The Council on Environmental Cooperation: Redaction of Effective Enforcement within the North American Agreement on Environmental Cooperation

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COMMENT

THE COUNCIL ON ENVIRONMENTAL COOPERATION: REDACTION OF “EFFECTIVE ENFORCEMENT” WITHIN THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

I. INTRODUCTION

Nearly twenty-five years after the proliferation of United States legislation to combat environmental degradation, focus is shifting to the international arena in an attempt to protect the environment. The three parties to the North American Free Trade Agreement1 ("NAFTA") have innovatively created an agreement that truly empowers the people. The North American Agreement on Environmental Cooperation2 ("NAAEC") allows private groups or non-governmental organizations ("NGOs") to submit "complaints" to enforce a party’s environmental laws.3 This aspect of the NAAEC is truly innovative; however, scholars and commentators are not convinced of its effectiveness. Moreover, a section of the NAAEC that defines "environmental laws" could nullify the entire agreement because a party is allowed to exclude the "exploitation of natural resources" from the definition of "environmental laws."4 This is inconsistent with other language of the NAAEC, such as language found in the Preamble, the Obligations, and the Levels of Protection.

For example, the Preamble affirms a party’s right to exploit its natural resources, yet seeks to ensure that the party’s exploitation of natural resources does not cause environmental damage to another member’s environment.5 The Objectives state that the purpose of the NAAEC is to foster protection of the environment and promote sustainable development.6 The Levels of Protection state that the “Part[ies] shall ensure that its laws and regulations provide for

3. See id. at 1488.
4. Id. at 1495.
5. See id. at 1482.
6. See id. at 1483.
high levels of environmental protection and shall strive to continue to *improve those laws and regulations.*" Moreover, other innovations of the NAAEC such as allowing NGOs to submit complaints are diluted because the Secretariat, in determining whether to request a response from a country, shall be guided by whether the submission alleges a harm to the "person or organization making the submission." The NAAEC could be a useful document for protecting the environment and promoting environmental awareness; however, inconsistent language within the document weakens its usefulness.

This paper examines the NAAEC and its implications for the environment. The paper begins with a discussion of international cooperation regarding the environment and then focuses on how environmental treaties have been implemented and enforced. Section II addresses the role of the international community in its relation to the environment. Section III discusses the NAAEC in detail, focusing on the inconsistencies within the agreement itself. Section IV examines the complaints submitted to the NAAEC's enforcement body and illustrates how the inconsistent language leads to determinations that are contrary to the agreement.

II. The International Community and the Environment

Can the international community fashion agreements that are conducive to environmental quality? How one responds to this question depends in large part upon whether one believes that an international environmental treaty, or agreement, can effectively coexist with international trade agreements that are designed to enhance a global economy. Since 1972, the United States has participated in 168 environmental agreements.

Can one say that after the influx of so many agreements, the world is a much cleaner, safer, or better place to live? The implementation of most of these agreements depends solely upon the ratification processes of the respective governments. Interestingly, a 1992 General Accounting Office Report found that determining whether a signatory had implemented an agreement, while itself a difficult question, did not even address whether an agreement had been substantively effective.

Environmental concerns have increased dramatically in the last twenty years. Global environmental awareness among industrialized nations and third-world countries has heightened. This has led to increased amounts of international agreements relating to the environment. In 1972, more than 130

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7. *Id.* at 1483 (emphasis added).
8. *Id.* at 1488.
9. *See id.* Complaints are submitted to the Commission for Environmental Cooperation. *See infra* notes 90-173 and accompanying text.
12. *See id.* at 8.
nations participated in the United Nations Conference on the Human Environment. Since that conference, the United States’ participation in environmental agreements has grown dramatically from 44 agreements in 1969 to 88 by the end of 1979. This number then increased to 168 by 1989. As one commentator stated: “if someone thinks an issue is important, he or she wants a treaty on the subject, much as each new nation seems to feel the need to establish an airline.” Regardless of whether one favors the increased participation in international environmental agreements or not, it is important to note that participation in their formation alone does not make an agreement effective.

Development and implementation of environmental agreements in the international arena depend on the national legislative process of the signatories. Although there are methods of international law other than treaty implementation, “treaties are now the most frequent method of creating binding international rules relating to the environment.” However, there are usually no penalties or sanctions imposed on a country for failure to implement an agreement negotiated in good faith. Absent a penalty process for non-implementation, why would a national legislative body ratify a treaty that it perceives as a detriment to trade?

Perhaps the use of customary international law is more conducive to establishing an international norm regarding the environment. The use of custom in creating international law removes the burdens of treaty ratification and can bring about universal application since acquiescence is adequate to bind even non-signatories.

The problem with relying on custom to enforce international environmental principles is simply time. For a practice to develop into international law, the international community must consider unilateral and multilateral agreements, legislative actions and court decisions, and actions taken within the international community. It is also difficult to ascertain exactly when a custom has crystallized into international law. The use of customary international law is still, however, an important tool in protecting the environment.

