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UNDERSTANDING CANADA'S RESPONSES TO CITIZEN SUBMISSIONS UNDER THE NAAEC

CHRIS TOLLEFSON* & ANTHONY HO**

I. INTRODUCTION

The North American Agreement on Environmental Cooperation (NAAEC) is a side-agreement to the North American Free Trade Agreement (NAFTA), to which the United States, Canada, and Mexico are signatory parties (Parties). A central feature of the NAAEC is its citizen submission on enforcement matters (SEM) process, by which citizens and citizen groups from any of the three signatory countries can call on the NAAEC Secretariat to consider whether a Party is failing to effectively enforce its environmental laws. To date, there have been eighty-one citizen submissions filed against the three Parties.¹

Much of the scholarship surrounding the SEM process has concerned its efficacy, particularly from the perspective of citizens and non-governmental organizations.² In contrast, there has been relatively

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¹ *Registry of Submissions*, COMMISSION FOR ENVTL. COOPERATION, www.ccc.org/Page.asp?PageID=751&SiteNodeID=250 (last visited Nov. 20, 2013).

² *E.g.*, JONATHAN GRAUBART, *LEGALIZING TRANSNATIONAL ACTIVISM: THE STRUGGLE TO GAIN SOCIAL CHANGE FROM NAFTA'S CITIZEN PETITIONS* (2008); PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* (1996); Greg M. Block, *NAFTA's Environmental Provisions: Are They Working as Intended? Are They Adequate?—A View from Canada*, 23 CAN.-U.S. L.J. 409 (1997); John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an*

little work done that seeks to understand the manner in which the Parties have interacted with this innovative SEM process. To assess whether and to what extent the SEM process is working, and to envision ways that the process (or analogous ones) might be improved, it is important to gain a better understanding of how governments perceive and react to processes of this kind. This Article represents a tentative foray into this research area.

For this Article, we examined only SEM submissions against Canada. We used a case-study approach, selecting three cases that help illustrate any trend in the Canadian government's response to SEM submissions.³ We then sought to understand Canada's responses through three theoretical perspectives: realism, pluralism, and institutionalism.

We begin by briefly describing the NAAEC and the SEM process in Part II. Part III lays out three cases in which submitters alleged that Canada had failed to effectively enforce its environmental laws and Canada's responses to each of them. This is followed in Part IV by a discussion of trends in Canada's responses arising from the case studies. In Part V, we analyze Canada's responses through three theoretical perspectives. Finally, Part VI concludes by offering insights for further research.

II. THE NAAEC & THE SEM PROCESS

The NAAEC arose as a response to criticisms by environmental groups during the negotiations for NAFTA. Environmental groups were concerned that NAFTA would drive Canadian and American companies to Mexico, where they could take advantage of more lenient environmental standards.⁴ The result was a side agreement whose objectives include "the protection and improvement of the environment"⁵ and the enhancement of "compliance with, and

Analysis of the NAFTA Environmental Commission, 47 TEX. INT'L L.J. 505 (2012); David L. Markell, *The North American Commission for Environmental Cooperation After Ten Years: Lessons About Institutional Structure and Public Participation in Governance*, 26 LOY. L.A. INT'L. & COMP. L. REV. 341 (2004); Isabel Studer, *The NAFTA Side Agreements: Toward a More Cooperative Approach?*, 45 WAKE FOREST L. REV. 469 (2010).

³ This Article is limited to an analysis of the Canada's "Party Responses" to SEM submissions as described in Part II. Of course, governments can also respond to SEM submissions through policy or legislative changes after the release of a factual record. However, this Article examines the behaviour of Canada as an actor *within* the SEM process. Therefore, Canada's policy and legislative response outside the SEM process, the understanding of which is also an important part of the bigger picture, is beyond the scope of this Article.

⁴ Knox & Markell, *supra* note 2, at 510.

⁵ North American Agreement on Environmental Cooperation art. 1(a), U.S.-Can.-Mex., Sept. 8-14, 1993, 32 I.L.M. 1480 (1994) [hereinafter NAAEC].

enforcement of, environmental laws and regulations.”⁶ Article 5 states that “each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action.”⁷ The NAAEC came into effect on January 1, 1994.⁸

The NAAEC established the Commission for Environmental Cooperation (CEC), which consists of a Council, a Secretariat, and a Joint Public Advisory Committee (JPAC).⁹ The Council is the governing body of the CEC, and is made up of cabinet-level representatives from the three Parties.¹⁰ The Council meets annually in regular session, and in special session at the request of any Party.¹¹ The Secretariat provides technical, administrative, and operational support to the Council, and is headed by an Executive Director appointed by the Council for a three-year term.¹² Each Party may appoint three members to the fifteen-member JPAC, which provides advice to the Council and information to the Secretariat.¹³ Each Party may also convene its own National Advisory Committee (NAC) consisting of members of its public.¹⁴

A hallmark feature of the NAAEC is its SEM process. Article 14 allows the Secretariat to “consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law.”¹⁵ If the submission meets certain screening criteria, the Secretariat can request a response from the Party in question.¹⁶ Normally, the Party will have thirty days to respond.¹⁷ Article 15 allows the Secretariat to recommend to the Council that a submission warrants the development of a factual record.¹⁸ The Council has the power, by two-thirds vote, to instruct the Secretariat to proceed with the development of a factual record.¹⁹

To date, there have been thirty-one SEM submissions against Canada:²⁰

⁶ *Id.* art. 1(g).

⁷ *Id.* art. 5(1).

⁸ *Id.* art. 47.

⁹ *Id.* art. 8.

¹⁰ *Id.* art. 9(1), 10(1).

¹¹ *Id.* art. 9(3).

¹² *Id.* art. 11(1), (5).

¹³ *Id.* art. 16(1), (4), (5).

¹⁴ *Id.* art. 17.

¹⁵ *Id.* art. 14(1).

¹⁶ *Id.* art. 14(2).

¹⁷ *Id.* art. 14(3).

¹⁸ *Id.* art. 15(1).

¹⁹ *Id.* art. 15(2).

²⁰ *Submissions on Enforcement Matters: Canada*, COMMISSION FOR ENVTL. COOPERATION,

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- Terminated due to not having met the criteria for proper submission: twelve;
- Secretariat is reviewing the submission: three;
- Secretariat is reviewing the Party response: two;
- Secretariat has recommended against developing factual record: three;
- Council has voted not to develop factual record: one;
- Submitter withdrew from the SEM process: one; and
- Factual record developed and published: eight.

III. CASE STUDIES INVOLVING SUBMISSIONS FILED AGAINST THE GOVERNMENT OF CANADA

In this Part, we explore three case studies involving Canadian government responses to Article 14 submissions: *BC Hydro* (SEM-97-001), *Ontario Logging I & II* (SEM-02-001 & SEM-04-006), and *Pulp and Paper* (SEM-02-003). To provide the context for Canada's responses, synopses of the submissions themselves are also presented. We only provide a very brief description of the Secretariat's factual finding in each case for completeness, as the Secretariat's findings are not relevant to our analysis.

