

# Trade Treaties, Citizen Submissions, and Environmental Justice

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*The history of the U.S. environmental justice movement reveals that successful campaigns are seldom waged solely through litigation. Instead, communities have employed litigation and administrative actions as part of a broader grassroots struggle to achieve short- and long-term change. Even when not successful on the merits, such actions can facilitate both information-gathering and information-dissemination, with the accompanying public scrutiny providing an increased incentive to reform agency or corporate behavior.*

*Latin American communities seeking environmental justice face similar, and often greater, obstacles in pursuing claims through the courts. Transnational corporations, operating under U.S. trade and investment treaties like the North American Free Trade Agreement, can take advantage of ineffective environmental protection regimes in Latin American countries and generally escape liability in U.S. courts as well. Yet these trade treaties also include a citizen submission on enforcement matters process, where citizens can spotlight environmental violations and force an oversight body to generate and publish an authoritative factual record.*

*This Article assesses this citizen submissions process in the context of a holistic approach to environmental justice campaigns. Drawing on parallels from the U.S. movement, the Article highlights how the citizen submissions process can validate data gathered by the community, facilitate generation of new information, publicize that information to a much wider audience, and provide a meaningful rallying point for community organizing. The Article concludes that, while the factual record itself holds limited value as a standalone remedy, the informational aspects of the process nonetheless can be an effective compliance-promoting tool in a broader environmental justice campaign.*

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## INTRODUCTION

Environmental justice has emerged as an important frame for considering trade and investment policy,<sup>1</sup> especially for the challenge of foreign persons suffering personal and property injury caused by transnational corporations (TNCs) that engage in environmentally hazardous operations.<sup>2</sup> This frame reveals that U.S. trade and investment treaties like the North American Free Trade Agreement (NAFTA)<sup>3</sup> and the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA)<sup>4</sup> incentivize industries to operate in Latin American countries that lack effective environmental protection regimes.<sup>5</sup> These treaties chill attempts at environmental regulation by providing investors strong substantive law and investor-state dispute mechanisms (ISDMs) that allow TNCs to recover for losses caused by host governments' legal decisions.<sup>6</sup>

By contrast, the treaties offer little protection to local residents. Rather than mandate effective new environmental laws and mechanisms that allow recourse against the alleged polluter, they merely create a Secretariat to handle

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1. E.g., Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT'L L. 723, 730 (2011) (writing that "trade policy has emerged as an important environmental justice issue" in Latin America); David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 ECOLOGY L.Q. 443, 493 (2006) ("Environmental justice . . . continues to have some bearing on domestic and international public policy, remaining an important paradigm in the global dialogue on environment and social justice.").

2. E.g., Jonas Ebbesson, *Piercing the State Veil in Pursuit of Environmental Justice*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 270 *passim* (Jonas Ebbesson & Phoebe N. Okowa eds., 2009); Carmen G. Gonzalez, *Environmental Justice and International Environmental Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 77, 92–95 (Shawkat Alam et al., eds., 2012) [hereinafter ROUTLEDGE HANDBOOK].

3. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA].

4. Dominican Republic-Central America Free Trade Agreement, Aug. 5, 2004, <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA] (including the United States, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua).

5. E.g., Madison Condon, *The Integration of Environmental Law into International Investment Treaties and Trade Agreements: Negotiation Process and the Legalization of Commitments*, 33 VA. ENVTL. L.J. 102, 106–07 (2015); see Chelsea M. Keeton, Comment, *Sharing Sustainability: Preventing International Environmental Injustice in an Age of Regulation*, 48 HOUS. L. REV. 1167, 1194 (2012) (referring to TNCs as the "most common instigators of environmental harms . . . that take advantage of developing countries' lax regulation and abundant natural resources"); Paulette L. Stenzel, *Free Trade and Sustainability Through the Lens of Nicaragua: How CAFTA-DR Should Be Amended to Promote the Triple Bottom Line*, 34 WM. & MARY ENVTL. L. & POL'Y REV. 653, 659–60 (2010) (discussing how NAFTA and CAFTA do not promote the triple bottom line of sustainability: economy, social equity, and environmental protection).

6. See, e.g., Philip Moreman, *Private Rights of Action to Enforce Rules of International Regimes*, 79 TEMP. L. REV. 1127, 1157 (2008) (writing that investors have brought claims for indirect expropriation for losses related to environmental regulation); Vivian H.W. Wang, Note, *Investor Protection or Environmental Protection? "Green" Development under CAFTA*, 32 COLUM. J. ENVTL. L. 251, 281 (2007) (concluding that CAFTA, like NAFTA, "creat[es] an imbalance between investor protections and environmental protections.").

submissions on enforcement matters (SEMs).<sup>7</sup> These citizen submissions allege failure by the host government to enforce already-existing domestic environmental laws, but can only result in the publication of a factual record.<sup>8</sup> The hope is that SEMs spotlight the nation's lack of enforcement and thus spur it toward action.<sup>9</sup> Commentators have called the SEM process "toothless" and "pure rhetoric,"<sup>10</sup> citing numerous shortcomings, including slow and politically-influenced procedures, the absence of provisions requiring stronger domestic environmental laws, and the lack of enforcement mechanisms and remedies.<sup>11</sup> Some have concluded that the SEM process denies environmental justice to the victims of environmental harm.<sup>12</sup>

This wholesale condemnation is not shared by all scholars, however. Some claim that a few SEMs have resulted in remediation of contaminated sites and improved enforcement of environmental laws in Mexico.<sup>13</sup> At least one commentator has concluded that a submission contributed to environmental justice for a Mexican indigenous community.<sup>14</sup> Others recognize that the process can be effective but would benefit from better adherence to deadlines and more autonomy for the Secretariat to pursue and prepare factual records.<sup>15</sup>

7. E.g., North American Agreement on Environmental Cooperation, Can.-Mex.-U.S., arts. 14–15, Sept. 14, 1993, 32 I.L.M. 1480 (1993) [hereinafter NAAEC]; CAFTA, *supra* note 4, arts. 17.7–17.8; see Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 182 (2002) (comparing the investor protections in NAFTA with the citizen submission process in its side agreement, the NAAEC).

8. NAAEC, *supra* note 7, arts. 14–15; CAFTA, *supra* note 4, arts. 17.7–17.8; see Tollefson, *supra* note 7, at 182.

9. 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, 129 (2007); David Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, 45 WAKE FOREST L. REV. 425, 430–31 n.30 (2010).

10. Lauren A. Hopkins, *Protecting Costa Rica's Osa Peninsula: CAFTA's Citizen Submission Process and Beyond*, 31 VT. L. REV. 381, 392 (2007); Bradley N. Lewis, Comment, *Biting Without Teeth: The Citizen Submission Process and Environmental Protection*, 155 U. PA. L. REV. 1229, 1229–30 (2007).

11. See *infra* Part V.A.2–3.

12. E.g., Malgosia Fitzmaurice, *Environmental Justice through International Complaint Procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, *supra* note 2, at 211, 224; 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, 446 (2005); see Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 223–25 (2008) (citing data showing the rapid growth of trade and investment, as well as dramatic increases in pollution in Mexico following NAFTA).

13. JONATHAN GRAUBART, LEGALIZING TRANSNATIONAL ACTIVISM: THE STRUGGLE TO GAIN SOCIAL CHANGE FROM NAFTA'S CITIZEN PETITIONS 123–25 (2008); John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*, 47 TEXAS INT'L L.J. 505, 527–28 (2012).

14. Dorn, *supra* note 9, at 138.

15. See, e.g., Tracy D. Hester, *Designed for Distrust: Revitalizing NAFTA's Environmental Submissions Process*, 28 GEO. ENVTL. L. REV. 29, 60 (2015) (recognizing criticisms, but concluding that they "overlook a key point: given the right circumstances, the SEM process can actually work well");

The lack of scholarly consensus invites critical reassessment<sup>16</sup> of the existence and the extent of the environmental justice potential for SEMs and, more importantly, how foreign persons can turn that potential into reality by having the government act upon the data they submit. The roots of environmental justice struggles in other countries connect to the U.S. environmental justice movement (EJM),<sup>17</sup> so a consideration of the history, tenets, and tactics of the U.S. movement provides a reference point from which to measure the effectiveness of SEMs.<sup>18</sup> Faced with harm to the environments where they lived, worked, played, and went to school, poor and minority communities employed activist tactics to counter a political system stacked against them.<sup>19</sup> The courts were part of that system: litigating expensive and time-consuming cases based on imprecise legal theories diverted already-limited resources away from community organizing and toward proceedings that offered little chance of obtaining a judgment.<sup>20</sup> Even though their struggle was political rather than legal, the plaintiffs employed litigation to achieve additional goals, such as obtaining data, supporting a grassroots campaign

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Hopkins, *supra* note 10, at 428–29 (calling the NAAEC and CAFTA “promising models for the interplay between trade and the environment”).

16. Ole W. Pedersen, *Environmental Principles and Environmental Justice*, 12 ENVTL. L. REV. 26, 49 (2010) (writing that “it is important to constantly and critically assess calls made for environmental justice”).

17. J. Timmons Roberts, *Globalizing Environmental Justice*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT 285, 285–86 (Ronald Sandler & Phaedra C. Pezzullo, eds., 2005); André Nollkaemper, *Sovereignty and Environmental Justice in International Law*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, *supra* note 2, at 253, 258.

18. See, e.g., Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71, 76–77 (2006) (“draw[ing] from United States environmental justice litigation approaches to create a model for deconstructing environmental harm to humans, and then appl[y]ing this model to sixteen case studies” from tribunals in other countries and before alternative dispute resolution bodies); Ole W. Pedersen, *Environmental Justice in the UK: Uncertainty, Ambiguity and the Law*, 31 LEGAL STUDIES 279, 279 (2011) (considering the concept of environmental justice by comparing the U.S. EJM with movements in the UK, South Africa, and India); John T. Suttles, Jr., *Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry*, 16 TUL. ENVTL. L.J. 1, 3 (2002) (writing that “the [U.S.] environmental justice movement provides a relevant and effective construct for addressing institutional and doctrinal imbalances inherent in multilateral trade agreements”).

19. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10–18 (2001); Shannon M. Roesler, *Challenging What Appears “Natural”: The Environmental Justice Movement’s Impact on the Environmental Agenda*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 230, 234–36 (Keith H. Hirokawa, ed., 2014).

20. Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 FORDHAM URB. L.J. 523 *passim* (1994); Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 31 WASH. U. J.L. & POL’Y 121 *passim* (2009); see Robert Benford, *The Half-Life of the Environmental Justice Frame: Innovation, Diffusion, and Stagnation*, in POWER, JUSTICE AND THE ENVIRONMENT: A CRITICAL APPRAISAL OF THE ENVIRONMENTAL JUSTICE MOVEMENT 37, 51–52 (David Naguib Pellow & Robert J. Brulle, eds., 2005) (arguing that the EJM should be more radical and not seek justice through legislative, judicial, and regulatory means because those mechanisms are part of the system and thus benefit the status quo).

centered on making the community stronger, and forcing engagement with other stakeholders.<sup>21</sup> Several commentators have shown that these goals are also obtainable through actions before administrative agencies.<sup>22</sup> Despite a lack of enforceable remedies and an inability to hold industrial polluters directly accountable, these formal proceedings can nevertheless lead to change by supplementing a broader campaign of organizing, meetings, and demonstrations with a governmental forum that increases political legitimacy.<sup>23</sup>

Affected persons from communities in foreign countries face greater obstacles than Americans in pursuing relief through courts,<sup>24</sup> and the U.S. and its trading partners are unlikely to pass new laws or to revise treaties that will increase access to courts or other tribunals.<sup>25</sup> When employed strategically, however, citizen submissions and the information and data they convey have the same potential as U.S. administrative actions to bring recognition to a transnational cause, to force responses from and negotiations with important stakeholders, to aid in obtaining direct remedies, and to lead longer-term to the broader acceptance of environmental justice principles by governments and TNCs.

This strategic approach connects SEMs and grassroots activism with the theme of digital data. The link between SEMs and data is fairly obvious: citizen submissions work (in theory) because people closer to an environmental problem possess information that the government might not have;<sup>26</sup> thus, for example, Article 14(1)(c) of the North American Agreement on Environmental Cooperation (NAAEC) directs citizens to submit “sufficient information” based on “documentary evidence.”<sup>27</sup> The people thus sound a “fire alarm,” which

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21. E.g., Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 647–48, 668 (1992); see Gregg P. Macey & Lawrence E. Susskind, *The Secondary Effects of Environmental Justice Litigation: The Case of West Dallas Coalition for Environmental Justice v. EPA*, 20 *VA. ENVTL. L.J.* 431, 432–33 (2001) (distinguishing between the primary and secondary effects of environmental justice litigation); *infra* Part II.B.2.

22. E.g., COLE & FOSTER, *supra* note 19, at 96–97; Kang, *supra* note 20, at 131; Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 *ENVTL. L. REP.* 10,681, 10,696 (2000); Jeremy Linden, Note, *At the Bus Depot: Can Administrative Complaints Help Stalled Environmental Justice Plaintiffs?*, 16 *N.Y.U. ENVTL. L.J.* 170, 221–23 (2008).

23. See *infra* Part III.C.

24. E.g., Tarik R. Hansen & Christopher A. Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 *IOWA L. REV.* 923, 926 (2016) (recognizing the “access-to-justice gap” created by forum non conveniens and the laws of enforceability of foreign money judgments); Noah Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law*, 55 *UCLA L. REV.* 837, 848–49 (2008) (discussing “liability walls” like jurisdiction, choice of law, forum non conveniens, and enforcing judgments).

25. E.g., Jeff Todd, *Ecospeak in Transnational Environmental Tort Proceedings*, 63 *U. KAN. L. REV.* 335, 367–69, 376–77, 379–80 (2015) (discussing the political and practical shortcomings of proposals to increase foreign plaintiff access to U.S. courts or to treaty-based dispute resolution tribunals).

26. Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 *LOY. L.A. INT’L & COMP. L. REV.* 389, 405 (2004).

27. NAAEC, *supra* note 8, art. 14(1)(c).

allows the Secretariat to force the government to provide additional information; if a factual record is released, it provides the impetus for the authorities to respond to the environmental issue.<sup>28</sup> The SEMs are most effective as one tactic in a broader campaign, and environmental justice campaigns increasingly have a digital component, such as websites and streaming videos created by activists, or online information disseminated by public interest attorneys.<sup>29</sup> Indeed, the Secretariat's request for submissions and issuance of a factual record are key pieces of information that the Secretariat itself, as well as activists and attorneys, share digitally, meaning that multiple digital information threads merge to call public attention to a cause and set a foundation for change.<sup>30</sup>

Part I first summarizes the EJM in the United States and its goals of distributive, procedural, and corrective justice. It then turns to a consideration of litigation, including the challenges to obtaining judgments, as well as its use in meeting other grassroots activism objectives. Finally, it investigates how these objectives are alternatively attainable by employing administrative proceedings. Part II explores how U.S. trade and investment treaties have fostered environmental injustice in Latin American countries, thus leading to the rise of local EJMs, which adopt the tactics of the U.S. EJM. Part III lists the array of practical issues and procedural mechanisms that limit non-U.S. citizens' access to tribunals. It then considers how, like their counterparts in the United States, foreign environmental justice communities pursue litigation for additional reasons besides judgments. Part IV argues that foreign persons injured by investor activities can use the citizen submission mechanism in U.S. trade treaties much like U.S. communities use administrative actions as a strategic part of a political campaign, highlighting the example of the Metales y Derivados (Metales) lead recycling facility in Tijuana, Mexico.<sup>31</sup>

## I. THE U.S. ENVIRONMENTAL JUSTICE MOVEMENT: AN OVERVIEW

### A. *Background: Activism to Achieve Distributive, Procedural, and Corrective Justice*

Noted sociologist Professor Robert Bullard characterized “urban ghettos, barrios, ethnic enclaves, rural ‘poverty pockets,’ and Native American reservations” as “invisible communities.”<sup>32</sup> White and middle-class

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28. Raustiala, *supra* note 26, at 393, 397.

29. *See infra* Part III.A.

30. *See infra* Part IV.

31. CITIZEN SUBMISSION ON ENVTL. ENFORCEMENT, METALES Y DERIVADOS FINAL FACTUAL RECORD, SEM-98-007 (Feb. 11, 2002), <http://www3.cec.org/islandora/en/item/11644-expediente-de-hechos-metales-y-derivados-derecho-y-pol-ticas-ambientales-en-am-en.pdf>. All factual records cited in this Article are available online: *Registry of Submissions*, COMM'N FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/registry-of-submissions> (last visited June 22, 2016).

32. Robert D. Bullard, *Environmental Racism and “Invisible” Communities*, 96 W. VA. L. REV. 1037, 1046 (1994).

communities enjoyed political success by insisting “not in my back yard” to environmentally hazardous activities, and they received faster and better governmental responses to their environmental complaints.<sup>33</sup> By contrast, the politically weak invisible communities existed where companies sited waste facilities and incinerators, engaged in or allowed hazardous operations like lead smelting, and extracted natural resources that required dangerous pesticides or left toxic byproducts.<sup>34</sup> Because corporations often engaged in polluting activities with government permission but without adequate governmental oversight, the laws did not adequately protect these communities.<sup>35</sup> Instead, “those with political and economic power have used environmental laws in ways which have resulted in poor people bearing a disproportionate share of environmental hazards.”<sup>36</sup>

To change this status quo, the communities themselves had to become more visible.<sup>37</sup> Rather than work with a political and judicial system stacked against them, they adopted the tactics of the civil rights and anti-toxics movements to disrupt that system.<sup>38</sup> Rather than the top-down structure of mainstream environmentalists, communities engaged in grassroots activism.<sup>39</sup> Rather than seeking to save flora and fauna that existed beyond some frontier, they fought to protect an environment that they redefined as the places where people “live, work, play, and go to school.”<sup>40</sup> Many commentators trace the origin of the EJM to Warren County, North Carolina,<sup>41</sup> so its example illustrates the movement well.

Following the illegal spraying of waste contaminated with polychlorinated biphenyls along a stretch of highway in North Carolina in 1978, the state decided to construct a storage site for the contaminated soil near Afton in Warren County, which was primarily African American.<sup>42</sup> Community

33. *Id.* at 1041; Cole, *supra* note 21, at 646–47.

34. Bullard, *supra* note 32, at 1041; Monsma, *supra* note 1, at 454–55; see Pearl Kan, *Towards a Critical Poiesis: Climate Justice and Displacement*, 33 VA. ENVTL. L.J. 23, 36 (2015) (“Environmental justice recognizes that environmental hazards, externalities largely associated with the frenetic productivity of our capitalist system, are calculated to burden the most vulnerable and the poor because there corporate power faces the least resistance—or so they think.”).

35. COLE & FOSTER, *supra* note 19, at 11; Kang, *supra* note 20, at 122; Yang, *supra* note 12, at 488.

36. Cole, *supra* note 21, at 642.

37. Kan, *supra* note 34, at 35–36 (“The discursive and disruptive force of the environmental justice movement ultimately makes visible communities and peoples that the late modern machine discounts as disposable.”).

38. COLE & FOSTER, *supra* note 19, at 20–23; see *id.* at 20 (“Perhaps the most significant source feeding into today’s Environmental Justice Movement is the Civil Rights Movement of the 1950s, 1960s, and 1970s.”); *id.* at 22–23 (calling the anti-toxics movement the “second major tributary” of the EJM river); Kan, *supra* note 34, at 39 (“To say no to the status quo is inherently destabilizing.”).

39. COLE & FOSTER, *supra* note 19, at 12–13, 16.

40. COLE & FOSTER, *supra* note 19, at 16; Robert D. Bullard, *Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 459 (1999).

41. *E.g.*, Kang, *supra* note 20, at 130.

42. Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 GOLDEN GATE U. ENVTL. L.J. 9, 11–15 (2007).



members launched a campaign against the dump.<sup>43</sup> That campaign started with meetings—some organized by community leaders and others sponsored by the government—but soon turned to action, such as raising money to conduct an independent scientific assessment of the site.<sup>44</sup> Community members, with the aid of the local chapter of the NAACP and a church, tried but failed to enjoin construction of the site through a lawsuit claiming racial discrimination and violation of state and local environmental laws.<sup>45</sup> On the first day that contaminated soil arrived, activists marched on the site to block the dump trucks and orchestrated additional protests to garner national media attention.<sup>46</sup> Though not successful in stopping the dump, these protests led to increased voter registration by minorities, who then elected African Americans to local government, who in turn passed laws creating buffer zones around the site and forbidding new dumping.<sup>47</sup> When the polychlorinated biphenyls later started to leak from the site, community members were part of the task force for detoxifying the site.<sup>48</sup> The task force required every contractor to appear at public meetings and explain its role in the process and how the process would work.<sup>49</sup>

This activism morphed into a national EJM that scholars have recognized as a quest for several intersecting component “justices.”<sup>50</sup> Distributive justice addresses “the disproportionate public health and environmental risks borne by people of color and lower incomes.”<sup>51</sup> While economic benefits flow from industrial development, transportation, and waste management, “the distribution of the benefits and the costs is inequitable, and thereby unjust.”<sup>52</sup> For example, the polychlorinated biphenyls had contaminated hundreds of miles of North Carolina highway, so the perception was that Warren County, which had the second-highest percentage of African Americans in the state, would assume the risks of a toxic waste dump so that whiter communities in other parts of the state would not have to.<sup>53</sup> Numerous studies show a correlation between minority communities and higher levels of exposure to

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43. *Id.* at 12–15.

44. *Id.* at 14–19.

45. *Id.* at 20.

46. *Id.* at 20–28.

47. *Id.* at 28–31.

48. *Id.* at 31–36.

49. *Id.* at 34.

50. *E.g.*, Kuehn, *supra* note 22, at 10,681–82.

51. *Id.* at 10,684; *see* FOSTER & COLE, *supra* note 19, at 10 (“Environmental hazards are inequitably distributed in the United States, with poor people and people of color bearing a greater share of pollution than richer people and white people.”); Bullard, *supra* note 32, at 1041 (writing that environmental justice involves “unequal protection, differential exposures, and unequal enforcement of environmental, public health, civil rights, and housing laws”).

52. Mihaela Popescu & Oscar H. Gandy, Jr., *Whose Environmental Justice? Social Identity and Institutional Rationality*, 19 J. ENVTL. L. & LITIG. 141, 189 (2004); *see* Allan Kanner, *Environmental Justice, Torts and Causation*, 34 WASHBURN L.J. 505, 506 (1995) (writing that “toxic communities” bear the health, economic, and quality of life risks and burdens).

53. Burwell & Cole, *supra* note 42, at 11, 14–15.

environmental hazards like automobiles, industrial facilities, toxic waste disposal and incinerators, and toxic products like lead paint.<sup>54</sup> Distributive justice seeks to remedy this imbalance.

The equal distribution of environmental harms and benefits requires procedural justice, which deals with the right to equal concern and respect in the political decisions about how those harms and benefits are to be distributed.<sup>55</sup> Procedural justice emphasizes the need for democratic decisions based on “inclusiveness, representation, parity, and communication.”<sup>56</sup> Not only must the process be designed to lead to fair outcomes, but affected communities must have access to legal and technical resources and an equal voice in every level of decision making.<sup>57</sup> For example, in Warren County, governmental authorities invited residents to informational meetings prior to construction of the facility, but the residents had no say in the siting decision.<sup>58</sup> By contrast, after protests that forced changes in local government, citizens were part of the task force for addressing leaks at the site. They acquired a meaningful voice because the government followed their insistence on detoxifying the site rather than relocating the waste to another community.<sup>59</sup>

The movement pushes its agenda through protests and other confrontational tactics,<sup>60</sup> so it is no surprise that activists make use of adversarial proceedings against the agents of harm as well as governmental decision makers as part of their strategy.<sup>61</sup> Two communications professors go so far as to claim that the “identity of this movement emerged gradually through interaction with the actors that contested it, such as the courts, the administrative agencies and the agents of harm.”<sup>62</sup> Ideally, litigation can prevent environmental threats before they occur by challenging siting decisions

54. COLE & FOSTER, *supra* note 19, at 10; Lisa A. Binder, *Religion, Race, and Rights: A Rhetorical Overview of Environmental Justice Disputes*, 6 WIS. ENVTL. L.J. 1, 6–7 (1999); Monsma, *supra* note 1, at 451.

55. Kuehn, *supra* note 22, at 10,688 (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 273 (1977)).

56. *Id.* (citing ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, & ENVIRONMENTAL QUALITY* 12 (1990)).

57. *Id.* at 10,688–89.

58. Burwell & Cole, *supra* note 42, at 14–15.

59. *Id.* at 33–35.

60. *E.g.*, KEVIN MICHAEL DELUCA, *IMAGE POLITICS* 74–78 (1999) (describing theatrical protests like carrying the casket of “Kentucky” to the state capital so that it could be “buried in waste”); *see id.* at 80 (referring to the “use of confrontational tactics and local activists” by environmental justice groups); Roesler, *supra* note 19, at 231 (writing that today’s calls for environmental justice are shaped by a history of opposition to both law and mainstream environmentalism).

61. *E.g.*, Cole, *supra* note 20, *passim*; Kang, *supra* note 20, *passim*; Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENVTL. AFF. L. REV. 27 *passim* (2004); *see* Popescu & Gandy, *supra* note 52, at 152–57 (identifying local, state, and federal administrative agencies and the agents of harm—those “involved in the management of waste, the production of energy, or the production of goods and services that have accompanying ‘spillover effects’”—as defendants in environmental justice lawsuits).

62. Popescu & Gandy, *supra* note 52, at 143.

and permits.<sup>63</sup> Often, the harm to persons and property already exists—and sometimes the source of the harm remains—so communities must litigate if they are to receive compensatory and equitable relief.<sup>64</sup>

The desire for remedies aligns the EJM with the origins of environmental law in claims based on tort, such as nuisance and trespass for harm to property and negligence and strict liability for harm to persons.<sup>65</sup> This association with tort law means that corrective justice is another aim of the EJM. Professor Robert Kuehn prefers the term corrective justice to its more narrow cousin retributive justice because it allows both for the punishment of those who violate environmental laws as well as remediation of injuries caused by harmful acts.<sup>66</sup> Though remedies imply compensatory justice—money damages that bring the victim to the condition he or she would have been in had the injurious event not occurred—the term “corrective” rejects any suggestion that the payment alone makes an unjust action acceptable.<sup>67</sup> After all, “invisible communities” seek visibility to change the status quo, so the ability to vindicate claims shows the unequal burdens these people have borne.<sup>68</sup>

### B. Litigation and Environmental Justice

If we take the traditional view that litigation is about winners and losers, then environmental justice plaintiffs almost always lose because they fail to obtain a judgment.<sup>69</sup> Litigation is so problematic that environmental justice attorneys “strongly recommend *against* lawsuits whenever possible.”<sup>70</sup> Community activists do not pin their hopes on litigation alone, however, but employ it as one of several complementary tactics to achieve their objectives. Litigation has rhetorical purposes, such as bolstering the community campaign

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63. Bullard, *supra* note 40, at 454.

64. April Hendricks Killcreas, Comment, *The Power of Community Action: Environmental Injustice and Participatory Democracy in Mississippi*, 81 MISS. L.J. 769, 770–71 (2012); see Kanner, *supra* note 52, at 507 (discussing private tort actions for existing harm versus increased risk); Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 485, 556 (1997) (discussing tort actions when the defendant’s conduct causes present physical or property injury).

65. Albert C. Lin, *The Unifying Role of Harm in Environmental Law*, 2006 WIS. L. REV. 897, 903–05 (2006); Northern, *supra* note 64, at 453; see La Londe, *supra* note 61, at 42 (writing that, prior to the passage of environmental laws, plaintiffs had to find relief through common law torts); Lin, *supra*, at 925–26 (claiming that the broad reach of tort is appropriate for environmental law because it seeks to compensate for harm and to foster corrective justice).

66. Kuehn, *supra* note 22, at 10,693–94; see *id.* at 10,693 (“Corrective justice involves not only the just administration of punishment to those who break the law, but also a duty to repair the losses for which one is responsible.”).

67. *Id.* at 10,694.

68. See Kanner, *supra* note 52, at 506 (writing that “toxic communities” must have the “ability to vindicate personal injury and property damage claims” because they bear the health, economic, and quality of life risks and burdens).

69. Kuehn, *supra* note 22, at 10,698; La Londe, *supra* note 61, at 34–35; Monsma, *supra* note 1, at 467–68.

70. Cole, *supra* note 20, at 541 (emphasis in original).

by providing a key data point to articulate a message, identify shared interests, and build a coalition, as well as indirectly attacking the agent of harm by engaging additional stakeholders such as regulators. Litigation also gives plaintiffs the opportunity to negotiate and perhaps force a settlement, which can go beyond compensation to include abatement or reduction of the harmful activity and remediation of polluted sites.

### 1. *The Limits of Litigation*

Environmental justice plaintiffs can potentially pursue several different legal claims, including those related to the Constitution, civil rights, various torts, and environmental statutes. Lawsuits based on constitutional claims have failed.<sup>71</sup> Communities with a large proportion of minority residents have challenged the siting and operation of waste facilities and dumps as violating the equal protection clause.<sup>72</sup> However, in light of Supreme Court precedent rejecting discriminatory impact as “without independent constitutional significance,”<sup>73</sup> these claims cannot clear the high hurdle of proving discriminatory intent.<sup>74</sup>

Title VI of the Civil Rights Act initially appeared to offer a way around intent when the Supreme Court in *Alexander v. Choate* ruled that federal agency regulations promulgated under Section 602—which combats discrimination against minorities by any program or activity that receives federal funds—could address “actions having an unjustifiable disparate impact on minorities.”<sup>75</sup> For example, in *Chester Residents Concerned for Quality Living v. Seif*, a community group prevailed against the Pennsylvania Department of Environmental Quality when the court ruled that its permit for a soil remediation facility violated EPA regulations on disparate impact.<sup>76</sup> Section 602 has no express private right of action, however, and the Supreme Court in *Alexander v. Sandoval* later ruled that Title VI does not include an implied private right of action to enforce Section 602 regulations, nor does

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71. *E.g.*, Killcreas, *supra* note 64, at 801 (calling civil rights lawsuits to remedy environmental harms “largely ineffective from a legal standpoint”); Monsma, *supra* note 1, at 446 (writing that major civil rights remedies “have been essentially unsuccessful” in addressing environmental justice impacts); Uma Outka, Comment, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 218 (2005) (calling equal protection “one of the most disappointing failures” for remedying environmental injustice).

72. *E.g.*, R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff’d*, 977 F.2d 573 (4th Cir. 1992); E. Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb Cty. Planning & Zoning Comm’n, 706 F. Supp. 880 (M.D. Ga. 1989), *aff’d*, 888 F.2d 1573 (11th Cir. 1989), *opinion amended and superseded on denial of reh’g*, 896 F.2d 1264 (11th Cir. 1989).

73. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 (1977).

74. Cole, *supra* note 20, at 538–39; *see* Linden, *supra* note 22, at 181–82 (writing that plaintiffs often lack hard evidence of intent).

75. 469 U.S. 287, 293 (1985).

76. 132 F.3d 925, 927 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998).

Section 602 create a private remedy.<sup>77</sup> Justice Stevens in dissent predicted that plaintiffs would bring 42 U.S.C. § 1983 claims to enforce Title VI regulations,<sup>78</sup> but section 1983 requires not merely the violation of a federal law but the violation of a federal right.<sup>79</sup> Since *Sandoval* and *Gonzaga University v. Doe*,<sup>80</sup> all circuit courts considering the applicability of section 1983 to Title VI have held that Title VI does not create an actionable right.<sup>81</sup>

Environmental justice plaintiffs can seek both monetary and equitable remedies through tort lawsuits like negligence, strict liability, trespass, and nuisance.<sup>82</sup> As with constitutional claims, tort lawsuits often fail to result in monetary redress, and, even if the plaintiffs prevail, “abatement of the problem is not a guaranteed remedy.”<sup>83</sup> In seeking to recover for personal injury under any of these torts, “significant problems of proof often preclude a finding of liability against the defendant enterprise.”<sup>84</sup> The cause-in-fact element is difficult in any toxic tort lawsuit based on negligence because it requires complex scientific and medical proof.<sup>85</sup> The problem is exacerbated for persons of color and the poor, who are often exposed to numerous environmental background hazards in their neighborhood, job, and food, thus making it difficult to show that the specific polluter is more likely than not the cause in fact of a plaintiff’s harm.<sup>86</sup> Assuming the polluting activity meets the multifactor test to be considered abnormally dangerous,<sup>87</sup> that abnormally dangerous activity must still cause harm,<sup>88</sup> so this cause of action likewise fails. The presence of multiple sources of pollution also makes recovery with property torts like trespass and nuisance against any one defendant problematic because community members have difficulty marshalling proof that the individual defendant’s trespass was more likely the cause of harm than other

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77. 532 U.S. 275, 288–89 (2001); see La Londe, *supra* note 61, at 34–35 (writing that “the decision in *Alexander v. Sandoval* closed the door to private individuals seeking to bring environmental justice claims under § 602 of Title VI”).

78. *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting) (citing 42 U.S.C. § 1983 (2012)).

79. Linden, *supra* note 22, at 186.

80. 536 U.S. 273, 283–84, 286–87 (2002) (holding that statutes which create no privately enforceable rights cannot be enforced under § 1983 and restating the finding in *Sandoval* that there was no evidence of intent by Congress to create an implied right of action under Title VI).

81. La Londe, *supra* note 61, at 42 (calling *Gonzaga University v. Doe* the “death knell to bringing disparate-impact claims under § 1983”); Linden, *supra* note 22, at 187 (citing *Save Our Valley v. Sound Transit*, 335 F.3d 932, 936, 939 (9th Cir. 2003) (listing Third, Fourth, Ninth, and Eleventh Circuits)); *Johnson v. City of Detroit*, 446 F.3d 614, 629 (6th Cir. 2006).

82. La Londe, *supra* note 61, at 42–46; Northern, *supra* note 64, at 543.

83. Kang, *supra* note 20, at 143.

84. Northern, *supra* note 64, at 543–44.

85. Kuehn, *supra* note 22, at 10,698.

86. Cole, *supra* note 21, at 621–31; Kanner, *supra* note 52, 511.

87. La Londe, *supra* note 61, at 45.

88. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 20(a) (AM. LAW. INST. 2010) (“An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.”); *id.* at § 20 cmt. f (noting that strict liability is appropriate when the defendant’s role in causing harm is sufficiently determinate).

sources of pollution,<sup>89</sup> or that the defendant's conduct was unreasonable enough to allow compensatory or injunctive relief in light of other polluting sources.<sup>90</sup> Property torts have other limitations: low property values mean low recoveries, the equitable balancing of interests under private nuisance might not lead to abatement of the activity, and federal or state statutes might preclude a nuisance suit.<sup>91</sup>

Environmental justice plaintiffs enjoy their best success with lawsuits involving environmental statutes like the National Environmental Protection Act (NEPA).<sup>92</sup> NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."<sup>93</sup> "Major Federal actions" include undertaking or authorizing federal projects, issuing federal permits, dispensing federal funds, or even the failure to act where such omissions are reviewable by courts.<sup>94</sup> One consideration for an EIS is environmental justice: the Council on Environmental Quality has established guidance that "[e]ach federal agency should analyze the environmental effects, including human health, economic, and social effects of Federal actions, including effects on minority populations, low-income populations, and Indian tribes, when such analysis is required by NEPA."<sup>95</sup> An agency's failure to follow just one of NEPA's many procedural requirements *might* lead to remedies like the revocation of a permit.<sup>96</sup> Because NEPA is procedural rather than substantive, plaintiffs are unlikely to halt an already-approved project.<sup>97</sup> Instead, "the legal remedies often only require the simple reissuance of environmental impact assessments with appropriate notice and comment periods."<sup>98</sup> If plaintiffs cannot prevent a siting, then recovering compensatory or injunctive relief is impossible.

Another drawback to litigation—whether it sounds in civil rights, tort, environmental statutes, or some combination thereof—is that it consumes money and time.<sup>99</sup> Environmental justice plaintiffs by some definitions are

89. La Londe, *supra* note 61, at 44–45; Northern, *supra* note 64, at 544–45.

90. La Londe, *supra* note 61, at 44–45; Northern, *supra* note 64, at 549–50.

91. La Londe, *supra* note 61, at 44–45; Northern, *supra* note 64, at 545–46.

92. Cole, *supra* note 20, at 527–28.

93. 42 U.S.C. § 4332(C) (2012).

94. Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 603–04 (2006) (citing 40 C.F.R. § 1508.18 (2005)).

95. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE; GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 4 (1997).

96. Killcreas, *supra* note 64, at 799–800.

97. La Londe, *supra* note 61, at 48–49 ("While NEPA can be an effective tool in dissuading the potential siting of a harmful environmental hazard, it cannot totally prevent the siting, as it is merely a procedural statute."); *see also* Outka, *supra* note 94, at 608–18 (identifying numerous gaps in NEPA like the timing and structure of public participation, statutory and judicial exemptions, and conflicts with other laws).

98. Macey & Susskind, *supra* note 21, at 435–36.

99. *E.g.*, Kang, *supra* note 20, at 138 (writing that "court cases require extensive investment of both time and money"); Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 223, 250

people of limited means,<sup>100</sup> so they typically cannot afford attorney's fees, especially for attorneys who specialize in highly technical environmental statutes.<sup>101</sup> Even if the plaintiffs secure pro bono assistance or connect with an environmental law clinic, proving complex issues of causation and harm requires scientific and medical experts.<sup>102</sup> Rules of procedure and evidence make time the enemy: court cases are slow, and for sources of pollution that started decades earlier, witnesses may be hard to find or the culpable defendant may no longer exist.<sup>103</sup> Contrast the communities with their adversaries, corporations that by comparison have near-unlimited resources. Instead of holding a bake sale to pay for an environmental assessment,<sup>104</sup> they "have the best lawyers, scientists, and government officials money can buy."<sup>105</sup> As one environmental justice litigator and scholar writes, taking the struggle "out of the streets and into the courts plays right into the polluters' hands."<sup>106</sup>

## 2. *Litigation Can Be a Tactical Element in a Broader Strategy*

Despite the litigation rarely resulting in judgments, injunctions, or specific performance, some commentators characterize environmental justice as a combination of legal and community action.<sup>107</sup> Courtroom victory is an objective, but a short-term gain against a single bad actor means little if the community cannot change a system that institutionalizes environmental harm.<sup>108</sup> Advocates recognize that a single lawsuit is not an effective vehicle for this broader change, but litigation can nevertheless be one tactic that supports—though not replaces—a strategy of community activism.<sup>109</sup> One environmental justice commentator adopted the language of civil rights litigation, writing that it "can and should serve lawyer and client as a community-organizing tool, an educational forum, a means of obtaining data, a method of exercising political leverage, and a rallying point for public

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(1995) (writing that litigation of environmental claims under any theory is "expensive and time consuming"); *id.* at 251 (calling litigation "costly and slow").

100. Kang, *supra* note 20, at 123 ("At the [Environmental Law and Justice Clinic at Golden Gate University School of Law], we define environmental justice ('EJ') communities as low-income communities and communities with a majority population who are people of color."); see COLE & FOSTER, *supra* note 19, at 33 (characterizing grassroots environmentalists as "largely, though not entirely, poor or working-class people").

101. Killcreas, *supra* note 64, at 800; Cole, *supra* note 20, at 528.

102. Kang, *supra* note 20, at 138.

103. *Id.*; Northern, *supra* note 64, at 555–56.

104. Burwell & Cole, *supra* note 42, at 14.

105. Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1996 (1992).