A country that seeks a multilateral environmental agreement must first build a consensus among the many states the agreement may affect. One of the most important issues facing a potential party-country is how the agreement

13. See id. at 9.
14. See id.
15. See id.
20. See id. at 10.
21. See BIRNIE & BOYLE, supra note 18, at 15.
22. See id. at 16.
23. See id. at 15.
would effect it financially. Parties are motivated by global economic concerns when fashioning trade agreements that could perhaps envelop environmental interests. Moreover, some parties fashion environmental laws to give themselves a competitive edge in the marketplace. This could compel a nation to enter into an agreement it would not have otherwise joined. Furthermore, there is an argument among some commentators that environmental agreements are subjected to more stringent processes than other types of agreements such as international trade treaties.

However an international environmental norm is effectuated, it is the spirit of the agreement that should be controlling, not technical bureaucratese. The spirit of the NAAEC can be extrapolated from the preamble and the objectives expounded in the Agreement, as well as in other sections of the document. However, as will be demonstrated below, the spirit of the document and the decisions of the Council on Environmental Cooperation ("CEC") seem to be at odds.

III. THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

The NAAEC, completed in September, 1993, has been both praised and ridiculed. Some groups feared that an agreement of this nature would promote industrialization over environmental concerns. Moreover, "environmental groups fear[ed] that NAFTA [would] create incentives for corporations to move environmentally-sensitive production to the least restrictive and least regulated areas available." The fear was that the parties to the Agreement would relax environmental regulations in an effort to attract industry. Application of its innovative language has been less than effective. Though con-

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27. See id. at 444.
29. See NAAEC, supra note 2, at 1480-83.
30. See NAAEC, supra note 2, at 1483.
31. See NAAEC, supra note 2, at 1485-89.
32. See infra, section IV and accompanying notes.
33. See NAAEC, supra note 2, at 1480.
36. See Raustiala, supra note 34, at 34.
37. Id.
38. See id. at 34-35. See also Some Environmentalists Fault Side Deal, supra note 35, at 1506.
39. See Raustiala, supra note 34, at 34-35.
40. See infra section IV.
ceptually novel, the NAAEC possesses contradictory language needing clarification.

The spirit of the NAAEC is encompassed in the Preamble which states that the countries are "[c]onvinced of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation." The Preamble reaffirms the sovereign rights of members to "exploit their own resources pursuant to their own environmental and development policies and their responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction." This language does nothing to quiet the fears that the country with the least amount of environmental protection will attract industry.

The parties to the NAAEC formulated objectives embodying very lofty goals of cooperation in environmental protection and enforcement designed to prevent pollution while promoting economic development. The language should be read to give highest priority to environmental protection. However, Article 3 of the NAAEC recognizes that each party has the right to establish its own protection, stating that each party "shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations." This language suggests that the purposes of the NAAEC are to promote enforcement and to thwart regulatory degradation. There is no language, however, suggesting a party is absolutely barred from attracting industry by undermining another party’s environmental regulations. In fact, recent determinations by the CEC have undermined this language by finding that an effective enforcement does not entail new statutes and regulations, but will only include a failure to effectively enforce current laws through administrative actions.

Other provisions further illustrate the NAAEC’s objectives. Part Two of the NAAEC states the obligations of the parties. These provisions provide that: each party shall publish in advance any measures it proposes to adopt; each party shall use the appropriate governmental actions to enforce its environmental laws and regulations; each party shall ensure that aggrieved individuals within a party’s jurisdiction have private access to remedies; and each party shall ensure that an aggrieved party has procedural guarantees and that its administrative and judicial proceedings are “fair, open and equitable” and comport with due process of law.

41. NAAEC, supra note 2, at 1482.
42. Id.
43. See id. at 1483.
44. Id.
45. See Raustiala, supra note 34, at 39.
46. See infra section IV and accompanying notes.
47. See NAAEC, supra note 2 at 1483.
48. See id. at 1483–84.
49. See id. at 1484.
50. See id. at 1484.
The NAAEC has other unique aspects that raise concerns for some groups, while alleviating the fears of others. In Article 8, the NAAEC sets up the Commission For Environmental Cooperation ("CEC"), which receives complaints concerning a party-country's environmental laws. The NAAEC has been perceived as procedurally cumbersome because the complaints submitted to the CEC regarding enforcement matters can be halted at many different stages. Others have touted the NAAEC's importance by pointing out its novelty in allowing private parties to initiate complaints before the CEC.

The NAAEC states that all decisions made by the CEC shall be taken by consensus, unless so specified, and that all decisions must be made public, unless otherwise specified. The Council's functions are: to oversee the implementation of the NAAEC, to oversee the Secretariat, to address questions and differences of the parties that may arise, to approve the budget of the CEC, and to facilitate cooperation between the parties. Incidentally, the Council is to review the NAAEC four years after its implementation in order to determine its "effectiveness in the light of experience."

The Secretariat is headed by an Executive Director chosen by the CEC. The Executive Director serves a three-year term that may be renewed by the CEC for one additional three-year term. Moreover, the "position of Executive Director shall rotate consecutively between the nationals of each party." The Executive Director can also be removed for cause by the CEC.

