
MEASURING PERFORMANCE THROUGH INDEPENDENT ENFORCEMENT REVIEW: CHALLENGES AND OPPORTUNITIES FOR INDEPENDENT REVIEWERS, THE PUBLIC AND THE GOVERNMENTS AND OTHER INSTITUTIONS SUBJECT TO REVIEW

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SUMMARY

The submissions on enforcement matters process of North America's Commission for Environmental Cooperation (CEC) has features similar to those of many other independent review mechanisms across the globe that have the potential to examine the enforcement performance of governments or other institutions, such as development banks. These mechanisms pose challenges to the different actors that are involved in using them and implementing them in a manner that yields valuable information. The experience of the CEC's submissions process illustrates how the public, governments and the CEC Secretariat have met such challenges in its first ten years. This experience may provide insight to others involved with similar mechanisms that have as a goal the promotion of effective enforcement of environmental law. With a focus on the CEC's citizen submissions process, this paper outlines some of the challenges facing the principal actors in independent review mechanisms that examine performance of environmental enforcement or related obligations: the governments or other entities reviewed, the public and the independent reviewers.

1 INTRODUCTION

In the early 1990s, Canada, Mexico and the United States took advantage of the opportunity that the debate over the North American Free Trade Agreement (NAFTA) presented to create an institutional structure for examining environmental issues on a continental scale. Established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), the CEC was graced at its inception with a unique set of mechanisms for protecting, conserving and enhancing the environment in a new era of liberalized trade among the NAFTA partners. Of the tools in the CEC's innovative toolbox, none has drawn more attention than the submission on enforcement matters (SEM) process under Articles 14 and 15 of the

NAAEC, under which North American non-governmental organizations and persons may assert that one of the NAFTA governments is failing to effectively enforce its environmental law.

Although submissions on enforcement matters mechanisms have unique attributes, they belong to a larger family of independent review mechanisms, or accountability mechanisms, that exist at the international, national and sub-national level. Some members of this family, most notably the Supreme Audit Institutions that exist in more than 170 countries across the globe, generally retain the authority to choose the topics of review themselves or respond to requests from government officials or legislators (INTOSAI 2005). For the NAFTA countries, these institutions are the Auditor General in Canada, the Govern-

ment Accountability Office in the United States and the Auditoría Superior de la Federación in Mexico.

Organizations whose mission includes conducting independent investigations into governments' or other institutions' performance of their responsibility to enforce environmental laws or follow required procedures can have utility to governments or other entities reviewed, as sources of feedback on their performance, and to the public, in helping to ensure accountability of governments or institutions to those they represent or serve. However, to work well and make a positive contribution, mechanisms such as the CEC's submissions process present challenges to the public, to the governments or institutions whose performance is reviewed and to the institutions responsible for conducting the reviews.

2 THE CEC'S SUBMISSIONS PROCESS

Building on the emphasis in its preamble on the importance of public participation in environmental protection, the NAAEC threads public participation into the fabric of the CEC. The agreement's explicit objective in Article 1(h) is to "promote transparency and public participation in the development of environmental laws, regulations and policies" (NAAEC 1994). In support of this objective, the NAAEC commits the Parties to providing for public participation in various ways, establishes a unique, 15-member tri-national public advisory committee (called the Joint Public Advisory Committee) to advise the CEC Council (comprised of the top environment official from each country) and allows persons and non-governmental organizations in North America to bring directly to the CEC their concerns regarding enforcement of environmental laws in the three NAFTA countries. In practice, providing opportunities for public involvement in all aspects of the CEC's work has become a hallmark of the organization.

2.1 How the Process Works

The CEC's citizen submissions process gives individual members of the public and non-governmental organizations their most direct means for focusing the CEC's attention on a particular concern – as long as the concern is related to environmental enforcement. Article 14 of the NAAEC provides that the CEC Secretariat may consider a submission from any person or nongovernmental organization asserting that Canada, Mexico, or the United States is failing to effectively enforce an environmental law.

Where these requirements are met, the Secretariat may then request a response from the government party concerned, taking into account the factors in Article 14(2), including (a) relevancy to the person or organization filing the submission and (b) that private remedies have already been pursued.

Where the Secretariat requests a party response, it forwards to the Party a copy of the submission and any supporting information provided with the submission. Based on the submission and the response, if any, the Secretariat can recommend to the Council under Article 15(1) that a so-called "factual record" be prepared.

