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SUCCESSFUL CITIZENS SUBMISSIONS UNDER THE NORTH-AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

Andrea M. Wyrick

I. INTRODUCTION

With the dawn of the North American Free Trade Agreement in 1993 came the birth of “side accords” meant to deal with other issues of concern between the parties of Mexico, Canada and the United States. The North American Agreement on Environmental Cooperation was the agreement proposed to legally manage economical concerns the United States and Canada had with Mexico and the new economic incentives NAFTA created.¹ This particular side accord set up a system to monitor the environmental enforcement of the three parties, involving a detailed procedure in which citizens of any nation-member to NAFTA may complain and pursue “judgments” against parties for possible violations.² Since its conception, this mini-judiciary has heard several petitions, and it appears to be effectively consistent in laying out the “law” as it applies to environmental issues between parties. The following pages will attempt to outline a *prima facie* violation of the environmental accord and how to successfully prevail in a citizen submission.³

1. See Canada-Mexico-United States: North American Agreement on Environmental Cooperation, Sept. 9, 1993, 32 I.L.M. 1480, [hereinafter NAAEC]. There was concern on behalf of many in the US that with the signing of NAFTA, the Mexican environmental standards would not be as duly enforced. The creation of the NAAEC was a effective way to appease environmental groups and members of Congress. See also *NAFTA: Energy Provisions and Environmental Implications: Hearing Before the House Committee on Energy and Commerce*, 103rd Cong. 30 at 44 (1993).

2. “The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law” See NAAEC, Article 14(1), *supra* note 1, at 952.

3. It should be noted that all references made to litigation terms, like “*prima facie*” and “petition” are the authors own. The NAAEC does not purport to be a judiciary body, rather terms are inserted for comparison/illustration purposes only.

II. THE SYSTEM PROVISIONS

A citizen petitioner must understand how the system functions. The North American Agreement on Environmental Cooperation (NAAEC) established the Commission for Environmental Cooperation which is comprised of three main components: a Council, a Secretariat and a Joint Public Advisory Committee.⁴ The two most important parts for purposes of this discussion are the Council and the Secretariat.

The Council is like the functioning executive body of the Commission. They make decisions and recommendations by consensus and are represented by each of the Parties to NAFTA.⁵ They also oversee the position of Secretariat. The Secretariat "shall, as appropriate, provide the Parties and the public information on where they may receive technical advice and expertise with respect to environmental matters."⁶ It is the Secretariat who directly deals with citizen submissions and decides whether it is necessary or not to inform the Council of the complaint.

A. Determining Whether the Submission Satisfies Article 14 Criteria

Article 14 sets out in the first paragraph the duties of the Secretariat in this regard. "The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law" and then it lists the prerequisites a submission must meet before it is considered.⁷ This process is much like the procedural process in the United States in that the "petition" must satisfy minimum requirements in order to survive a directed verdict. In special guidelines for submissions published by the Commission it states, "The Secretariat may only consider a submission on enforcement matters if that submission meets the criteria set forth in Article 14 (1) of the Agreement."⁸ The basic requirements in Article 14(1) are:

- a) is in writing in a language designated by that Party in a notification to the

4. "The Commission shall comprise a Council, a Secretariat and a Joint Public Advisory Committee." See NAAEC, Article 8, *supra* note 1, at 946.

5. "The Council shall comprise cabinet-level or equivalent representatives of the Parties, or their designees." See NAAEC, Article 9(1), *supra* note 1, at 946. "All decisions and recommendations of the Council shall be taken by consensus, except as the Council may otherwise decide or as otherwise provided in this Agreement." See also NAAEC, Article 9(6), *supra* note 1, at 946.

6. See NAAEC, Article 11(7), *supra* note 1, at 950.

7. See NAAEC, Article 14(1), *supra* note 1, at 952.

8. The Commission published on the internet guidelines all submissions must adhere to. *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Part 4.1, at 2 (visited August 23, 1998) <<http://www.cec.org>>.

Secretariat;

- b) clearly identifies the person or organization making the submission;
- c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- d) appears to be aimed at promoting enforcement rather than at harassing industry;
- e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- f) is filed by a person or organization residing or established in the territory of a Party.⁹

B. Party Responses to the Submission

If a submission successfully completes the procedural criteria, then "the Secretariat shall determine whether the submission merits requesting a response from the Party" under Article 14(2). The guiding principles for the Secretariat's determination are:

[T]he submission alleges harm to the person or organization making the submission; the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement; private remedies available under the Party's law have been pursued; and the submission is drawn exclusively from mass media reports.¹⁰

After making this determination, the Secretariat will either ask for a response (similar to an answer) to the submission from the accused Party, or dismiss the submission. If a Party is requested to respond, the Secretariat will then consider both the submission and the response in its decision on whether to notify the Council of the matter. "If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall inform the Council and provide its reasons."¹¹

C. Preparation of a Factual Record

After notification, the Council can vote to have the Secretariat prepare a factual record. "The Secretariat shall prepare a factual record if the Council, by a two-thirds vote instructs it to do so."¹² A factual record is similar to a report on the whole situation aimed at helping the environmental community become aware of the complaint and problems, with

9. See NAAEC, Article 14(1), *supra* note 1, at 952.

10. See NAAEC, Article 14(2), *supra* note 1, at 952.

11. See NAAEC, Article 15(1), *supra* note 1, at 953.

12. See NAAEC, Article 15(2), *supra* note 1, at 953.

hopes at curtailing the enforcement violations. "A factual record may assist the public and Parties in assessing the effectiveness of specified enforcement practices."¹³ Factual records contain:

a summary of the submission that initiated the process; a summary of the response, if any, provided by the concerned Party; a summary of any other relevant factual information; and the facts presented by the Secretariat with respect to the matters raised in the submission.¹⁴

In addition, it can incorporate the comments of any Party.¹⁵ A factual record, in some ways is much like a public reprimand, and Parties are not apt to take it lightly. "The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission."¹⁶ In this way, the objectives of the NAAEC are upheld by environmental peers in the NAFTA community. This system operates to promote primary objectives of the NAAEC such as, "to foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations."¹⁷

The understanding of this system will aid a petitioner in accomplishing the task of proffering a successful submission. As of the writing of this article, seventeen submissions have been presented to the Secretariat since its conception.¹⁸ Each submission is denoted with a number comprised of the year of the submission, and its number in succession (example—95-001 is "1995" and the first submission). A thoughtful petitioner can learn from these submissions through their subsequent "rulings" and apply the "law" on the important issues in his or her own submission. There are many issues that stand out amongst the cases submitted as being very important to the success or failure of a citizen submission. These issues will be discussed by examining the important "case" submissions and their decisions by the Secretariat under the NAAEC.¹⁹

13. *Secretariat's Determination under Articles 14(1) and 14(2)*, SEM-95-002, (Visited August 23, 1998) <<http://www.ccc.org>>.