The main function of the Secretariat is to consider submissions from NGOs or any person asserting that a member of the NAAEC has failed to effectively enforce its own environmental laws. Clearly, the parties to the NAAEC are attempting to encourage active participation from its citizens in effectuating the

52. See NAAEC, supra note 2, at 1485. Article 8 establishes the Commission which is comprised of a Council, a Secretariat, and a Joint Public Advisory Committee. See id.
53. See id. at 1484-90. The Council is the NAAEC's governing body and is comprised of cabinet-level designees or their equivalents. See id. The rules and procedures governing the CEC are established by the Council. See id. The agreement states that the Council shall convene at least once a year in a regular session or at the request of any party, conduct public meetings when the sessions are regular. See id. If the sessions are special, the Council shall decide if the meetings are public. See id. The Council may, if it so desires establish ad hoc committees or working expert groups. See id. The Council may additionally seek the advice of NGOs or take such action in the exercise of its functions as the parties may agree. See id.
54. See id.
55. See Baron, supra note 51, at 604.
56. See Abbot, supra note 34, at 7.
57. See NAAEC, supra note 2, at 1485.
58. See id.
59. See id.
60. See id.
61. See id.
62. See id.
63. Id.
64. See id. at 1487.
65. See id.
66. Id.
67. See id.
68. See id. at 1488.
agreement. However, Article 14, discussing submissions on enforcement matters ("SEMs"), sets forth a rather stringent process for those submitting complaints to the CEC.

A SEM is essentially a complaint made by a person or a NGO asserting that a party-country as been derelict in enforcing its environmental laws. In considering whether a NGO or a person has a viable submission, the Secretariat should make a determination conforming with the requirements of Article 14. If the Secretariat determines that a submission has met the requirements of Article 14.1 and 14.2, then it requests a response from the offending Party based on the considerations of Article 14.3. This is the Party's opportunity to prevent a factual record from being prepared.

After the NGO or private person has submitted all information and the allegedly offending party has made any response, the Secretariat determines whether a factual record is warranted. The Council then decides by a two-thirds vote whether a factual record will be required. Furthermore, if a factual record is made, the Council will decide by a two-thirds vote whether this factual record will be made public. The NAAEC states that in preparing a factual record, "the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Commit-

69. See id. at 1485. Article 11, Secretariat Structure and Procedures, states that the Secretariat shall not receive or seek instructions from any government or any other authority external to the Council. See id. at 1487. The Secretariat shall provide technical support to the Council. See id. The Secretariat shall provide to the public information on where it can obtain technical advice with respect to environmental matters. See id. Further, the Secretariat shall safeguard from disclosure information it receives identifying a non-governmental organization or person making a submission, if the person or organization so requests. See id.

70. See id. at 1488. Article 14.1 considers whether the submission is in the proper language, clearly identifies the person or organization making the submission, provides sufficient information or documentary evidence on which the submission may be based, indicates that the matter has been presented in writing to the appropriate authorities of the Party, and shows that the group making the complaint resides in a territory of a party. See id. Article 14.2 states "[i]f the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall [additionally] determine whether the submission merits requesting a response from the Party." Id. In deciding whether the submission is a valid complaint, the Secretariat shall be guided by whether the submission alleges harm to the person or organization submitting the complaint, whether the submission warrants further studies pursuant to the Agreement, whether private remedies have been pursued in the Party's legal forum, and whether the submission is drawn exclusively from mass media reports. See id. The CEC has placed Article 14 requirements on the Internet for easy access by private persons and NGOs at <http://cec.org>.

71. See NAAEC, supra note 2, at 1488. When the Secretariat determines that a response from the party in question is necessary, it shall forward the submission and any other relevant information to the Party. See id. The Party is then given the opportunity to respond within thirty days. In exceptional circumstances, the Party is given sixty days. See id. The Party advises the Secretariat as to whether the submission is the subject of a pending judicial or administrative proceeding. See id. If so, the Secretariat shall proceed no further. See id. If the submission is not the subject of a judicial dispute or administrative proceeding, the party should instruct the Secretariat as to whether the submission concerns a previous judicial or administrative proceeding and whether there are private remedies yet to be pursued. See id.

72. See Baron, supra note 51, at 610.

73. See NAAEC, supra note 2, at 1488.

74. See id. at 1488.

75. See id. at 1489.
tee; or (d) developed by the Secretariat or independent experts.”

Even though there is nothing in Part Three of the NAAEC suggesting what is to be done with a factual record, some have suggested that merely publicizing the lack of enforcement will prompt a government to address the matter, and increase enforcement procedures.

The submission requirements should not, however, be read too stringently. Some argue that a conservative reading of these requirements would undermine the credibility of the NAAEC. These requirements, however, are the procedural requirements. Assuming that a submitter presents a complaint that satisfies the procedural aspects of Article 14, the hurdle remains of submitting a complaint that alleges a party-country has substantively failed to effectively enforce its environmental laws.