If a majority of the Council authorizes preparation of a factual record, the Secretariat, in accordance with Articles 15(4) and 21(1)(a) of the NAAEC, undertakes an in-depth investigation, gathering facts from the governments and other sources or developing information itself, often with the assistance of technical or legal experts. Ultimately, the Secretariat produces a factual record and, if a majority of the Council agrees, publishes it in accordance with Article 15(7) of the NAAEC. Factual records do not reach a conclusion as to whether the Party is failing to effectively enforce its environmental law. Instead, they provide information regarding asserted failures to effectively enforce environmental law in North America that may assist submitters, the NAAEC parties, and other interested members of the public in reaching their own conclusions and taking any action they deem appropriate in regard

to the matters addressed.

2.2 History and Status of the Process

As of February 15, 2004, the Secretariat has received 50 citizen submissions since the CEC's creation, including 17 concerning Canada, 24 concerning Mexico, and 9 concerning the United States. Ten submissions are currently pending at the CEC. The CEC has published ten factual records:

- the Cozumel factual record (October 1997), involving enforcement of Mexico's environmental impact assessment legislation in connection with a pier terminal in Cozumel;
- the BC Hydro factual record (June 2000), involving Canada's enforcement of the Canadian Fisheries Act in connection with hydroelectric facilities in British Columbia;
- the Metales y Derivados factual record (February 2002), involving Mexico's enforcement of its hazardous waste laws in connection with an abandoned lead smelter near the United States-Mexico border in Tijuana;
- the Migratory Birds factual record (April 2003), involving the United States' enforcement of its migratory bird law in connection with logging operations;
- the Aquanova factual record (June 2003), involving Mexico's enforcement of its environmental law in connection with a shrimp farm in Nayarit;
- the BC Mining factual record (August 2003), involving Canada's enforcement of the Canadian Fisheries Act in connection with acid mine drainage from the Britannia Mine, near Vancouver, British Columbia;
- the BC Logging factual record (August 2003), involving Canada's enforcement of the Canadian Fisheries Act in connection with two logging operations on Vancouver Island, British Columbia;
- the Oldman River II factual record (August 2003), involving Canada's

enforcement of the Canadian Fisheries Act and the Canadian Environmental Assessment Act in connection with a forest road in Alberta;

- the Rio Magdalena factual record (December 2003), involving Mexico's enforcement of its water pollution law in connection with municipal water discharges into the Rio Magdalena from three communities in the state of Sonora, Mexico; and
- the Molymex II factual record (October 2004), involving Mexico's enforcement of various environmental laws in connection with a molybdenum trioxide plant in Sonora, Mexico.

Four additional factual records are in preparation as of February 2005. Twice, the Council has voted against a factual record that the Secretariat recommended. A registry of the submissions, as well as factual records, the Secretariat's determinations and notifications to the Council at various stages in the process, and the Council's resolutions on factual record recommendations and publication are available on the CEC's website (CEC 2003).

2.3 Factors Affecting the Suitability of the Process to a Particular Matter

The CEC has opened a new set of opportunities for addressing issues of concern to the North American public. The citizen submissions process in particular is a bold innovation by the three NAFTA countries. In addition to being an accountability mechanism, the process also has the potential to dislodge thorny environmental issues that have been difficult to resolve domestically and to invigorate responsive action by the public, government and other stakeholders. That potential must have been part of what drove the NAFTA countries, and others since, to create the citizen submission mechanism.

The suitability of the process to a particular situation, and hence its value to members of the public who might want to use it, depends on several factors, including a consideration of the inherent features

of the process.

First, it is essential that any CEC submission involve an assertion that one of the NAFTA countries is failing to effectively enforce an environmental law. For purposes of Article 14, "environmental law" according to Article 45(2)(a) means:

[A]ny statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants, (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

However, in Article 45(2)(b) the agreement excludes from the definition of "environmental law" any law for which "the primary purpose ... is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources." This definition might limit the range of issues of concern to members of the public that could be addressed in the citizen submissions process. The CEC has not yet had occasion to address that issue in any detail.