14. See Guidelines, Part 12, *supra* note 8, at 6.

15. Comments from Parties normally incorporate their response to the Submitters allegations and any other pertinent information in their own defense. See *id.*

16. See NAAEC, Article 15(7), *supra* note 1, at 953.

17. See NAAEC, Article 1(a), *supra* note 1, at 942. A complete list of the NAAEC's objectives are listed in Article 1.

18. Research for this article was completed on or before October 1, 1998. Any new information since that date has yet to be included in this article.

19. These three issues are not the only ones to be gained from the citizen submission process.

III. THE ISSUES

A. What Constitutes "Environmental Law"

Article 14(1) states, "The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its *environmental law*."²⁰ This broad language considers a variety of different laws and regulations a Party could be failing to enforce. In citizen submission 97-005 and 98-002 the Secretariat clearly states what constitutes environmental law in light of the NAAEC's objectives.

1. Citizen Submission 97-005

The Submitters in 97-005 alleged that, "Canada is failing to enforce its regulation ratifying the Convention on Biological Diversity signed at the Rio Earth Summit on June 11, 1992."²¹ According to them, under Canadian law a Ratification Instrument is a legally binding regulation. In particular, "Canada has failed to fulfill the requirements . . . which stipulates that each country must 'develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.'²² In the submission, great length is taken to point out Canada's growing endangered species problem and the lack of legislation to regulate it. The Submitters argue that if legislation is required to protect endangered species, and Canada has not enacted any under the Ratification Agreement, then it is failing to enforce the Ratification Agreement, rather, "failing to enforce an environmental law."²³ The Secretariat first states how Article 14(1) should be interpreted. Accordingly, Article 14(1), "should be given a large and liberal interpretation, consistent with the objectives of the NAAEC and the provisions of the Vienna Convention on the Law of Treaties."²⁴ This means that "an assertion" that a "Party" is "failing to effectively enforce its environmental law" sets the threshold analysis for all submissions by initially screening out those that don't pass its standard. Article 45(2) expressly defines the term "environmental law" granting more support to the Secretariat's threshold test. Article 45 definition is as follows:

"[E]nvironmental law" means any statute or regulation of a Party, or provi-

20. See NAAEC, Article 14(1), *supra* note 1, at 952 (emphasis added).

21. See SEM 97-005, at 1 (visited September 12, 1998) <<http://www.ccc.org>>.

22. See *id.* at 3.

23. See *id.* at 7.

24. See *Secretariat's Determination under Article 14(1) of the NAAEC*, SEM 97-005, (visited September 12, 1998) <<http://www.ccc.org>> at 2.

dence thereof, the primary purpose of which is the protection of the environment or the prevention of a danger to human life or health, through prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants, the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information regarding thereto, or the protection of wild flora or fauna, including endangered species, habitat, and specially protected natural areas.²⁵

"Primary purpose" is defined as "[T]he primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part."²⁶

The Agreement recognizes that at times an entire scheme of a particular piece of legislation's purpose might be entirely different than its sub-components. In 97-005 there is no doubt that the Biodiversity Convention to which Canada has pledged their consent to be bound is environmental law. Canada has joined together with other nations in the international arena and agreed to create and implement laws governing endangered species and other environmental concerns. However, the issue brought before the Secretariat is whether the Ratification Instrument is environmental law. The Secretariat decisively concludes it is not. First, the Submitters failed to distinguish between international obligations and domestic law. The Agreement, Article 45 in particular, only contemplates "any statute or regulation of a Party, or province thereof."²⁷ The Secretariat argues that the Ratification Instrument's purpose is to confirm the international obligations of Canada in the Biodiversity Convention:

In Canada, there is a fundamental and long-standing constitutional principle, derived from Canada's legal heritage, that the ratification process does not import international obligations into domestic law. Until international obligations are implemented by way of statute or regulation pursuant to a statute, those obligations do not constitute the domestic law of Canada.²⁸

If the Biodiversity Convention has not been implemented into Canadian domestic law, it can not be considered a regulation for the purposes of the NAAEC. The Secretariat notes that the Agreement does not exclude possible future submissions from raising issues regarding a Party's international obligations.²⁹ Situations exist where a Party's international

25. See NAAEC, Article 45(2), *supra* note 1, at 965.

26. See *id.*

27. See *id.* (emphasis added).

28. See 97-005, *supra* note 24, at 3.

29. See *id.*

obligations are incorporated into the domestic law and therefore would meet the criteria of the NAAEC for citizen submissions. The distinction between international and domestic enforcement is important to control the scope of the NAAEC.

Second, the Submitters failed to accurately define "regulation" as it is used in Article 45, and other sections of the NAAEC. In the opinion of the Secretariat, the Ratification Instrument is not a "regulation," rather it "simply evidences and constitutes a one-time administrative act by a representative of the executive branch of the Canadian government."³⁰ The Secretariat goes on to say, "a regulation . . . is authorized by statute and is subjected to the formal process of registration, Parliamentary scrutiny and publication." It appears that environmental law must be legislative in nature and its primary purpose in line with the definition in Article 45. The Ratification Instrument is not legislative in nature and furthermore, its primary purpose is to require Canada's legislature to pass laws implementing the Biodiversity Convention's principles. While it seems at the time of the submission Canada had failed to do so, the Secretariat made it clear that a law must *exist* before it can fail to be enforced, and the role of the NAAEC is not to dictate to the Parties' legislatures how to create the law.³¹ While this decision may appear to be "splitting hairs," it once again effectively limits the scope of the NAAEC and the role of the Secretariat. In light of this analysis, citizen submission 97-005 was rejected for further consideration by the Secretariat.³²

2. Citizen Submission 98-002

In citizen submission 98-002 the Submitter alleges, "improper administrative processing, omission and persistent failure to effectively enforce the applicable environmental legislation" of Mexico.³³ In addition, Submitter alleges, "procedural violations in the course of the various procedures described in the Submission relating to lumbering operations at the El Taray site in the state of Jalisco."³⁴ The complaint against Mexico was in regards to the management of commercial forestry resources (the El Taray site in particular) said to be in procedural violation of existing environmental law of Mexico.

First, Article 45(b) states, "For greater certainty, the term 'environmental law' does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial har-

30. *See id.*

31. *See id.* at 4.

32. According to Part 6.2 of the Guidelines, the Submitters can resubmit the petition after aligning it to meet the criteria of Article 14. *See* Guidelines, Part 6.2, *supra* note 8, at 3.

33. *See* SEM 98-002, (visited September 12, 1998) <<http://www.cec.org>> at 1. This submission is available only in Spanish.