106. *Id.*

107. *E.g.*, Kanner, *supra* note 52, at 507 (writing that environmental justice requires private law actions in conjunction with political action); Killcreas, *supra* note 64, at 773 (stating that environmental justice combines litigation with community action).

108. Cole, *supra* note 21, at 642–44.

109. *Id.* at 668.

support.”<sup>110</sup> Litigation is most effective when it empowers the community because the group can maximize the power of a lawsuit for both short-term and long-term change.

Environmental justice advocates see roles for litigation that relate to the recognition that stakeholders besides the polluter are part of every environmental dispute.<sup>111</sup> Consider the divergent views that could exist in a community: some local residents might favor an industrial facility because it provides employment, while others with homes near that facility oppose it.<sup>112</sup> To build a broad-based coalition against the facility, activists must therefore articulate a clear message so that they can educate about issues and identify shared interests.<sup>113</sup> A carefully-worded complaint can be the platform to announce the message, and filing the complaint generates publicity to spread the message.<sup>114</sup> The lawsuit also helps strengthen the community group outside of the courtroom by providing a topic of conversation and means for strategic action.<sup>115</sup>

Environmental justice scholars refer to street-level struggles in grassroots movements,<sup>116</sup> but disseminating the message, maintaining the conversation, and mobilizing the actors frequently occur in the digital world. Activists and advocates maintain websites where they can easily and inexpensively share data about local causes with a global audience, including the progress of litigation.<sup>117</sup> As one environmental justice group writes on its “Why We Litigate” web page: “Litigation, often in conjunction with focused, grassroots organizing and coalition building efforts, amplifies the voice of people of color in the low-income neighborhoods that suffer the most from adverse health effects of pollution, such as asthma, cardiovascular illness, and cancer.”<sup>118</sup> Lawsuits in conjunction with political action can therefore help organize the community and thus build morale and political momentum.<sup>119</sup>

This momentum is key for correcting problems that are political rather than legal in nature.<sup>120</sup> Environmental laws are neutral, but they are applied through a process that is political.<sup>121</sup> The poor and minorities have historically

110. *Id.* (quoting Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 513 (1976)).

111. Todd, *supra* note 25, at 343–46.

112. Popescu & Gandy, *supra* note 52, at 154.

113. Binder, *supra* note 54, at 61; Macey & Susskind, *supra* note 21, at 437–48.

114. See COLE & FOSTER, *supra* note 19, at 105 (calling litigation a way to frame the political struggle); Cole, *supra* note 105, at 1997.

115. Macey & Susskind, *supra* note 21, at 437.

116. *E.g.*, COLE & FOSTER, *supra* note 18, at 12–13, 16; Cole, *supra* note 105, at 1996.

117. See Kang, *supra* note 20, at 124 n.5 (describing the pollution maps contained on an environmental justice group’s website); *id.* at 132 n.28 (citing law school clinic websites that list cases challenging state air standards plans).

118. *Why We Litigate*, CMTY’S FOR A BETTER ENVT., <http://www.cbecal.org/legal/why-we-litigate-2/> (last visited May 19, 2016).

119. Cole, *supra* note 20, at 541; Cole, *supra* note 105, at 1997.

120. Cole, *supra* note 20, at 541.

121. Cole, *supra* note 21, at 646.



been left out of this process, so their communities bear a disproportionate share of environmentally hazardous facilities coupled with lower enforcement of environmental regulations.<sup>122</sup> More to the point, litigation by itself will not result in change because industrial and government actors often cause harm without violating the law.<sup>123</sup> Because their power is in people rather than money, environmental justice communities need to employ litigation in a way that supports the movement.<sup>124</sup>

Consider *Bean v. Southwestern Waste Management Corp.*, where persons from a predominantly African-American neighborhood in Houston sued regulators and corporate owners and operators to block construction of a proposed waste facility.<sup>125</sup> Though the plaintiffs lost, the case led to several long-term victories for the community. “[R]esidents sent a message through their protests that they would fight any future attempts to site unwanted facilities in their neighborhood.”<sup>126</sup> Lawsuits like *Bean* also reveal more, such as how “outsider” lawyers and experts can help with regulations and scientific reports.<sup>127</sup> Residents not only obtained the help of an attorney, Linda Bullard, but also her social scientist husband, Professor Robert Bullard, who conducted studies for that lawsuit and continued to engage in environmental justice scholarship.<sup>128</sup> Plus, the suit did result in change: Houston restricted dumping of garbage near public facilities like schools and prohibited city-owned trucks from dumping at the landfill, and “the Texas Department of Health began to require demographic data from landfill proponents.”<sup>129</sup>

Suits against governmental bodies also provide an important avenue for combatting polluters. Many proposed or ongoing activities need permits under federal law or must abide by state regulations or local ordinances,<sup>130</sup> making administrative agencies key stakeholders. Sometimes communities can obtain direct relief through suits against the permitting authority. A coalition of environmental justice groups won an injunction preventing the South Coast Air Quality Management District from selling pollution credits for the construction of eleven new power plants in the Los Angeles area.<sup>131</sup> In another case brought by a coalition, a trial court set aside the City of Richmond, California’s

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122. *Id.* at 646–47.

123. *Id.* at 642–43.

124. *Id.* at 650.

125. 482 F. Supp. 673, 674–75 (S.D. Tex. 1979).

126. Cole, *supra* note 20, at 539 n.79 (citing BULLARD, *supra* note 56, at 54).

127. Cole, *supra* note 21, at 651.

128. Cole, *supra* note 20, at 539 (citing BULLARD, *supra* note 56, at 138–39).

129. Cole, *supra* note 20, at 539, 539 n.79.

130. La Londe, *supra* note 61, at 36; Outka, *supra* note 94, at 611–12 (writing that several states administer water, air, and conservation statutes, and that sixteen states have their own versions of NEPA, referred to as SEPAs).

131. Decision on Ruling on Respondent’s Motion for Summary Adjudication at 32, Nat. Res. Def. Council, Inc. v. S. Coast Air Quality Mgmt. Dist., No. BS 110792 (Los Angeles Cty. Super. Ct. Jul. 28, 2008); Kang, *supra* note 20, at 131–32.

approved expansion of a Chevron refinery.<sup>132</sup> Lawsuits based on federal or state environmental statutes and regulations also give courts the opportunity to interpret those rules to show whether governments and governmental agencies have acted properly.<sup>133</sup> As one litigator writes, NEPA “forces government agencies to become more environmentally conscious and accountable for their decisions.”<sup>134</sup>

Another effect is more long-term. For example, a NEPA lawsuit can delay the operation of an environmentally hazardous facility, thus driving up costs and eliminating the benefit of siting the facility in a minority neighborhood.<sup>135</sup> The cumulative effects of these environmental justice suits have the power to force corporations to change their practices from pollution control to pollution prevention. Because the increased cost of siting waste has caused companies to start paying a truer social cost, corporations have responded by minimizing their waste production.<sup>136</sup>

One potential outcome of a lawsuit is the same as for all litigation: “negotiated agreements between corporations and environmental justice communities.”<sup>137</sup> Corporate polluters are not only blind to invisible communities but frequently deaf to their voices as well, so lawsuits make them listen by requiring a response; accordingly, litigation can be “uniquely successful in motivating pollution sources to negotiate with community groups” by forcing corporate decision makers to consider their positions.<sup>138</sup> Residents of low-income or minority communities have brought toxic tort lawsuits for industrial accidents or ground contamination that resulted in multi-million-dollar settlements.<sup>139</sup> For example, RSR Corporation had acquired a lead smelter located near low-income housing in the predominantly black area of West Dallas in 1971.<sup>140</sup> Studies as early as 1972 showed that emissions from the smelter caused lead poisoning in children, yet officials ignored that data until initiating a comprehensive clean-up plan in 1992, despite a zoning compliance lawsuit by the City of Dallas in 1974 and an emissions lawsuit by the State of Texas in 1983.<sup>141</sup> Despite decades of inaction by corporate and government authorities, residents did obtain relief from RSR after initiating

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132. Kang, *supra* note 20, at 130–31 (citing *Cmtys. for a Better Env't. v. City of Richmond*, No. N08-1429 (Cal. Super. Ct. June 4, 2009) (unreported minute order)).

133. Kang, *supra* note 20, at 136, 144–45.

134. La Londe, *supra* note 61, at 49.

135. *Id.* at 48–49.

136. Cole, *supra* note 21, at 644–45.

137. Popescu & Gandy *supra* note 52, at 146; see Macey & Susskind, *supra* note 21, at 435 (noting that incorporation of civil rights claims to address environmental harms has not provided a legal remedy “with the exception of a negotiated settlement”).

138. Kang, *supra* note 20, at 136, 144–45.

139. Kuehn, *supra* note 22, at 10,697.

140. Bullard, *supra* note 32, at 1043; *Burden of Lead: Timeline of Smelter Operations*, DALLAS MORNING NEWS (Dec. 2012), <http://www.dallasnews.com/burdenoflead/20121214-timeline-of-smelter-operations.ece> [hereinafter *Burden of Lead*].

141. Bullard, *supra* note 32, at 1043–44; *Burden of Lead*, *supra* note 140.

litigation, however, first with a \$20 million settlement of claims in the early 1980s, and later with a \$16.1 million settlement of similar claims in 1995.<sup>142</sup>

Settlements need not be only about money; to the contrary, a quick victory may disempower a community movement by removing “an important organizing tool” and thus make it more difficult to sustain a lasting power base that can address systemic issues and long-term correctives.<sup>143</sup> Effective litigation—including negotiated settlements and political pressure—can lead to cessation of harmful conduct, remediation of hazardous areas, and greater participation in environmental decision making. For example, the residents of West Dallas and their West Dallas Coalition for Environmental Justice (Coalition) maintained their organization to achieve additional goals.<sup>144</sup> The Coalition sued the EPA; though the Comprehensive Environmental Response, Compensation, and Liability Act claims were ultimately dismissed,<sup>145</sup> the case encouraged the EPA to remove hazardous soil from the RSR site for storage at a hazardous waste facility.<sup>146</sup> Coalition members also turned their attention to other sources of harm, and fought to alleviate them through, for example, a court challenge to the renewal of a permit for an industrial waste storage and processing facility.<sup>147</sup> The owners and Coalition settled out of court, and “the company agreed to decrease the number of gallons of hazardous waste that it would process, incorporate clean-up and disposal services, and hire a certain proportion of workers from the surrounding neighborhood.”<sup>148</sup>

Another case involved a coalition of environmental groups and residents that sued the City of New York and the City Department of Environmental Protection for nuisance related to the North River Pollution Control Plant in West Harlem.<sup>149</sup> The parties’ settlement included allowing the community groups to be “co-enforcers” of an earlier consent order from the state, mandating strict enforcement of corrective actions, requiring measurements and studies of the facility, and making a \$1.1 million pledge to the “North River Fund” to be administered by the community groups.<sup>150</sup>

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142. *Burden of Lead*, *supra* note 140.

143. Cole, *supra* note 22, at 651.

144. Macey & Susskind, *supra* note 21, at 465–66.

145. *W. Dallas Coal. for Env'tl. Justice v. United States*, No. 3:91-CV-2615-R, 1998 WL 892122, at \*2 (N.D. Tex. Dec. 14, 1998).

146. Macey & Susskind, *supra* note 21, at 465–66.

147. *Id.* at 466 (citing *Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. for Env'tl. Justice*, 962 S.W.2d 288, 290 (Tex. Ct. App. 1998)).

148. *Id.*

149. Vernice D. Miller, *Planning, Power and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant*, 21 *FORDHAM URB. L.J.* 707, 720 (1994) (citing *West Harlem Env'tl. Action v. New York City Dep't Env'tl. Protection*, No. 92-45133 (N.Y. Sup. Ct. May 17, 1993)).

150. *Id.* at 721 (citing Stipulation of Settlement 3–22, *West Harlem Env'tl. Action*, No. 92-45133 (filed Jan. 4, 1994)).

C. *Administrative Actions and Environmental Justice*

Access to justice for affected communities means more than pursuing judgments in court: it includes enlarging the opportunities for corrective justice by providing practical and effective rights and by expanding accountability and remedies.<sup>151</sup> To create linkages across “access chokepoints,”<sup>152</sup> claimants need alternatives to ordinary courts and litigation procedures.<sup>153</sup> One alternative that may be more effective for achieving the same tactical objectives as environmental justice litigation is administrative advocacy.<sup>154</sup>

1. *Administrative Actions with Regulatory Agencies: Overview and Criticisms*

Although the Supreme Court in *Sandoval* rejected a private right of action under section 602 of Title VI, section 602 still does allow “redress by filing an administrative complaint with an agency, asking it to enforce its regulations.”<sup>155</sup> Title VI prohibits federal agencies from providing funding to grant applicants that discriminate on the basis of race.<sup>156</sup> Section 602 requires every federal agency to issue regulations that describe how the agency will investigate, assess, and resolve complaints about racial discrimination.<sup>157</sup> A federal agency may deny funding to applicants whose practices have discriminatory effects.<sup>158</sup>

Take as an example the EPA. The siting of a waste facility or operation of a hazardous activity requires a government permit.<sup>159</sup> Almost every state and local environmental agency that issues such permits receives EPA funding.<sup>160</sup> EPA regulations specifically prohibit the use of discriminatory criteria in federal programs and the siting of a facility in an area where it will have a discriminatory effect.<sup>161</sup> Residents of communities of color affected by polluting activities can therefore initiate a complaint with the EPA against the agency that issued the siting or use permit.<sup>162</sup> If the EPA accepts the complaint

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151. William E. Davis & Helga Turku, *Access to Justice and Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 47, 49 (2011); Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 117, 128 (2010).

152. Galanter, *supra* note 151, at 117–18.

153. Davis & Turku, *supra* note 151, at 55.

154. Cole, *supra* note 21, at 667 (“Other tactics may be more useful in generating public pressure on an unresponsive bureaucracy or polluting corporation: tactics such as community organizing, administrative advocacy, or media pressure.”).

155. La Londe, *supra* note 61, at 36.

156. Bradford C. Mank, *Is There a Private Cause of Action under EPA’s Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 12 (1999).

157. *Id.*

158. *Id.* at 13.

159. La Londe, *supra* note 61, at 36.

160. See Mank, *supra* note 156, at 16.

161. Nondiscrimination in Programs Receiving Federal Assistance from the EPA, 40 C.F.R. § 7.35(b)–(c) (2016).

162. Kuehn, *supra* note 22, at 10,696.

for investigation, then it can seek an informal settlement between the parties.<sup>163</sup> If that fails, at least the EPA can gather more data by conducting a formal investigation; a finding that the fund recipient has violated the statute or regulations could trigger the EPA Administrator “to refuse, postpone or discontinue agency funding” of the recipient.<sup>164</sup> The threat of lost funding to a state or local regulatory agency indirectly benefits the affected community by prompting that agency to negotiate a settlement to eliminate the discriminatory practice.<sup>165</sup> Many other federal agencies, such as the Department of Transportation, have complaint procedures similar to the EPA’s.<sup>166</sup>

Commentators have highlighted numerous drawbacks to these administrative proceedings. Agencies do not adhere to their time limits for responding to complaints, and the process might drag on for years before a decision is rendered.<sup>167</sup> Administrative proceedings are not adversarial, so the complainant has no right to participate, thus limiting the voice of the environmental justice group and leaving it uninformed during the process.<sup>168</sup> Also, the agency conducts the investigation at its discretion.<sup>169</sup> Plaintiffs have no right to appeal the agency’s dismissal of a complaint,<sup>170</sup> while the recipient of federal funds does have a right to appeal an adverse decision.<sup>171</sup> From a corrective justice standpoint, perhaps the greatest limit is that administrative proceedings do not allow for substantive remedies like money damages or equitable relief.<sup>172</sup> Instead, the agency can only withhold federal funds from the recipient, a drastic remedy that the EPA hesitates to impose.<sup>173</sup>

These limitations can lead to frustrating results for an affected community; even when they collect and generate compelling data, the federal agencies might refuse to act upon it. For example, environmental justice scholar and advocate Luke Cole assisted the residents of Buttonwillow—a working-class town in the San Joaquin Valley—in their struggle to stop the expansion of a nearby toxic waste dump run by the Canadian company Laidlaw.<sup>174</sup> Because Buttonwillow is over 50 percent Latino, the residents brought Title VI complaints with the EPA and with the Department of Housing and Urban Development (HUD) against Laidlaw, Kern County (which received HUD funds), and the California Department of Toxic Substances Control (which

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163. Mank, *supra* note 156, at 21.

164. *Id.*

165. *Id.* at 21–22.

166. Linden, *supra* note 22, at 192 (citing Dep’t of Transp. Effectuation of the Title VI of the Civil Rights Act of 1964, 49 C.F.R. § 21.5(b) (2006)).

167. La Londe, *supra* note 61, at 38; Outka, *supra* note 71, at 227.

168. Linden, *supra* note 22, at 220; Outka, *supra* note 71, at 227.

169. Linden, *supra* note 22, at 220.

170. Outka, *supra* note 71, at 227.

171. La Londe, *supra* note 61, at 38.

172. Linden, *supra* note 22, at 221.

173. La Londe, *supra* note 61, at 38.

174. COLE & FOSTER, *supra* note 19, at 80–81, 95.

received EPA funds).<sup>175</sup> The EPA took six months to accept the complaint, and then it investigated only the state agency and dismissed the complaint against Laidlaw.<sup>176</sup> While HUD accepted the complaint against Kern County, HUD “never seriously investigated.”<sup>177</sup> Cole and his co-author Professor Sheila R. Foster thus concluded that administrative proceedings, rather than a tool to raise civil rights issues and put on pressure, “turned out to have little utility in the long run because of the inability or unwillingness of the federal agencies, EPA and HUD, to mount serious investigations.”<sup>178</sup>

## 2. Administrative Actions Can Be a Tactical Element in a Broader Strategy

The drawbacks of administrative actions need to be considered in light of the lack of remedy offered through litigation.<sup>179</sup> Commentators in the 1990s may have preferred section 602 lawsuits over section 602 administrative complaints,<sup>180</sup> but *Sandoval* has eliminated the former as an option.<sup>181</sup> Section 601 or Equal Protection claims require the near-impossible showing of discriminatory intent, while section 1983 claims are foreclosed because Title VI does not confer a federal right.<sup>182</sup> Tort-based suits typically fail to result in a judgment or injunction.<sup>183</sup> Even the law that offers the best chance of success, NEPA, is an indirect attack if the source of pollution is a private sector actor and usually leads to delay rather than cessation.<sup>184</sup> The successes of these lawsuits come in forcing negotiation, obtaining judicial interpretation of statutes and regulations, getting review of governmental agencies, driving up project costs, increasing awareness by collecting data on the injustices, and building coalitions.<sup>185</sup> These results are also available, and perhaps better attainable, through administrative proceedings.

Environmental justice advocates use litigation to force negotiation and possibly settlement, and they can employ administrative proceedings to the same effect. For example, inspectors from the Louisiana Department of Environmental Quality had documented dozens of violations of environmental laws by the Industrial Pipe waste facility and issued a closure order.<sup>186</sup> Residents of nearby Oakville filed a Title VI complaint with the EPA alleging

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175. *Id.* at 81, 96–97.

176. *Id.* at 99.

177. *Id.*

178. *Id.* at 99–100; see La Londe, *supra* note 61, at 38 (writing that administrative proceedings “may be an exercise in futility”).

179. See, e.g., Linden, *supra* note 22, at 180 (writing that administrative complaints have become “more valuable” because litigation using environmental laws has been weakened).