A. BC HYDRO

On April 2, 1997, the Canadian-based Sierra Legal Defence Fund (now Ecojustice) and the United States-based Sierra Club Legal Defense Fund (now Earthjustice) jointly filed the first major SEM submission against Canada under Article 14 of the NAAEC. The submission, known as *BC Hydro*, was filed on behalf of a cross-border coalition of Canadian and American environmental groups: B.C. Aboriginal Fisheries Commission, British Columbia Wildlife Federation, Trail Wildlife Association, Steelhead Society, Trout Unlimited (Spokane Chapter), Sierra Club (United States), Pacific Coast Federation of Fishermen's Association, and Institute for Fisheries Resources. The submitters asserted that the Canadian government had failed to enforce section 35(1) of the federal Fisheries Act²¹ and section 119.06 of the federal National Energy Board Act (NEB Act),²² and in doing so failed to

www.cec.org/Page.asp?PageID=1226&SiteNodeID=546&BL_ExpandID=502 (last visited Nov. 20, 2013). The listed numbers add up to only thirty, because two of the submissions have been consolidated by CEC Council Resolution 05-04.

²¹ Fisheries Act, R.S.C. 1985, c. F-14, s. 35(1), amended by 2012, c. 19, s. 142 (Can.).

²² National Energy Board Act, R.S.C. 1985, c. N-7, s. 119.06, amended by 2012, c. 19, s. 94

protect fish and fish habitat from environmental damage caused by the hydroelectric power development in the province of British Columbia.²³

Although *BC Hydro* was not the first SEM submission against Canada, it was the first that represented a serious challenge against the Canadian government through the SEM process of the NAAEC. The one submission that predated *BC Hydro* was *Oldman River I*, in which The Friends of Oldman River claimed that the Canadian government had failed to effectively enforce certain provisions of the federal Canadian Environmental Assessment Act²⁴ and the Fisheries Act.²⁵ In *Oldman River I*, the submitter's description of the alleged failures to enforce was somewhat vague and limited. Ultimately, the Secretariat recommended against developing a factual record because the matter at issue was the subject of an ongoing judicial proceeding.²⁶

In contrast to *Oldman River I*, the submitters in *BC Hydro* provided a more robust description of Canada's alleged failures to enforce its habitat protection laws. The submitters' main argument was two-pronged. The first prong was that while B.C. Hydro had "consistently and routinely violated section 35(1) [of the Fisheries Act]," the Canadian government had laid only two charges against B.C. Hydro "despite clear and well documented evidence that Hydro's operations have damaged fish habitat on numerous occasions."²⁷

B.C. Hydro is a Crown corporation, wholly owned by the Province of British Columbia, and responsible for the development and maintenance of hydroelectric power infrastructure within much of the province. The submitters claimed that B.C. Hydro's regular operation of hydroelectric dams "causes consistent and substantial damage to fish and fish habitat."²⁸ Section 35(1) of the Fisheries Act states that "[n]o person shall carry on any work . . . that results in the harmful alteration,

(Can.).

²³ Comm'n for Env'tl. Cooperation, *Submission to the Commission on the Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation*, CEC Doc. A14/SEM/97-001/01/SUB (Apr. 2, 1997), available at www.cec.org/Storage/83/7858_ACF756.pdf [hereinafter *BC Hydro Submission*].

²⁴ Canadian Environmental Assessment Act, S.C. 1992, c. 37, repealed by 2012, c. 19, s. 66 (Can.).

²⁵ Comm'n for Env'tl. Cooperation, *The Friends of the Oldman River: North American Agreement on Environmental Cooperation Article 14 Submission*, CEC Doc. A14/SEM/96-003/04/RSUB (Oct. 8, 1996), available at www.cec.org/Storage/88/8478_96-3-RSUB-E.PDF.

²⁶ Comm'n for Env'tl. Cooperation, *Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, CEC Doc. A14/SEM/96-003/12/15(1) (Apr. 2, 1997), available at www.cec.org/Storage/66/6019_96-3-DET-OE3.pdf.

²⁷ *BC Hydro Submission*, *supra* note 23, at 1.

²⁸ *Id.*

disruption or destruction of fish habitat,”²⁹ and section 40(1) makes the contravention of section 35(1) an offence. The term “harmful alteration, disruption or destruction of fish habitat” is also known as “HADD.” The submitters argued that B.C. Hydro’s operation of dams was causing HADD in at least seven ways: 1) reduction in stream flow, 2) rapid changes in flow, 3) inadequate flushing flows, 4) altered water quality, 5) entrainment of fish, 6) flow diversion, and 7) reservoir drawdown.³⁰

According to the submission, both B.C. Hydro and the Canadian government were aware of these Fisheries Act violations, but Canada failed to enforce the law. The submitters quoted various documents that tended to confirm that B.C. Hydro was aware its operations violated the Fisheries Act.³¹ Aside from this evidence, the submitters also provided specific evidence of six instances in which B.C. Hydro, the relevant federal authorities, or both were aware that dam operations harmed fish and fish habitat.³² Nevertheless, the submitters claimed that the Canadian Department of Fisheries and Oceans (now Fisheries and Oceans Canada), the federal authority responsible for the administration of the Fisheries Act, had laid only two charges against B.C. Hydro despite “clear and overwhelming evidence of [B.C.] Hydro’s violations of [the Act], and the clear evidence of a decline in fish populations and habitat.”³³

The second prong was that the federal National Energy Board (NEB) had failed to consider the environmental impact of electricity exportation contrary to the NEB Act.³⁴ The NEB is responsible for making recommendations to the Canadian government regarding applications for electricity export. The NEB Act provides a list of factors that the NEB must consider when making such recommendations, including “the impact of the exportation on the environment.”³⁵ It also provides that the NEB should “avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported.”³⁶

The submitters alleged that the NEB failed its obligation to consider the impact of electricity exportation on fish and fish habitat despite the

²⁹ Fisheries Act, R.S.C. 1985, c. F-14, s. 35(1), amended by 2012, c. 19, s. 142 (Can.).

³⁰ *BC Hydro Submission*, *supra* note 23, at 3-4.

³¹ *Id.* at 6-7.

³² These six instances included 1) Keenleyside Dam/Norns Creek fan, 2) Cranberry Creek, 3) Revelstoke Dam, 4) Cheakamus River, 5) Shuswap Falls Project, and 6) Downton Lake. *Id.* at 5-6.

³³ *Id.* at 10.

³⁴ *Id.* at 1.

³⁵ National Energy Board Act, R.S.C. 1985, c. N-7, s. 119.06, amended by 2012, c. 19, s. 94 (Can.).