Another feature of the citizen submissions process is that it is not well-suited for emergencies or other situations in which a relatively quick response is desired. On average, factual records have taken about three years from the date the submission was received to finalize and publish. Indeed, while voting within two months on some occasions, the Council has taken up to fifteen months to take action on pending factual record recommendations. Although the creation of a separate unit to process

submissions and the hiring of additional staff have improved timeliness, experience to date suggests that normally it will be difficult to produce a final factual record in less than approximately two years. It is possible, however, as the first factual record, for the Cozumel submission, was published 21 months after the submission was filed.

A further feature of the citizen submissions process is that it touches upon two particularly sensitive areas for national governments: sovereignty and enforcement discretion. Although the governments consistently have expressed their support for the process, Articles 14 and 15 confront them with an inherent tension between their roles as both creators and overseers of the process and as potential targets of it. That the process allows an international organization to present information regarding a country's enforcement of its own laws likely exacerbates this inherent tension. NAFTA chapter 11 is arguably a broader relinquishment of sovereignty, in that through binding arbitration chapter 11 can require a country to compensate a private investor for expropriation of an investment contrary to NAFTA's terms (NAFTA 1992). Nevertheless, the citizen submissions process is at the frontier of North American accountability mechanisms that give an international organization a degree of independence in reviewing the actions of one of the three NAFTA countries. Shining light on a country's enforcement actions can run up against the potential reluctance of governments to provide details regarding enforcement strategies and the exercise of enforcement discretion. Further, the possibility, however remote, that a citizen submission could trigger a dispute resolution proceeding and monetary enforcement sanctions under part V of the NAAEC, which allows one NAFTA country to claim that another has a "persistent pattern of failure by that other Party to effectively enforce its environmental law" in Article 22(2), potentially affects how the countries handle the citizen submissions process.

The critical juncture at which the parties' potential concerns over sovereign-

ty and their sensitivity regarding enforcement matters are most likely to be reflected is when the Council votes on factual record recommendations. Although the Council has authorized preparation of factual records for fourteen submissions, in four of those cases, BC Logging, BC Mining, Migratory Birds, and Oldman River II (CEC 2003), it instructed the Secretariat to prepare factual records significantly different in scope than what the submitters sought and the Secretariat recommended. These Council decisions are likely an outgrowth of the inherent tension that the governments confront with respect to the submissions process. The possibility that a factual record might not address the enforcement issues that a potential submitter sought to raise might deter use of the process to some extent, particularly when it is only at the stage where the Council votes on a factual record recommendation that the scope of a factual record is determined. Uncertainty in this regard might dissuade a potential submitter from investing resources into gathering the information necessary to support its assertions.

A potential submitter must also take into account the likelihood that a submission will not proceed through the process if the submitters have not pursued private remedies available under the laws of the party whose environmental enforcement is questioned. Article 14(2) guides the Secretariat to consider whether private remedies have been pursued in deciding whether to request a response from the party. Although there is no explicit requirement that private remedies be pursued, let alone exhausted, the NAAEC strongly suggests that a submitter seek domestic relief before filing a submission with the CEC.

A final major feature of the process that could affect its suitability to a particular situation is that a factual record cannot impose sanctions or force a government to do anything in regard to the matters addressed. Indeed, as noted above, a factual record does not even reach a conclusion whether the party is failing to effectively enforce its environmental law. As a result, reflecting frustration of some mem-

bers of the public that factual records are not as effective as they might be, the Joint Public Advisory Committee and others have advised the Council to commit to some kind of follow-up to a factual record, for example by requiring the party whose enforcement is addressed in a factual record to report periodically to the Council on follow-up actions (JPAC 2001). To date, the Council has deemed follow-up to factual records to be a matter exclusively of domestic concern (Smith 2002). At its most recent meeting, the Council committed itself "to exploring ways for each Party to communicate how matters raised in factual records may be addressed over time" (CEC 2004).

2.4 Impact and Utility of Submissions and Factual Records

Despite the potential limitations noted above, submitters have found that the filing of a submission or publication of a factual record can fulfill at least some of the goals of their submissions. For example, the submitters of the Cozumel submission found that the submission "led to additional protection of coral reefs in the area, improvements to Mexican law on environmental impact assessment, and establishment of a trust fund for reef protection" among other benefits (Garver 2001). Likewise, the submitters of the BC Hydro submission have stated that substantive commitments that the Canadian and British Columbia governments made that were recorded in the BC Hydro factual record have helped keep on track a water use planning process that responded to concerns highlighted in the submission (Bowman 2001). Indeed, the Submitters found that the mere filing of the submission brought increased government attentiveness to their concerns regarding the impact of hydroelectric facilities on fish habitat (Bowman 2001).