180. See Mank, *supra* note 156, at 24.

181. See *supra* notes 75–77 and accompanying text.

182. See *supra* notes 71–82 and accompanying text.

183. See *supra* notes 83–92 and accompanying text.

184. See *supra* notes 93–99 and accompanying text.

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

186. Kuehn, *supra* note 22, at 10,696.

that the Louisiana agency had not issued a single penalty or forced the site to shut down.<sup>187</sup> That action was resolved informally through a voluntary agreement.<sup>188</sup>

Because it can come early in the process, a negotiated settlement through administrative proceedings may be more advantageous than one reached through litigation by reducing time and therefore cost. These proceedings do not involve a court, so citizens can save additional costs by filing complaints without necessarily having to employ attorneys.<sup>189</sup> Realistically, communities will need legal advice, so administrative proceedings are not cost-free; indeed, cash-strapped communities will likely need expensive legal advice and expert studies to obtain enough information to file a complaint.<sup>190</sup> The communities need data based upon sufficient research and analysis to persuade the administrative agency, and many will lack the money to do so, even with pro bono assistance.<sup>191</sup> However, the communities do not have to engage in costly discovery and motion practice. Indeed, the federal agency bears the expense of the investigation, thus balancing out the lack of involvement by the communities.<sup>192</sup>

Administrative proceedings have additional value when considered as part of a larger environmental justice campaign. Affected communities see a system rigged against them, so their tactics aim to disrupt that system.<sup>193</sup> NEPA litigation can delay projects and drive up their costs, and administrative proceedings can do the same.<sup>194</sup> This tactic need not be petty: driving up corporate costs can be an intentional strategy to force changes in production practices.<sup>195</sup>

Administrative proceedings can help achieve other tactical aims as well. For example, advocates seek to tarnish a corporation's image to persuade it to drop risky behavior—or even abandon environmentally hazardous industries altogether.<sup>196</sup> Tarnishing an image requires getting the message out, and filing

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187. *Id.*

188. *Complaints Filed with EPA under Title VI of the Civil Rights Act of 1964*, EPA.GOV, <http://www2.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964> [<https://web.archive.org/web/20150823073806/http://www2.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964>] (last visited Aug. 25, 2015) (listing Complaint No. 03R-96-R6 against the LA DEQ as “Informally Resolved; Supported by voluntary agreement”).

189. Mank, *supra* note 156, at 24.

190. Linden, *supra* note 22, at 220.

191. *Id.*

192. *See* Mank, *supra* note 156, at 23–24 (comparing Title VI lawsuits with administrative complaints in article written prior to *Sandoval*).

193. COLE & FOSTER, *supra* note 19, at 20–23.

194. *Compare* La Londe, *supra* note 61, at 48–49 (discussing litigation), *with* Linden, *supra* note 22, at 221 (discussing administrative actions).

195. DELUCA, *supra* note 60, at 80–81.

196. *Id.*; *see* Benford, *supra* note 20, at 52 (“The environmental justice movement’s power lies in its capacity to disrupt the system rather than to seek to reform it.”).

an administrative complaint is a means of generating media attention.<sup>197</sup> For example, the Title VI complaints in the Buttonwillow campaign may not have resulted in meaningful action by the EPA or HUD, but those complaints generated statewide press coverage in the *San Francisco Chronicle*, the *San Francisco Examiner*, and the *Los Angeles Times*.<sup>198</sup>

As one example of a tactical, campaign-based administrative action, consider the fight of community group West Harlem Environmental Action, Inc. (WE ACT) against the New York City Metropolitan Transit Authority's (MTA) decision to re-open a diesel bus depot in a Harlem neighborhood.<sup>199</sup> Most of the Manhattan bus depots were in Northern Manhattan—where the majority of residents were minorities—rather than Southern Manhattan.<sup>200</sup> Because the MTA receives federal funds from the DOT, WE ACT brought a Title VI action with the DOT's Federal Transit Administration (FTA) alleging disparate impact by the MTA and its subsidiary New York City Transit Authority (NYCT).<sup>201</sup> WE ACT encountered a slow response to its complaint and a lack of contact from the FTA.<sup>202</sup> The FTA concluded that the respondents' actions had neither discriminatory intent nor disparate impact.<sup>203</sup>

Rather than consider this a total loss, one student commentator listed several positive outcomes from the proceedings.<sup>204</sup> The formal proceedings complemented community organizing.<sup>205</sup> It also gave the community a voice: the NYCT had ignored WE ACT, but the administrative process forced the NYCT to respond, and it may have even led the NYCT to change its behavior, such as by printing more notices in Spanish.<sup>206</sup> The proceedings also allowed review of governmental bodies and consideration of environmental laws,<sup>207</sup> mirroring the environmental justice litigation goals of judicial review of governmental agencies and court interpretation of environmental laws.<sup>208</sup> The proceedings did result in change: the FTA required the NYCT to start including environmental impact reports in applications.<sup>209</sup> Plus, the FTA promised additional oversight of both the MTA and the NYCT to ensure continued compliance.<sup>210</sup> The student commentator therefore concluded that grassroots

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197. See Anne Bloom, "Milking the Cash Cow" and Other Stories: Media Coverage of Transnational Workers' Rights Litigation, 30 VT. L. REV. 179, 212 (2006) (writing, in the context of transnational workers' rights litigation, that the behavior of activists plays a role in how the mass media frames the case).

198. COLE & FOSTER, *supra* note 19, at 96–97.

199. Linden, *supra* note 22, at 192–204.

200. *Id.* at 194–97.

201. *Id.* at 196–97, 204–05.

202. *Id.* at 205–06.

203. *Id.* at 216–17.

204. *Id.* at 221–23.

205. *Id.* at 223.

206. *Id.* at 221–22.

207. *Id.* at 222.

208. E.g., Kang, *supra* note 19, at 132, 137.

209. Linden, *supra* note 21, at 222.

210. *Id.*



organizing alone would not have earned WE ACT “such a focused response from a funding agency.”<sup>211</sup>

Title VI applies only to governmental entities that receive federal funds,<sup>212</sup> but communities and their advocates can achieve similar results through proceedings with state and local governments and environmental agencies. For example, the City of San Francisco attempted to exempt the expansion of a rendering plant for biodiesel from environmental review.<sup>213</sup> The Bayview-Hunters Point community where the plant is located, with the assistance of an environmental law clinic, stopped that exemption through an appeal to the Board of Supervisors.<sup>214</sup> As another example, advocacy groups can fight companies that engage in dangerous activities like recycling batteries through hearings at environmental agencies like the Southern California Air Quality Management District.<sup>215</sup>

Whether or not administrative proceedings result in short-term remedies, they can lead to long-term change, including the adoption of environmental justice principles by government stakeholders. For example, President Clinton in 1992 issued Executive Order 12,898, which requires the EPA to consider environmental justice principles in its decisions.<sup>216</sup> The Council on Environmental Quality promulgated its environmental justice guidelines in response to the Executive Order.<sup>217</sup> Several commentators attribute this Executive Order to the efforts of environmental justice advocates pursuing environmental law cases, such as one involving residents of Kettleman City suing the local planning commission for violating the California Environmental Quality Act.<sup>218</sup> The pursuit of formal proceedings before administrative bodies has this same potential.

Unlike the EPA, businesses have been less willing to adopt environmental justice principles into their corporate codes on social responsibility, despite environmental justice being “the conceptual link between human rights and the environment that is missing in the dialogue on corporate social responsibility and sustainable development.”<sup>219</sup> Environmental justice and corporate social responsibility have the potential to share an “articulation of normative goals and values” if environmental justice can better assert itself among the standards and dialogue on global corporate conduct.<sup>220</sup> Pursuing administrative actions

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211. *Id.*

212. La Londe, *supra* note 61, at 36.

213. Kang, *supra* note 20, at 131.

214. *Id.*; Robert Selna, *Environmentalists Delay S.F. Biodiesel Plans*, SFGATE (Apr. 3, 2009, 4:00 AM), <http://www.sfgate.com/bayarea/article/Environmentalists-delay-S-F-biodiesel-plans-3166332.php>.

215. *Current Cases and Campaigns*, CMTYS. FOR A BETTER ENV. <http://www.cbecal.org/legal/current-cases-2/> (last visited May 19, 2016).

216. Roesler, *supra* note 19, at 238–40.

217. Outka, *supra* note 94, at 606 (citing COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 21 (1997)).

218. COLE & FOSTER, *supra* note 19, at 123.

219. Monsma, *supra* note 1, at 494, 497.

220. *Id.* at 473, 495–96.

might offer the best means for environmental justice to assert itself, and the scholarly commentator's reference to "global corporate conduct" suggests that such proceedings need not be limited to the United States.

## II. TRADE TREATIES, ENVIRONMENTAL INJUSTICE, AND TRANSNATIONAL ENVIRONMENTAL JUSTICE MOVEMENTS

Critics decry trade and investment treaties like NAFTA as promoting export-oriented manufacturing of goods and unsustainable exploitation of natural resources in nations of the global South for consumption by nations of the global North, in particular the United States.<sup>221</sup> Within nations of the global South there exist "hotspots of environmental injustice"<sup>222</sup> because indigenous peoples, the urban poor, and rural farmers disproportionately suffer the negative externalities of industrial pollution, petroleum waste, and pesticide runoff.<sup>223</sup> With such parallels to environmental injustice in the United States, it is unsurprising that these people have followed the U.S. EJM by engaging in grassroots activism in pursuit of distributive, procedural, and corrective justice.<sup>224</sup>

### A. Trade Treaties: Greater Investment Means More Environmental Harm

NAFTA Chapter 11 sought to increase investment in Mexico by reducing the political risk of those ventures.<sup>225</sup> Several provisions targeted protectionist laws, such as those stipulating performance requirements or appointment of nationals to management positions,<sup>226</sup> but Article 1110 in particular broadened international law by forbidding direct and indirect nationalization or expropriation of an investment and "tak[ing] a measure tantamount to nationalization or expropriation."<sup>227</sup> NAFTA was also one of the first treaties to create ISDMs that compelled the host state to participate in arbitration at the

221. E.g., Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 154 (2015); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979, 982–83 (2001).

222. Keeton, *supra* note 5, at 1173.

223. *Id.* at 1171 (writing that "a majority of the most-polluting industries [are] concentrated in the world's poorest communities"); Gonzalez, *supra* note 1, at 730 (noting the efforts of indigenous peoples to resist exploitation of their lands by extractive industries), 751–52 (citing the economic hardship on small subsistence corn farmers in Mexico caused by trade liberalization and the negative impact on the environment as they shifted their cultivation practices).

224. E.g., Gonzalez, *supra* note 2, at 78–80.

225. E.g., Michael Wallace Gordon, *Economic Integration in North America: An Agreement of Limited Dimensions but Unlimited Expectations*, 56 MODERN L. REV. 157, 166 (1993) (discussing history of political turmoil).

226. NAFTA, *supra* note 3, arts. 1106–1107.

227. *Id.*, art. 1110(1); see Howard Mann & Mónica Araya, *An Investment Regime for the Americas: Challenges and Opportunities for Environmental Sustainability*, in GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE 163, 165 (Carolyn L. Deere & Daniel C. Esty, eds., 2002) [hereinafter GREENING THE AMERICAS] (writing that Chapter 11 "provides investors with a broader combination of rights and remedies than all previous bilateral investment treaties").

investor's request and to pay damages if warranted.<sup>228</sup> These protections encouraged companies to locate some operations south of the border to save money with Mexico's cheaper labor force.<sup>229</sup>

Increased trade and investment meant the potential for environmental harm.<sup>230</sup> Mexico has environmental laws that are based on U.S. laws, but "corruption, incompetence, and a tradition of exclusion" in the executive—which controls agencies like the Federal Environmental Protection Agency (PROFEPA)—combined with a "flaccid judiciary" resulted in non-enforcement of those laws.<sup>231</sup> When coupled with the reduction of non-tariff barriers to trade and the ability to move goods tariff-free across borders, environmentalists feared that this lack of environmental regulation would provide an economic incentive for polluting industries to relocate from the more heavily-regulated United States to save on the costs of environmental compliance, thus potentially turning Mexico into a pollution haven.<sup>232</sup> Even if companies did not seek to save costs on environmental regulation, another concern was that the liberalization of trade and investment would lead to such rapid industrial growth in Mexico that it would overwhelm the already limited enforcement capabilities.<sup>233</sup> The entry into force of CAFTA—with investment provisions similar to NAFTA—created more incentive for investment abroad: the average laborer in a Mexican maquiladora (assembly factory) makes \$8.50 per day compared to the \$1.86 daily average of a Nicaraguan factory worker, and countries like Honduras and Guatemala have weaker environmental protection schemes than their Central American neighbors.<sup>234</sup> With their low costs and weak labor and environmental laws, these nations offer attractive locations for factories and extraction industries, thus exacerbating the race to the bottom.<sup>235</sup>

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228. NAFTA, *supra* note 3, arts. 1115–1138; *see* Mann & Araya, *supra* note 227, at 165 ("In fact, only in the 1990s did mandatory investor-state arbitration processes emerge as an alternative to local legal remedies.").

229. Wold, *supra* note 12, at 223–24.

230. *Id.* at 210–11.

231. Katherine M. Bailey, Note, *Citizen Participation in Environmental Enforcement in Mexico and the United States: A Comparative Study*, 16 GEO. INT'L ENVTL. L. REV. 323, 324–26, 329–30, 335–36 (2004); *see* John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1, 23 (2001) (writing that Mexico has environmental laws equivalent to the United States but that "the problem was inadequate compliance with those laws").

232. Condon, *supra* note 5, at 107; Hopkins, *supra* note 10, at 387; Tollefson, *supra* note 8, at 166–67.

233. Wold, *supra* note 12, at 211–12.

234. Stenzel, *supra* note 5, at 683, 698; *see* Daniel John Monahan, Note, *Breaking NAFTA's Habits: The Pacific Rim Dispute and the Ongoing Challenge of Fostering Environmental Protection in the Age of Free Trade*, 41 GA. J. INT'L & COMP. L. 251, 252 (2012) ("CAFTA, like its predecessor, the North American Free Trade Agreement (NAFTA), has been roundly criticized . . . for allowing private corporations to undermine—or even dictate—host nations' environmental policy choices.").

235. Stenzel, *supra* note 5, at 698.

At the time of its signing, NAFTA seemed a green treaty.<sup>236</sup> NAFTA Article 104 referenced several bilateral and multilateral environmental agreements to which the United States, Canada, and Mexico are all parties, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.<sup>237</sup> Article 104 did not merely mention these treaties but gave them precedence in the event of an inconsistency between their terms and those of NAFTA.<sup>238</sup> Article 1114 checked the investment protection provisions by stating that the parties should not waive or derogate from environmental protection measures “as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.”<sup>239</sup> Additionally, in response to criticism that the completed-but-not-yet-ratified NAFTA did not protect the environment adequately, the Clinton Administration negotiated a side agreement, the NAAEC.<sup>240</sup> The NAAEC reaffirmed the commitment of the NAFTA parties to environmental protection and improvement, including specific reference to the then-recently-completed Rio Declaration and its principles like sustainable development.<sup>241</sup>

CAFTA drew heavily from NAFTA and the NAAEC<sup>242</sup> and in several regards strengthened environmental protection. Many of the environmental provisions that were scattered throughout NAFTA or included in the NAAEC side treaty are consolidated in the main text of CAFTA in Chapter 17, which reflects that environmental concerns are integral to trade and investment rather than being an “afterthought.”<sup>243</sup> For example, instead of including non-derogation from environmental standards as a check only on investment, CAFTA applies non-derogation from environmental standards to all aspects of trade and investment.<sup>244</sup> It also encourages the parties to add domestic laws that

236. Condon, *supra* note 5, at 106–08; Tollefson, *supra* note 8, at 150–52.

237. NAFTA, *supra* note 3, art. 104(1).

238. *Id.*

239. *Id.*, art. 1114(2).

240. Condon, *supra* note 5, at 130; Tollefson, *supra* note 8, at 167.

241. NAAEC, *supra* note 8, Preamble (“REAFFIRMING the *Stockholm Declaration on the Human Environment* of 1972 and the *Rio Declaration on Environment and Development* of 1992”) (emphases in original), art. 1(a)–(b) (“The objectives of this Agreement are to [] foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations” and “promote sustainable development based on cooperation and mutually supportive environmental and economic policies”); see The United Nations Conference on Environment and Development, UN Doc A/CONF.151/26/Rev.1 (1992) [hereinafter *Rio Declaration*].

242. Wang, *supra* note 6, at 258 (stating that the investor protections in U.S. trade and investment treaties are modeled after NAFTA, while “a substantial amount” of CAFTA’s environmental chapter is drawn from the NAAEC).

243. *Id.* at 270.

244. Compare NAFTA, *supra* note 3, art. 1114(2) (“[A] Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.”), with

increase public participation in environmental matters.<sup>245</sup> CAFTA is not unique in encouraging such domestic legislation because free trade agreements with Colombia and Panama contain similar provisions.<sup>246</sup> The United States-Peru Trade Promotion Agreement went a step farther by requiring Peru to enact additional laws, including some related to environmental regulation such as the protection of biodiversity.<sup>247</sup>

Critics contend that the green provisions lack substance: none of the treaties except for the U.S.-Peru agreement created any new laws for environmental protection, thus allowing countries with poor environmental standards to maintain them.<sup>248</sup> Some member nations like Costa Rica have relatively strong environmental regimes,<sup>249</sup> and others might wish to increase environmental protection, but the treaty investment provisions create a disincentive for host governments to enact or enforce environmental laws.<sup>250</sup> Investors have employed Chapter 11 provisions “to lobby against the promulgation and implementation of domestic laws (including environmental or human health protection laws) and have sought redress (through government compensation) for negative effects on profitability due to the adoption of such laws.”<sup>251</sup>

Consider the dispute between the U.S. company, Metalclad, and the government of Mexico.<sup>252</sup> Metalclad purchased a Mexican company that had obtained federal and state permits to build and operate a hazardous waste facility near Guádalcazar in the state of San Luis Potosí.<sup>253</sup> Local residents and government officials opposed the facility; for example, after the facility was built, protesting residents blocked entrance to it, and the City refused a

CAFTA, *supra* note 4, art. 17.2(2) (“[I]t is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws.”).

245. CAFTA, *supra* note 4, art. 17.4.

246. United States-Panama Trade Promotion, Pan.-U.S., Ch. 17, June 28, 2007, <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text> [hereinafter Pan-U.S. TP]; United States-Colombia Free Trade Agreement, Colom.-U.S., Ch. 18, May 15, 2012, <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text> [hereinafter Colom.-U.S. FTA].

247. Condon, *supra* note 5, at 111–13 (citing United States-Peru Trade Promotion Agreement, Peru-U.S., annex 18.3.4, Apr. 12, 2006, Hein’s No. KAV 8674 (2009) [hereinafter Peru-U.S. TPA]).

248. Hopkins, *supra* note 10, at 398; *see* Monahan, *supra* note 234, at 263 (characterizing CAFTA as having the “appearance” of encouraging environmental protection).

249. Hopkins, *supra* note 10, at 398 (referring to Costa Rica as “a model for environmental policymaking” because of its “comprehensive set of environmental laws”).

250. *E.g.*, Rachel T. Kirby, Note, *Giving Power to the People: Comparing the Environmental Provisions of Chile’s Free Trade Agreements with Canada and the United States*, 10 SUSTAINABLE DEV. L. & POL’Y 65, 68 (2009) (calling investor protections a threat to new environmental laws).

251. Mann & Araya, *supra* note 227, at 165; *see* Travis Robert-Ritter, Note, *Achilles’ Heel: How the ATS and NAFTA Have Combined to Create Substantial Tort Liability for U.S. Corporations Operating in Mexico*, 42 U. MIAMI INTER-AM. L. REV. 443, 445 (2011) (writing that NAFTA allows corporations to override domestic law).

252. *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 5 ICSID Rep. 212 (2002).