34. *See id.*

vest or exploitation, or subsistence or aboriginal harvesting, of natural resources."³⁵ The facts raised in the submission by the Submitter do not allege violations of environmental law as defined in Article 45. "On the contrary, the complaints are related to the management of commercial forestry resources, a subject which, under paragraph (b) of the above mentioned NAAEC article, is expressly excluded from the definition of 'environmental law.'"³⁶ In accordance with the purposes and objectives of the NAAEC, the Secretariat does not want to encroach upon economic policies and regulations of the respective Parties. Therefore, if as in this submission, the complaint seems aimed more at a particular industry rather than environmental concerns, the Secretariat will refuse to entertain it further. This is in line with Article 14(1)(d), "appears to be aimed at promoting enforcement rather than at harassing industry."³⁷

Second, the submission alleged procedural violations of Mexico's primary administrative agency. To this the Secretariat responds:

In this regard, it should be noted that the process established in articles 14 and 15 of the NAAEC does not constitute a forum in which to revisit a Party's internal administrative proceeding; rather it is strictly framed within the obligations undertaken by the Parties signatory to the Agreement to effectively enforce their 'environmental laws.'³⁸

Thus, the submission was rejected by the Secretariat for further analysis under the NAAEC.

From the analysis of 97-005 and 98-002 it can be concluded that "environmental law" must be legislative in nature, implemented into the domestic body of law of a Party and it must not be aimed at economic policy or procedural violations of an administrative proceeding. If a citizen submission follows these points of "law" and the guidelines laid out in Article 45, this first issue should not preclude the submission from going forward.

B. The Temporal Aspect of "is failing"

Once again, notice the language of Article 14(1), "The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party *is failing* to effectively enforce its environmental law."³⁹ The language specifically denotes a temporal restraint, and

35. See NAAEC, Article 45(2), *supra* note 1, at 965.

36. See *Determination under Article 14(1)*, SEM 98-002, (visited September 12, 1998) <<http://www.cec.org>>, 4.

37. See NAAEC, Article 14 (1)(d), *supra* note 1, at 952.

38. See *Determination*, SEM 98-002, *supra* note 36, at 4.

39. See NAAEC, Article 14(1), *supra* note 1, at 952 (emphasis added).

in citizen submissions 97-004, 95-002, and 96-001 the Secretariat interprets this key phrase.

1. Citizen Submission 97-004

The Submitter alleges that Canada is not enforcing its law requiring environmental assessments of federal initiatives, policies and programs. "In particular, the Canadian government failed to conduct an environmental assessment of The Atlantic Groundfish Strategy (TAGS), as required under Canadian law."⁴⁰ The "is failing" language purports to place a time constraint on the submission that works similar to the statute of limitations in the U.S. Submission 97-004 was filed three years after the alleged violations in enforcement entered into force. "The significant delay between the time of the alleged failure to enforce and the filing of the submission contravenes the purpose and intent of Article 14(1)."⁴¹ No indication is given in the submission that the Party's failure in enforcing is continual or happening recently. No reason is given by the Submitter for the delay in submission, (like other remedies were being pursued, etc.) and without that, the Secretariat cannot say the submission falls within the temporal restraints.

Two policy reasons stand out for placing this restraint on the submission process in situations like this one. First, the passage of time makes it extremely difficult (even impossible) to determine whether or not there was a failure to enforce a law in an earlier time period.⁴² Many things can happen in a nation in 3 years. Second, laws change, sometimes cease to exist over time.⁴³ In this case, the law in question was not even in force, it had been superseded by other legislation and it apparently wasn't preserved in the new laws. Even when laws are still in force, policies surrounding their implementation and effect might change with time. Therefore it is important to abide by the temporal restraint in evaluating a failure to enforce. This submission raises the question of what exactly is a significant amount of time. Three years is a "significant delay" in this case, but what about 1 year? The Secretariat does not discuss this, but it will probably be left up to the discretion of the Council and what is reasonable for the situation.

2. Citizen Submission 95-002

In citizen submission 95-002, Submitters allege that the "Rescissions Act" eliminated private remedies for salvage timber sales and therefore

40. See SEM 97-004, (visited September 12, 1998) <<http://www.cec.org>>, at 1.

41. See *Determination under Article 14(1)*, SEM 97-004, (visited September 12, 1998) <<http://www.cec.org>>, at 4.

42. See *id.*

43. See *id.*

results in a failure to enforce environmental laws.⁴⁴ Specifically, "submitters allege that the rider in Rescissions Act . . . provides that salvage timber sales shall not be subject to administrative review and that the sales shall be deemed to satisfy all federal environmental and natural resource laws."⁴⁵ The Submitters emphasize throughout the submission that they think the rider is in effect suspending citizen enforcement of environmental laws. The submission alleges, "suspending citizen enforcement of federal environmental laws constitutes a failure to effectively enforce such laws."⁴⁶ The Submitters focus on a later-enacted law that impacts an existing environmental law without amending or repealing it.

First, the Secretariat rules that Submitters have not effectively asserted that the United States "is failing" to enforce environmental law simply because the government has chosen to apply a new legal regime. "The Secretariat . . . cannot characterize the application of a new legal regime as a failure to enforce the old one."⁴⁷ Without more facts alleged, the enactment of a new law cannot by itself constitute the failure to enforce an old one. If the law still exists, then the new and old law will be read side-by-side and only when the new law specifically "exempts, modifies or waives provisions of an earlier law" will the new law prevail.⁴⁸

Second, a submission cannot be solely prospective in nature. The "is failing" language clearly indicates the present tense, not contemplating future consequences of a regulation or enactment of a Party. In 95-002 the submission is alleging anticipated but not realized enforcement problems. "[S]ubmitters allege that '[t]he logging rider precludes them from effectively using administrative appeals and the courts to facilitate or compel compliance with U.S. environmental laws. As a result, many environmental violations *will be left* unredressed and a great deal of on-the-ground environmental harm *will occur*."⁴⁹ The language in the submission itself is prospective, anticipating harm by pure speculation with an absence of concrete events or situations where the Party "is failing" to enforce. The Secretariat is not prepared to consider the wide range of speculations and possibilities citizen submitters could allege. Rather, the case is dismissed until the enforcement failure is actually realized.

3. Citizen Submission 96-001

In citizen submission 96-001, Submitters allege that Mexican

44. See SEM 95-002, (visited August 23, 1998) <<http://www.cec.org>>, at 1.

45. See *id.*

46. See *id.*

47. See *Secretariat's Determination under Articles 14(1) and 14(2)*, SEM 95-002, (visited August 23, 1998) <<http://www.cec.org>>, 3.