³⁶ *Id.*

lack of applicable provincial laws. They also challenged NEB's claim that the province was "actively regulating the activity at issue," since "[ninety-three percent] of the [provincial] water licenses held by [B.C.] Hydro make no provision for the release and maintenance of water flows necessary to conserve fish populations."³⁷

On July 21, 1997, the Canadian government filed its Party Response arguing that a factual record was unwarranted.³⁸ Canada raised several threshold objections, including that the matter in question was the subject of pending judicial and administrative proceedings, and that the alleged enforcement failures arose prior to the NAAEC's coming into force. However, Canada's principal argument was that the NAAEC contemplated a different and a much broader concept of enforcement than what the submitters had relied upon in their submission. According to Canada, the "submission fail[ed] to appreciate the comprehensive approach recognized in Article 5 and followed by Canada," and "the submission [was] based on a more limited view of enforcement, which equate[d] enforcement directly with legal and judicial sanctions."³⁹ Furthermore, Canada asserted that it used "a range of compliance activities, from voluntary compliance and compliance agreements to legal and judicial sanctions," to effectively enforce its environmental laws.⁴⁰

In support of this argument, Canada described in comprehensive detail the federal regulatory regime relating to the protection of fish and fish habitat. In so doing, Canada underscored that the NAAEC should be interpreted in a way that allows each Party to make its own determination of how best to enforce its domestic environmental laws.⁴¹ To this end, Canada situated its national fish habitat protection regime within the larger context of the federal government,⁴² broader enforcement and compliance strategies such as emergency response and monitoring,⁴³ Regional Technical Committees,⁴⁴ provincial Water Use Planning (WUP) Initiative,⁴⁵ and Water Quality Guidelines.⁴⁶

³⁷ *BC Hydro Submission*, *supra* note 23, at 11.

³⁸ Comm'n for Env'tl. Cooperation, *BC Hydro—Party Response*, CEC Doc. A14/SEM/97-001/05/RSP (July 21, 1997), available at www.cec.org/Storage/87/8430_97-1-RSP-E.PDF.

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 11.

⁴² *Id.* at 6-7.

⁴³ *Id.* at 18.

⁴⁴ *Id.* at 18-19.

⁴⁵ *Id.* at 20-21.

⁴⁶ *Id.* at 21.

Canada also defended itself against the specific allegations of enforcement failures set out in the submission. These included detailed rebuttals to each of the submitters' seven allegations, a tabular exposition on the range of enforcement instruments that Canada had used to protect fish and fish habitat in streams that contain B.C. Hydro facilities, and a list of orders and authorizations issued to B.C. Hydro since 1990.⁴⁷

Canada's line of argument regarding the interpretation of "enforcement" was favourably received by the Secretariat. The Secretariat agreed that "enforcement" should be given a broad definition that encompasses more than prosecutions.⁴⁸ Much of the Secretariat's factual findings revolved around the effectiveness of Canada's WUP process as a means to achieve No Net Loss of fish habitat.

B. ONTARIO LOGGING I & II

The saga of *Ontario Logging I & II* is interesting for a variety of reasons, perhaps most notably the intervention of the Council into the SEM process, an intervention that arguably resulted in raising the burden of proof that submitters must meet.⁴⁹ On February 4, 2002, the Sierra Legal Defence Fund filed a submission against Canada alleging a failure to enforce laws protecting migratory bird nests from clear-cut logging operations in the province of Ontario.⁵⁰ The submission was filed on behalf of the following groups: Canadian Nature Federation, Canadian Parks and Wilderness Society, Earthroots, Federation of Ontario Naturalists, Great Lakes United, Sierra Club (United States), Sierra Club of Canada, and Wildlands League. The submitters alleged that Canada failed to "effectively enforce subsection 6(a) of the *Migratory Birds Regulations* against the logging industry in Ontario."⁵¹

Section 6(a) of the Migratory Birds Regulations states in the relevant part that "no person shall . . . disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird."⁵² This is

⁴⁷ *Id.* at 16-17, 22.

⁴⁸ COMM'N FOR ENVTL. COOPERATION, FINAL FACTUAL RECORD FOR SUBMISSION (SEM-97-001), at 35 (May 30, 2000), available at www.cec.org/Storage/68/6220_BC-Hydr-Fact-record_en.pdf.

⁴⁹ Geoff Garver, *Tooth Decay*, 25 THE ENVTL. F. 34, 36-37 (2008), available at www.sierraclub.org/trade/downloads/nafta-tooth-decay.pdf.

⁵⁰ Comm'n for Env'tl. Cooperation, *Submission to the Commission for Environmental Cooperation Pursuant to Article 14, North American Agreement on Environmental Cooperation*, CEC Doc. A14/SEM/02-001/01/SUB (Feb. 4, 2002), available at www.cec.org/Storage/83/7894_02-1-sub-e.pdf [hereinafter *Ontario Logging Submission*].

⁵¹ *Id.* at 1 (citation omitted).

⁵² Migratory Birds Regulations, C.R.C., c. 1035, s. 6(a) (Can.).

a regulation enacted pursuant to section 12(1) of the federal Migratory Birds Convention Act (MBCA).⁵³ Section 13(1)(a) of the MBCA makes it an offence to contravene the Act or its regulations. At the time of the submission, Environment Canada administered the MBCA through the Canadian Wildlife Service (CWS).

In the province of Ontario, the provincial Ministry of Natural Resources (MNR) manages forestry activities through a Forest Management Plan (FMP) for each designated forest area, called a Forest Management Unit (FMU). According to their initial submission, the submitters estimated that over 85,000 nests of migratory birds had been destroyed by clear-cut logging during 2001 in fifty-nine FMUs.⁵⁴ The submitters asserted that these FMPs had been prepared without regard to migratory bird protection and with little input from the federal government.⁵⁵ The submitters also alleged that the CWS was aware of such nest destruction, and that CWS officials called this “incidental” kill.⁵⁶

The submitters challenged the approach taken by the CWS in the enforcement of the MBCA. The submitters made an Access to Information request to Environment Canada, seeking all documents related to efforts by both Environment Canada and the CWS to enforce section 6(a) of the Migratory Bird Regulations. This request revealed that no investigation or charges against Ontario’s logging industry had been made in 2001.⁵⁷ The submitters argued that the CWS had been aware that the incidental destruction of migratory bird nests was illegal, but had declined to prosecute in the belief that cooperation with industry would yield better results.⁵⁸ The submitters claimed that there was no evidence to support the belief that such a “vague strategy” was more effective than enforcement, and that the CWS had no authority to choose not to enforce certain laws in the interest of economic gains.⁵⁹

The Council initially rejected the Secretariat’s recommendation that the development of a factual record was warranted. The Council reasoned that the submission had been based on estimations and had failed to provide specific instances of enforcement failure.⁶⁰ Given these

⁵³ Migratory Birds Convention Act, S.C. 1994, c. 22, s. 12(1) (Can.).

⁵⁴ *Ontario Logging Submission*, *supra* note 50, at 5.

⁵⁵ *Id.* at 6.

⁵⁶ *Id.* at 5.

⁵⁷ *Id.* at 6.

⁵⁸ *Id.* at 7-8.