How the phrase “effectively enforce environmental laws” is to be interpreted is the crucial determination. The objectives of the NAAEC were to foster the protection and improvement of the environment. Should that mean that a party-country is to refrain from diminishing the substantive laws and regulations from their body of laws? The NAAEC defines environmental law as “any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health ....” It excludes from this definition “any statute or regulation thereof, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.”

This latter definition is inconsistent with the Preamble and the Objectives stated within the NAAEC. Thus, if the NAAEC was designed to ensure that a party-country could not dilute its environmental laws in order to attract business, the latter definition suggests that a legislature concerned more with economic growth than with environmental protection could simply designate a new statute or regulation as an exploitation of natural resources, which would therefore exempt the new statute or regulation from the requirements of the NAAEC. The Secretariat has taken this position, determining that “failure to enforce” will be construed as the acts or omissions of agencies and officials charged with enforcing environmental law, and not the acts of the legislative or executive branches of government.

Article 5 of the NAAEC illustrates the CEC’s reasoning and supports the contention that new laws and regulations are not considered a failure to effec-

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76. Id.
78. See Baron, supra note 51, at 608.
79. See NAAEC, supra note 2, at 1483.
80. See id. at 1495.
81. Id.
82. See id.
tively enforce environmental laws.\textsuperscript{84} The language of this Article is directed specifically at laws already in force.\textsuperscript{85} It does not speak of the degeneration of environmental policy the NAAEC was designed to prevent.\textsuperscript{86} Rather, the Article suggests only that it may be invoked if a country is not enforcing an active environmental law.\textsuperscript{87} Therefore, a conservative legislature can dilute a party-country's environmental policy by passing a new law without offending the NAAEC's Article 5 provisions, yet the new law could be contrary to the objectives of the NAAEC.

Law makers and commentators have suggested that the interpretation of the NAAEC should reflect its central purpose which is to "protect and enhance environmental quality."\textsuperscript{88} Moreover, lawmakers in the United States have suggested that the impetus of the NAAEC should also be considered in determining how the NAAEC should be read.\textsuperscript{89} If the CEC is unwilling to interpret the agreement \textit{in toto}, then the objective of the NAAEC will be violated on a regular basis. Party-countries will be able to curtail environmental policy to attract industry by simply passing new laws and regulations, which is exactly what the NAAEC was supposed to prevent.

Incidental to the submissions by NGOs is Part Five\textsuperscript{90} of the NAAEC which establishes the manner in which the Parties will deal with each other in the event that one Party-country asserts that another Party-country is not effectively enforcing its environmental laws.\textsuperscript{91} Part Five does not specify what entails a "persistent pattern." Perhaps a persistent pattern is derived from factual records developed as a result of the submissions of NGOs or private persons? On the other hand, the definition of "persistent pattern" could be formulated by the Parties in requesting a consultation where a complaining country asserts that

\begin{itemize}
  \item \textsuperscript{84} See NAAEC, supra note 2, at 1483-84. This article states, \textit{inter alia}, that:
    \begin{itemize}
      \item with the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, subject to Article 37, such as: (a) appointing and training inspectors; (b) monitoring compliance and investigating suspected violations, including through on-site inspections; . . . (e) issuing bulletins or other periodic statements on enforcement procedures; (f) promoting environmental audits; . . . (j) initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations; . . . (l) issuing administrative orders, including orders of a preventative, curative or emergency nature.
    \end{itemize}

    \textit{Id.} (emphasis added). Further, each party shall ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws and regulations.

    \textit{Id.} at 1484.
  \item \textsuperscript{85} See \textit{id.}
  \item \textsuperscript{86} See \textit{id.}
  \item \textsuperscript{87} See \textit{id.}
  \item \textsuperscript{88} Baron, \textit{supra} note 51, at 605 n.14.
  \item \textsuperscript{89} See \textit{id.}
  \item \textsuperscript{90} See NAAEC, \textit{supra} note 2, at 1490-94.
  \item \textsuperscript{91} See \textit{id.} Article 22 states that "[a]ny Party may request in writing consultations with any other party regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law." \textit{Id.} at 1490. Moreover, if a consultation has been requested, a third party that considers it has a substantial interest in the matter is entitled to participate in the consultation provide that it has delivered in writing a notice to the other parties. See \textit{id.} The Article also states that the parties shall make a good faith effort to arrive at a mutually satisfactory resolution of the matter. See \textit{id.}
\end{itemize}
the offending country has failed to effectively enforce an environmental law. If the former definition is utilized, the environment will continue to suffer since the CEC has determined that a "failure to effectively enforce" does not entail new laws and regulations, which would mean a new law or regulation could never demonstrate a "persistent pattern." If the latter definition prevails, however, the Parties perhaps will be more effective than citizen submissions in ensuring that the spirit of the NAAEC is followed.

