-99-002	Three countries	Environmental impact

SOURCE: Own analysis.

TABLE 3
FACTUAL RECORDS RELEASED BY NACEC (1995-SEPT. 2007)

Issue Area	Mexico	U. S.	Canada	Total
Forestry	1	0	2	3
Chemicals	2	0	2	4
Environmental impact	1	1	2	4
Wastewater	2	0	0	2
	6	1	6	13

SOURCE: Own calculations.

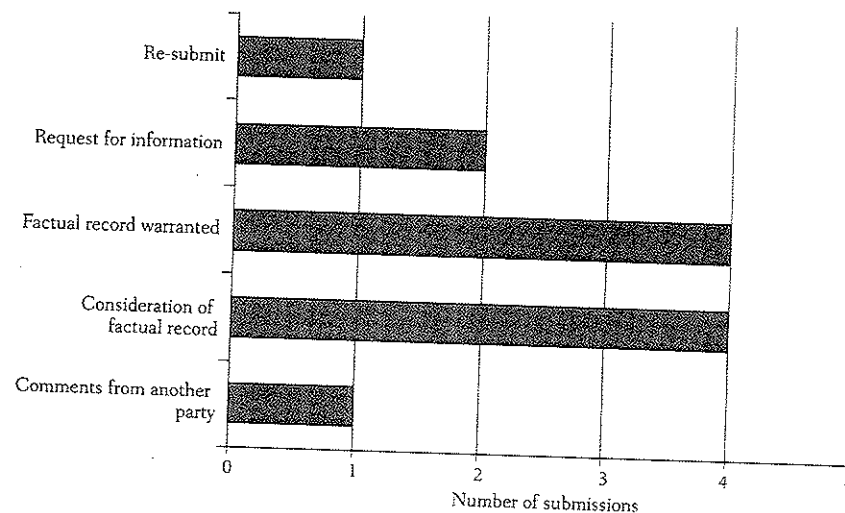
issues that ENGOs will try to mobilize around. Frequently, these same ENGOs will lobby against polluting industries.

Two cases that led to the publication of factual records have been widely discussed in the academic literature. The Metales y Derivados case is the first, which Yang examines in detail (2005). Cozumel is the second case and has proven to be popular, too (Kibel, 2001).

Active Files

Figure 7 provides a breakdown of the status of active files at the time of this writing. It is interesting to note that Mexico is the target of 66.7 percent of the total active submissions, and that 50 percent of the cases in which a factual record is warranted are against Mexico (Environmental Pollution in Hermosillo II and Lake Chapala II). Of the remaining files, 25 percent target Canada (one case, Species at Risk), and 25 percent, the United States (one case, Coal-fire Power Plants). The latter is the first in almost a decade against the U.S. that has warranted the development of a factual record.

FIGURE 7
TOTAL NUMBER OF ACTIVE SUBMISSIONS AGAINST EACH PARTY (1995-SEPT. 2007)



SOURCE: Own calculations based on NACEC's SEM data.

It is important to note that the high number of warranted factual records (those cases where the submission warrants further investigation) or under consideration (where a final decision is pending on whether the Secretariat will proceed with a factual record) speaks to the relevance of the environmental issues at stake. Despite the high number of closed cases (40), the cases that have gone as far in the process as to warrant a factual record (or are deemed important enough to be considered) really highlight the importance of the process in and of itself. ENGOS that choose to painstakingly submit a full citizen submission and follow up to the end are quite aware that the process is time- and resource-consuming, and that the outcome may not even be satisfactory to the non-governmental group responsible for submitting. However, apparently, these ENGOS seem to value the process since the issues under discussion negatively affect them.

Closed Cases

Closed cases have generated little research so far. They would provide a rich dataset to examine the reasons behind the effectiveness and/or failure of the citizen submission process. If an ENGO wants to know what worked in a submission, it is not only useful to look at those that have led to a factual record but also those that were dismissed and the reasons for dismissal. Wyrick (1999) makes reference to several closed submissions, arguing that two types of "attacks" are not permissible under NAAEC Articles 14/15: attacks on industry and on individuals. We intend to explore this issue further in our research.