⁵⁹ *Id.* at 8-9.

⁶⁰ Comm’n for Env’tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion That Canada Is Failing to Effectively Enforce*

deficiencies, the Council gave the submitters 120 days to provide further information.⁶¹ The Council's decision not to adopt the Secretariat's recommendation drew criticism from both the JPAC and the Canadian NAC. In an advice letter to the Government Committee dated March 17, 2003, the Canadian NAC expressed concern over the Council's interference with the independence of the Secretariat in carrying out its mandated functions, and recommended that Canada support the Secretariat's recommendation to develop a factual record.⁶² JPAC echoed this concern stating that the Council's resolution created a "higher evidentiary threshold" for submitters that might "render it prohibitively difficult for citizens to participate in the process."⁶³

The submitters filed supplementary evidence on August 20, 2003, in response to the Council's resolution. Using actual data from the MNR, the submitters provided more accurate assessments of the number of nests destroyed in forty-nine of the original fifty-nine FMUs in the submission.⁶⁴ The submitters also provided information on four additional FMUs in a separate submission (*Ontario Logging II*).⁶⁵ The Council approved the development of factual records for both these submissions and instructed the Secretariat to consolidate them into one factual record.⁶⁶

Section 6(a) of the Migratory Bird Regulations (MBR) Adopted Under the Migratory Birds Convention Act, 1994 (MBCA) (SEM 02-001), Council Resolution 03-05, CEC Doc. C/C.01/03-02/RES/05/final (Apr. 22, 2003), available at www.cec.org/Storage/72/6574_02-1-RES-E.pdf.

⁶¹ *Id.*

⁶² Letter from Can. Nat'l Advisory Comm. to Governmental Comm. (Mar. 17, 2003), available at www.naaec.gc.ca/eng/nac/adv032_e.htm.

⁶³ Comm'n for Env'tl. Cooperation, *Limiting the Scope of Factual Records and Review of the Operation of CEC Council Resolution 00-09 Related to Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Advice to Council 03-05, CEC Doc. J/03-05/ADV/Final (Dec. 17, 2003), available at www.cec.org/Page.asp?PageID=122&ContentID=1274&SiteNodeID=295&BL_ExpandID=.

⁶⁴ CANADIAN NATURE FED'N ET AL., SUPPLEMENTARY SUBMISSION TO THE COMMISSION FOR ENVIRONMENTAL COOPERATION IN RESPONSE TO COUNCIL RESOLUTION 03-05 (Aug. 20, 2003), available at www.cec.org/Storage/72/6589_02-1-supplementary%20information_en.pdf.

⁶⁵ CANADIAN NATURE FED'N ET AL., SUBMISSION TO THE COMMISSION FOR ENVIRONMENTAL COOPERATION (Oct. 5, 2004), available at www.cec.org/Storage/83/7895_04-6-SUB_en.pdf.

⁶⁶ Comm'n for Env'tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion That Canada Is Failing to Effectively Enforce Section 6(a) of the Migratory Bird Regulations (MBR) Adopted Under the Migratory Birds Convention Act, 1994 (MBCA) (SEM-02-001)*, Council Resolution 04-03, CEC Doc. C/C.01/04-01/RES/03 (Mar. 12, 2004), available at www.cec.org/Storage/75/6898_02-1-Res04-03_en.pdf; Comm'n for Env'tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion That Canada Is Failing to Effectively Enforce Section 6(a) of the Migratory Bird Regulations (MBR) Adopted Under the Migratory Birds Convention Act, 1994 (MBCA) (SEM-04-006)*, Council Resolution 05-04, CEC Doc. C/C.01/05/RES/04/Final (Apr. 1,

Canada raised three issues with the original submission prior to responding to the submitters' allegations. First, it suggested that the submitters did not adequately pursue other civil remedies prior to making their SEM submission.⁶⁷ Second, Canada noted that the CWS had been trying to set up a meeting with several of the submitters and other environmental organizations to discuss the enforcement of the MBCA by the CWS and its overall enforcement approach.⁶⁸ Canada claimed, however, that the submitters had delayed the meeting until after the filing of the submission.⁶⁹ Third, Canada pointed out that the submission contained no allegations of specific instances of enforcement failure.⁷⁰

Canada denied that it failed to enforce section 6(a) of the Migratory Bird Regulations with respect to the logging industry in Ontario in two ways. First, Canada questioned the submitters' estimation of the potential impact of logging on migratory bird nests claiming that the estimation was based on scarce data.⁷¹ Canada also noted that the CWS was aware that provincial guidelines regarding forest resource licensing included biodiversity components, and that federal input was invited in the development of FMPs.⁷² Second, Canada denied the submitters' allegation that the CWS had a sweeping policy of non-enforcement in the logging sector.⁷³

Similar to *BC Hydro*, Canada's response in *Ontario Logging* included a discussion and defense of the enforcement approach taken by Environment Canada and the CWS. In fact, Canada asserted again that "[e]nforcement is understood to include a broad range of activities from inspections, investigation and prosecution to education, compliance promotion, regulation development and public reporting, among others."⁷⁴ Canada argued that wildlife enforcement priorities must balance public concern, conservation science, and international commitments.⁷⁵ Given limited resources and broad geographic scope, certain enforcement options would have higher priorities than others.⁷⁶

2005), available at www.cec.org/Storage/75/6913_04-6-Resolution_en.pdf.

⁶⁷ Comm'n for Env'tl. Cooperation, *Response to Submission SEM-02-001*, at 1, CEC Doc. A14/SEM/02-001/12/RSP(Apr. 11, 2002), available at www.cec.org/Storage/88/8479_02-1-RSP-E.pdf.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2.

⁷⁰ *Id.* at 2-3.

⁷¹ *Id.* at 5.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 7.

⁷⁵ *Id.*

⁷⁶ *Id.*

Canada claimed that the more appropriate enforcement approaches in the forestry sector were compliance promotion and education among industry, rather than enforcement through the courts.⁷⁷ Nevertheless, should compliance promotion fail, Environment Canada would conduct investigations and lay charges.⁷⁸ Finally, Canada noted that only one complaint had been filed regarding section 6(a) of the Migratory Bird Regulations and logging in Ontario, and that Environment Canada recorded and followed-up on the complaint.⁷⁹ However, Environment Canada received no complaint from the submitters.⁸⁰

Canada also challenged the reliability of the submitters' estimates of nest destruction. It contended that the submitters failed to demonstrate that any logging had actually occurred during nesting season for migratory birds in 2001, or that any nests had been destroyed as a result of such logging.⁸¹ It further argued that the submission was based on inappropriate assumptions, and that a factual record should be based on allegations of specific instances rather than hypotheses.⁸² Finally, Canada offered additional information on the enforcement approach taken by the CWS, including continuing attempts to create dialogue with industry and environmental groups regarding conservation and compliance with the MBCA.⁸³

On the whole, the Secretariat's factual record in this case was less favourable to Canada than in *BC Hydro*. While Canada had indicated that it was focusing enforcement efforts on species with conservation priority, the Secretariat noted that information gaps still existed despite decades' worth of monitoring efforts to ascertain population data of migratory birds.⁸⁴ The Secretariat found that the CWS website contained no information for the public on how and where to file complaints, even though Canada had stated that determining where to focus enforcement efforts depended in part on complaints from the public.⁸⁵ The Secretariat also found the CWS did "not have the resources to strictly enforce

⁷⁷ *Id.* at 8.