IV. SUBMISSIONS OF ENFORCEMENT MATTERS: COMPLAINTS SUBMITTED TO THE NAAEC

Since the inception of the NAAEC, the Secretariat has made determinations on a total of five submissions made by NGOs and private persons. Of the five submissions, in only one has the Secretariat recommended a factual record be prepared. 92

A. Submissions by Private Persons and NGOs

1. SEM-95-001

The first submission ("SEM-95-001") was made the Biodiversity Legal Foundation against the government of the United States, 93 alleging that the United States government was not effectively enforcing the Endangered Species Act of 1973 ("ESA"). 94 It is rather ironic that the first complaint was made against the United States because many individuals believed the NAAEC was to be utilized primarily against Mexico. 95 President Clinton had signed into law the Emergency Supplemental Appropriations and Rescissions For the Department of Defense to Preserve and Enhance Military Readiness Act of 1995. 96 The Submitters alleged that the Act contained an unrelated amendment, later known as the "Hutchison Rider" or "ESA Moratorium." 97 The Fish and Wildlife Service, which oversees the ESA, determined that the Rider affected its enforcement of the ESA's listing provisions 98 in two ways. First, the Rider prohibited the agency from making "final determinations" for species or critical

94. See id. See also 16 U.S.C. §§ 1531-1534 (1994). For the view that the ESA does not give enough protection to endangered species, see Tzong-Bing Tsai, One Step Further Towards Biodiversity Conservation, 30 TULSA L.J. 657 (1995).
95. See Raustiala, supra note 34, at 35. See also Bureau of National Affairs, supra note 35, at 1506.
96. See id. See also Emergency Supplemental Appropriations and Rescissions For the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73.
97. See SEM-95-001, supra note 93.
98. See id. "[T]he Secretary [of Interior] shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted... the Secretary shall promptly publish each finding under this subparagraph in the Federal Register." 16 U.S.C. § 1533(b)(3)(A)(I) (1994).
habitat designations for the remainder of fiscal year 1995. Second, the Rider rescinded $1.5 million from the budget allocated to the program and prevented it from offsetting the loss from other programs.

The Submitters emphasized that the Rider should not be construed as an amendment to the ESA, arguing it was instead a suspension of the ESA’s enforcement provision, in violation of the NAAEC provision requiring each party to “effectively enforce its environmental laws and regulations through appropriate governmental action.” The Submitters, in relying on this contention, cited a decision from the United States District Court for the District of Arizona. Additionally, they noted that suspension of the ESA was for purely economic reasons, quoting the legislative history. The distinction between amendment and suspension was critical to the determination issued by the CEC.

The Submitters tailored their first argument to Article 5, which required each party to “effectively enforce its environmental laws and regulations through appropriate governmental action.” They noted that Article 45(2)(a)(iii) supplied a definition “environmental law.” They also contended that Article 3 applied because the Rider suspended enforcement instead of amending or modifying the ESA. The Submitters concluded that the CEC should prohibit any suspension of enforcement of an environmental law or regulation by any branch of government.

The Secretariat, however, did not accept any of the Submitters arguments. The Secretariat determined that because the alleged failure to enforce an environmental law was the product of competing legislative mandates and not the product of actions taken by an agency, it must consider whether the “failure to effectively enforce” could result from two contradicting statutes. The Secretariat determined that Articles 14 and 15, when read in conjunction with other

99. See SEM-95-001, supra note 93.
100. See id.
101. See id.
102. NAAEC, supra note 2, at 1483-84.
103. See SEM-95-001, supra note 93 (citing Silver v. Babbitt, 68 F.3d 481 (9th Cir. 1995)).
104. See SEM-95-001, supra note 93. The Submitters quoted Senator Hutchinson, the author of the Rider, who stated that the Rider declared a time-out on the enforcement of the ESA’s listing provisions so that “silly things will not happen.” Id. Senator Hutchinson also noted that the Rider was designed to ensure that bait fish and golden checked warblers and jaguars and salmon that are running the wrong way in a stream will not take precedence over the rights of farmers and ranchers who have toiled on their land and who are working for living and providing the food for citizens to eat in this country.
105. See id.
106. See id.
107. See id.
108. See id.
109. See id.
110. See id.
articles of the NAAEC, suggest that a failure to enforce environmental law pertains to an administrative agencies or officials charged with implementing laws and regulations. It determined this while finding that "there is little to support the notion in Article 14.1 that the word Party is restricted to include only the executive functions of agencies or departments, or that the term should mean anything other than 'government' in a broader sense, including its separate branches."

This distinction was critical because the Secretariat determined that a "failure to effectively enforce" pertained only to actions taken by an agency, concluding that the Department of Interior had not failed to "effectively enforce" the ESA. It reasoned that "while not conclusive, the provisions of Article 14 are most logically triggered when a failure to enforce is brought about by administrative shortcomings rather than legislative mandates." Moreover, Article 14.2 asserts that private persons or NGOs must pursue private remedies before filing a submission. By passing a moratorium on the ESA listing process through the Rider, Congress effectively removed any private remedy for the Submitters, and the only way to change that fact was through legislative amendment. The Secretariat stated that:

> [t]he absence of a legal remedy further underscores the difficulties associated with evaluating legislative actions under Article 14. Here, the Submitters have lodged a submission immediately after the U.S. has spoken through the voice of its elected representatives. Article 14 was not intended to create an alternate forum for legislative debate.