48. See *id.*

49. See *id.*

authorities did not enforce environmental laws during a project evaluation process. Contrary to Mexican law, the Submitters allege that the construction of a public harbor terminal for tourist cruises was initiated "without a declaration of environmental impacts covering all the works comprised in the project."⁵⁰ In addition, they argue that the project area is located within a natural zone protected under a special legal regime.⁵¹

Mexico responds and argues that "the matters raised in the submission are based on acts which took place prior to the NAAEC entering into force, pre-dating the establishment of the CEC."⁵² Mexico's main argument is that the language of "is failing" specifically rules out submissions retroactive in character. Therefore, the Submitters can not proceed forward in the process. The Secretariat first notes that Article 47 of the NAAEC indicates that the agreement was to take effect on January 1, 1994. Additionally, "the Secretariat is unable to discern any intentions, express or implied, conferring retroactive effect on the operation of Article 14 of the NAAEC."⁵³ However, the Secretariat points out that "events or acts concluded prior to January 1, 1994, may create conditions or situations which give rise to current enforcement obligations."⁵⁴ The Secretariat once again turns to The Vienna Convention on the Law of Treaties, section 28, which says in part:

[U]nless a different intention appears from the Treaty or is otherwise established, its provisions do not bind the party in relation to any act or fact which took place or any situation *which ceased to exist* before the date of the entry into force of the Treaty with respect to that party.⁵⁵

If Submitters can allege that events or acts occurred both before and after January 1, 1994, then it would not be applying the NAAEC retroactively. Rather, "in light of the possibility that a present duty to enforce may originate from, in the language of the Vienna Convention, a situation which has *not* ceased to exist," the submission would not be retroactively applying the NAAEC.⁵⁶ In this case, the Secretariat found facts alleged (like the protective zones and violations of certain environmental safety declarations) constituted a duty on the part of Mexico both before the NAAEC and after to effectively enforce the applicable environmental

50. See SEM 96-001, (visited August 23, 1998) <<http://www.cec.org>>, 1. This submission is available only in Spanish.

51. See *id.*

52. See *Secretariat's Notification to Council (Article 15(1))*, SEM 96-001, (Visited August 23, 1998) <<http://www.cec.org>>, 2.

53. See *id.* at 3.

54. See *id.*

55. See *id.* (emphasis added).

56. See *id.*

laws. The Secretariat therefore recommended to the Council that a factual record be made, and the Submitters were successful in their petition.

In summarizing the main points out of these three cases, the "is failing" language denotes present tense: it must be a current, existing violation on the part of a Party in enforcing the applicable environmental law. If the violation existed before January 1, 1994, it still might meet the criteria as long as the situation still exists. A significant delay from the time of the enforcement violation to the time of the submission may decrease the chances of a successful submitter.

C. Parallel Proceedings/Remedial Provisions of the Commission

The relevant provisions of the NAAEC on this issue are found in Articles 14(2) and 14(3). Section two states that one factor in determining whether a submission merits a response or not is that, "private remedies available under the Party's law have been pursued."⁵⁷ In Section Three it goes on to list the things a Party may want to bring to the Secretariat's attention in its response, including, "whether the matter was previously the subject of a judicial or administrative proceeding, and whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued."⁵⁸ Citizen submissions 96-003 and 97-001 point out the importance of the Article 14 principles and the guidelines other submitters can follow on this issue.

1. Citizen Submission 96-003

Citizen submission 96-003 alleges that the Canadian government is not enforcing the habitat provision sections under the Fisheries Act. In particular, they allege that "there are very few prosecutions under the habitat provisions of the Fisheries Act and the prosecutions that do occur are very unevenly distributed across the country."⁵⁹ The Secretariat agrees that the submission meets the criteria set out in Article 14 and requests a response from the government of Canada. Canada argues "that the matter raised in this submission is the subject of a pending judicial or administrative proceeding before the Federal Court of Canada."⁶⁰ They also point out that private remedies are available and are being pursued.

First, the Secretariat looks at Article 45(3)(a) for a definition of "judicial or administrative proceeding" where it states:

57. See NAAEC, Article 14, *supra* note 1, at 952.

58. See NAAEC, Article 14(3), *supra* note 1, at 953.

59. See SEM 96-003, (visited August 30, 1998) <<http://www.cec.org>>, 1.

60. See Article 15(1) Determination, SEM 96-003, (visited August 30, 1998) <<http://www.cec.org>>, 3.

[A] domestic judicial, quasi-judicial or administrative action *pursued by the Party* in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order.⁶¹

The phrase "pursued by the Party" implies only one meaning: the Party must be the one initiating the action. "The term 'Party' is employed consistently throughout the North American Agreement on Environmental Cooperation to refer to a government signatory to the Agreement."⁶² The action mentioned by Canada, therefore, is not an "action pursued by the Party within the meaning of Article 45(3)(a)."⁶³

The principle behind this limitation is to give a Party the opportunity to correct its own actions or omissions before contemplating the Commission's procedure. This way governmental actions pending before a citizen submits a petition are pre-empted, and the submission process becomes unnecessary. This approach is supported by the examples listed in Article 45(3)(a) since the type of actions enumerated are mostly taken by governmental officials enforcing the law.⁶⁴

Second, regardless of who is pursuing the action, the pending judicial action is still pertinent to the Secretariat's decision. All the issues in the submission are also the subject of the judicial action. The parties to the action are the same and the results and findings of one could thus influence the other proceeding. Even though it does not specifically state it in the NAAEC, the Secretariat considers it implicit in Article 14 that parallel proceedings in regards to the submission process should be prohibited.⁶⁵ The legal issues are similar in both actions, as mentioned earlier, and a decision in the judicial action would provide remedies to the Submitters and render the central issue in the submission moot. In addition, there exists the possibility that the submission process at this point would only interfere with the pending litigation. For the foregoing reasons and in light of the analysis of Article 14, the Secretariat decided that the submission process should be terminated. "However, the Submitter may wish in the future to file a new submission following a decision, dismissal or

61. See NAAEC, Article 45(3)(a), *supra* note 1, at 965 (emphasis added).

62. See *Determination*, SEM 96-003, *supra* note 60, at 4.

63. See *id.*

64. See *id.*

65. The NAAEC provision found in Article 14(2), "In deciding whether to request a response, the Secretariat shall be guided by whether. . . private remedies available under the Party's law have been pursued . . ." This implies that parallel proceedings were not contemplated by the NAAEC. See NAAEC, Article 14(2), *supra* note 1, at 952.

other resolution”⁶⁶

In this case, Submitters did file another submission alleging the same issue as previously discussed.⁶⁷ The parallel proceedings problem was dealt with by the Submitters abandoning their application in the Federal Court of Canada.⁶⁸ It remains to be seen whether the submission shall now warrant the development of a factual record for the Secretariat has yet to rule on the subject.

2. Citizen Submission 97-001

The facts alleged in this petition are much like the previous submission. The Submitters allege that Canada is failing to enforce the Fisheries Act, particularly in relation to the protection of fish and fish habitat in hydro-electric dam areas. They further allege that the National Energy Board “recently refused to examine the environmental impacts of the production of electricity for exportation, despite receiving evidence of those impacts”⁶⁹ This case is important for two clarifications on this issue.