⁷⁸ *Id.* at 8-9.

⁷⁹ *Id.* at 9.

⁸⁰ *Id.*

⁸¹ GOV'T OF CAN., RESPONSE TO SUPPLEMENTAL INFORMATION 3 (Oct. 16, 2003), available at www.ccc.org/Storage/72/6595_02-1-PTS_en.pdf.

⁸² *Id.* at 4.

⁸³ *Id.* at 4-6.

⁸⁴ COMM'N FOR ENVTL. COOPERATION, FACTUAL RECORD: ONTARIO LOGGING SUBMISSION (SEM-02-001) & ONTARIO LOGGING II SUBMISSION (SEM-04-006), at 8 (June 2006), available at www.ccc.org/Storage/75/6907_CCE_21_english.pdf.

⁸⁵ *Id.* at 8-9.

section 6(a) of the [Migratory Bird Regulations].”⁸⁶

C. PULP AND PAPER

Our first case study (*BC Hydro*) marked the first time a SEM submission against Canada culminated in the development of a factual record. Our final case study represents the last time a submission involving Canada has culminated in the preparation of a factual record. The Sierra Legal Defence Fund filed the *Pulp and Paper* submission under Article 14 of the NAAEC on May 6, 2002. The submission was filed on behalf of Friends of the Earth, Union Saint-Laurent, Grands Lacs, Conservation Council of New Brunswick, Ecology Action Centre, and Environment North. The submitters alleged that Canada had failed to effectively enforce sections 34, 36, 40, 78, and 78.1 of the federal Fisheries Act⁸⁷ and sections 5 and 6 and Schedules I and II of the Pulp and Paper Effluent Regulations (PPER)⁸⁸ against pulp and paper mills in Ontario, Québec, and the Atlantic provinces (New Brunswick, Nova Scotia, Newfoundland and Labrador).⁸⁹

Section 36(3) of the Fisheries Act states:

Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

Subsection (4) allows for deposits authorized by regulation, while “deleterious substance” is defined in section 34. Section 40(2) makes it an offence to contravene section 36(3), and sections 78 and 78.1 are the penalty provisions.

The PPER states that the following mill effluents are considered “deleterious substances” for the purposes of the Fisheries Act: a) acutely lethal effluent, b) biochemical oxygen demand (BOD) matter, and c) suspended solids.⁹⁰ The PPER contains an absolute prohibition on acutely lethal effluent, but it allows for authorized discharge of BOD matter and suspended solids. Schedule I describes the prescribed

⁸⁶ *Id.* at 10.

⁸⁷ Fisheries Act, R.S.C. 1985, c. F-14, s. 35(1), amended by 2012, c. 19, s. 142 (Can.).

⁸⁸ Pulp and Paper Effluent Regulations, SOR/92-269 (Can.).

⁸⁹ FRIENDS OF THE EARTH ET AL., SUBMISSION TO THE COMMISSION FOR ENVIRONMENTAL COOPERATION 2 (May 6, 2002), available at www.ccc.org/Storage/83/7896_01-SUB.pdf.

⁹⁰ Pulp and Paper Effluent Regulations, SOR/92-269, s. 3 (Can.).

methods for testing the level of these substances. In the event of a failure of an effluent to pass the prescribed test, Schedule II also describes the required follow-up testing and monitoring procedures.

The submitters alleged two categories of enforcement failure: 1) the failure of mill effluent to pass the prescribed deleterious substance test, and 2) the failure of mills to carry out the required follow-up when there is an effluent test failure.⁹¹ In total, the submitters alleged that there had been more than 2,400 documented violations of federal law at mills in Central and Atlantic Canada from 1995 to 2000, but that only eight mills had been prosecuted under federal law.⁹²

The submission addressed alleged violations in each of the three regions studied by the submitters. In Québec, the submitters alleged 1,093 violations from 1995 to 2000.⁹³ In the year 2000 alone, twenty-six mills were supposedly responsible for 171 violations.⁹⁴ In Ontario, the submitters claimed that there had been 232 violations from 1995 to 2000.⁹⁵ They noted also that Ontario had had a pattern of more prosecutions and fewer violations when compared to Québec and the Atlantic provinces.⁹⁶ The Atlantic provinces supposedly had 1,081 violations from 1995 to 2000.⁹⁷ However, the submitters noted that they had obtained only partial data for certain years and no data in 1999, and so the number of violations might have been underestimated.⁹⁸

In spite of the large number of violations, the submitters found that from 1995 to 2000 there had been only six prosecutions under the federal Fisheries Act in Ontario, two in the Atlantic provinces, and none in Québec, although they found five prosecutions under the provincial Québec Environmental Quality Act.⁹⁹ Perhaps in anticipation of the Canadian government's response, the submission stated that “[w]hile the Submitters do not simply equate prosecution (and fines)... with effective enforcement, such prosecutions are an important enforcement tool that has been effective where used.”¹⁰⁰ The submitters claimed that due to the lack of effective enforcement, some “free riders”—certain mills with a large number of violations but very few to no prosecutions—

⁹¹ FRIENDS OF THE EARTH ET AL., *supra* note 89, at 6.

⁹² *Id.* at 1.

⁹³ *Id.*

⁹⁴ *Id.* at 7.

⁹⁵ *Id.* at 1.

⁹⁶ *Id.* at 9.

⁹⁷ *Id.* at 1.

⁹⁸ *Id.* at 10.

⁹⁹ *Id.* app. 5.

¹⁰⁰ *Id.* at 2.

had been allowed to operate.¹⁰¹

Finally, the submitters argued that the lack of enforcement was contrary to the federal government's own Fisheries Act Habitat Protection and Pollution Prevention Provisions, Compliance and Enforcement Policy (Compliance and Enforcement Policy).¹⁰² The submitters claimed that the intent of the Compliance and Enforcement Policy was "to ensure that violators will comply with the Fisheries Act within the shortest possible time, that violations are not repeated and that all available enforcement tools are used."¹⁰³

Canada provided its Party Response to the Secretariat on August 6, 2002.¹⁰⁴ As with the previous responses, Canada provided a description of the federal agency's enforcement approach, consistent with its longstanding advocacy of a broad definition of enforcement for the purpose of Articles 14 and 15 of the NAAEC. The response also included an explanation of Environment Canada's enforcement response in specific cases highlighted in the submission. However, out of the sixty-six mills for which the submitters had data on violations, and prosecutions listed in their appendix, Canada provided responses only for the twelve mills that the submitters had specifically highlighted in the body of their submission.