Implications of Our Analysis

Our analysis extends previous works in two ways. First, we undertake a longitudinal quantitative analysis, which allows us to discern certain trends over time. We could expect that, as time went by (and experience was gained), CSEM processes would have been expedited. Institutional learning by both ENGOS and the CEC Secretariat (specifically the SEM unit) could potentially improve the quality of submissions (on the ENGO side) and the processing speed (on the Secretariat side).

Second, our analysis is enhanced through interviews with ENGO representatives and CEC staff. Previous analyses of specific cases such as *Metales y Derivados* and the CSEM mechanism in general have lacked interview data (as Mitchell clearly states in his article [2006]).¹² Our work includes some interviews, but more are still needed.

In quantitative terms, Mexico is the Party that has been targeted the majority of times by citizen submissions. From an outsider's point of view, this could be just

¹² This is not a small shortcoming. Relying solely on document sources greatly hinders any analyses of effectiveness. Interviews with government officials, ENGO representatives, and Secretariat staff allow us to understand how key players view the process and whether they deem it effective.

a result of generalized perceptions of weak enforcement and latitude in the application of Mexican environmental laws. The mere creation of CSEM was a result of fears of a combined pollution haven/race-to-the-bottom effect. However, some comments by Mexican industry representatives at the 2000 Workshop on CSEM are quite worrisome, as are some of the responses from the Party itself. Two examples follow. First, the comments by Daniel Basurto (a lawyer who represents industry interests, and who has frequently lobbied against the Mexican pollutant release and transfer registry, or PRTR),¹³ as quoted in the text of the proceedings:

Daniel Basurto argued that the entity analyzing the submission must have some discretionary power, although with legal limitations on that power, so as to provide certainty to the Parties and avoid an undue restriction of their rights. He stated that care should be taken with the possible abuse of this participatory instrument, since it is conceivable that relatively unserious or unprofessional submitters could make fraudulent use of Articles 14 and 15 to challenge a given action or activity, thereby vitiating the process.

In this regard, *Carla Sbert* stated that pursuant to the NAAEC, any person or organization without government ties and resident in North America may use the citizen submission process, and asserted that there has been no case in which a submitter under the NAAEC was unqualified or acted in bad faith. Submissions are dismissed if their content does not meet the requirements of the NAAEC. (CEC 2000a: 5)

Another industry representative, Hector Sepulveda (at the time of this writing, a member of the Joint Public Advisory Committee, JPAC), also made some worrisome comments regarding transparency. Among his suggestions:

- Submitter should have to demonstrate its moral and economic solvency.
- Industry-confidential information should be protected.
- There should be a possibility of holding other groups (industry or NGOs) responsible for failure to enforce the law. (CEC 2000a: 6)

Both sets of comments highlight the interest of Mexican industry in reducing transparency and accountability through the citizen submissions process. There is little doubt that Mexican government officials and industry representatives have worked hard at undermining the process through time. In a country that has traditionally lacked transparency, this should not come as a surprise. However, without the support of government officials and industry representatives, this will continue to be an uphill battle for the Secretariat, the SEM unit, and environmental non-governmental organizations. Therefore, unless there is support from all parties and stakeholders involved, the CSEM will continue to be a toothless process.¹⁴

¹³ This is quite a paradox, as Basurto has been both a representative of Mexico on JPAC and a member of the Consultative Group of the North American Pollutant Release and Transfer Registry Project.

¹⁴ Although the aforementioned insights pertain to something we had not intended to include in the proposal (the desire of business to undermine the process), we believe it is worth mentioning, as this is an insight gained through fieldwork.

Who Uses CSEM and Why?

There are various ways in which ENGOs use CSEM. It can be used as a mechanism for citizen participation and also to increase transparency. Finally, in addition, it can foster cross-border coalition building.