First, the phrase “judicial, quasi-judicial or administrative action” in Article 45(3)(a) should be interpreted narrowly in light of the objectives and rationale of the NAAEC.⁷⁰ Therefore, “administrative action” in particular constitutes a small range of possibilities, which the Secretariat does not enumerate. The term does imply action from a regulating body of the Party’s government in relation to the enforcement of that particular environmental law. In this case, Canada’s Regional Technical Committees and British Columbia’s Water Use Planning process do not constitute “administrative action” for purposes of Article 14.⁷¹

Second, if litigation is pending on only one issue in the submission, the Council can (at its own discretion) decide to split the issues by dismissing the parallel issues and develop a factual record for the issues remaining. In 97-001, the Council directed the Secretariat, “in developing the factual record, not to consider issues that are within the scope of the pending judicial proceeding”⁷² In this way all the alleged violations

66. See *determination*, SEM 96-003, *supra* note 60, at 5.

67. In October of 1997, after the determination previously mentioned on April 2, 1997, the Submitters resubmitted the submission under SEM 97-006. See SEM 97-006, (visited September 12, 1998) <<http://www.cec.org>>.

68. “The Friends of the West Country Association are abandoning their application against the Minister of Fisheries and Oceans and the Attorney General of Canada, application number T-2457-96.” See *id.* at 1.

69. See SEM 97-001, (Visited August 30, 1998) <<http://www.cec.org>>, 1.

70. See *Secretariat’s Notification to the Council*, SEM 97-001, (Visited August 30, 1998) <<http://www.cec.org>>, 2.

71. See *id.*

72. See *Council Resolution*, SEM 97-001, (Visited August 30, 1998)

are dealt with in a more time efficient manner.

In addition to these three main issues, several smaller key points merit discussion. Some of them are related to the “big three” but require a closer look at detail.

D. The Notion of “Harm”

Like many legal proceedings, the notion of harm is important to the submission process. Inherent in alleging that a Party is failing to enforce its environmental laws is the proof of harm on the part of the petitioner. Article 14(2) states “in deciding whether to request a response [from the alleged Party in violation] the Secretariat shall be guided by whether . . . the submission alleges harm to the person or organization making the submission.”⁷³ Section 7.3 of the Guidelines for Submission further adds for clarification:

In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether . . . the alleged harm is due to the asserted failure to effectively enforce environmental law; and the alleged harm relates to the protection of the environment or the prevention of danger to human life or health . . .⁷⁴

Technically, if a submission does not allege harm, and harm that specifically falls into the category authorized by Article 45(2) of the Agreement, the Secretariat must “dismiss” the petition.⁷⁵ Three cases to date discuss harm as it is intended to be dealt with by the Secretariat: Citizen Submission 97-003, 96-001 and 95-002.⁷⁶

1. Citizen Submission 97-003

The petitioners in this case allege that the Quebec government is not carefully regulating deposits, discharges and emissions coming from live-

<<http://www.cec.org>>, 1.

73. See NAAEC, Article 14 (2), *supra* note 1, at 952.

74. See Guidelines, Part 7, *supra* note 8, at 4.

75. This logic follows from a general knowledge of the submission process and an examination of the Secretariat’s decisions to date. It is also outlined in the Guidelines, in Part 6, where it says, “Where the Secretariat determines that a submission does not meet the criteria set out in Article 14 (1) of the Agreement or any other requirement set out in these guidelines, with the exception of minor errors of form contemplated in section 3.10 of these guidelines, the Secretariat will promptly notify the Submitter of the reason (s) why it has determined not to consider the submission.” See Guidelines, Part 6, *supra* note 8, at 3. It can be inferred from this passage and language in Part 7 (quoted in this section) that harm is indeed an “element” necessary in a successful submission.

76. These cases have been chosen because they explicitly mention the harm element. The notion of harm can be seen, however, throughout successful submissions, indicating its importance in the submission process.

stock production in relation to the area's water supply systems.⁷⁷ In particular, "[t]he Quebec government has not ensured the effective enforcement of certain provisions of its laws and regulations regarding livestock operations."⁷⁸ The petitioners discuss the definition of environmental law first and then go on to say how important the notion of "harm" is to their submission process. "Pollution of watercourses from agricultural sources is one of the most important environmental problems in Quebec [S]ignificant harm is thus done both to the environment and to populations, especially those living near places where livestock operations are concentrated."⁷⁹ The petitioners not only lay out the harm caused by the alleged failure to enforce environmental laws, but they also link themselves to the actual harm.⁸⁰ "This submission is made by organizations whose members feel the direct or indirect effects of this environmental problem which affects numerous Quebec watercourses."⁸¹ Specific harm is then further alleged in the conclusion in attempts to make the Secretariat understand the situation as they see it. "This contamination has major consequences for the health of the population; for watercourses (e.g. eutrophication, destruction of certain habitats and species); for the cost of treating drinking-water; for recreational activities and tourism; etc"⁸² The submission leaves no question of the notion of harm. Petitioners have made sure that they have fully alleged enough to satisfactorily meet the criteria under the Agreement.⁸³

2. Citizen Submission 95-002

This case has been discussed previously under the issue of "is failing."⁸⁴ Briefly, for the purposes of review, the petitioners in this case were alleging that legislation passed by the United States government effectively "suspended" the enforcement of some important environmental laws.⁸⁵ In particular, the piece of legislation most troublesome to them is the Logging Rider. The Secretariat points out that the petition does not allege that the United States "is failing" to enforce environmental laws,

77. See SEM 97-003, (visited September 12, 1998) <<http://www.ccc.org>>.

78. See *id.* at 3.

79. See *id.* at 7.

80. The reader will note that this is not only a requirement for the submission process, but for the general concept of proving actual harm exists.

81. See *id.* at 7.

82. See *id.* at 11.

83. Once again, the criteria set out in Article 45(2) and further elaborated on in the Guidelines, Part 7. (This particular submission has yet to be determined by the Secretariat, however there is little doubt that it will fail on the "harm" notion.)