Interestingly, the Secretariat read Articles 14 and 15 in conjunction with certain articles of the NAAEC while failing to read them in conjunction with the Preamble, the Obligations, the General Commitments, and the Levels of Protection. When read in conjunction with these sections, it is apparent that the Rider contradicts the spirit of the NAAEC. The NAAEC was a response to fears that NAFTA would cause companies to move environmentally sensitive production to countries with the least environmental regulation. This first determination was dangerous in allowing the legislature to decimate an environmental law for a more lax statute, or for no statute at all. Additionally, the determination allows a country to reduce its environmental protection for purely economic reasons, contrary to the intent of the NAAEC.

110. See id.
111. Id.
112. See id.
113. Id.
114. See NAAEC, supra note 2, at 1488.
115. SEM-95-001, supra note 93.
116. See id.
117. See NAAEC, supra note 2, at 1482.
118. See id. at 1483.
119. See id.
120. See id.
121. See Raustiala, supra note 34, at 34.
In rejecting the Article 3 argument offered by the Submitters, the Secretariat recognized the right of each Party to set its own level of environmental protection and then somewhat whimsically stated that the "[P]arties [should] further commit to maintaining high levels of environmental protection." The Secretariat also noted that the "application of the Rescissions Act has suspended for a stipulated period of time the implementation of certain provisions of the ESA." How can the CEC assert that a suspension of an important piece of environmental legislation, such as the ESA, is also a commitment to maintaining high levels of environmental protection? This determination must be viewed as both a setback in the environmental movement and a rejection of the spirit of the NAAEC. The Secretariat has in essence nullified the importance of the NAAEC by determining that a Party can diminish environmental legislation through the ballot box, which can still attract industry to environmentally sensitive areas.

2. SEM-95-002

The second submission ("SEM-95-002") was filed by a variety of environmental groups led by the Sierra Club. The complaint first alleged that the provisions of the Emergency Supplemental Appropriations for Additional Disaster Assistance and Rescissions Act ("Rescissions Act") resulted in failure to effectively enforce all applicable environmental laws by eliminating private remedies for salvage timber sales. The Secretariat rejected this argument, ruling that an actionable failure to effectively enforce an environmental law could not be found in an action taken by the legislature. The Submitters further contended that the Rescissions Act contained a Rider that suspended enforcement of U.S. environmental laws in violation of the NAAEC. The Rider allowed a "massive logging program on U.S. public lands," which would "promote a cheap supply of timber from federal lands for timber industries." The Submitters sought preparation of a factual

122. SEM-95-001, supra note 93.
123. Id.
125. See SEM-95-002, supra note 83.
126. See id.
127. See id.
128. See id. The Submitters felt that this was a violation notwithstanding the SEM-95-001. The Submitters stated:

It is important to recognize that the logging rider did not emerge as free-standing legislation. If it had, it would have been referred to congressional committees with jurisdiction to hold hearings, analyses, committee votes, and public reports. It also would have been more visible to the public, U.S. trading partners, and Members of Congress. Instead, the logging rider was tacked onto a popular budget-cutting and disaster-assistance measure that few Members of Congress wanted to vote against. The rider was not the subject of full congressional scrutiny, which normally includes public hearings, committee review, and committee and floor votes on substantive legislation. Even the committees with jurisdiction over forestry and forest reserves were denied the opportunity to review fully and comment on the rider . . . .

Id.
129. Id.
130. Id. It is important to remember that the NAAEC was designed to prevent "incentives for corporations
The Submitters were concerned that the Rider would eviscerate the only mechanism ensuring federal environmental laws to be enforced by federal agencies charged with managing public forests. They stated that this Rider abolished the mechanism which enforced federal environmental statutes providing for the management of public forests. Moreover, the Rider would not be subject to administrative review, which is "[o]ne of the cornerstones of our democracy." Because the Submitters believed these actions amounted to a failure to effectively enforce environmental laws, they presumed that the NAAEC would be the proper vehicle to combat this legislation.

The Submitters relied upon the language of Article 5 to bolster their argument that the Rider was a failure to effectively enforce an environmental law. They asserted that each of the Submitters have "legally recognized interests under U.S. law to protect endangered species and natural areas from which their members obtain aesthetic, recreational, and avocational benefits." By precluding these members from seeking administrative review, the Rider thus
failed to effectively enforce environmental laws. They also argued that Article 6 of the NAAEC\textsuperscript{138} was applicable because the Rider eliminated the "most effective (and often only) judicial rem[ed]y for violations of environmental laws."\textsuperscript{139}

The Submitters further noted that Article 45(2)(b) excluded laws which exploited natural resources. However, they argued that Article 45(2)(a)(iii) applied to any provision of the law in which the primary purpose was the protection of the environment.\textsuperscript{140} The Submitters stated that the principle target of the Rider was the suspension of enforcement of environmental statutes such as the National Environmental Policy Act and the Endangered Species Act, the primary purpose of which was environmental protection.\textsuperscript{141} They believed a proper reading of Article 45 would require "[t]he primary purpose [to be] determined by reference to each statutory or regulatory provision, rather than to the law as a whole."\textsuperscript{142} This reading mandates the Rescissions Act be interpreted as a failure to effectively enforce environmental laws. Although the Secretariat acknowledged that the Rider addressed exploitation of natural resources,\textsuperscript{143} it determined that the submission alleged a failure to enforce environmental laws specified in the logging rider which met the definitional requirements of Article 45.\textsuperscript{144}