253. *Id.* ¶¶ 28–36.

construction permit.<sup>254</sup> The governor of San Luis Potosí then prevented operation of the facility by issuing an ecological decree for the protection of a rare cactus.<sup>255</sup> Pursuant to Chapter 11, Metalclad forced Mexico to arbitration and prevailed, with the Supreme Court of British Columbia affirming a near-\$15 million (U.S.) award for the cost of the facility.<sup>256</sup> The panel and then the court agreed that the environmental decree was “tantamount to expropriation” under Article 1110.<sup>257</sup> This article contains no exemption for environmental measures,<sup>258</sup> and neither tribunal considered Article 1114, which prioritized environmental over investor protection.<sup>259</sup> *Metalclad* expanded international law on expropriation by not requiring the investor to show an improper purpose in the taking.<sup>260</sup> Other U.S. trade treaties as well as Bilateral Investment Treaties (BITs) with Latin American countries like Ecuador contain similar ISDMs.<sup>261</sup>

Trade and investment treaties therefore encourage U.S. companies to engage in activities that have an adverse impact on the environments and people of the global South while shielding those companies from the consequences.<sup>262</sup> Aided by international agreements, foreign direct investment emerged in the 1990s as “a popular tool” to finance development in Latin American and Caribbean countries.<sup>263</sup> For example, in the period just prior to NAFTA and for five years after its entry into force, Mexico’s GDP grew by 38 percent.<sup>264</sup> The increase in environmental harms within the same period dwarfs that growth: soil erosion (89 percent), municipal waste (108 percent), water pollution (29 percent), and air pollution (97 percent).<sup>265</sup> The expansion of

254. *Id.* ¶¶ 37–56.

255. *Id.* ¶¶ 58–63.

256. *Id.*; Mexico v. Metalclad Corp., 2001 B.C.S.C. 644, ¶¶ 81–105, 134–35 (B.C. Sup. Ct. May 2, 2001), <http://courts.gov.bc.ca/jdb-txt/sc/01/06/2001bcsc0664.htm>. The parties reached an agreement to settle the case for \$15,626,260. William S. Dodge, *Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1*, 40 *ILM* 36 (2001), Available at <http://www.worldbank.org/icsid/cases/awards.htm>. NAFTA Chapter 11 Arbitral Tribunal, August 30, 2000. Mexico v. Metalclad Corp., 2001 B.C.S.C. 664, Available at <http://www.courts.gov.bc.ca>. Supreme Court of British Columbia, May 2, 2001, 95 AM. J. INT’L L. 910, 915 (2001).

257. *Mexico*, 2001 B.C.S.C. 644, at ¶¶ 99–102.

258. Tollefson, *supra* note 8, at 160–61.

259. Condon, *supra* note 5, at 108–09.

260. Tollefson, *supra* note 8, at 160–61.

261. *E.g.*, CAFTA, *supra* note 5, arts. 10.15–10.27; see Todd, *supra* note 25, at 371 (“An arbitration provision is a common feature of BITs between the United States and developing countries.”); Bilateral Investment Treaty, Ecuador-U.S., art. VI, Aug. 27, 1993, S. Treaty Doc. No. 103–15 (1997) (providing ISDM in the form of arbitration that can be initiated by an investor or Party against the other).

262. Elisa Morgera, *Multinational Corporations and International Environmental Law*, in ROUTLEDGE HANDBOOK, *supra* note 2, at 189.

263. Mann & Araya, *supra* note 227, at 163.

264. Wold, *supra* note 12, at 225.

265. *Id.* (citing Kevin P. Gallagher, *The CEC and Environmental Quality: Assessing the Mexican Experience*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 117, 119 (David L. Markell & John H. Knox, eds. 2003)).

border maquiladora plants have brought with them “environmental corner cutting” in some sectors and resulted in overcrowding, poor sanitation, and industrial discharge.<sup>266</sup> Companies have avoided stringent U.S. regulation of hazardous substances like asbestos by shifting their manufacture south of the border.<sup>267</sup> Many products consumed in the United States such as batteries have parts with toxic materials, so those components are exported abroad for disposal.<sup>268</sup> Some nations of the global South are rich in natural resources but poor in the capital needed to exploit those resources. Consequently, they grant favorable concessions and enter into joint ventures with U.S. companies to extract minerals or engage in large-scale agriculture, but then turn a blind eye to the harm caused by the byproducts of petroleum or agrochemicals.<sup>269</sup> Nor do those who benefit most from investment and trade—the consumers and companies in the United States—see the harm borne by those who benefit the least—the poor and indigenous persons in Latin America.<sup>270</sup>

*B. The Internationalization of the Environmental Justice Movement*

Following the lead of the U.S. EJM, these foreign, invisible communities have adopted activist tactics to become more visible.<sup>271</sup> The “internationalization of the environmental justice movement” includes the local struggles of poor communities in poor nations against “globalizing corporation[s].”<sup>272</sup> By litigating against TNCs for conduct that occurred abroad—including cases related to chemical exposure and environmental harm—plaintiffs engage in several “out-of-court tactics” to advance their cases

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266. Carolyn L. Deere & Daniel C. Esty, *Trade and Environment: Reflections on the NAFTA and Recommendations for the Americas*, in GREENING THE AMERICAS, *supra* note 227, at 329, 334, 339 n.13.

267. Suttles, *supra* note 18, at 29–34 (describing the regulatory flight of asbestos manufacturing from the United States to other countries like Brazil and the health consequences on Brazilian workers).

268. Gonzalez, *Eco-Imperialism*, *supra* note 221, at 991–92; Keeton, *supra* note 5, at 1179–80.

269. *Id.* at 996 (“While transnational corporations and Southern timber, mining, and agribusiness companies reap the benefits of deforestation, the costs are often borne by the Southern poor.”); see George K. Foster, *Investors, States, and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. REV. 361, 380–83 (2013) (describing how treaties lead to the formation of host state/investor contracts that exclude local stakeholders like indigenous persons).

270. Gonzalez, *supra* note 2, at 78 (“While the affluent reap the benefits of unsustainable economic activity, the burdens are borne disproportionately by the global South and by the world’s most vulnerable communities, including indigenous peoples, racial and ethnic minorities, and the poor.”); Yang, *supra* note 12, at 490 (“Their economic and social marginalization puts a distance between them and most communities in the United States. . .”).

271. See *supra* note 17 and accompanying text.

272. Roberts, *supra* note 17, at 287, 291, 300.

and to “tout larger sets of causes.”<sup>273</sup> These tactics mirror those of the U.S. EJM—including the use of digital data.<sup>274</sup>

For example, indigenous peoples from the Oriente region of Ecuador have waged a multi-decade campaign against Chevron and its subsidiary Texaco for environmental and personal injury related to petroleum operations.<sup>275</sup> They have organized into a local group called the Amazon Defense Coalition, which partners with the U.S. group Amazon Watch.<sup>276</sup> Their media tactics center on an Internet campaign called ChevronToxico, The Campaign for Justice in Ecuador, which includes “fact sheets, press kits, letter writing and other social organizing campaigns, news items, photos, videos, and plaintiffs’ court documents.”<sup>277</sup> The Internet is a popular tool for justice advocates because websites are inexpensive and easy to maintain, plus they have a worldwide reach that allows for information about foreign struggles to reach U.S. audiences.<sup>278</sup> ChevronToxico.com therefore operates as a vehicle for “public relations, advocacy, and community organizing” by gathering the group’s information and data in one place.<sup>279</sup> This struggle has been the subject of the documentary *Crude* and feature articles in *Vanity Fair* and the *New Yorker*, and the activists make appearances on television and radio shows.<sup>280</sup> The group also engages in more confrontational tactics, such as appearing at Chevron shareholder meetings and participating in political advocacy with government officials in both the United States and Ecuador.<sup>281</sup>

The use of out-of-court tactics is increasing, as evidenced by another campaign involving persons from a U.S. trade treaty country: Nicaraguans alleging injury from exposure to the pesticide DBCP on Dole-affiliated banana farms have organized into groups, engaged in political action to change Nicaraguan law, and participated in rallies and marches.<sup>282</sup> Digital media also formed part of their strategy. For example, a Swedish documentarian made a film following two California attorneys litigating a DBCP case in Los Angeles,

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273. Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT’L L. 456, 457–58, 473 (2011).

274. See Judith Kimerling, *Transnational Operations, Bi-National Injustice: Chevrontexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445, 446 (2007); Jeff Todd, *The Rhetoric of Recognition*, 45 MCGEORGE L. REV. 209, 241 (2013).

275. See Todd, *supra* note 25, at 335–36, 349.

276. Drimmer & Lamoree, *supra* note 273, at 504.

277. *Id.*; see *The Chevron Tapes*, CHEVRONTOXICO: THE CAMPAIGN FOR JUSTICE IN ECUADOR, <http://www.chevrontoxico.com> (last visited June 16, 2016).

278. Drimmer & Lamoree, *supra* note 273, at 474–75.

279. *Id.* at 475.

280. *Id.* at 505–06; *Crude: The Real Price of Oil*, CRUDE THE MOVIE, <http://www.crudethemovie.com> (last visited June 16, 2016); Patrick Radden Keefe, *Reversal of Fortune*, THE NEW YORKER (Jan. 9, 2012), <http://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe>; William Langewiesche, *Jungle Law*, VANITY FAIR (May 2007), <http://www.vanityfair.com/news/2007/05/texaco200705>.

281. Drimmer & Lamoree, *supra* note 273, at 503–04, 507–08.

282. *Id.* at 486, 489–98.



a film supported by a website.<sup>283</sup> And a search of YouTube with terms like “DBCP,” “*afectados*” (the affected ones), or “Nemagon” (one of the brand names for the pesticide) reveals numerous short films.<sup>284</sup> The communities are not the only ones active in the digital arena: both Chevron and Dole maintain websites offering their versions of events related to the Ecuador and DBCP cases, respectively.<sup>285</sup>

It is not surprising that advocates for environmental justice in other countries have adopted these tactics, as they share the same goals of distributive, procedural, and corrective justice as the U.S. EJM.<sup>286</sup> Distributive justice in a transnational sense seeks to end the current scheme where the benefits of trade and investment flow to the global North and to elites in the global South, while the environmental detriments—including impacts on human health—remain concentrated in the global South where the actual extraction of minerals and clearing of timber, heavy manufacturing, and storage of hazardous materials is done.<sup>287</sup> Procedural justice “requires that persons on the other side of the border, potentially affected by environmental laws and policies, are given a right to participate and be represented in the law-making processes.”<sup>288</sup> The understanding of corrective justice in transnational environmental justice comports with the domestic concept and its foundation in tort law.<sup>289</sup> This notion finds expression in international environmental law; the polluter pays principle “is based on the concept of environmental justice, as it encompasses the notion that those who engage in and profit from activities that damage the environment should be liable for the harm caused.”<sup>290</sup> The tortfeasor should therefore be liable for compensating the injured as well as

283. BANANAS!\* (WG Film 2009), <http://www.bananasthemovie.com> (last visited Nov. 3, 2016).

284. E.g., Mario Cano, *Afectados por el Nemagón en Nicaragua*, YOUTUBE.COM (June 10, 2011), <https://www.youtube.com/watch?v=tLbT8bdDE-4>.

285. *DBCP Facts*, DOLE, <http://www.dole.com/en/AboutDole/DBCP-Facts> (last visited Nov. 3, 2016); *Ecuador Lawsuit*, CHEVRON, <https://www.chevron.com/ecuador/> (last visited Nov. 3, 2016).

286. E.g., Jonas Ebbesson, *Introduction: Dimensions of Justice in Environmental Law* (writing that most contributors to books on international environmental justice “focus on the procedural, distributive and/or corrective elements of justice”), in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, *supra* note 2, at 1, 3; Gonzalez, *supra* note 2, at 78 (citing Kuehn, *supra* note 22, at 10,681) (adding social injustice to international environmental justice’s concern with distributive, procedural, and corrective injustice).

287. E.g., Gonzalez, *Eco-Imperialism*, *supra* note 221, *passim* (devoting article to the unequal distribution of economic benefits and environmental harms between the North and South, including the Southern poor).

288. Ebbesson, *supra* note 2, at 275.

289. Lea Brilmayer, *International Justice and International Law*, 98 W. VA. L. REV. 611, 617 (1996) (characterizing the domestic corrective justice concept as “substantially the same when international jurisprudence is at issue”); *see id.* at 618 (writing that tort law embodies both retributive and corrective justice).

290. Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals*, in LINKING HUMAN RIGHTS AND THE ENVIRONMENT 1, 23 (Romina Picolotti & Jorge Daniel Taillant, eds. 2003); *see* Hans Christian Bugge, *The Polluter Pays Principle: Dilemmas of Justice in National and International Contexts* (writing that the polluter pays principle “has old roots in tort law”), in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, *supra* note 2, at 411, 420.

taking other corrective measures like abating the source of harm and clean-up of the affected area.<sup>291</sup>

The Rio Declaration not only expresses the polluter pays principle<sup>292</sup> but also requires access to justice to ensure that the polluter will in fact pay.<sup>293</sup> The NAAEC “reaffirms” the parties’ commitment to the Rio Declaration.<sup>294</sup> More specifically, the NAAEC and subsequent U.S. trade treaties address access to justice so that victims of environmental harm can obtain relief. NAAEC Article 6 is titled “Private Access to Remedies,” and it requires each party to ensure that persons “have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party’s environmental laws and regulations.”<sup>295</sup> The private access to remedies includes the right to sue another person under the Party’s jurisdiction for damages and to seek equitable relief.<sup>296</sup> Under CAFTA’s Article 17.3, “Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings, in accordance with its law, are available to sanction or remedy violations of its environmental laws.”<sup>297</sup> That Article continues, “Each Party shall provide appropriate and effective access to remedies, in accordance with its law,” including the right to sue for money damages or to seek equitable relief.<sup>298</sup>

### III. TRANSNATIONAL LITIGATION AND ENVIRONMENTAL INJUSTICE

Despite adopting polluter pays and access to justice principles, U.S. trade treaties do not provide an adequate forum where the victims of investment-related environmental harm can obtain relief. To the contrary, they serve as Exhibit A to the claim that “[e]ffective global liability rules ‘are the Yeti of international environmental law—pursued for years, sometimes spotted in rough outlines, but remarkably elusive in practice.’”<sup>299</sup> Because the treaties do

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291. Bugge, *supra* note 290, at 420 (calling the polluter pays principle a principle “for the allocation of the cost of pollution prevention, and for liability and compensation for environmental damage”); Ebbesson, *supra* note 2, at 277 (“Claims for civil liability and torts, where harm is compensated for, and other reparative and remedying claims such as clean-up, may also produce corrective effects”); Gonzalez, *supra* note 2, at 79 (“Corrective justice imposes an obligation to provide compensation for historic inequities and to refrain from repeating the conduct that caused the harm.”).

292. Bugge, *supra* note 247, at 411 (citing Rio Declaration, *supra* note 241, Principle 16).

293. Rio Declaration, *supra* note 241, Principle 10 (“Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”).

294. NAAEC, *supra* note 8, Preamble.

295. *Id.* art. 6(2).

296. *Id.* art. 6(3)(a)–(d).

297. CAFTA, *supra* note 4, art. 17.3(1).

298. *Id.* art. 17.3(4)(a)–(d). Other U.S. trade treaties with Latin American countries have similar provisions. Colom.-U.S. FTA, *supra* note 246, Art. 18.4 (requiring Parties to ensure proceedings leading to remedies for violations of the Party’s environmental laws); Pan-U.S. TP, *supra* note 246, art. 17.4 (same); Peru-U.S. FTA, *supra* note 247, art. 18.4 (same).

299. Robert V. Percival, *International Responsibility and Liability for Environmental Harm* (quoting Sachs, *supra* note 24, at 839), in *ROUTLEDGE HANDBOOK*, *supra* note 23, at 681, 692; see Brilmayer, *supra* note 289, at 619–20 (“International law has as many norms as one might need; what is

not require new laws or specific tribunals, plaintiffs must rely on their own country's insufficient laws and courts or the tantalizing but unattainable prospect of U.S. courts, which are often rendered inaccessible by an array of judicial doctrines. Like their counterparts in the United States, however, communities nevertheless employ litigation because it can be a tactic to achieve additional strategic goals.

*A. Foreign Environmental Justice Plaintiffs Lack Access to  
Tribunals and Remedies*

The most obvious avenue for redress is through the environmental laws of the nation where the activity occurred.<sup>300</sup> What should also be obvious is that nations with lax environmental protection typically lack a legal system capable of providing relief to individuals, especially persons of limited means. For example, Mexico has laws that address the environment: the Mexican Constitution incorporates the idea of natural resource conservation, and the *Ley General del Equilibrio Ecológico y de Protección del Ambiente* of 1988 is comparable to U.S. environmental legislation.<sup>301</sup> Mexico's administrative body PROFEPA is also charged with enforcing environmental standards and liaising with the public.<sup>302</sup> Like other Latin American countries, Mexico has a civil law system, so PROFEPA should be the first place citizens affected by environmental harms can turn for relief.<sup>303</sup> *Ley General* Article 189 allows citizens to file a complaint that could lead to an investigation, intermediate plant closings, negotiated compliance agreements, and even administrative detention of the polluters.<sup>304</sup> Unfortunately, another common feature of civil law systems is the "unchallenged power of the executive and its agencies."<sup>305</sup> The executive has discretionary power to enforce environmental laws and regulations while the public has no power to participate in or monitor enforcement.<sup>306</sup> Administrative law in Mexico is "hermetic and secret," with the result being that "the government does not follow the administrative steps described on the books, and citizens who try to use them see no results."<sup>307</sup>

The courts of Mexico likewise offer little prospect for relief. One possibility is an *amparo* suit, which is similar to a U.S. citizen suit under the

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lacking are ways to put them into action."); Gonzalez, *supra* note 2, at 83 (claiming that TNCs are "adept at evading regulatory oversight and democratic control").

300. Ebbesson, *supra* note 2, at 281.

301. Bailey, *supra* note 231, at 329–30 (citing MEX. CONST. tit. I, art. 27; *Ley General del Equilibrio Ecológico y de Protección del Ambiente*, D.O., Dec. 13, 1996 (Mex.) [hereinafter *Ley General*]).

302. *Id.* at 330.

303. *Id.* at 335.

304. *Id.* (citing *Ley General*, *supra* note 301, art. 189).

305. *Id.*

306. *Id.*

307. *Id.* at 335–36.

Administrative Procedure Act.<sup>308</sup> An injured party with standing may sue the government to defend an individual right or “to contest an unconstitutional law, judicial action, or administrative action.”<sup>309</sup> However, the *amparo* is not as effective as a U.S. citizen’s suit because the Mexican Supreme Court has construed standing narrowly, so it is difficult for an environmental non-governmental organization (NGO) to obtain standing.<sup>310</sup> The vast majority of *amparo* suits are denied proceedings, with the most common ground cited by courts as “improper procedure.”<sup>311</sup>

If an individual suffers personal or property harm, that individual could also file a civil suit directly against the polluter for violation of environmental laws.<sup>312</sup> The practical difficulty of bringing civil suits makes them infrequent, however.<sup>313</sup> The courts of Mexico—indeed, all of Latin America—lack many of the mechanisms of U.S. courts that make litigation feasible for an environmental justice community. While U.S. plaintiffs have difficulty paying for experts, they have the possibility of retaining attorneys on a contingency fee basis.<sup>314</sup> Not only are contingency fee contracts forbidden in many Latin American countries, but the loser must also pay the winner’s costs, a frightening consequence for persons of limited means.<sup>315</sup> U.S. procedural and evidentiary rules allow for class actions and broad discovery, which are essential for litigating complex tort claims based on harm to a community.<sup>316</sup> Latin American judicial and administrative mechanisms, however, are geared toward resolving disputes brought by an individual against another individual.<sup>317</sup>

The strong executive branch in Latin American countries can also pressure courts to deny relief. Trade and investment treaties align the interests of the host state and investor against local stakeholders.<sup>318</sup> Foreign investment brings several financial benefits to the host nation like revenues from concessions and profits from joint ventures. Such is the case with state-owned Petroecuador’s participation in a consortium with a Texaco subsidiary based on a concession for petroleum exploration granted by the Republic of Ecuador.<sup>319</sup> Several Latin

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308. *Id.* at 337–38.

309. *Id.* at 336.

310. *Id.*

311. *Id.* at 338.

312. *Id.*

313. *Id.*; Alicia Ely Yamin & Ma. Pilar Noriega Garcia, *The Absence of Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L.A. INT’L & COMP. L. REV. 467, 489 (1999).