According to Canada's response, the Compliance and Enforcement Policy directed Environment Canada officials to choose the appropriate enforcement action (which ranged from warning, to inspector's direction, to prosecution) based on the nature of the violation, the likelihood of achieving the desired result, and consistency in enforcement.¹⁰⁵ Factors that went into assessing the nature of the violation included 1) seriousness of the (potential) environmental damage, 2) intent of the alleged violator, 3) repeat occurrences, and 4) attempts by the violator to circumvent enforcement.¹⁰⁶ In considering the likelihood of achieving the desired result, factors included 1) history of compliance, 2) willingness to cooperate, 3) extent of corrective action already taken, and 4) enforcement actions by other government authorities.¹⁰⁷ Finally, the decision to proceed with prosecution ultimately rested with the Attorney

¹⁰¹ *Id.* at 12.

¹⁰² *Id.* at 4.

¹⁰³ *Id.*

¹⁰⁴ GOV'T OF CAN., RESPONSE TO SUBMISSION SEM-02-003 (Aug. 6, 2002), available at www.cec.org/Storage/72/6634_02-3-Rsp-e.pdf.

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

General of Canada.¹⁰⁸

Using the discussion of the federal agency's enforcement approach as the policy context, Canada's response then provided explanations for the enforcement action taken by Environment Canada at each of the twelve mills highlighted in the submission. In three instances, Environment Canada took no action because the mill in question had taken its own corrective action after effluent test failures.¹⁰⁹ In two instances, violations were overlooked because they were due to temporary maintenance activities.¹¹⁰ In many cases, Environment Canada opted to give written warnings or notices of infraction rather than proceeding with prosecution.¹¹¹ Lastly, Canada declined to provide information on five mills due to ongoing investigations.¹¹²

The factual record in this case was quite limited in scope relative to the original submission. The Council instructed the Secretariat to develop a factual record only for ten mills, and only for enforcement failures in 2000, except for one mill, which the Secretariat was allowed to examine from 1996 to 2000.¹¹³ At those mills in the time period examined, the Secretariat found that Environment Canada had responded to at least 1,246 violations.¹¹⁴ According to the Secretariat's factual findings, Environment Canada responded to these violations with ten warnings, twenty investigations (including on-site inspections and sampling), five charges laid, and no enforcement action in eleven instances.¹¹⁵

IV. TRENDS IN CANADA'S RESPONSES TO CITIZEN SUBMISSIONS

An examination of Canada's responses in these three cases reveals some notable patterns. We will summarize these patterns here and will analyze their significance in Part V. As expected, when the submissions have alleged specific instances of enforcement failure, Canada has

¹⁰⁸ *Id.* at 4.

¹⁰⁹ *Id.* at 5-28.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Comm'n for Env'tl. Cooperation, *Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion That Canada Is Failing to Effectively Enforce Sections 34, 36, 40 78 and 78.1 of the Federal Fisheries Act and Sections 5 and 6 and Schedules I and II of the Pulp and Paper Effluent Regulations (PPER) Promulgated in 1992 (SEM-02-003)*, Council Res. 03-16, CEC Doc. C/C.01/RES/16/final (Dec. 11, 2003), available at www.cec.org/Storage/72/6640_02-3-Res_en.pdf.

¹¹⁴ COMM'N FOR ENVTL. COOPERATION, FACTUAL RECORD: PULP AND PAPER SUBMISSION 26-31 (June 2006), available at www.cec.org/Storage/72/6649_SEM-02-003-FR_en.pdf.

¹¹⁵ *Id.*

responded in kind by offering detailed denials. More intriguing, however, is the manner and consistency with which Canada, in all of these cases, has asserted the view that the submissions are inconsistent with the broader interpretation of “effective enforcement” it claims the Secretariat should adopt.

The detail with which Canada has responded to submissions is especially evident in the *BC Hydro* and *Pulp and Paper* cases. In *BC Hydro*, the submitters alleged seven ways in which B.C. Hydro operations harmed fish habitat. In response, Canada made three general rebuttals to these seven allegations before making specific rebuttals against each of them. Furthermore, Canada’s response included a table of specific orders and authorizations issued to B.C. Hydro from 1990 to 1997. In *Pulp and Paper*, Canada made detailed responses to allegations of enforcement failure at twelve mills highlighted in the submission. Canada’s response in *Ontario Logging I & II* differs in this regard from the other two cases because the submitters had made no specific allegations such as targeted accusations against any particular logging company.

The most striking trend that emerges from the case studies, however, is the manner and consistency with which Canada articulated its views on the question of how “effective enforcement” should be interpreted, and on the proper scope of factual records. In all three cases, Canada consistently took the position that “effective enforcement” for the purposes of the NAAEC meant more than the number of prosecutions. *BC Hydro* was the first case in which Canada made the argument for an expansive interpretation of “effective enforcement” that included a range of enforcement options, from voluntary compliance and compliance agreements to legal and judicial sanctions. In *Ontario Logging I & II*, Canada expanded the list even further to include inspections, education, compliance promotion, regulation development, and public reporting. Likewise, in *Pulp and Paper*, enforcement was defined to range from warnings, to inspector’s direction, to prosecution.

In order to show that the range of enforcement options available to federal authorities forms part of a larger enforcement framework, Canada’s responses invariably included descriptions of the relevant regulatory framework. For example, in *BC Hydro* Canada went to great lengths in describing the federal regulatory regime relating to the protection of fish and fish habitat, such as Regional Technical Committees, provincial Water Use Planning initiatives, and Water Quality Guidelines. Similarly, in *Pulp and Paper*, Canada’s response described Environment Canada’s Compliance and Enforcement Policy relative to Fisheries Act violations at pulp mills, including the range of

factors that federal officials would consider in determining the appropriate enforcement action. Likewise, in *Ontario Logging I & II*, Canada discussed in detail the enforcement approach taken by the CWS, especially in the area of compliance promotion through dialogue with industry and environmental groups.

V. UNDERSTANDING CANADA'S RESPONSES TO CITIZEN SUBMISSIONS:
THE ROLE OF THEORY

What explains the consistency and tenacity with which Canada has advocated for such a broad interpretation of "effective enforcement"? There is no obvious reason for Canada to adopt such a stance. Canada's responses could simply have consisted of replies to the specific instances of enforcement failures that had been alleged, particularly in the *BC Hydro* and *Pulp and Paper* cases. In terms of what Canada technically needed to provide to the Secretariat, such narrow responses would have been enough. Instead, Canada's responses not only countered those specific allegations, but also pushed the Secretariat to consider the larger regulatory scheme.

Can theory be harnessed to explain this apparent pattern? The discussion below uses three theoretical lenses to examine this question: a realist perspective, a pluralist perspective, and an institutionalist perspective. Ultimately, we conclude that it is this third perspective that likely offers the most potential to explain how Canada has to date engaged with the citizen submission process.