The Secretariat again determined that the facts did not suggest a failure to effectively enforce an environmental law or regulation; rather, the statute must be read in conjunction with the entire corpus of the law.\textsuperscript{145} The Secretariat stated that it "considers [that] enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of

\textsuperscript{138} See NAAEC, supra note 2, at 1484. The section entitled "Private Access to Remedies" states:
1. Each party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law.
2. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, or judicial proceedings for the enforcement of the Party's environmental laws and regulations.
3. Private access to remedies shall include rights, in accordance with the Party's law, such as: . . . (b) to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations; (c) to request the competent authorities to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm; or (d) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person under that Party's jurisdiction contrary to that Party's environmental laws and regulations or from tortious conduct.

\textit{Id.}

\textsuperscript{139} SEM-95-002, supra note 83.
\textsuperscript{140} Id. See also NAAEC, supra note 2, at 1495.
\textsuperscript{141} See SEM-95-002, supra note 83.
\textsuperscript{142} Id.
\textsuperscript{143} See id. This statement by the Secretariat is rather problematic in that it could foreshadow future determinations. Although exploitation of natural resources is an important and legitimate function of government, the Secretariat may have unwittingly established a precedent that would allow a conservative legislature to simply designate a new law or regulation as an exploitation of natural resources and thereby circumvent the requirements and the spirit of the NAAEC.
\textsuperscript{144} See id.
\textsuperscript{145} See id.
the greater body of laws and statutes on the books." Moreover, this would be true "even if [the] pre-existing law is not amended or rescinded and the new legislation is limited in time." Therefore, the logging rider must be read in conjunction with pre-existing environmental law, and if the latter law or regulation waives, exempts, or modifies the former, the latter will prevail.

The Secretariat then dispensed with the Article 6 component of the complaint. It determined that the Rider did not provide facts supporting an inference of a failure to enforce. The Secretariat determined that the submission was "prospective in nature, alleging anticipated but unrealized enforcement consequences." Hence, the Secretariat determined it was not provided with sufficient details to review the submission because there was not a factual basis to determine upon which environmental law was not being enforced. The Secretariat again made formalistic determinations based on individual articles within the NAAEC, and refused to examine the document in toto and approach the determinations based on the spirit of whole agreement.

3. SEM-96-001

In the third complaint submitted to the CEC, the Secretariat determined that a factual record should be prepared. The Complaint was submitted by environmental groups in Mexico, led by the Comité para la Protección de los Recursos Naturales A.C. The groups alleged that the Mexican government was failing to effectively enforce an environmental law by "not requiring the presentation of an Environmental Impact Assessment in connection with the construction and operation of a port terminal and related works located in Cozumel, Quintana Roo." The Mexican government responded by raising procedural and substantive inadequacies.

146. Id.
147. Id.
148. See id.
149. See id. Article 6 provides for Private Access to Remedies. The Submitters alleged that the Rider included suspension of citizen enforcement provisions through additional limitations on administrative and judicial review. See id. See also supra notes 141-42 and accompanying text.
150. See id.
151. Id.
152. See id. See also NAAEC, supra note 2, at 1488.
153. Id. See SEM-96-001, supra note 92.
154. See id. Author note: The complaint and the response from the Mexican government can be found at http://cec.org; however, these documents only appear in Spanish. A summary of the submission and the response by the Mexican government is provided by the CEC at http://cec.org/cgi-ush/dbml.exe. The Secretariat managed to reduce twenty pages of submission and response to less than a two-page summary. It is imperative that the CEC remedy this situation so that interested persons can read the documents in toto and come to their own conclusions instead of relying on the CEC's interpretation of the events.
155. Id.
156. See id.
and the government of Mexico’s important contentions in this matter. Further, the Secretariat noted:

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. 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 specially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.\textsuperscript{158}

Although it is laudable that the Secretariat arrived at this conclusion, the Secretariat offered no guidance to subsequent Submitters. Also, the Secretariat was willing to overlook the fact that the Submitters “may not have alleged the particularized, individual harm” in this submission, yet were unwilling to examine future harms alleged by the Submitters in SEM-96-001 concerning the logging rider.\textsuperscript{159} If the NAAEC is to live up to its billing as a valuable international legal regime,\textsuperscript{160} the Secretariat must give more explicit guidance through its determinations.