In general, cases against Mexico have been filed by firms or individuals (33 percent of cases) or one or more Mexican NGOs (60 percent of cases). Cases against Canada have been brought by individuals (12 percent) and exclusively Canadian NGO coalitions (41 percent). In 47 percent of cases against Canada, a foreign or transnational NGO was listed among the submitters, although these groups generally do not play a leading role in advancing the submission. While the Sierra Club (U.S.) has not been involved in bringing cases against the U.S., it has participated in three cases against Canada.¹⁵

Among domestic NGOs, an even smaller number are responsible for a significant proportion of cases. In Canada, the Sierra Legal Defense Fund has made a total of seven submissions.¹⁶ It represents the NGO coalition in all of these cases. Of the seven cases, six are against Canada and one is against the U.S. (CEC, 2006). In cases against Mexico, one person, Domingo Gutiérrez Mendivil, has brought seven cases.¹⁷

Most cases against the U.S. have been brought by domestic American NGOs, often with support from Canadian or Mexican NGOs. Of the nine cases, five include at least one foreign NGO. (The two cases brought by corporations both pertain to the Methanex case, which did not go to a factual record because it was being examined through NAFTA's Chapter 11 process for investor protections.) Somewhat surprisingly, the American NGOs using the process against the U.S. do *not* include the Group of Seven major environmental NGOs that were most supportive of the creation of a Commission for Environmental Cooperation. (Their possible reasons for not using the process are discussed at length below.) What is more, the U.S. NGOs that have used the process include more radical groupings that were vehemently opposed to NAFTA, such as Friends of Earth.¹⁸ In general, NGOs bringing cases against the U.S. have been smaller groups without a national presence.

Transparency and Accountability

Substantial issues have hampered the ability of CSEM to be an effective tool to enhance transparency and accountability of each national government. A detailed

¹⁵ BC Hydro (SEM-97-001), Ontario Logging (SEM-02-001), and Ontario Logging II (SEM-04-006).

¹⁶ Coal-fired Power Plants (SEM-04-005), Ontario Logging (SEM-02-001), Ontario Logging II (SEM-04-006), Pulp and Paper (SEM-02-003), BC Hydro (SEM-97-001), BC Mining (SEM-98-004), and BC Logging (SEM-00-004).

¹⁷ Molymex I (SEM-00-001), Molymex II (SEM-00-005), Cytrar I (SEM-98-005), Cytrar II (SEM-01-001), Cytrar III (SEM-03-006), Environmental Pollution in Hermosillo I (SEM-04-002), and Environmental Pollution in Hermosillo II (SEM-05-003).

¹⁸ Great Lakes (SEM-98-003).

review of the text of some of the comments of each Party to specific factual records indicates a clear intent to limit the scope of the examination of particular cases, thus limiting the ability of NACEC and CSEM to provide an independent examination of the failure to enforce domestic environmental laws.

Just as an example, we present the comments below, excerpts from the BC Hydro factual record. These are some of the comments by the Mexican government (which was not the target country):

By requesting additional information from the Submitters, including information relating to the Response of the Party, the Secretariat overstepped its authority under the NAAEC, which does not provide for such a possibility... By acting in this way, the Secretariat opened the door for the Submitters to expand on the original content of their Submission, as they did, as well as to contest the arguments contained in the Response of the Party. This procedure adopted by the Secretariat has no basis in the NAAEC nor [in] the Guidelines... In summary, it is clear that the Secretariat put procedures into practice that have no basis, thereby vitiating the process contemplated in Articles 14 and 15 of the NAAEC and its *Guidelines*. (CEC, 2000b: 295-296)

If we were to examine the other factual records, we would find a similar pattern, whereby the countries not being targeted end up siding with the country under scrutiny. This phenomenon is part and parcel of any country's reaction to transnational or domestic ENGO pressures. However, a larger issue is at stake here. If countries feel that they can "bully" the NACEC Secretariat by questioning its authority or common sense in probing each case to the depth that NACEC and the SEM office have done, then these countries are also sending a strong signal that their faith in the CSEM mechanism is nil and, ultimately, that they are not interested in increasing accountability and transparency. Considering that all three countries in North America are democratic societies, this finding should be enough to make us shudder with worry for the future of transparency and democracy.