314. Todd, *supra* note 25, at 360.

315. Alejandro M. Garro, *Forum Non Conveniens: “Availability” and “Adequacy” of Latin American Fora from a Comparative Perspective*, 35 U. MIAMI INTER-AM. L. REV. 65, 88–91 (2004).

316. Todd, *supra* note 25, at 360–61.

317. Garro, *supra* note 315, at 84.

318. Foster, *supra* note 269, at 368, 373, 380–82.

319. *Id.* at 382 (writing about the “financial incentive” that host states have in their contracts with investors); see Todd, *supra* note 25, at 349 (describing how Ecuador obtained royalties via a petroleum

American nations, such as parties to U.S. trade and investment treaties like Nicaragua and Ecuador, “rank among the judiciaries with the most corruption.”<sup>320</sup> The judiciary is particularly vulnerable to political pressure from the executive branch in highly publicized cases where the government has a stake in the proceedings.<sup>321</sup>

Because the host state cannot afford relief, and because the harm relates to transnational trade and investment, plaintiffs should also be able to assert tort claims in the courts of the corporation’s home, the United States.<sup>322</sup>

From a justice perspective, the main concern is whether the locals—i.e. those affected *in* the state of the activity/harm—may make the transnational corporation responsible, so as to prevent or remedy harm, through legal proceedings *outside* that state, for example in the home state of the parent company.<sup>323</sup>

*The Restatement (Third) of Foreign Relations* answers in the affirmative that foreigners injured by the pollution caused by domestic actors should have access to the same domestic remedies as U.S. residents.<sup>324</sup> The court system of a developed country like the United States should therefore be an “important vehicle of redress” because it can assert jurisdiction over TNCs and offer the substantive and procedural mechanisms unavailable in developing countries.<sup>325</sup> One commentator even calls transnational law litigation in the courts of developed countries the “essence of environmental justice.”<sup>326</sup>

But law and justice are not the same thing: the former privileges the status quo, while the latter “searches for ideals, not practical solutions.”<sup>327</sup> Foreign plaintiffs face additional, perhaps insurmountable obstacles compared to their domestic counterparts in attempting to obtain relief from U.S. corporations in U.S. courts. For one, they do not have as many causes of action available to them. The domestic plaintiffs’ strongest claims are those under NEPA related to “major Federal actions,”<sup>328</sup> which by definition would not apply to the actions of Mexican or Nicaraguan environmental agencies. Even if U.S. environmental laws applied extraterritorially, instrumentalities of foreign states

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concession to a consortium of U.S. oil companies, and how the state-owned Petroecuador eventually became part of the consortium).

320. John S. Baker, Jr. & Agustin Parise, *Conflicts in International Tort Litigation Between U.S. and Latin American Courts*, 42 U. MIAMI INTER-AM. L. REV. 1, 13 (2010).

321. Garro, *supra* note 315, at 84–85.

322. Ebbesson, *supra* note 2, at 276, 281, 287–88.

323. *Id.* at 270 (emphasis in original).

324. Percival, *supra* note 299, at 693–94 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 602(2) (“Where pollution originating in a state has caused significant injury to persons outside that state . . . , the state of origin is obligated to accord to the person injured . . . access to the same judicial or administrative remedies as are available in similar circumstances to persons within the state.”)).

325. *Id.* at 693; see Ebbesson, *supra* note 2, at 290 (writing that increasing opportunities to litigate outside the state of harm are “instrumental” when that state has insufficient forums).

326. Suttles, *supra* note 18, at 38.

327. Brilmayer, *supra* note 289, at 632.

328. 42 U.S.C. § 4332(C) (2012).

acting wholly within their jurisdiction could avoid litigation by claiming sovereign immunity or the act of state doctrine.<sup>329</sup> Extraterritoriality—or rather the presumption against it—also prevents claims under the Alien Tort Statute (ATS).<sup>330</sup> Many commentators thought that environmental justice plaintiffs could have success with claims based on the ATS.<sup>331</sup> In *Kiobel v. Royal Dutch Shell*, however, the Supreme Court held that the ATS applied only to torts committed in the United States or to piracy, thus precluding claims against U.S. TNCs for environmental harm caused by their investment activities in other countries.<sup>332</sup>

Foreign plaintiffs can still assert common law tort claims against U.S. corporations,<sup>333</sup> though they frequently do not reach the merits stage of litigation because courts dismiss them on the basis of forum non conveniens (FNC). Assuming that the courts of the plaintiff's country are available and adequate, U.S. courts will grant dismissal if certain private and public interest factors balance in favor of litigating the case abroad.<sup>334</sup> The adequacy consideration is such a “low hurdle” that none of the shortcomings of Latin American courts that drive foreign plaintiffs to choose U.S. courts—the lack of contingency fee contracts, the inability to handle complex cases, the lack of strict liability and punitive damages and jury trials, the probability of lower damage awards, and corruption in and politicization of the judiciary—render the foreign forum inadequate.<sup>335</sup> The private and public interest factors relate to the parties' ability to obtain evidence from abroad and to the functional concerns of the court, respectively.<sup>336</sup> These typically balance in favor of dismissal,<sup>337</sup> especially for complex environmental justice cases that involve hundreds if not thousands of foreign plaintiffs, limited power by the court to compel witnesses or to grant injunctive relief, application of foreign law, and indispensable joint venture co-defendants that are immune from suit.<sup>338</sup>

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329. See Gonzalez, *supra* note 2, at 93–94 (noting the “significant procedural hurdles” that cases in the United States face); James L. Stengel & Kristina Pieper Trautmann, *Determining United States Jurisdiction over Transnational Litigation*, 35 REV. LITIG. 1, 35 (2016) (writing that statutory provisions like CERCLA are “fully subject to the presumption against extraterritoriality”).

330. 28 U.S.C. § 1350 (2012).

331. *E.g.*, Drimmer & Lamoree, *supra* note 273, at 465; Suttles, *supra* note 18, at 37–38.

332. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 12 (2013); see Roger P. Alford, *Human Rights after Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L. J. 1089, 1091 (2014) (calling ATS claims based on acts occurring outside the United States “dead”).

333. Alford, *supra* note 332, at 1091 (predicting a post-*Kiobel* rise in transnational tort litigation).

334. Jeff Todd, *Phantom Torts and Forum Non Conveniens Blocking Statutes; Irony and Metonym in Nicaraguan Special Law 364*, 43 U. MIAMI INTER-AM. L. REV. 291, 299–300 (2012).

335. Todd, *supra* note 274, at 236–37.

336. Todd, *supra* note 334, at 299–300.

337. Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 KAN. L. REV. 609, 619 (2008).

338. *E.g.*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 479–80 (2d Cir. 2002) (affirming forum non conveniens dismissal of putative class action, noting that the case involved 55,000 Ecuadorans, the tortious acts were not clearly attributable to the parent company defendant, Ecuadoran government

In light of the shortcomings of Latin American courts, dismissal had been outcome determinative: many cases were never pursued further, and the few in which plaintiffs prevailed or negotiated settlements saw far lower amounts than would have been available in the United States.<sup>339</sup> Plaintiffs are starting to obtain judgments in foreign courts, however, because third-party litigation financing has increased;<sup>340</sup> countries have changed their laws on aggregate litigation, contingency fees, and punitive damages;<sup>341</sup> and some countries like Nicaragua and Ecuador have enacted blocking statutes for certain tort claims that include procedural and evidentiary mechanisms, strict liability, and damage amounts comparable to those in the United States.<sup>342</sup>

Plaintiffs face another obstacle when they attempt to enforce foreign judgments against U.S. TNCs in the United States. The state laws that govern the recognition and enforcement of foreign money judgments all contain numerous grounds, some mandatory and some discretionary, for denying recognition and enforcement.<sup>343</sup> Several commentators find the “systemic inadequacy” ground particularly galling because it mandates non-recognition for reasons that courts during FNC hearings often decline to consider,<sup>344</sup> but other grounds may be more problematic for foreign environmental justice plaintiffs. For example, DBCP plaintiffs in *Osorio v. Dole Food Co.* had obtained a near-\$100 million judgment under Nicaragua’s blocking statute, but a U.S. court denied recognition because the blocking statute violated Florida public policy and the Nicaraguan courts lacked personal and subject matter jurisdiction over the defendants.<sup>345</sup> Although the court bifurcated the proceedings and thus never reached the issue of fraud,<sup>346</sup> most states also include judgments obtained by fraud as a discretionary ground for non-

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defendants were not joined in the action, and the U.S. court had limited power to enforce remedies); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir. 1985) (affirming FNC dismissal of fifty-eight Costa Ricans’ DBCP claims because compulsory process was not available, defendants could not implead potential third-party defendants, the logistics were too difficult, and a complex comparative law analysis of an unfamiliar legal system would be required).

339. Todd, *supra* note 334, at 238.

340. Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT’L L. 159, 161 (2011).

341. Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT’L L. 31, 35 (2012).

342. Todd, *supra* note 334, at 238.

343. *Id.* at 223–25.

344. *E.g.*, Hansen & Whytock, *supra* note 24, at 931; *see* UNIF. FOREIGN MONEY JUDGMENT RECOGNITION ACT § 4(b)(1) (1962) (mandating non-recognition if “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law”).

345. 665 F. Supp. 2d 1307, 1352 (S.D. Fla. 2009), *aff’d*, *Osorio v. Dow Chem. Co.*, 635 F.3d 1277, 1279 (11th Cir. 2011); *see* FLA. STAT. § 55.605(1)(b)–(c) (making lack of personal and subject matter jurisdiction mandatory grounds for non-recognition); § 55.605(1)(2)(c) (making repugnance to public policy a discretionary ground for non-recognition).

346. *Osorio*, 665 F. Supp. 2d at 1321, 1321 n.7.

recognition,<sup>347</sup> and a few have adopted the Uniform Foreign-Country Money Judgments Recognition Act of 2005, which adds as a discretionary ground judgments “rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.”<sup>348</sup> The findings of a California court regarding other Nicaraguan DBCP plaintiffs suggests these discretionary grounds also could have applied to deny recognition and enforcement in *Osorio*: the out-of-court tactics like pressuring judges and holding mass demonstrations and rallies in Nicaragua led to a fraudulent scheme that infected U.S. proceedings.<sup>349</sup>

Assuming that the laws were modified to make FNC dismissal harder and recognition easier,<sup>350</sup> “access to the courts may not ensure procedural justice or a just substantive outcome.”<sup>351</sup> U.S. environmental justice plaintiffs have tremendous difficulty paying litigation and expert costs and proving causation in tort cases,<sup>352</sup> and it is likely foreign plaintiffs will face these same challenges. In addition, foreign plaintiffs have other weaknesses that corporate defendants have exploited. For example, the TNC can push the distinction between the U.S. parent and the liable foreign subsidiary.<sup>353</sup> Even if the plaintiffs succeed in piercing the corporate veil,<sup>354</sup> the TNC can argue that, because the tortious conduct and injuries suffered were in a foreign country, then that country’s laws should apply under conflict-of-laws balancing; one commentator notes that defendants could urge limitations on damages like Mexico’s \$2500 cap on the wrongful death of a child.<sup>355</sup> And if plaintiffs somehow win a large foreign judgment, the TNC could seek creative equitable

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347. Todd, *supra* note 274, at 223–24 (citing UNIF. FOREIGN MONEY JUDGMENT RECOGNITION ACT § 4(b)(2) (1962)).

348. *Id.* at 225 (citing UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(7) (2005)).

349. *Rojas Laguna v. Dole Food Co.*, No. B233497, 2014 WL 891268 at \*1–5, \*14 (Cal. Ct. App. Mar. 7, 2014).

350. *See, e.g.,* Gonzalez, *supra* note 2, at 94–95 (arguing that BITs and free trade investment chapters should include provisions to make investors civilly liable in their home state for environmental harm in the host state); Hansen & Whytock, *supra* note 24, at 927 (arguing that judges should give more weight to the enforceability of a judgment in deciding whether to dismiss for FNC); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1121–22, 1128–29 (2010) (advocating for legislative or treaty modifications to FNC).

351. Jona Razzaque, *Information, Public Participation and Access to Justice in Environmental Matters*, in ROUTLEDGE HANDBOOK, *supra* note 2, at 137, 151.

352. *See supra* Part II.B.

353. Osofsky, *supra* note 18, at 99–101.

354. Ebbesson, *supra* note 2, at 289 (writing that courts will pierce the corporate veil if the parent has de facto control over the subsidiary).

355. Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1183 (2005); *see* Baker & Parise, *supra* note 331, at 29–30 (writing that U.S. court application of the traditional *lex loci* rule for torts would deny plaintiffs the punitive damages they seek).



relief, as Chevron did by obtaining an injunction against the Ecuadoran judgment creditors from enforcing their \$9 billion Ecuadoran judgment.<sup>356</sup>

*B. Litigation Can Be a Tactical Element in a Broader Strategy*

Like their counterparts in the United States, foreign persons seeking environmental justice employ litigation as a tactic to achieve broader strategic aims beyond obtaining a favorable judgment.<sup>357</sup> After all, they are part of a global “movement,” with each community waging a “campaign” as part of a localized struggle.<sup>358</sup> Accordingly, litigation can be part of a broader fight that includes grassroots organizing and out-of-court tactics like assemblies, demonstrations, and distribution of written materials.<sup>359</sup>

Litigation bolsters the broader campaign by generating publicity, galvanizing the community, and garnering support, often by disseminating data digitally. Media releases frequently spike with major events in the lawsuit, like the filing of a complaint or the issuance of important rulings.<sup>360</sup> Litigation can also encourage affected persons to join and stay with the campaign.<sup>361</sup> Consider the example of the Beaumont, Texas, law firm that represents Central American DBCP plaintiffs: Provost Umphrey maintains a client information web page (including a Spanish-language option) with contact information, FAQs, and press releases.<sup>362</sup> Litigation also helps capture the attention—and thus the support—of more recognized international social movements.<sup>363</sup>

Plaintiffs also seek to disrupt the status quo. Transnational environmental justice campaigns include using personal injury lawsuits as a means to single out a particular company and “attack in as many ways as possible.”<sup>364</sup> Despite the procedural barriers plaintiffs face, negotiated settlements are one possible result. For example, a California court approved a settlement between Dole and

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356. Todd, *supra* note 25, at 356–57 (citing *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 383–86 (S.D.N.Y. 2014)).

357. Drimmer & Lamoree, *supra* note 273, at 488 (writing that litigation in tandem with other out-of-court tactics can add the “necessary element” to a campaign).

358. *See id.* at 488 (“[T]he filing of the litigation may serve as a means of advancing a larger goal of drawing attention to the broader advocacy campaign.”); Roberts, *supra* note 17, at 291 (referring to the transnational EJM as the struggles of local communities against globalizing corporations).

359. Kimerling, *supra* note 274, at 479–80, 492–93.

360. Drimmer & Lamoree, *supra* note 273, at 477.

361. Kimerling, *supra* note 274, at 480 (writing that legal action was part of a broader “lucha” or fight by indigenous peoples in Ecuador, “including efforts to build alliances with other affected groups and outsiders who share their concerns”).

362. *DBCP Exposure Information*, PROVOSTUMPHREY.COM, <http://www.provostumphrey.com/dbcp-exposure-information.shtml> (last visited Nov. 3, 2016); *see Provost Umphrey Settles Lawsuit Against Dole Food Company*, PROVOST UMPHREY LAW FIRM (Sept. 10, 2012), <http://www.provostumphrey.com/press-releases/provost-umphrey-settles-lawsuit-against-dole-food-company.html>.

363. Roberts, *supra* note 17, at 291.

364. *Id.* at 293.

thousands of clients of Provost Umphrey from Costa Rica, Honduras, and Nicaragua who had DBCP claims.<sup>365</sup>

Even if the parties cannot obtain a judgment or settlement, NGOs can litigate with the longer-range goal of changing law and policy. Litigation generates rulings, with each new court decision adding to a body of law that might have precedential or persuasive authority to promote change, however incremental.<sup>366</sup> As the law changes, so too do governments. For example, the United Kingdom government has issued a number of statements and publications that, while vague on details, at least demonstrate a commitment to addressing environmental injustice.<sup>367</sup>

#### IV. CITIZEN SUBMISSIONS AND ENVIRONMENTAL JUSTICE

When President Clinton first assumed office, environmentalists, who traditionally supported the Democratic Party, demanded that NAFTA be fixed with an enforcement mechanism to prevent weakening or non-enforcement of environmental laws.<sup>368</sup> With its history of state ownership of key industries, Mexico hesitated even in regard to the substantive rules and ISDM in Chapter 11, so it would not cede even more sovereignty related to environmental protection during the NAAEC negotiations.<sup>369</sup> The Parties therefore crafted a mechanism that “strikes a balance between state sovereignty and the public desire for a cleaner environment.”<sup>370</sup>

The SEM process has been called the “centerpiece” of the NAAEC because of its novel approach to giving citizens a chance to spotlight the non-enforcement of environmental laws, including those relating to the harmful activities of investors.<sup>371</sup> Subsequent trade treaties adopted the SEM mechanism and improved its procedures.<sup>372</sup> While noting some positives, critics have catalogued numerous shortcomings in SEMs, with some concluding that they are ultimately ineffective.<sup>373</sup> The lack of a process

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365. Nathan Koppel, *Dole Settles Pesticide Litigation*, WALL ST. J.: LAW BLOG (Oct. 4, 2011, 1:51 PM), <http://blogs.wsj.com/law/2011/10/04/dole-settles-pesticide-litigation/>; PROVOST UMPHREY LAW FIRM, *supra* note 362.

366. Osofsky, *supra* note 18, at 129–30.

367. Pedersen, *supra* note 18, at 292–93.

368. Tollefson, *supra* note 8, at 167.

369. *Id.* at 148; see Carolyn L. Deere & Daniel C. Esty, *Trade and the Environment: Overview of Key Issues* (writing that Mexico complained during NAFTA negotiations that the environmental provision could be used to hinder trade, foreign investment, and economic growth), in GREENING THE AMERICAS, *supra* note 227, at 1, 8.

370. Kirby, *supra* note 250, at 66; see *id.* at 67 (writing that SEMs have lower sovereignty costs for Latin American countries because the treaties allow only citizens and only factual records rather than impose new law or have trade sanctions); Tollefson, *supra* note 8, at 168 (calling SEMs a compromise that left sovereignty intact).

371. Markell, *supra* note 9, at 430; see Hester, *supra* note 15, at 34 (calling SEMs a “novel strategy”).

372. Hopkins, *supra* note 10, at 393, 425–27.

373. E.g., Josephine M. Balzac, *CAFTA-DR's Citizen Submission Process: Is It Protecting the Indigenous Peoples Rights and Promoting the Three Pillars of Sustainable Development?*, 11 LOY. U.

comparable to ISDMs does not mean that SEMs deny environmental justice, however. Considering the experience of U.S. environmental justice communities using administrative actions to advance strategic goals, citizen submissions combined with political action can lead to measurable distributive, procedural, and corrective justice.

*A. Submissions on Enforcement Matters: Overview and Commentary*

Part III of the NAAEC established the Commission for Environmental Cooperation (CEC), which included a Council of one cabinet-level representative from each Party; a Secretariat to provide technical, administrative, and operational support to the Council; and the Joint Public Advisory Committee of fifteen persons to advise the Council and Secretariat.<sup>374</sup> Part B on the Secretariat contains Submissions on Enforcement Matters and Factual Records.<sup>375</sup> The purpose of the SEMs is generating data through a cumulative process. Any NGO or person from a member Party can file a submission with the Secretariat “asserting that a Party is failing to effectively enforce its environmental law.”<sup>376</sup>

One factor that the Secretariat considers is data: whether the submission “provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based.”<sup>377</sup> The Secretariat then determines whether to request a response from the Party, based on (1) if the submission alleges harm to the submitter, (2) if it raises matters that would advance the goals of the NAAEC, (3) if private remedies under the Party’s domestic law have been pursued, and (4) if the submission is not drawn exclusively from mass media reports.<sup>378</sup>

In light of data generated by the submission and response, the Secretariat can then inform the Council whether the submission warrants developing a factual record, which the Secretariat prepares if the Council approves by a two-thirds vote.<sup>379</sup> The factual record reports facts culled from the submission and response as well as public information, related submissions, and research by the Secretariat and independent experts.<sup>380</sup> The Secretariat has no power to enforce

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CHI. INT’L L. REV. 11, 54 (2013) (“In actuality, it seems the production of a factual record does not do much for the situation.”); Monahan, *supra* note 240, at 263 (writing that “key omissions in the Chapter’s language, the drawn out enforcement process, and an absence of meaningful sanctions in the event of a violation make it relatively feckless, perhaps by design”).