Last year, an independent committee appointed by the CEC Council to review the first ten years of the CEC noted additional impacts of citizen submissions and factual records, beyond those noted above

(CEC 2004). The committee noted that as a result of submissions and factual records:

- The Secretariat's investigation conducted as a result of the BC Logging submission uncovered deficiencies in the procedures of Fisheries and Oceans Canada that the Department subsequently addressed.
- Fisheries and Oceans Canada increased its presence in the prairie provinces.
- In a letter to BC government authorities, Environment Canada cited the BC Mining submission when it rejected a proposal to adopt a less costly, but less effective, effluent treatment method at the Britannia Mine.
- The submission related to the operation of a shrimp farm in Mexico (Aquanova) encouraged negotiations among the submitters, local and environmental authorities and the developer that led to actions to reduce the impact of the farms' waste water discharge and a mangrove replanting program.

As well, factual records equip the public with detailed information regarding the environmental law at issue and the policies and practices employed to enforce and seek compliance with it. This information can serve as a basis for identifying criteria of effective enforcement that can be applied to draw conclusions regarding a country's performance in a particular case. For example, the BC Logging factual record included a list of relevant indicia of effective enforcement, which, while not intended to be comprehensive or to establish a definition of effective enforcement, served as a guide for those assessing the matters addressed in the factual record. The indicia identified were as follows (CEC 2003):

- Government agencies obtain, use and maintain adequate information on the forest activities subject to enforcement.
- Compliance is encouraged through communication with parties affected by the relevant laws and regulations, and

agencies establish, through operational plan approval and related processes, expectations for forest practices which are enforceable and in accordance with the law.

- Enforcement personnel administer the law and accompanying regulations with an emphasis on preventing harm to fish and fish habitat.
- The public is encouraged to report suspected violations of the habitat protection and pollution preventions of the Fisheries Act, and when information or complaints are brought to the attention of enforcement personnel, additional inspections are carried out as required.
- Government agencies have an effective way of identifying risks associated with forest activities and utilize risk in inspection planning.
- A program of inspections to verify compliance is carried out, prioritized on the basis of compliance history and the risk to the fishery resource. A sufficient number of inspections are conducted in a fair, objective and effective way with the results accurately recorded and reported.
- Investigations are conducted in all applicable situations and only when warranted. They are performed in a fair, objective and consistent way and are accurately recorded and reported.
- Determinations of non-compliance are made in all applicable situations and only when warranted. They are made in a fair, objective, predictable and consistent way and are accurately recorded and reported. Rules, sanctions and processes securely founded in law are used.
- Priority to deal with suspected violations is guided by the degree of harm to fish, fish habitat or human use of fish caused by physical alteration of habitat or pollution of waters frequented by fish, or the risk of that harm; whether or not the alleged offense is a repeat occurrence;

and the intent of the alleged violator, including attempts to conceal information or circumvent the law.

- Enforcement measures are directed towards ensuring that violators comply with the law within the shortest possible time and that violations are not repeated.
- Enforcement personnel bring any charges in as short a time as possible, having regard for proper substantiation of the alleged violation and gathering of sufficient and appropriate evidence.
- Organizational structures, policies and processes that contribute to and support appropriate law enforcement are in place.
- The decisions and actions of different parts of government responsible for law enforcement are appropriate and coordinated.
- Reporting systems provide adequate information on agency performance in relation to enforcement objectives.

3 LESSONS LEARNED ON CHALLENGES TO GOVERNMENTS AND OTHER INSTITUTIONS SUBJECT TO REVIEW, THE PUBLIC AND INDEPENDENT REVIEWERS

The success of a mechanism such as the CEC submissions process depends on how the principle actors involved in its implementation approach and use it. The challenges facing these key actors – government, the public, and those conducting independent reviews – are likely similar across the spectrum of institutional mechanisms that allow independent review of governments' or other institutions' enforcement of environmental laws or compliance with mandatory environmental obligations.