84. This case is specifically referenced in note 44.

85. See SEM 95-002, *supra* note 44.

so therefore it does not meet the criteria.⁸⁶ However, for purposes of the notion of “harm”, the Secretariat also gives some suggestion that it might also have failed on that critical point as well.⁸⁷

The submission states, “[m]any environmental violations will be left unredressed and a great deal of on-the-ground environmental harm will occur.”⁸⁸ As with the “is failing” issue, there is also a temporal requirement to the notion of “harm.” The supposed harm petitioners gave evidence to in this submission was purely hypothetical and anticipatory. Petitioners were not experiencing the harm at the present time. A petitioner can learn again, from this case, the importance of alleging present facts and conditions and not futuristic possibilities. This is important not only for the “is failing” issue, but also for the notion of “harm.”⁸⁹

3. Citizen Submission 96-001

Like the previous submission, this one was also discussed under the “is failing” issue.⁹⁰ In this case, the petitioners alleged that the Mexican government failed to follow the appropriate guidelines for a project evaluation involving the Quintana Roo. The Secretariat believed that the petitioners met the criteria of the “is failing” language and determined the submission warranted the creation of a factual record. It appears, also, through a closer look, that the Secretariat believed the petitioners satisfactorily alleged harm caused by the failure to enforce the Mexican guidelines. “In considering harm, the Secretariat notes the importance and character of the resource in question—a portion of the magnificent Paradise corral reef located in the Caribbean waters of Quintana Roo.”⁹¹ The Secretariat also gives U.S. petitioners an idea of the measure of harm necessary to pass the submission criteria. “While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of

86. The Secretariat states this as the main reason for the failure of the submission. However, it is the author’s opinion that the absence of the actual harm element was also critical in the Secretariat’s decision. See SEM 95-002, Secretariat’s Determination, *supra* note 44.

87. *Id.*

88. See *id.* at 14.

89. Again, the reader will note how this aspect of the notion of harm also corresponds to the more general concept of proving actual harm in a tort case.

90. This case was first referenced in note 50. Because of the complications of language translation, it should be noted that the best source for accurate quotes from the submission itself is the Secretariat’s Determination.

91. See SEM 96-001, *supra* note 50, at 4.

the NAAEC."⁹² In other words, the standard is slightly lower than that of U.S. civil proceedings.⁹³ In particular, the standard mentioned here is "the especially public nature . . . brings submitters within the spirit of intent of Article 14 of the NAAEC."⁹⁴ The "spirit of intent" is outlined in the Preamble of the Agreement, where it states in part:

The Government of Canada, the Government of the United Mexican States and the Government of the United States of America . . . [c]onvinced of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations⁹⁵

As long as a petitioner can show harm that squarely falls within the criteria of Article 45(2) and the "spirit of intent" brought out in the Preamble, the submission should not fail on this ground.

E. The Impermissible Attacks

In studying the citizen submissions thus determined, two "attacks" stand out as being impermissible under the NAAEC. First, it is not permissible to attack industry under the guise of an environmental complaint; and secondly, it is made abundantly clear that it is impermissible to attack individuals in the Parties government agencies and organizations.⁹⁶

1. Attacks On Industry

First, a petition must not merely be an attack on a particular industry that might have impacts on the environment. The words of Article 14(1)(d) make it clear that a submission must "appear to be aimed at promoting enforcement rather than at harassing industry."⁹⁷ Section 5.4 of the Guidelines clarifies this further:

92. *Id.*

93. "Particularized, individual harm" mentioned by the Secretariat refers to the general requirements of some constitutional cases, as well as specific tort pleadings. This submission did not really show the petitioners *individually* suffering some kind of actual harm; rather, it was a collective, more general harm alleged as a consequence of the Mexican government's failure to enforce their specific regulations.

94. *See id.* at 4.

95. *See* NAAEC, Preamble, *supra* note 1, at 941.

96. The reader will note that the first "attack" is specifically not allowed in the agreement itself (as discussed later in this section). The other attack is inferred from a garnishing of the submissions' determinations and what the Secretariat has to say about their allegations.

97. *See* NAAEC, Article 14(1)(d), *supra* note 1, at 952.

A submission must appear to be aimed at promoting enforcement rather than at harassing industry. In making that determination, the Secretariat will consider such factors as whether or not . . . the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission . . . [and] the submission appears frivolous.⁹⁸

There are to date no companies or businesses alleging a competitor is not complying with an environmental law in the submission process, partly because it blatantly is impermissible in the Agreement, and also it is not in line with the procedure for submissions. Allegations are to *Parties* actions only, not to non-governmental organizations or agencies.⁹⁹ And so far there have not been any submissions declared “frivolous” by the Secretariat. Of the submissions that have been dismissed, the cause has not been frivolity.

Rather, the first factor of, “the submission is focused on the acts or omissions of a party rather than on compliance” can catch some submitters off guard in their petitions.¹⁰⁰ The key words are “the submission is focused on the acts or omissions of a party.”¹⁰¹ Any petitioner who wishes to be successful must be able to focus on the environmental law that they believe is not being enforced and then show by facts evidence that the Party’s acts or omissions are impeding the enforcement of the law. Two of the citizen submissions so far have gotten side-tracked from this goal resulting in a petition that appeared to attack the industry associated with the environmental concern rather than the Party’s environmental duties.¹⁰²

a. Citizen Submission 95-001

98. See Guidelines, Part 5, *supra* note 8, at 3.

99. This point seems obvious, because the submission process is set up through the NAAEC, which is a side agreement to NAFTA and only the United States, Canada, and Mexico are to date parties. However, it is a clarification that needs to be pointed out, since it is often hard to recognize the difference between governmental organizations (which would fall under the definition of “party”) and a non-governmental environmental group acting in virtually the same capacity.

100. See *id.* at 3.

101. *Id.*

102. It is the author’s belief that getting “side-tracked” could be relatively easy as environmental concerns seems to be directly connected to industry, in particular, industries that can have adverse affects on nature. In promotion of cooperation between Parties, the drafters of the NAAEC wisely decided to stay clear of such industrial/environmental effect debates. However, this is not to say that the debate is not of importance to the NAAEC and why it was created in the first place. As mentioned in note 1, the NAAEC was created to protect the environment from the NAFTA provisions—in effect, to keep the Parties from neglecting their individual duties to the environment over preference for wealth accumulation.

The petitioners argue that the United States has made it impossible to enforce certain environmental laws by the passing of new legislation regulating the timber industry. The petitioners could possibly, if approached appropriately, have a valid argument that the United States is not enforcing environmental laws.¹⁰³ However, the petitioners throughout the petition attack Congressmen as promoting industry over environmental concerns. Petitioners state:

[T]he United States has suspended its enforcement of Section 4 of the ESA [Endangered Species Act] for economic reasons—including consideration of the United State's ability to attract and retain economic investments and to export commodities (principally timber and farm products) at the lowest possible cost."¹⁰⁴

In addition, petitioners state, "The economic activities identified . . . are closely tied to trade among the Parties to the North American Free Trade Agreement (NAFTA)."¹⁰⁵ The petitioners state this, and further attack the logging/timber industry as contributing to the decline in endangered species, but fail to show how the United States has failed to continue to enforce the ESA simply because of the new legislation governing the timber industry.¹⁰⁶ The Secretariat points this out and dismisses the petition.

b. Citizen Submission 95-002

The petitioners attack the Logging Rider legislation which promotes the timber industry and in turn, (they allege) destroys endangered species.¹⁰⁷ Rather than show how the United States is failing to enforce the environmental laws, however, the petitioners focus on the logging rider and the timber industry. Again, for this and other reasons previously mentioned, the Secretariat dismisses the submission.¹⁰⁸

The submission should clearly show that rather than enforcing an

103. See SEM 95-001, (visited August 23, 1998) <<http://www.cec.org>>. The Secretariat does not base his reason for not accepting the submission on the impermissible attack grounds. The reasons stated go to the issue of what constitutes environmental law under the NAAEC. However, the reader will note that many times, an attack on industry is directly related to defining environmental law.