374. NAAEC, *supra* note 8, arts. 8–16.

375. *Id.* arts. 14–15.

376. *Id.* art. 14(1).

377. *Id.* art. 14(1)(e).

378. *Id.* art. 14(2).

379. *Id.* art. 15(1)–(2).

380. *Id.* art. 15(4).

a remedy because it has no power to enter a remedy; indeed, the factual record does not even recommend corrective action.<sup>381</sup>

### *1. Strengths of the NAAEC SEM Process*

The goal of the SEM process is that corrective action will nevertheless result. SEMs act as a “fire alarm” because citizens can monitor compliance and trigger the mechanism to signal a nation’s noncompliance with its own environmental laws.<sup>382</sup> Through the data generated by the process and disseminated digitally on the CEC’s website, this negative publicity from a neutral factfinder can shame the nation into enforcing its laws and taking other actions.<sup>383</sup> For example, a developer sought to erect a second cruise ship pier in Cozumel, Mexico in a sensitive coral reef area of the Gulf of Mexico.<sup>384</sup> A consortium of environmental NGOs submitted a complaint that no environmental impact assessment had been conducted, in violation of Mexican law. The Secretariat subsequently published a factual record that included governmental admissions of harm to the reef and suggested that the government’s actions were inconsistent with legal obligations.<sup>385</sup> Though the government did not stop construction of the pier, it did downsize the project, establish the area as a national marine park, “and express[] its intent to implement a management plan for the park and to initiate an ecological management study of Cozumel Island.”<sup>386</sup> Some commentators attribute this environmental action to the influence of the factual record.<sup>387</sup>

The factual record could also provide the basis for another NAFTA party to request an arbitral panel because of “the alleged persistent pattern of failure by the Party to effectively enforce its environmental law.”<sup>388</sup> Unlike the neutral factual record following a citizen submission, the report of an arbitral panel can include an action plan.<sup>389</sup> Failure to follow that plan could subject the Party to a

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381. Markell, *supra* note 9, at 432–33 (citing NAAEC, *supra* note 8, art. 13(1)); *see* Hopkins, *supra* note 10, at 423 (“The factual record does not draw legal conclusions and does not order the accused government to remedy the environmental problems in its territory.”).

382. *E.g.*, Markell, *supra* note 9, at 430–31 n.30; *see* Kirby, *supra* note 255, at 67 (writing that citizens are “better equipped to identify ineffective enforcement because they are closer to violations”).

383. Dorn, *supra* note 9, at 160 (“The strength of the Factual Record is its ability to shine a light on a non-compliant Party and ‘shame’ the Party into enforcing its domestic environmental laws.”); *see All Submissions*, COUNCIL FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/all-submissions> (last visited Nov. 3, 2016).

384. Dorn, *supra* note 9, at 130–31.

385. *Id.* at 130–31; *see* Comm’n for Env’tl. Cooperation, Citizen Submission on Environmental Enforcement: Cruise Ship Pier Project in Cozumel, Quintana Roo Final Factual Record, SEM-96-001 (Oct. 24, 1997).

386. Fitzmaurice, *supra* note 12, at 221; *see* Dorn, *supra* note 8, at 131.

387. *Id.*; *see* Fitzmaurice, *supra* note 12, at 221 (noting “disagreement” over whether the government’s action resulted from the citizen submission process).

388. NAAEC, *supra* note 8, art. 24(1); Dorn, *supra* note 9, at 142 (describing the potential for these proceedings but noting that no Party has initiated them).

389. NAAEC, *supra* note 8, art. 34(1).

monetary enforcement assessment and even the suspension of NAFTA benefits.<sup>390</sup>

The SEM submission process itself can be advantageous. The CEC posts not only the final factual record on its website but also the submission, response, and many other documents, so that activists gain a forum for data dissemination merely by filing the submission.<sup>391</sup> In the time between the response and publication of the factual record, the government might see the lack of enforcement and take corrective measures; indeed, factual records sometimes note this.<sup>392</sup> In one submission related to illegal logging in the lands of indigenous peoples, the Mexican Government initiated a \$10 million program to combat illegal logging prior to publication of the factual record.<sup>393</sup> Though not subject to the proceedings, sometimes the private enterprise responsible for pollution will take corrective measures. For example, the factual record related to a shrimp farm operated by Granjas Aquanova, S.A. de C.V. (Aquanova), revealed environmental harm and violation of some environmental laws.<sup>394</sup> In light of public pressure, Aquanova agreed to several remedial measures and began implementing them prior to publication of the record.<sup>395</sup>

## 2. *Mixed Results: Criticisms of and Correctives for SEMs in Trade Treaties*

From a formal perspective, these treaties have the potential to foster environmental justice by allowing citizens to spotlight problems and spur nations to enforce their laws.<sup>396</sup> Commentators are split, however, on whether the process affords procedural justice. For example, the process increases the opportunities for citizen involvement in environmental matters, but also precludes citizens from active post-submission participation.<sup>397</sup> One environmental justice advocate notes the high cost of submission, but a former director of the SEM Unit writes that the citizen submission process is not

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390. *Id.* art. 34(4)–(5), 36(1).

391. *See, e.g.*, COMM'N FOR ENVTL. COOPERATION, CITIZEN SUBMISSION ON ENVIRONMENTAL ENFORCEMENT: LA PRIMAVERA FOREST, SEM-15-001 (last updated Apr. 21, 2016), [http://www.cec.org/sites/default/files/submissions/1995\\_2000/5989\\_acf17d1.pdf](http://www.cec.org/sites/default/files/submissions/1995_2000/5989_acf17d1.pdf) (posting the submission, Secretariat determinations, and government response in an ongoing submission related to a housing development affecting a forest).

392. Dorn, *supra* note 9, at 143.

393. *Id.* at 137–38, 143; *see* COMM'N FOR ENVTL. COOPERATION, CITIZEN SUBMISSION ON ENVIRONMENTAL ENFORCEMENT: TARAHUMARA FINAL FACTUAL RECORD, SEM-00-006 (July 2005), <http://www3.cec.org/islandora/en/item/2750-north-american-environmental-law-and-policy-volume-20-en.pdf>.

394. Dorn, *supra* note 9, at 133; *see* COMM'N FOR ENVT. COOPERATION, CITIZEN SUBMISSION ON ENVIRONMENTAL ENFORCEMENT: AQUANOVA FINAL FACTUAL RECORD, SEM-98-006 (May 5, 2003), [http://www.cec.org/sites/default/files/submissions/1995\\_2000/6550\\_98-6-fr-e.pdf](http://www.cec.org/sites/default/files/submissions/1995_2000/6550_98-6-fr-e.pdf).

395. Dorn, *supra* note 9, at 134, 143.

396. Fitzmaurice, *supra* note 12, at 225.

397. Hopkins, *supra* note 10, at 424.

resource intensive when compared to the costs of court proceedings.<sup>398</sup> Of more concern to procedural justice are delay and politicization, which continue to be problematic even in light of CEC revised guidelines to the NAAEC process and of modifications to the process in subsequent trade treaties.

One complaint is the lack of speed.<sup>399</sup> A recent survey of the NAAEC submissions revealed that each step of the process takes months or years, so that preparation of a factual record does not occur until long after the initial submission.<sup>400</sup> As of 2013, the average length from filing a submission to publication of a factual record is fifty-four months—though the process has slowed down since 2003, with the average for submissions filed between 2003 and 2008 at five years, and those in preparation in 2012 languishing for seven years.<sup>401</sup> Without firm deadlines for each stage, the Council has too much discretion to make decisions about whether to approve a factual record, which can sometimes take four or five years.<sup>402</sup> The Council adopted guidelines in 2012 that added deadlines to each stage of the process, which would cut processing time in half—assuming that the Secretariat and Council adhere to the deadlines in practice, which is not certain.<sup>403</sup> Data generated about an ongoing problem does little to correct the problem if dissemination of the factual record—the document prepared by the neutral, treaty-created body—is delayed.

The NAAEC guidelines may have called for greater speed, but they also granted more political discretion to the Secretariat and Council, thus increasing the possibility that a submission would not lead to a response or to a factual record.<sup>404</sup> The process already put much discretion in the hands of the Council, which creates the perverse situation that the party subject to the complaint also has authority to reject a factual record or to limit its scope.<sup>405</sup> Through March 2013, only a quarter of submissions resulted in a factual record: thirty of eighty did not clear the initial admissibility decision, and only twenty-six of the remaining fifty resulted in a request for a factual record, of which the Council

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398. Compare Balzac, *supra* note 373, at 46–52 (writing that the process requires the assistance of lawyers and generates costs), with Markell, *supra* note 9, at 432 (calling the process “relatively non-resource intensive” because of “no discovery costs, no litigation costs, etc.”).

399. Knox & Markell, *supra* note 13, at 521 (applying justice theory from sociology to conclude that the NAAEC citizen submission procedure is not “timely and fair”).

400. John H. Knox, *Fixing the CEC Submissions Procedure: Are the 2012 Revisions Up to the Task?*, 7 GOLDEN GATE U. ENVTL. L. J. 81, 95–96 (2014).

401. *Id.* at 88–89.

402. *Id.* at 89. The Secretariat has also slowed the speed with which it produces factual records. *Id.* at 89–90.

403. *Id.* at 94–98; see COMM’N FOR ENVTL. COOPERATION, SEM GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (July 11, 2012), <http://www3.cec.org/islandora/en/item/10838-guidelines-submissions-enforcement-matters-under-articles-14-and-15-north-en.pdf>.

404. Knox, *supra* note 400, at 98–103.

405. Knox & Markell, *supra* note 13, at 539 (noting concerns with procedural justice because the countries perform dual roles as the “target” of submissions as well as “key players during the decision-making process”).

authorized twenty-one.<sup>406</sup> The guidelines added some confusing language about exhaustion of domestic remedies by the submitter as a factor in requesting a response as well as language that might constrain the Secretariat in requesting a factual record based on the sufficiency of information in the response.<sup>407</sup> Plus, the guidelines could not change the treaty language that the Council “instructs” production of a factual record by majority vote, and, even if one is produced, the Council can order that the factual record not be published.<sup>408</sup> The Council has also sought to limit the autonomy of the Secretariat, such as through resolutions in 2001 that restricted the Secretariat’s focus to specific examples of non-enforcement rather than broad and programmatic issues that might indicate widespread failures.<sup>409</sup> The Council has often narrowed the scope of a factual record, and sometimes it suspends or dismisses submissions by claiming that pending legal or administrative actions address the same concern.<sup>410</sup>

Perhaps in response to these shortcomings, CAFTA established an Environmental Cooperation Commission with a SEM mechanism that has the same end result—a factual record without recommendation or remedy—but with an improved process.<sup>411</sup> For example, multiple points within the process have deadlines to facilitate greater speed.<sup>412</sup> Plus, rather than requiring a majority, any one party can vote to have the Secretariat prepare a factual record,<sup>413</sup> and any one party can vote to have that factual record made public.<sup>414</sup> The Secretariat can also consider amicus submissions in preparing the factual record.<sup>415</sup> Another addition is a provision for a recommendation to monitor compliance following the factual record.<sup>416</sup> Free trade agreements with Colombia, Panama and Peru contain similar citizen submission provisions.<sup>417</sup>

These improvements have not completely eliminated the shortcomings. For example, the deadlines in CAFTA are not firm at every stage; the vote to

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406. Knox, *supra* note 400, at 86–87.

407. *Id.* at 98–101.

408. David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651, 664–65 (2006) (calling these “checks” on the Secretariat’s authority).

409. Fitzmaurice, *supra* note 12, at 220–21; Moreman, *supra* note 6, at 1152–53.

410. Hester, *supra* note 15, at 42; Knox & Markell, *supra* note 13, at 525.

411. Hopkins, *supra* note 10, at 425–27.

412. *E.g.*, CAFTA, *supra* note 4, art. 17.7(5) (requiring a Party response within forty-five days or, in exceptional circumstances, sixty days of delivery of the request from the secretariat); *id.* art. 17.8(5) (allowing Party comments on the secretariat’s draft factual record within 45 days); *id.* art. 17.8(7) (providing that the vote to make the factual record public shall normally be within sixty days following submission).

413. *Id.* art. 17.8(2).

414. *Id.* art. 17.8(7).

415. *Id.* art. 17.8(4)(b) (“In preparing a factual record, the secretariat . . . may consider any relevant technical, scientific, or other information . . . submitted by interested persons.”).

416. Balzac, *supra* note 373, at 45 (citing CAFTA, *supra* note 4, art. 17.8.8).

417. Colom.-U.S. FTA, *supra* note 246, arts. 18.8–18.9; Pan-U.S. TP, *supra* note 246, arts. 17.8–17.9; Peru-U.S. FTA, *supra* note 247, arts. 18.8–18.9.

make the final factual record public is “normally” sixty days.<sup>418</sup> Plus, while politicization has been reduced with the elimination of majority votes, the fact is that each Party continues to be both respondent and official in proceedings. Specific examples suggest that the process presents environmental justice communities with challenges, such as one commentator’s study of two submissions against Guatemala that did not move very far in the process.<sup>419</sup> Indeed, the CAFTA SEM has so far resulted in only four of thirty-four submissions reaching the factual record stage.<sup>420</sup>

### 3. *The Negative: Lacking Substance and Remedy, SEMs Fail to Provide Environmental Justice*

For some commentators, the procedural improvements in CAFTA and other trade treaties add nothing because all of the treaties allow the Latin American members to maintain their existing “poor” environmental standards.<sup>421</sup> The only ground for complaint is a nation’s lack of enforcement of its domestic environmental laws; however, the treaties do not create any substantive law, nor do they require the nations to implement new domestic laws, so “there is currently very little to enforce.”<sup>422</sup> Some therefore equate CAFTA with the NAAEC, describing it as “pure rhetoric” because the improved procedures do not expand its reach.<sup>423</sup> The U.S.-Peru free trade agreement does require Peru to implement new environmental laws, but political opposition within the Peruvian government prevented the nation from actually doing so.<sup>424</sup>

Ultimately, none of the treaty SEM procedures force the polluter to pay—or to do anything to halt or remediate the harmful conduct.<sup>425</sup> The sources of personal and environmental harm are frequently TNCs or businesses related to international trade, like border maquiladora plants that discharge pollutants into the water or battery recycling facilities that discard lead and other heavy metals into the soil.<sup>426</sup> The Secretariat has no jurisdiction over these private parties but only over the State that has allowed the pollution by disregarding its environmental laws.<sup>427</sup> The treaties limit the Secretariat’s authority over the

418. CAFTA, *supra* note 4, art. 17.8(7).

419. Balzac, *supra* note 373, at 63.

420. *Registro Publico*, SAA-SEM.ORG, <http://www.saa-sem.org/es/registro> (last visited June 19, 2016).

421. Hopkins, *supra* note 10, at 398.

422. Stenzel, *supra* note 5, at 699.

423. Balzac, *supra* note 373, at 14.

424. Condon, *supra* note 5, at 113–14.

425. NAAEC, *supra* note 8, arts. 14–15 (allowing preparation and publication of a factual record if a party is failing to enforce its environmental laws but otherwise containing nothing about injunctive or monetary relief).

426. *See supra* text accompanying notes 241–244.

427. *E.g.*, NAAEC, *supra* note 8, art. 14 (empowering the Secretariat to consider submissions that Parties are not enforcing their laws and to request a response from the Party).



State to requiring responses so that the factual record can reflect a finding of non-enforcement, if warranted. The Secretariat has no power to order the State to comply; indeed, the factual record cannot even make a recommendation about how to comply. Nor can the Secretariat force the polluter to pay, whether the State permits that agent to cause harm or we define the polluter as the agent of harm.<sup>428</sup> Compared to U.S. citizen suits, which entail court proceedings and have the potential for an enforceable remedy, the Secretariat cannot afford monetary remedies for personal or property damage, nor can it enter an injunction or award other equitable relief.<sup>429</sup>

One commentator puts it bluntly: “In all, therefore, this complaint procedure, as it stands at present, cannot be said to embody or further the principles of environmental justice.”<sup>430</sup>

*B. Citizen Submissions as an Effective Tactic in Environmental Justice Campaigns*

Critics have proposed countering the harmful effects of trade and investment treaties by including provisions that open access to U.S. courts or grant citizens greater substantive rights coupled with access to a tribunal for enforcement, similar to ISDMs.<sup>431</sup> In light of their exposure to multi-million and multi-billion dollar claims by investors,<sup>432</sup> the United States and its trading partners have a disincentive to cede more sovereignty.<sup>433</sup> Plus, the treaties currently impose no liability on TNCs for environmental harm to citizens, and those TNCs use their political and economic influence to keep it that way.<sup>434</sup> The United States has included SEMs in trade treaties subsequent to NAFTA and the NAAEC, including a modified version in the recently completed Trans

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428. See Bugge, *supra* note 293, at 412–13 (exploring what is meant by “polluter” in the polluter pays principle).

429. David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens’ Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1, 7–11 (2008); Yang, *supra* note 12, at 478.

430. Fitzmaurice, *supra* note 12, at 224.

431. *E.g.*, Foster, *supra* note 269, at 393, 406–07 (arguing that BITs could add provisions that increase access to arbitration for local stakeholders, specifically for indigenous peoples); Gonzalez, *Eco-Imperialism*, *supra* note 221, at 1012–13 (arguing for multilateral agreements that impose human rights standards on TNCs and for expanding the rights of victims of TNC pollution to sue in home state courts); Yang, *supra* note 12, at 495 (proposing that private individuals have standing to initiate the NAAEC Part V proceedings, which can lead to binding arbitration).

432. See, *e.g.*, *supra* text accompanying notes 252–260 (discussing the Metalclad dispute that resulted in a \$15 million award); Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement, *TransCanada Corp. v. United States* (Jan. 6, 2016), <http://www.keystone-xl.com> (seeking \$15 billion for losses related to U.S. refusal to approve Keystone oil pipeline project).

433. See Tollefson, *supra* note 7, at 184 (calling the limits on the power of citizen submissions “a protectionist approach to sovereignty”).

434. Todd, *supra* note 25, at 380.

Pacific Partnership,<sup>435</sup> but neither the United States nor its trading partners have strengthened SEMs significantly.<sup>436</sup> History and politics therefore demonstrate that affected citizens will not gain greater access to courts or a forum equivalent to an ISDM.<sup>437</sup>

Affected communities do not need these provisions to access justice, however. An effective system must provide real alternatives to ordinary courts and litigation procedures through alternative dispute resolution.<sup>438</sup> Not all forms of alternative dispute resolution require an enforceable remedy: scholars recognize that access to justice includes ensuring claimants have representation for informal negotiation or the potential for truncated invocation of formal legal process.<sup>439</sup> After all, many forms of dispute settlement—whether at the domestic or international level, whether involving public or private entities—aim to resolve disputes by avoiding binding awards and judgments altogether.<sup>440</sup> Mediation involves the presence of a third-party neutral to facilitate discussions between the parties, while conciliation goes a step farther by resulting in a non-binding report.<sup>441</sup> Inquiry adds an independent investigation by the panel that becomes part of the report, similar to SEMs.<sup>442</sup> The data-gathering approaches of conciliation and inquiry are parts of several environmental treaties for resolving state-to-state disputes.<sup>443</sup> These forms of alternative dispute resolution may be more effective than binding mechanisms in producing change: the failure of less developed nations to comply with treaty obligations is often a result of “inadvertence, lack of capacity, or transitional difficulties” rather than “wanton disregard,” so “a reliable and neutral account of a domestic law enforcement failure is likely to induce a party to take corrective actions.”<sup>444</sup>

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435. See Trans-Pacific Partnership, art. 20.9, Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (providing that each Party shall provide a mechanism for members of the public to make submissions about non-enforcement of environmental laws and provide for Party responses to those submissions).