A. REALIST PERSPECTIVE

The realist perspective understands the behaviour of states as being driven largely by the enduring struggle to maintain sovereignty. The sovereign state exists in a competitive international environment, with survival dependent on a jealous guarding of autonomous control over the state's affairs. Hobbes provides a popular characterization of this struggle: a state maintains the "posture of Gladiators" in order to ensure that its absolute sovereignty remains unchallenged.¹¹⁶ However, the absoluteness of state sovereignty may be eroded through participation in the international arena, because "states acting together through negotiated legal instruments can accede sovereignty over specified issues

¹¹⁶ Alan Chong, *Classical Realism and Tension Between Sovereignty and Intervention: Constructions of Expediency from Machiavelli, Hobbes and Bodin*, 8 J. INT'L REL. & DEV. 257, 272 (2005).

to a supranational institution.”¹¹⁷ At least in some measure, can Canada’s response to SEM submissions be explained as an effort to protect its sovereignty?

Some scholars have studied the relationship between the NAAEC and state sovereignty.¹¹⁸ These studies tended to focus on the impact of the NAAEC on the sovereignty of the Parties, rather than on how the Parties have reacted to possible intrusions on sovereignty by the CEC. Throughout the design and implementation of the SEM process, Parties “have tended to exhibit a highly protectionist approach to defending their Westphalian sovereignty.”¹¹⁹ However, in practice, the SEM process is like a “fire alarm” that empowers citizens to bring negative attention to the targeted Party.¹²⁰ As such, the SEM process may threaten a Party’s sovereignty to the extent that it “has the potential to influence a Party’s behaviour should it become the focus of such a submission.”¹²¹

In drafting the NAAEC, the Parties ensured that this trilateral agreement impedes state sovereignty as little as possible. The preamble to the NAAEC reaffirms “the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies.”¹²² Article 3 states:

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its own environmental laws and regulations, 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.¹²³

However, the NAAEC does not define “high” and Parties only need to “strive.”¹²⁴ Article 5 states that “each Party shall effectively enforce its environmental laws and regulations through appropriate governmental

¹¹⁷ Sarah Richardson, *Sovereignty, Trade, and the Environment—The North American Agreement on Environmental Cooperation*, 24 CAN.-U.S. L.J. 183, 184 (1998).

¹¹⁸ See, e.g., *id.*; Chris Tollefson, *Games Without Frontiers: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT’L L. 141 (2002).

¹¹⁹ Tollefson, *supra* note 118, at 146.

¹²⁰ Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT’L & COMP. L. REV. 389, 390 (2004).

¹²¹ Richardson, *supra* note 117, at 193.

¹²² NAAEC, *supra* note 5, pmbl.

¹²³ *Id.* art. 3.

¹²⁴ Richardson, *supra* note 117, at 190.

action.”¹²⁵ The Parties are fulfilling this commitment trilaterally through a North American Working Group on Environmental Enforcement and Compliance.¹²⁶

Turning to Articles 14 and 15, Parties retain a high level of control over the SEM process. The Secretariat may prepare factual records only with the approval of the Council by two-thirds vote.¹²⁷ Parties can comment on the draft factual record, and the Secretariat must incorporate those comments as appropriate into the final factual record.¹²⁸ Finally, the Council retains the ultimate authority to decide whether to publish a factual record.¹²⁹

While the foregoing demonstrates that the Parties were very alert to potential threats to their sovereignty during the drafting of the NAAEC, it is not clear that this perspective can explain the trend in Canada’s response to SEM submissions. The realist sovereignty perspective does not, for example, help us understand why Canada has so consistently argued in favour of a very specific interpretation of “effective enforcement” as opposed to merely addressing the specific allegations of enforcement failures. It is not clear that the former response protects sovereignty over domestic environmental law enforcement policy more than the latter. As noted above, Parties retain significant control over the SEM process, and factual records do not assign fault but are merely a summary of factual findings. In terms of asserting domestic sovereignty over the environmental law enforcement, a curt response from Canada would have served just as well as a much lengthier one that comprehensively catalogued the relevant regulatory regimes in question.

Perhaps the limitation of this theoretical perspective in explaining Canada’s responses is partly due to its ontology. As Professor Krasner reminds us, “Realism is a theory about *international* politics. It is an effort to explain both the behaviour of individual states and the characteristics of the international system as a whole.”¹³⁰ The concept of sovereignty is best employed to understand state-to-state behaviour. In this case, the actor with which Canada interacts—the Secretariat—is neither a separate sovereign entity nor an entity to which Canada has acceded sovereignty. Moreover, the Secretariat remains subject to the direction and veto of the Council, a body to which Canada belongs.

¹²⁵ NAAEC, *supra* note 5, art. 5(1).

¹²⁶ Richardson, *supra* note 117, at 191.

¹²⁷ NAAEC, *supra* note 5, art. 15(2).

¹²⁸ *Id.* art. 15(5), (6).

¹²⁹ *Id.* art. 15(7).

¹³⁰ Stephen D. Krasner, *Realism, Imperialism, and Democracy: A Response to Gilbert*, 20 POL. THEORY 38, 39 (1992) (emphasis in original).

B. PLURALIST PERSPECTIVE

In a pluralist democracy, there is a marketplace of ideas and policies held by different actors or groups of actors. These actors have differing levels of resources and influence. As a result, “the pattern of [public] policy will reflect the distribution of power and influence.”¹³¹ Within Canada’s multiparty political system, voters choose from a number of political parties that represent different bundles of ideas and policies. While policy outcomes may depend on more than whoever is in power, control over formal policy agency is in the hands of elected officials.¹³² Trends in public policy may then be traced by the flow of people who are in political office. To the extent that both Canada’s stance in its interpretation of “effective enforcement,” and Canada’s responses to SEM submissions are policy, Canada’s domestic politics may offer some explanation.

A brief look at the history of the Canadian political landscape quickly dispels the usefulness of this theoretical perspective in this present case. While Canada’s responses to submissions have been quite consistent over the three SEM cases, the Canadian political landscape has experienced quite dramatic changes. The three cases span a ten-year period from the April 1997 submission of *BC Hydro* to February 2007 publication of the factual record in *Pulp and Paper*. Over this decade, Canadians have voted in three prime ministers from two different political parties: Jean Chrétien (Liberal Party of Canada (Lib.)), Paul Martin (Lib.), and Stephen Harper (Conservative Party of Canada (Con.)). Canada has also witnessed six Ministers of the Environment: Sergio Marchi (Lib.), Christine Stewart (Lib.), David Anderson (Lib.), Stéphane Dion (Lib.), Rona Ambrose (Con.), and John Baird (Con.).

The difference in the government’s attitude to environmental issues between Stéphane Dion’s tenure as Minister of the Environment and Rona Ambrose’s is striking. Stéphane Dion was seen as a champion of environmental causes. Through his efforts, Canada got the signatories to the Kyoto Protocol to extend the international agreement beyond 2012 at a conference held in Montréal in 2005.¹³³ In contrast, Canada rapidly retreated from its Kyoto commitments when the new Conservative government came to power in 2006.¹³⁴

¹³¹ Richard Simeon, *Studying Public Policy*, 9 CAN. J. POL. SCI. 548, 568 (1976).