3.1 Challenges to Governments and Institutions Subject to Review

The experience of the CEC illustrates well the challenges governments face when they both create and fund a

mechanism that allows for independent review of enforcement performance and also defines themselves as the subject of that review. The inherent tension this creates is discussed above. As well, governments that rely on taxpayers to fund government programs have a responsibility to use resources wisely, and in a manner that the public accepts. In creating a mechanism such as the CEC submissions process, governments also assume the challenge of marshalling the resources necessary not only for the institution conducting the reviews, but also for the government to respond to requests for information necessary for those reviews. Beyond these resource issues, however, are more fundamental challenges. Inherent in the creation of a mechanism such as the CEC submissions process is the challenge to governments to determine what benefits they seek to achieve through such a mechanism. One theory of mechanisms that expose facts regarding government performance to public light is that "sunlight is the most effective disinfectant." However, posing the challenges of such a mechanism in terms of shaming or embarrassing governments likely shortchanges the process if it implies only a backward-looking focus; it is more constructive, yet perhaps not always easy, for governments to be open to receiving these reviews in a manner that can highlight areas where improvements in performance are possible. The results to date of the CEC's submissions process suggest that the governments, at least in some cases, may well be taking the process seriously and treating it as a potential source of constructive and useful feedback.

3.2 Challenges to the Public

The most basic challenge to members of the public seeking to use the process to seek improvements in governmental or institutional enforcement performance is to weigh the costs and benefits involved. Unlike litigation or other remedial processes, the CEC's submissions process and other similar petitioning processes

involve primarily an up-front, non-continuing investment of time and resources. Once the CEC receives a submission, the greatest resource burdens fall on the Secretariat and the government Parties. Nonetheless, the up-front investment to submitters can be significant, especially to meet the expectations that the CEC Council has put forth in regard to the kind of information it will require in order to authorize the preparation of a factual record.

In fact, the Council previously noted similar concerns regarding sufficiency of information, albeit with less explanation, most notably when it limited the scope of the factual record it authorized for the B.C. Logging submission (CEC 2001). There, the Council “[recognized] that Canada in its response indicated that the submission did not include sufficient information to enable Canada to provide a meaningful response to other matters raised in the submission for which the Secretariat’s notification recommends a factual record.” (CEC 2001). The Council’s decision with respect to the information necessary to support the B.C. Logging submission likely placed a considerable additional resource burden on the submitters, but, as the Council notes, the submitters found it worthwhile to expend those resources to produce additional information to support their assertions.

The CEC’s submissions process also challenges the public, and in particular those who make submissions, to be prepared to respond constructively once a factual record is produced. Submitters expressing disappointment, as some have, that a factual record is merely a record of facts that does not force action or penalize failure of enforcement do not fully understand the process and its potential, as the parameters of the process clearly do not allow for injunctive orders or penalties. Instead, factual records impose a challenge on the public to use the information provided in a manner that may resolve the problem underlying the submission. Understanding this at the front end of the process may help ensure that submissions address matters as to which factual records have a

reasonable potential to produce valuable information.

3.3 Challenges to Independent Reviewers

Those charged with implementing an independent review mechanism, such as the CEC’s Secretariat in key stages of the submissions process, confront a challenge to ensure that the mechanism remains as accessible, transparent and credible – to governments and the public alike – as possible. Meeting this challenge requires attentiveness to the timeliness with which submissions are processed; care in the selection of competent and objective experts to assist in the processing of submissions; and rigor in conducting comprehensive, objective and independent investigations. One way in which the CEC Secretariat has sought to meet this challenge is through consultations with a distinguished panel of Special Legal Advisors, who volunteer their time and expertise on the questions of international and environmental law that arise in the processing of submissions. In preparing the processing of submissions and preparing the factual record, the Secretariat ultimately must meet the challenge of gathering, developing and presenting sound and valuable factual information while abiding by the terms of the NAAEC and the instructions of the CEC Council.

4 CONCLUSION

The challenges that face governments and other institutions subject to review, the public and those conducting independent review of government or institutional performance are not unique to the CEC’s submissions process. Whether a reactive mechanism focusing on environmental enforcement concerns, such as the CEC’s citizen submissions process, will prove valuable in regard to a particular matter will depend on the circumstances and the goals of those who initiate its use, as well as on how the various actors involved meet the challenges they face in making

the mechanism work. Hopefully, the experience of the CEC, and a discussion of the challenges facing the principle players in that process, provides food for thought for others involved in implementing the many other similar mechanisms that exist across the globe.

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