A recent example of an attempt to trump the transparency of the CSEM process can be found in the text of Mexico's response to SEM-05-001: pages 275 to 277 have been removed upon request of the Party (Mexico). While this obscuring of the text falls within the legal terms of Articles 14/15, it does bring into question whether Mexico is failing to provide information that is public and thus failing to enforce its transparency law (LGTAIP). Admittedly, it is not the purpose of Articles 14/15 to discern whether a Party is failing to enforce a transparency law. However, if we agree that CSEM is a transparency reform, then we have to admit that any efforts on the part of a country to keep parts of a response or a submission confidential will result in diminished transparency, thus rendering CSEM ineffective.

Coalitional Dynamics

We were interested in examining ENGO coalition emergence, dynamics, and impact. We were particularly interested in trinational networks. In terms of policy impact,

we examined how much multilateral institution policy reforms really impact domestic politics and policy-making. Furthermore, we also contributed to theoretical discussions on processes of citizen accountability.

For the coalitional dynamics component of our project, we undertook a test of the theoretical construct of the "boomerang effect" (Hochstetler, 2002) (also framed by Pacheco-Vega as the "first- and second-order pressure transmission mechanisms" [2002]). To this end, we included insights from the growing literature on NGO coalition-building (Princen and Finger, 1994; Ritchie, 1995; Wagner, 1999; Legler, 2000; Wright, 2000).

Although the CSEM process allows any individual or NGO resident in one of the three Parties to file submissions, in practice most cases are filed by NGOs against their own governments. CEC Secretariat officials indicated that, although many NGOs may be attached to a submission, in reality the case is usually brought forward by a single NGO. Rarely do these represent truly collaborative efforts (Sbert and Garver, 2004). An exception to this rule would be the recent U.S. Coal-fired Power Plants case (SEM-04-005). The submission appears to reflect a genuinely binational coalition, which was legally represented by Sierra Legal Defense Fund (Canada) and the Waterkeeper Alliance (U.S.).

Little support exists for the transnational civil society hypothesis about the existence of cross-border coalitions and the participation of transnational NGOs (such as Friends of Earth) in cases brought against Canada, and to a lesser extent, the U.S. Even here, however, cases are primarily being brought by domestic groups, with some support from cross-border partners. The boomerang effect would predict that cross-border coalitions and transnational NGOs would be most active in the less developed partner, Mexico. However, strikingly little evidence exists to show that this is occurring. The use of the CSEM process against Mexico is the most domestically focused of the three member states.

Influencing Actor and Influence Mechanisms

A striking similarity between the pollutant release and transfer registries (PRTR) policy instrument and CSEM is that they both belong to the same "toolkit." They are used to exert pressure on target actors. Transnational coalitions of environmental civil society organizations in North America make frequent use of these two instruments (Harrison, Pacheco-Vega, and Winfield, 2003; Pacheco-Vega, 2005a, 2005b, and 2006) to attempt to bring about behavioral changes. However, the scale and type of target actors differs (individual versus national, firms versus governments).

In the case of PRTRs, NGOs use one of two main tactics (first-order and second-order mechanisms). Direct lobbying about specific polluting plants would be a first-order mechanism. In this type of strategy, the target actor has direct interaction with the influencing actor and may seek to achieve specific reduction targets—but not necessarily. Antweiler and Harrison (2003) indicate that consumers may pun-

ish polluting firms by choosing not to purchase their goods (or acquire reduced volumes), thereby creating a "green consumerism" effect.

Publishing "score-cards" over the Internet has also become one of the main strategies ENGOS use to attract attention to heavy polluters in certain geographical areas. This is an indirect strategy, however. Individual companies and environmental groups are not in direct interaction. Non-governmental organizations sometimes use the published data to create "maps of shame" where users can view in a simple graphical interface about *who* is polluting *where* and *how much*.¹⁹ Arguably, these maps are supposed to have an effect on the behavior of individual firms, prompting them to reduce their emissions to avoid being showcased on them.

In the case of CSEM, civil society organizations bring their complaint to an inter-governmental body (NACEC) to try to influence domestic governments to comply with national environmental policies. Pacheco-Vega calls this a second-order pressure transmission mechanism (2005b). Other authors have called this strategy "the boomerang effect" or the "spiral model" (Risse-Kappen, 1995; Keck and Sikkink, 1998 and 1999; Hochstetler, 2002).