104. See *id.* at 2.

105. See *id.* at 3.

106. Seemingly, the whole petition is aimed at pointing out the timber industry's faults and how it adversely affects endangered species. The submission does not prove how the piece of legislation in question is causing the United States to not enforce its environmental laws. See Secretariat's Determination of SEM 95-001, *supra* note 103, at 5.

107. See SEM 95-002, *supra* note 44.

108. This submission is discussed in great detail under the issue of "is failing" language.

existing environmental law, the Party is choosing to place economic interests in higher priority. The Secretariat would most surely (as long as other procedural issues are met) have to consider the submission more clearly under those circumstances.¹⁰⁹

2. Attacks On Individuals

Even if other procedural issues are met, a submission should not attack individuals in governmental positions. The Party is to be criticized as a whole, not for the duties and performances of its individual representatives.

a. Citizen Submission 98-002

The petitioner in this case makes continuous, derogatory accusations against an important member of the Mexican Administration.¹¹⁰ The Secretariat dismisses the petition for not complying with the definition of “environmental law” and then also admonishes:

The submission in question contains accusations against various government officials in different agencies and at different levels of government, which in the opinion of the Secretariat are inappropriate for this forum. The process established by the NAAEC in articles 14 and 15 aims at promoting cooperation amongst the Parties for environmental protection in North America. It should be stressed that this process, designed to examine submissions related to the failure to effectively enforce “environmental law,” is not intended as a mechanism to review allegations respecting the performance of individual public officials. This process solely addresses the actions of the authorities as institutions, and the specific facts and actions that are related to the effective enforcement of “environmental law,” as defined in the Agreement.¹¹¹

The Secretariat makes the point that according to the goals and policies of the NAAEC, it is impermissible in the citizen submission forum to attack individuals. This conclusion follows also from the emphasis of the submission process being only on the Parties to the Agreement, not on individual “violators” of environmental laws. The Commission’s job is not to police North America for environmental violations. It is rather to give Parties an incentive to enforce their own environmental laws and

109. As mentioned earlier, it is in the interest of the NAAEC to protect the environment from NAFTA’s impact. However, the submission must not be directly focused solely on the industry, but rather needs to show how the Party is failing to enforce the environmental law under the NAAEC.

110. See SEM 98-002, *supra* note 33.

111. See *id.* at 5, Secretariat’s Determination.

thus promote cooperation amongst the three nations.¹¹²

F. Amending Petitions and the Importance of "Appeals"

In the citizen submission process there are many analogies to the civil procedure process. Like civil petitions can be amended (under certain restrictions) a submission under the NAAEC can be amended also.¹¹³ Section 6.2 of the Guidelines states, "After receipt of such notification from the Secretariat, the Submitter will have 30 days to provide the Secretariat with a submission that conforms to the criteria of Article 14(1) of the Agreement and to the requirements set out in these guidelines."¹¹⁴

After reading through the citizen submissions that have been submitted to date, the Secretariat often ends his determinations (if the submissions don't meet the criteria) with, "For the foregoing reasons, the Secretariat will take no further action in connection with submission 95-002. Accordingly, in the absence of new or supplemental information provided within 30 days of receipt of this notice, the Secretariat concludes its consideration of this matter."¹¹⁵ This in effect lets petitioners have one more shot before they are out of the process altogether. If the submission is amended and submitted again, then the Secretariat reviews the new material and determines if it now meets the criteria in Article 14(1). If the amended submission now meets the criteria, then the alleged Party is requested to enter a response. If, however, the submission still does not comply with the criteria, then the submission process is terminated. Section 6.3 of the Guidelines states:

If the Secretariat again determines that the Submitter has not met the criteria of Article 14(1) of the Agreement or the requirements set out in these guidelines, the Secretariat will promptly inform the Submitter of its reason(s), and inform the Submitter that the process is terminated with respect to that submission.¹¹⁶

The word "that" implies that it is possible to bring another submission in the future, possibly only if it is substantially different than the first. There is no clear guidelines on this, and to date there have not been any

112. As noted earlier, cooperation is an important goal of the NAAEC as outlined in the Preamble and Article 1 objectives. See NAAEC, Article 1, *supra* note 1, at 942.

113. The reader must note that the terms "amended petition" and other procedural terms are used only for the sake of analogy. It is the author's hope that the reader will see the definite parallels between a normal judicial proceeding and the submission process.

114. See Guidelines, Part 6, *supra* note 8, at 3.

115. This particular language is taken out of SEM 95-002, *supra* note 44, at 4 of the Secretariat's Determination.

116. See Guidelines, Part 6, *supra* note 8, at 3.

submissions submitted more than twice.¹¹⁷

There is also a sort of “appeal” process built into the submission process. In several submissions, as discussed previously, the Secretariat dismissed them because they were parallel proceedings (with civil suits). In all these submissions, the Secretariat makes it clear that if the civil suit is terminated or resolved, the submission can continue. In Submission 96-003, (discussed *supra*), the Secretariat states, “[T]he Submitter may wish in the future to file a new submission following a decision, dismissal or other resolution of paragraphs 7 and 8 of the Originating Notice of Motion currently before the Federal Court of Canada.”¹¹⁸ In this particular submission, the petitioners did submit a new submission to the Secretariat, saying, “The Friends of the West Country Association are abandoning their application against the Minister of Fisheries and Oceans”¹¹⁹ In another, Submission 96-002, the Secretariat also dismissed the submission because of parallel proceedings:

The submission and Schedule “F” to the submission indicate that the Submitter has initiated a judicial proceeding against Her Majesty the Queen in Right of Alberta and several other defendants based on the same facts as those alleged in the submission The outcome of that pending judicial proceeding is likely to impact directly on the issues in the submission and, should the Submitter prevail, may resolve most or all of these issues. Accordingly, in accordance with Article 14 (2), the Secretariat will not proceed any further with the submission at this time. The Submitter may wish in the future to request the Secretariat to re-consider the submission following the resolution of the matter currently before the Queen’s Bench.¹²⁰

At the time of this writing, the submission had not been re-submitted. However, it brings up an interesting question. When the Secretariat states that the submission may be re-submitted “following the resolution of the matter,” does that resolution necessarily mean a non-favorable one for the petitioner? In other words, can a submission be re-submitted after a favorable resolution in civil suit? This would be quite contrary to the ap-

117. It will be interesting to see whether the submission process ever really terminates with respect to a particular complaint. The word “that” in Guideline 6.3 leaves it open for interpretation, and could possibly make room for continuous submissions with the same issues until they are resolved. There is nothing in the Guidelines or in the Articles themselves that addresses this problem, and since it has yet to happen (as of the date of this writing) it appears it is left to the discretion of the Secretariat.