¹³² Charles D. Elder & Roger W. Cobb, *Aging and Public Policy: The Politics of Agenda Setting*, 13 POL’Y STUD. J. 115, 118 (2005).

¹³³ Janice Harvey, *Climate Change Conference a Victory for Multilateralism and the Earth*, TELEGRAPH-JOURNAL, Dec. 14, 2005..

¹³⁴ Allan Woods, *Conservatives Won’t Be Bound by Kyoto, Ambrose Says*, OTTAWA CITIZEN,

Despite the changes in prime ministers and Ministers of the Environment, Canada's attitude toward SEM submissions remained the same throughout. The Canadian government's responses showed no indication of a more favourable disposition toward the allegations of the submitters during the years that the Liberal Party was in office than during the years the Conservatives held the reins of power. In short, domestic politics does not seem to have a bearing on Canada's response to SEM submissions.

Of course, modern scholarship recognizes that changes in domestic policy result from a confluence of factors. "Policy windows"—opportunities to set the formal agenda—open up when issues (problem stream) converge with institutional circumstances (politics stream) and the development of policy solutions (policy stream).¹³⁵ The pluralistic set of policy entrepreneurs from both inside and outside government may take advantage of these policy windows to affect policy outcomes. Differences in the national leadership may bring different sets of issues into the political foreground, such as meeting Canada's international commitments towards environment protection. That alone, however, may not be enough to generate different policy outcomes if the right institutional setting is not in place, or the appropriate set of policy tools is not available.

C. INSTITUTIONALIST PERSPECTIVE

The institutionalist perspective seeks to explain the behaviour of actors by understanding the boundaries of acceptable behaviours imposed by the institution within which the actors exist. As a matter of definition, "institution" here refers to what Professor Keohane terms "specific institution," which is a particular human-constructed and organized arrangement.¹³⁶ This is in contrast to "general institution," which is a general pattern or categorization of activity.¹³⁷ For example, marriage is a general institution, while the CEC is a specific institution. Specific institutions can be identified by "persistent sets of rules that constrain activity, shape expectations, and prescribe roles."¹³⁸

Much of the empirical work done by institutionalists has focused on

Feb. 18, 2006, at A6.

¹³⁵ Michael Howlett, *Predictable and Unpredictable Policy Windows: Institutional and Exogenous Correlates of Canadian Federal Agenda-Setting*, 31 CAN. J. POL. SCI. 495, 497 (1998).

¹³⁶ Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379, 383 (1988).

¹³⁷ *Id.*

¹³⁸ *Id.* at 384.

how institutions are created. Theories on the conditions that allow for actors to form institutions for cooperation and compliance have formed a staple of institutionalist research for quite some time.¹³⁹ However, there has also been empirical work that treats institutions as the independent variable that may explain state behaviour.¹⁴⁰ Insight into the reasons behind the trend in Canada's responses to SEM submissions may be gained by examining the rules and structure of the SEM process.

One of the oft-repeated criticisms of the SEM process is that the Parties have treated the process as an adversarial one.¹⁴¹ This is not surprising, given the nature of the SEM process itself. Granted, there are a few features of this process that lend themselves to encouraging more cooperative postures from the Parties. For example, the factual record is non-binding on the Party against which the submission was made, and the Council has a high degree of control over the scope of the factual record that the Secretariat is instructed to develop. These features lower the political stakes for the Parties involved, allowing for greater potential for cooperation.

Ultimately, however, the SEM process more closely resembles an adversarial litigation model rather than a more cooperative mediation- or negotiation-based model. The process commences with submitters filing a complaint against a particular Party, alleging a specified failure to effectively enforce its environmental law contrary to Article 5 of the NAAEC. If the submission passes screening requirements, the Secretariat gathers arguments from both sides before producing a factual record. Throughout this process, the NAAEC does not provide for the Secretariat to convene with the submitters and representatives of the Party together to discuss their points of contention. And while the factual record is non-binding on the Party, the Secretariat's factual findings can (and sometimes do) favour one side over the other. Thus, the function of the Secretariat is similar to a judge hearing argument from two opposing sides before rendering judgment.

In such an adversarial setting, the most advantageous strategy for a Party against whom a submission has been filed is to bring every argument to bear in the Party Response. Just as in a courtroom there is almost always no advantage to a party for eschewing even a remotely

¹³⁹ See generally Michael J. Gilligan & Leslie Johns, *Formal Models of International Institutions*, 15 ANN. REV. POL. SCI. 221 (2012).

¹⁴⁰ Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SECURITY 39, 48-50 (1995).

¹⁴¹ Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415, 417 (2004).

relevant legal or evidentiary argument, there was no advantage for Canada in any of the three cases highlighted in the previous section to abstain from arguing that Canada was effectively enforcing its environmental laws through comprehensive regulatory regimes. As long as the CEC, as an institution, is governed by the same written (and unwritten) rules and conventions, it seems likely that Canada's strategy in the SEM process will remain unchanged.

VI. CONCLUSION AND FURTHER RESEARCH

In this Article, we examined three cases in which citizen groups have filed submissions against Canada under Article 14 of the NAAEC. These cases show that Canada has consistently argued for a broad interpretation of "effective enforcement." Appealing to a broader meaning of "effective enforcement" expands the range of arguments available to the responding Party and reduces the likelihood of an unfavourable factual record. This tactic is consistent with a party acting within a set of institutional rules that create, in practice, an adversarial process.

Of course, in drawing up these findings we examined only the responses from Canada. This research is an initial attempt to understand the SEM process from the perspectives of the Party signatories, using Canada as the exemplar. Further research is needed to determine whether the institutionalist theory is a persuasive way for understanding government responses to SEM submissions more generally, further research is needed. If the Mexican and American Party responses to, and their interactions with, the SEM process are consistent with our initial findings, it may speak to a need to rethink the architecture of the SEM process to encourage more constructive engagement by the NAFTA Parties. On the other hand, if a close examination of American and Mexican responses to citizen submissions over time reveals a different pattern, this may undermine an institutionalist explanation of Canada's behaviour and suggest that a more complex dynamic is at work.

As a final note of caution, these case studies, while useful, offer only a partial picture of the Parties' behaviour. Our study focused on behaviour that is a matter of public record. It is important to acknowledge, however, that the SEM process also has a more "private" side involving significant backroom maneuvering that for the most part is obscured from public scrutiny. For example, during the *BC Hydro* process, the Canadian government lobbied the Council to sequester from the public confidential and sensitive information tendered by the

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Parties.¹⁴² Studying the inner workings of the Council is important to fully understanding how Parties are behaving within these institutional rules. Accordingly, research into this dimension of the institutionalized politics of the CEC and the SEM process should also be a priority and has the potential to offer significant insights.

¹⁴² Tollefson, *supra* note 118, at 176-78.