4. SEM-96-002

The fourth complaint submitted to the CEC was by a private person against Canada.\textsuperscript{161} It asserted that the Canadian government failed to effectively enforce its environmental laws resulting in the pollution of wetland areas which impacted the habitats of fish and migratory birds.\textsuperscript{162} The Submitter also instituted judicial proceedings against the province of Alberta that possibly would effect the outcome of any CEC decision.\textsuperscript{163} The Secretariat therefore decided to take no further action in this matter, pending the outcome of the judicial proceeding in Canada.\textsuperscript{164}

5. SEM-96-003

The fifth complaint made against a NAFTA-party was again by a Canadian environmental group against the government of Canada.\textsuperscript{165} The Friends of the Old Man River (FOR) were concerned that the Canadian authorities were failing to “apply, comply and enforce the habitat protection sections of the Fisheries Act, and the Canadian Environmental Assessment Act [hereinafter

\begin{footnotes}
\item[157.] See id.
\item[158.] Id. (emphasis added).
\item[159.] See id.
\item[160.] See Raustiala, supra note 34. See also Baron, supra note 51.
\item[162.] See id. at 2.
\item[163.] See id.
\item[164.] See id. See also NAAEC, supra note 2, at 1488.
\end{footnotes}
the primary purpose of which was environmental protection, and not resource management. FOR acknowledged the possibility that there were private remedies available to them in specific cases where fisheries habitats were damaged. Moreover, FOR admitted that there were private remedies available in specific cases to force the Canadian government to comply with the CEA. They explained, however, that they were not aware of private remedies that would compel the Canadian government to comply with the CEA in general.

Again, the Secretariat ruled that the complaint did not meet the Article 14 requirements. It determined that although the Canadian government had responded to the “specific” failure to enforce an environmental law, the submission focused on the governments “general” failure to enforce an environmental law, which had not been communicated to the government. Accordingly, the Secretariat informed the Submitters that they had thirty days to “provide the Secretariat with a submission that conforms to the criteria of Article 14(1) of the Agreement.” Once again, the spirit of the Agreement was ignored, and the decision was based on an overly technical reading of this so-called “prototype for regional integration arrangements.”

B. Analysis

The NAAEC contains dynamic language indicative of the Parties’ commitment to environmental protection. However, the CEC has taken an overly formalistic approach to the application of the Agreement, thus circumventing the Agreement’s substantive spirit. The Preamble states that the parties recognize the importance of the environmental goals of NAFTA, including enhanced levels of environmental protection. Further, the Preamble emphasizes the importance of public participation in conserving, protecting, and enhancing the environment. The submissions, discussed above, question the ability of the public to participate in global environmental protection. Moreover, the CEC has not offered any guidance to aid a party in its formulation of policy or to private persons in remaining vigilant observers of the environment.

The NAAEC contains the appropriate checks and balances to ensure the consideration of environmental issues. For example, Article 14(1)(d) dictates that the Secretariat should consider whether the submission “appears to be

167. See id.
168. See id.
169. See id. The specific example that FOR offered as evidence of Canada’s failure to enforce was the general failure of the Government of Canada to apply, comply with and enforce the Fisheries Act and the CEE.
170. See SEM-96-003, supra note 165. See also NAAEC, supra note 2, at 1488.
171. Id.
172. See generally Abbot, supra note 34.
173. See NAAEC, supra note 2, at 1482.
aimed at promoting enforcement rather than at harassing industry.” Article 14(1)(b) states that one objective is to “promote sustainable development based on cooperation and mutually supportive environmental and economic policies.” Lastly, Article 3 states that the member parties recognize “the right of each party to establish its own levels of domestic environmental protection . . . and shall strive to continue to improve those laws and regulations.” The Secretariat should consider the articles in toto instead of examining only a few articles that necessitate stringent, narrow determinations.

The NAAEC should not be applied in a hyper-technical manner or be construed to suggest that a party-country can simply enact a new law and not be in violation of the NAAEC. The Agreement was designed to ensure that a party-country could not diminish its environmental laws in order to attract business. Article 31 of the Vienna Convention on the Law of Treaties states that “a treaty will be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose . . . including its preamble and annexes.”

Thus far, the determinations made by the CEC have ignored these principles. Moreover, the CEC has suggested that laws designed to exploit or harvest natural resources are not applicable. Implyingly, a conservative legislature, more concerned with economic promotion than with environmental well-being, could simply designate a new law as an exploitation of natural resources and further circumvent the spirit of the NAAEC.

V. CONCLUSION

The NAFTA parties have agreed to protect the environment while promoting sustainable economic growth. The Agreement sets up a Commission for Environmental Cooperation, which hears complaints made by private persons and non-governmental organizations. The CEC has investigated five complaints made by NGOs to date and has only recommended that a factual record be prepared for one complaint. Its determinations thus far have been inconsistent with the spirit and intent of the Agreement. In order to satisfy the intent of the Agreement, the CEC will have to reformulate its reasoning. The NAAEC can be a useful document in protecting the environment and for promoting environmental awareness. To date, however, there is inconsistent language within the document that weakens its usefulness.

174. Id. at 1488.
175. See id. at 1483.
176. Id.
The spirit behind the NAAEC can be promoted by the CEC by interpreting the document in toto. The CEC should look to all these articles of the agreement in making its determinations, instead of making its determinations based on technical legalese.

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