118. See SEM 96-003, *supra* note 59, at 5 of Secretariat’s Determination.

119. See SEM 97-006, *supra* note 67, at 1.

120. See SEM 96-002, at 2 of Secretariat’s Determination, (visited August 30, 1998) <<http://www.ccc.org>>.

pellate procedure most familiar to the civil system. Taken in context with the Secretariat's policy reasons for not allowing parallel proceedings, it appears possible that the appeal process is only for non-favorable resolutions in civil suits. As the Secretariat stated in this submission, "should the Submitter prevail, [the pending judicial proceeding] may resolve most or all of these issues."¹²¹ This leads one to believe that only one solution should be available to the petitioners.

It is a waste of the Commission's resources to spend valuable time evaluating submissions where an effective and favorable resolution has already been granted in a civil suit. It also seems to go against the policies and goals of the NAAEC in the promotion of cooperation amongst Parties, if the Secretariat also granted the preparation of a factual record to the petitioners after a favorable resolution in civil suit. This is an area in the submission process that is yet to be defined and it will be interesting if the "appellate" process established by the NAAEC follows the civil procedure (as it has in so many other issues) or if it provides for "surplus" remedies to the prevailing petitioner.¹²²

G. Discretion of the Secretariat in Light of Policy

As with any "judge," a certain amount of decisions are determined by discretion. In the Secretariat's determinations (one might call them "opinions") a pattern of discretion is based on the policies and goals of the NAAEC. The objectives of the NAAEC are laid out in Article one of the agreement:

Objectives of this Agreement are to . . . [f]oster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations . . . [p]romote sustainable development based on cooperation and mutually supportive environmental and economic policies . . . [i]ncrease cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna . . . [s]upport the environmental goals and objectives of the NAFTA . . . [a]void creating trade distortions or new trade barriers . . . [s]trengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices . . . [e]nhance compliance with, and enforcement of, environmental laws and regulations . . . [p]romote transparency and public participation in the development of environmental laws, regulations and policies . . . [p]romote economically efficient an effective environmental measures . . . [a]nd promote

121. *Id.*

122. It is doubtful that this would be the result under the NAAEC. The Secretariat, as discussed below, has the power to exercise discretion on certain issues (as long as it is in line with the NAAEC's policies. This issue might be one of them that the Secretariat decides to use his discretion and dismiss a submission that already was favorably resolved.

pollution prevention policies and practices.¹²³

It can be effectively argued that all of the issues one must meet in submitting a successful petition contribute towards the accomplishment of the preceding objectives. For example, the term “environmental law” is key to not only the discernment of what will or will not be evaluated by the Secretariat, but it ultimately contributes in the furtherance of the NAAEC’s mission. Also, the objectives in Article 1 specifically speak of increasing, “cooperation between the Parties” and strengthening, “cooperation on the development and improvement of environmental laws”¹²⁴ It is therefore understandable why, as discussed *supra*, the Secretariat does not want to deal with attacks on industries and people in governmental positions. Moreover, it is clear in the submission procedure that Parties must cooperate when called upon to respond to a submission, and to act in alignment with the decisions made in a factual record. The whole procedure itself is based on the objective of cooperation.

In light of these objectives, however, the Secretariat, like any judge, must exercise some discretion in deciding the outer limits of issues presented. The Secretariat claims on more than one occasion that he cannot work beyond the procedure process laid out in the NAAEC. However, the Secretariat decides both whether the submission alleges “environmental law” as well as whether the temporal requirement of the “is failing” language is met. In making these decisions, he calls upon his discretionary powers inherent in the position of Secretariat.¹²⁵

For example, in Submission 97-005 (discussed *supra*) the issue is whether the petitioners are alleging environmental law.¹²⁶ The discussion is over a Ratification Instrument and whether or not it is environmental law. The Secretariat decides that it is not, and in doing so, states:

In making this determination, the Secretariat does not wish to exclude the possibility that future submissions may raise issues in respect of a Party’s international obligations that would meet the criteria of Article 14(1). Further, as noted above, the Secretariat acknowledges that the subject matter of the Submission raises important environmental concerns that should be the subject of debate and discussion between the NAAEC state Parties [T]he Secretariat is bound to interpret the provisions of Article 14(1) in a manner consistent with

123. See NAAEC, Article 1, *supra* note 1, at 942.

124. *Id.*

125. It should again be cautioned that the terms used in this section are not used per se in the submission process outlined in the NAAEC. Rather, they are used for the purposes of analogy only.

126. See SEM 97-005, *supra* note 21, at 4.

the language and purposes of the NAAEC.¹²⁷

In this submission, the Secretariat had to determine, as best he could, an issue that did not have a clear answer in the NAAEC. The Secretariat acknowledges other interpretations might exist, but dismisses the submission by saying he "is bound to interpret the provisions of Article 14 (1) in a manner consistent with the language and purposes of the NAAEC."¹²⁸ The Secretariat uses his discretion in light of the policies of the agreement.

In Submission 95-002, the Secretariat again mentions the importance of furthering the objectives of the NAAEC and his decisions regarding the submission.¹²⁹ In regards to a proposed factual record over the Logging Rider (discussed *supra*) the Secretariat dismisses the submission by concluding, "The reprise of this debate almost immediately following enactment of the law [the Logging Rider] would contribute marginally, if at all, to the overall goals of the Agreement."¹³⁰ The Secretariat refers to the objectives of the NAAEC also in Submission 96-001 when he concludes, "despite the complexity of the issues raised in the submission, the further study of this matter would substantially promote the objectives of the NAAEC"¹³¹ The Secretariat's biggest concerns involve promoting the objectives of the NAAEC, and in these examples one can see how he exercises his discretion to do so.

IV. CONCLUSION

There are many other issues a submitter must confront in the submission process. This area of environmental law is relatively new, and with each new petition finds more issues to grope with and learn from. A petitioner who meets the criteria in Article 14, along with the three main issues discussed in this article, can be successful in the citizen submission process and help contribute to the growing arena of environmental awareness between Parties. The citizen submission process established by the North American Agreement on Environmental Cooperation can help contribute to effective control and implementation of environmental laws in North America.

127. *See id.* at 4 of Secretariat's Determination.

128. *Id.*

129. *See SEM 95-002, supra* note 44.

130. *See id.* at 4 of Secretariat's Determination.

131. *See SEM 96-001, supra* note 50, at 4 of Secretariat's Determination.