Contributions to the Literature

Overall Contributions

This project contributes to at least three distinct bodies of literature. First, by undertaking an independent assessment of the effectiveness of the CSEM mechanism, we contribute to the literature on transparency and accountability. We also bring insights from the literature on toxic release inventories to an emerging body of literature on ENGO influence on policy change. Finally, we contribute to the ever-growing literature on the role of civil society in changing global governance.

This project provides an original contribution to our understanding of citizen-driven mechanisms that have the potential to increase transparency and governmental accountability. Given that democratic theory states the need for citizen participation in policy-making, this project will contribute to the broader literature on democratization.

Our analysis is both empirically grounded and theoretically informed. On the empirical side, we have employed a variety of data sources, both primary (interviews with CEC staff and ENGO representatives) and secondary (citizen submission documents, e-mail exchanges among key players). Methodologically, we have used a mixed approach, examining quantitative and qualitative data. Theoretically, our analyses have been informed by, among others, the literature on accountability and transparency, the body of work on civil society, social movements, and resource mo-

¹⁹ An example of such maps is available on line at <http://www.pollutionwatch.org/maps/maps.jsp>. The Canadian ENGO Pollution Watch creates these maps based on National Pollutant Release Inventory (NPRI) data.

bilization, and a growing critical mass of work that studies non-orthodox approaches to regulatory policy.

Our preliminary findings confirm previous researchers' comments on the presumed effectiveness of the CSEM process. However, we have gone further by incorporating the perceptions of NACEC's SEM staff and some selected ENGO representatives. In the next stage of our research we plan to interview many more ENGO representatives as well as key current and former government officials, particularly Canadian and Mexican, as these two countries are the ones that have faced the large majority of citizen submissions.

Conclusions

CSEM has been touted as a "tool without any bite." If this "toothless" mechanism were really all that weak, why would Canadian and Mexican ENGOs want to continue using it? Would it not make much more sense to save scarce and precious resources and try to use other domestic mechanisms? Our analysis provides evidence that, while the number of submissions against the U.S. is substantially lower than those against Canada and Mexico, the process is still going strong, with 63 submissions and 13 factual records up to the time of this writing.

Lewis appropriately indicates that

unlike the investment and trade provisions, the environmental citizen submission process does not guarantee an enforceable right of action to private parties: the outcome of a citizen submission will have no legally binding effect on any member state. (2007:20)

Wold, Ritchie, et al. (2004) draw lessons from the World Bank's Inspection Panel to improve the Citizen Submission on Enforcement Matters mechanism. Other authors seem to agree that lessons can be drawn from independent inspection panels such as the World Bank's (Lewis, 2007) and the investor claims from the NAFTA process (Tollefson, 2002).

However, the three processes exhibit substantial differences that may undermine the efforts to make them comparable. As Tollefson (2002) appropriately indicates, there are some similarities and a few differences. The CSEM was originally designed to be weak, whereas the investor claims and the World Bank Inspection Panel (WBIP) have been strong from the beginning.

Disseminating the potential benefits of the citizen submissions process may be one of the key factors in strengthening the mechanism. The more visible the submissions, the more ENGOs can learn about how to undertake this time- and resource-consuming process and achieve some degree of success. Several current and former CEC officials have written about CSEM (Markell, 2000 and 2003; Markell and Knox, eds., 2003; Paquin, Mayrand and Sbert, 2004; Garver, 2005; Opalka, 2005; Markell, 2006), arguably in hopes that this will help increase visibility. ENGO representatives and academic specialists who have brought cases to the CEC have frequently

done the same (Wold, Alanis-Ortega, etc.). This strategy is both astute and effective. Insiders can learn details about the submissions procedure that many researchers may be unable to gain. Furthermore, the cumulative experience of several years in the SEM unit can prove effective in understanding and processing future submissions. However, there is widespread concern in the community of scholars that studies the CEC about the lack of institutional memory in the SEM unit.

Field-based assessments, built on interviews with the full range of interested parties, are key because some actual impacts may be less than they claim, whereas others may go unnoticed or underestimated. This project has helped build a valuable trinational dataset that may be used to empirically ground theoretical constructs on the advancement of a North American civil society.

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