436. See *supra* Part V.A.3.

437. *E.g.*, Lewis, *supra* note 10, at 1256 (calling proposal to grant standing via the NAAEC or CAFTA to citizens in international tribunals for binding relief “politically unworkable”); Markell, *supra* note 9, at 455 n.126 (writing that “it seems unlikely that the parties will renegotiate the [NAAEC] any time soon to change the nature of the process in a fundamental way that makes it more like a form of ‘supranational adjudication’”); Moreman, *supra* note 6, at 1142 (writing that states hesitate to join legal regimes that increase “sovereignty costs”); Sachs, *supra* note 24, at 868 (writing that industrialized states have refused to sign and ratify liability treaties).

438. Davis & Turku, *supra* note 151, at 49, 55.

439. Galanter, *supra* note 151, at 122.

440. Tim Stephens, *The Settlement of Disputes in International Environmental Law*, in ROUTLEDGE HANDBOOK, *supra* note 2, at 175, 181–82.

441. *Id.* at 181.

442. *Id.* at 181–82; see Yang, *supra* note 12, 454 (describing how the Secretariat in the Metales submission requested information from government agencies and individuals, in addition to that submitted by the parties).

443. Stephens, *supra* note 440, at 181–82.

444. Dorn, *supra* note 9, at 142–43.

Because U.S. trade treaties grant private parties a similar right to invoke proceedings against a nation, affected residents gain some political leverage,<sup>445</sup> which is key to achieving solutions to what are political problems. The ability to articulate a complaint and force a response goes to the heart of why U.S. environmental justice communities initiate administrative proceedings, which is another process that lacks significant remedies. Yet the communities sometimes obtain relief as a result of the proceedings, plus pursuing administrative actions can strengthen a local campaign and lead to long-term changes by government entities and the agents of harm.

Unlike the United States, countries like Mexico limit access by citizens and forbid standing to NGOs to pursue administrative actions. The citizen submission process, though, provides an additional outlet to achieve the same objectives.<sup>446</sup> That outlet can be and has been effective: the “increased transparency and public attention” from submissions have caused governments to change their behavior.<sup>447</sup> The submission and factual record by themselves are insufficient, however; the process has “political bite” only when employed strategically as part of an activist campaign, one often involving a digital component.<sup>448</sup>

### 1. *The SEM Process in Metales*

The facts underlying the Metales submission are representative of the effects caused by border maquiladoras, which are typically plants that employ low-skill laborers to assemble components for goods for export to the United States.<sup>449</sup> While maquiladoras had already existed along the U.S.-Mexico border, their number exploded following the passage of NAFTA. Between 1996 and 2000, 210 new maquiladoras were built in Tijuana, Mexico, and as of 2003, the State of Baja California had 1300 maquiladoras, with most concentrated at the Tijuana-San Diego border.<sup>450</sup> Despite the increase in maquiladoras, Mexican spending on environmental enforcement dropped during the same period, and the number of environmental inspectors remained

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445. GRAUBART, *supra* note 13, at 106 (noting that the NAAEC offers one of the few transnational instruments that enable environmentalists to file complaints of government noncompliance to an outside body); *id.* at 139 (writing that “quasi-judicial mechanisms offer a valuable political platform for social activists”); Lewis, *supra* note 10, at 1260–63 (writing that the SEM process can help apply “political pressure”).

446. Balzac, *supra* note 373, at 53; Dorn, *supra* note 9, at 144; Fitzmaurice, *supra* note 12, at 222; Markell, *supra* note 9, at 431–32.

447. Knox & Markell, *supra* note 13, at 527; *see* Dorn, *supra* note 9, at 129–30 (“Such ‘shaming’ is effective at eliciting corrective action by the non-compliant party because it creates public awareness that the party is knowingly engaging in unlawful activities.”).

448. GRAUBART, *supra* note 13, at 116, 127, 131; *see* Knox & Markell, *supra* note 13, at 528 (writing that “the factual record is useful as part of a broader campaign”).

449. Yang, *supra* note 12, at 444–45.

450. *Id.* at 465.

flat.<sup>451</sup> As a consequence, the areas around maquiladoras have been characterized as “cesspools” and “fetid.”<sup>452</sup>

San Diego-based New Frontier Trading Company owned the Metales facility in Tijuana, Mexico, where it shipped used batteries and other materials to recycle lead and copper for re-importation back to the United States.<sup>453</sup> The operations resulted in tons of hazardous lead and other waste, much of which Metales disposed of improperly—including by simply leaving on the ground—despite the proximity of a poor residential neighborhood, Colonia Chilpancingo.<sup>454</sup> Faced with Mexican criminal charges, the owner closed the facility and fled the country in 1995, leaving the waste behind.<sup>455</sup> Despite knowledge by the criminal and environmental authorities and complaints from the residents, government officials took few measures to remediate the site.<sup>456</sup>

Accordingly, residents of Colonia Chilpancingo, with the aid of a U.S. environmental justice group, filed a submission alleging Mexico’s failure to enforce environmental laws related to controlling or preventing risks to ecological balance, human health, and soil contamination.<sup>457</sup> The Secretariat requested a response from Mexico, and when the Council approved development of a factual record, the Secretariat conducted its own investigation.<sup>458</sup> Though the factual record did not draw a legal conclusion about Mexican non-enforcement, it did substantiate the dangers posed by the site and the lack of sequestration or disposal of the waste.<sup>459</sup>

Some critics have concluded that the citizen submission process denied the Colonia Chilpancingo residents environmental justice.<sup>460</sup> The SEM process took three-and-a-half years from the filing of the submission in October 1998 to the publication of the factual record in February 2002.<sup>461</sup> Mexico’s response was kept confidential from June 1999 until June 2001, thus limiting the submitters’ access to data and precluding them from active involvement in the process.<sup>462</sup> Perhaps most damning is that, without remedy or recommendation or even legal conclusions, the factual record afforded the community no relief.

451. *Id.* at 465–66.

452. Robert-Ritter, *supra* note 251, at 446 (referring to dumping areas near maquiladoras as “cesspools for communicable disease”); Amelia Simpson, *Warren County’s Legacy for Mexico’s Border Maquiladoras*, 1 GOLDEN GATE U. ENVTL. L.J. 153, 165 (2007) (“Now, the river [near the Metales facility] is a fetid stew of industrial and biological waste.”).

453. Simpson, *supra* note 452, at 161–62; Yang, *supra* note 12, at 447–49.

454. Simpson, *supra* note 452, at 163; Yang, *supra* note 12, at 448–49.

455. Yang, *supra* note 12, at 448–50.

456. *Id.* at 450–51.

457. *Id.* at 453; Simpson, *supra* note 452, at 167–68. The EHC also complained about the failure of the government under criminal and treaty law to procure the extradition of the facility owner, but the Secretariat rejected the claim as outside the scope of its jurisdiction. Yang, *supra* note 12, at 453–54.

458. Yang, *supra* note 12, at 454.

459. *Id.*; Simpson, *supra* note 452, at 168.

460. Yang, *supra* note 12, at 446; Simpson, *supra* note 419, at 155 (calling Metales “the poster child for the failure of NAFTA as a model for protecting public health and the environment”).

461. Simpson, *supra* note 452, at 168.

462. Yang, *supra* note 12, at 454.

The data was generated, formalized, and disseminated—then abandoned. The initial Mexican governmental response to the factual record was mostly indifferent: PROFEPA put up new warnings signs and tarps over the waste piles.<sup>463</sup> No new laws were passed, despite some Mexican members of parliament supporting the idea of a clean-up fund,<sup>464</sup> nor did the United States respond to the factual record by triggering the bilateral dispute settlement process of the NAAEC,<sup>465</sup> even though the polluter was an American company and the waste originated in the United States.

## 2. *Metales Reconsidered: Citizen Submission Plus Community Action*

One student commentator opines that an “immediate remedy . . . matters little” because the purpose of citizen submissions is to force the government to fulfill treaty obligations.<sup>466</sup> The submission advanced a “political agenda” by forcing a response from Mexico and generating publicity.<sup>467</sup> The residents certainly had a political agenda, one that included clean-up of a dangerous site that they had neither the resources nor ability to do themselves. After all, environmental justice is a quest for distributive, procedural, and corrective justice, and the community sought to advance not only the first two but also the third.<sup>468</sup> Though not *the* means toward remediation and other political change, the submission process and resulting factual record were *a* means: as a tactical part of a broader U.S.-style environmental justice campaign, the citizen submission contributed to achieving all three component justices for the community as well as to longer-term objectives.

The process allowed environmental activists from different countries to work together. With the aid of the San Diego-based Environmental Health Coalition (EHC), the residents formed a community action team, the Colectivo Chilpancingo Pro Justicia Ambiental (Colectivo).<sup>469</sup> The EHC and Colectivo engaged in numerous tactics outside the submission process, such as media outreach, letter campaigns, candlelight vigils, and meetings with government officials.<sup>470</sup> The citizen submission augmented these tactics. For example, filing the submission generated international press coverage—including stories on National Public Radio and in major newspapers like the *Wall Street Journal*, *Los Angeles Times*, and *Washington Post*—that raised the profile of the

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463. *Id.* at 455.

464. *Id.* at 480; Simpson, *supra* note 452, at 172.

465. Yang, *supra* note 12, at 482.

466. Lewis, *supra* note 10, at 1262.

467. *Id.* at 1262–63.

468. Simpson, *supra* note 452, at 154 (noting the community’s “long struggle” to defend its “health and the environment”); see Markell, *supra* note 408, at 679–80 n.142 (writing that citizens will not have much interest in submissions “if the end result is not likely to be of value to them” by leading to effective outcomes).

469. Simpson, *supra* note 452, at 164.

470. *Id.* at 169–72.

campaign.<sup>471</sup> The Secretariat's request forced the Mexican government to respond, and its independent investigation added information otherwise unobtainable by the community.<sup>472</sup> Publication of the factual record also had symbolic value for members of the community, with one person stating that the favorable finding gave them "a sense of new hope that the site will ultimately be cleaned."<sup>473</sup>

The submission and factual record enabled the EHC and Colectivo to "legalize" their dispute with the government and thus give it greater status.<sup>474</sup> Although the Mexican response was kept confidential temporarily, documents related to the submission were and still are posted on the CEC website.<sup>475</sup> When the factual record was published, the activists organized a press conference demanding clean-up of the site.<sup>476</sup> With political legitimacy came access to those with political power: they met with representatives of the City of Tijuana, the State of Baja California, the Mexican environmental agency ("SEMARNAT"),<sup>477</sup> and even the U.S. EPA, and in 2004 they agreed on a five-year clean-up plan.<sup>478</sup> Remediation included removal of some waste and encasing the rest in concrete, and the work finished ahead of schedule in 2008 and includes monitoring by community residents.<sup>479</sup> Like other environmental justice advocates, the EHC maintains a website, which provided a digital tool to disseminate information about the submission and remediation processes.<sup>480</sup> The Metales site has been transformed from a lead wasteland that was particularly dangerous to children to one where children could play soccer.<sup>481</sup>

One glaring shortcoming is that the agents of harm—the U.S. company and its owner—were not liable to the community for money damages or for remediating the site. Commentators, including environmental justice scholars,

471. Yang, *supra* note 12, at 479.

472. GRAUBART, *supra* note 13, at 131.

473. *Id.* at 130; see Knox & Markell, *supra* note 13, at 528 (writing that "the submission procedure may strengthen environmental activists' domestic networks").

474. See GRAUBART, *supra* note 13, at 140 ("[T]he mechanism enables activists to *legalize an ongoing political dispute* with a government in a way that gives their cause greater status." (emphasis in original)).

475. *Metales y Derivados*, COMM'N ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/metales-y-derivados> (last visited Nov. 3, 2016).

476. Simpson, *supra* note 452, at 170; see GRAUBART, *supra* note 13, at 131 (calling the symbolic validation, eliciting government responses, and adding information that result from citizen submissions "opportunities" that require political mobilization to be of use).

477. SEMARNAT stands for *Secretaría de Medio Ambiente y Recursos Naturales* (Environment and Natural Resources Secretary). SEMARNAT, [gob.mx](http://gob.mx), [www.semarnat.gob.mx](http://www.semarnat.gob.mx) (last visited Jan. 25, 2017).

478. Simpson, *supra* note 452, at 169–72; but see Yang, *supra* note 12, at 502 (arguing that "it would be false to believe that [the agreement] is also a sign of the submission process' success").

479. Simpson, *supra* note 452, at 172; Jose Luis Jiménez, *Former Dump Is Revived*, SAN DIEGO UNION-TRIBUNE (Jan. 29, 2009); *Metales y Derivados Toxic Site*, ENVTL. HEALTH COALITION, <http://www.environmentalhealth.org/index.php/en/what-we-do/border-environmental-justice/metales-y-derivados-toxic-site> (last visited June 22, 2016).

480. ENVTL. HEALTH COALITION, *supra* note 454.

481. Jiménez, *supra* note 479.

have argued that if TNCs cannot be held accountable for environmental or personal injury, then the host state that allows the activity and the home state of the agent of harm should be.<sup>482</sup> The total clean-up cost was approximately \$2 million, with the bulk of that borne by the Mexican government that allowed Metales to operate.<sup>483</sup> The United States, home to New Frontier Trading Company, also contributed by hiring a contractor that specialized in remediation and paying roughly \$80,000 toward the effort.<sup>484</sup> The Metales submission even contributed in a small way toward offsetting distributive injustice. In the first phase of remediation alone, 1976 tons of toxic waste were removed, with at least 300 tons of that returned to the United States.<sup>485</sup>

Though the residents of Colonia Chilpancingo might never recover from New Frontier, activists in one campaign that included a citizen submission credit the procedure with helping obtain relief directly from the agent of harm. The NGO that brought the submission, which related to the harm to mangroves from construction and operation of a shrimp farm, claims that the submission motivated the operator Aquanova to change its “attitude and behavior.”<sup>486</sup> More to the point, Aquanova responded to public pressure and committed to several remedial and preemptive measures like halting certain practices, a reforestation program, and the return of some land to the government.<sup>487</sup> By garnering media attention and government responses, submissions in conjunction with political action like that in Metales and Aquanova might be helping to shift public perceptions of what constitutes acceptable corporate conduct, thus contributing to the commitment by TNCs and other business interests to voluntary codes of social and environmental responsibility.<sup>488</sup>

Finally, submissions might prevent future harm by encouraging better enforcement of environmental laws as well as longer-term government acceptance of environmental justice principles.<sup>489</sup> The Metales clean-up was the first project of the Border 2012 Plan and included cooperation by the EPA,

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482. E.g., Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 MODERN L. REV. 598, 599–600 (2007) (writing that both the home and host states have responsibility for violations of human rights); Gonzalez, *supra* note 1, at 786 (“States are legally obligated to respect, protect, and fulfill the human rights of persons located within their borders, but the duty to respect human rights also extends extraterritorially.”).

483. Jiménez, *supra* note 479.

484. *First Border 2012 Binational Site Stabilization Action*, EPA, <https://www3.epa.gov/region9/waste/features/metales/> (last updated Apr. 27, 2016).

485. *Id.*; Simpson, *supra* note 452, at 172.

486. Dorn, *supra* note 9, at 133–34.

487. *Id.* at 134.

488. Monsma, *supra* note 1, at 474–75; see Ebbesson, *supra* note 2, at 287–88; Suttles, *supra* note 18, 56–58.

489. Moreman, *supra* note 6, at 1150 (noting the “deterrent effect” of the SEM process); Zygmunt J. B. Plater, *Dealing with Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. L. & LITIG. 9, 27 (2005) (crediting citizens as providing “the critical vital catalyst to force creation of new laws, and force governmental agencies to enforce them”).

SEMARNAT, and the State of Baja California.<sup>490</sup> The factual record motivated a Mexican proposal for a clean-up fund similar to the U.S. Superfund.<sup>491</sup> Commentators argue that environmental justice lawsuits can have the long-term effect of laying a foundation for institutionalized international frameworks.<sup>492</sup> Just as litigation can chip away at non-enforcement by creating persuasive authority, so too can factual records create a body of multinational findings that pushes change, even if incremental.<sup>493</sup> The Metales factual record in combination with other submissions might therefore have influenced the stronger environmental protections—including better procedural mechanisms in citizen submission processes—in CAFTA and other Latin American trade treaties.

#### CONCLUSION

Rather than catalogue the weaknesses and strengths of the SEM processes, this Article concludes by focusing on the bottom line: SEMs can help communities achieve positive results, but only when employed strategically in conjunction with political action.<sup>494</sup> No doubt the SEM process does not come close to the protections that treaties offer investors. The lack of an equal mechanism does not mean that the treaties deny communities environmental justice, however. Poor and minority communities in the United States have access to courts, yet rarely win judgments or injunctive remedies. Theirs is a political rather than legal struggle, so they have employed administrative proceedings as a supplement to grassroots—and digital—activism to gather data, advance a cause, obtain some relief, and make lasting changes.

Trade treaties offer a similar mechanism, one that, despite the lack of remedy, is popular with environmental advocates.<sup>495</sup> Metales shows how citizen submissions can lead to direct relief and other benefits comparable to those obtained by U.S. communities through activism paired with

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490. EPA, *supra* note 484.

491. Simpson, *supra* note 452, at 172.

492. E.g., Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 201 (2010) (arguing that nuisance claims brought by Inuit peoples in U.S. federal court “could help lay a foundation for possible long-term, institutionalized frameworks at the international level to address on a broader scale the rights of populations disproportionately affected by climate change”).

493. Sachs, *supra* note 24, at 900 (writing that norms of transboundary environmental damage can emerge through rulings of international tribunals).

494. GRAUBART, *supra* note 13, at 140; *see id.* at 129 (noting a correlation between political activism/Secretariat support and positive results for the petitioners).

495. Markell, *supra* note 9, at 427. Scholars had noted a decline in the number of SEM submissions under the NAAEC, with zero in 2014. Hester, *supra* note 15, at 32–33; Knox, *supra* note 400, at 92. The year 2015 saw three submissions, however, with another in 2016 at the time of this Article’s writing. *All Submissions*, COMM’N FOR ENVTL. COOPERATION, <http://www.cec.org/sem-submissions/all-submissions> (last visited June 9, 2016). The Secretariat for Environmental Matters under CAFTA has received thirty-four submissions in its decade of existence, including three in 2015. SAA-SEM.ORG, *supra* note 420.



administrative proceedings. Plus, Metales is not and need not be a one-off.<sup>496</sup> One study analyzed ten submissions and found that seven led to “actual policy changes” while the other three brought “formal advancement of the cause onto the government’s agenda.”<sup>497</sup> Another analysis focused on six factual records concerning Mexico and concluded that four led to specific improvements, including Metales.<sup>498</sup> Though limited to gathering and disseminating information, these citizen submissions have a practical effect. By pushing governments toward better enforcement and inching TNCs toward accepting greater responsibility, SEMs supported by political action also help to reduce overall harm, thus aligning with Professor Bullard’s view of the purpose of environmental justice: “[T]o prevent environmental threats before they occur.”<sup>499</sup>

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496. See Dorn, *supra* note 9, at 138 (writing that a citizen submission brought by NGOs on behalf of indigenous peoples “arguably added additional fuel to the public scrutiny of Mexico’s failure to enforce environmental laws to halt the illegal logging and to provide environmental justice to the Tarahumara people” and resulted in government actions like a new program and investigations into police misconduct).

497. See GRAUBART, *supra* note 13, at 123–25.

498. Dorn, *supra* note 9, at 130–38.

499. Bullard, *supra* note 40, at 454.

**We welcome responses to this Article. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**

