Stare Decisis in Commission for Environmental Cooperation Recommendations

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Introduction

On January 1, 1994, the North American Free Trade Agreement ("NAFTA") became effective. On the same date, a companion treaty, the North American Agreement on Environmental Cooperation ("NAAEC"), also came into effect. The NAAEC established the Commission for Environmental Cooperation ("CEC"), an international body designed to investigate allegations of environmental violations by the three Parties to the two treaties, which are Canada, Mexico and the United States.

The CEC was conceived in response to concerns about the potential environmental effects of NAFTA. By creating a free trade zone, NAFTA placed additional pressure on the Parties to relax their environmental laws in favor of industry, thus giving business concerns in each Party's territory a competitive advantage over concerns located in the other Parties' territories (Bickel 2003; Mumme & Duncan 1997/98). Commentators summarized the fear of this pressure as the "pollution-haven concern" (Knox 2001) or the "race to the bottom" (Block 2004).

To allay these concerns, the CEC permits "Submissions" by NGO's, businesses and even private persons to challenge whether Parties are enforcing their environmental laws. Once a Submission is received, the CEC Secretariat reviews it to determine whether it meets certain criteria (NAAEC Art. 14(1)), and if so, whether it merits a

Response by the accused Party (NAAEC Art. 14(2)).[1] As more fully discussed below, one factor the Secretariat considers in deciding whether to solicit a Response from a Party is whether "private remedies available under the Party's law have been pursued" (NAAEC Art. 14(2)(c).

If the Secretariat concludes that a Response is merited, the Secretariat invites the Party concerned to submit one. This is a critical juncture in the Submission process because if "the matter is the subject of a pending judicial or administrative proceeding," then "the Secretariat shall proceed no further" (NAAEC Art. 14(3)(a)). If the Secretariat determines that the materials at hard warrant the recommendation that a "Factual Record" be prepared (NAAEC Art. 15), then the Secretariat forwards its Recommendation to the CEC Council, made up of representatives of the three Parties to the treaties (NAAEC Art. 9).[2] Upon a vote of at least two-thirds of the Party representatives, the Secretariat is instructed to prepare a Factual Record (NAAEC Art. 15(2)). After receiving additional materials and arguments from the Submitters and the Party, the Secretariat prepares a draft Factual Record and forwards it to the Council (NAAEC Art. 15(5)). The Council, again upon a two-thirds vote, may make the final Factual Record publicly available. (NAAEC Art. 15(7)).[3]

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[1] NAAEC Articles 14 & 15 are reproduced as Appendix A.

[2] The Secretariat usually labels these documents "Recommendations," but at times they have been called "Determinations" and "Notifications." This paper calls all such actions "Recommendations."

[3] Numerous authors describe the Submission process in detail. Among them are Bickel (2003), Knox (2001), Markell (2000), Markell (2005) and Patton (1994).

The Factual Record is simply that: A summary of the facts found by the Secretariat, as well as the legal arguments put forward by the Submitter and the Party whether the Party is effectively enforcing the Party's environmental laws. The Factual Record is not an arbitration award or any other type of adjudication. It serves only to "spotlight" the Party's environmental enforcement practices (Markell 2000). The Factual Record derives its authority solely from the independent investigation and fact-finding conducted by the CEC Secretariat.

The CEC has been called "a trailblazing institution of international environmental cooperation" (Bickel 2003) although it has been criticized as well. The Secretariat has been said to possess "substantial formal powers to shape the council's agenda" (Mumme & Duncan 1997/98). Prof. Markell, who at one time served as the Director of the CEC's Submissions on Enforcement Matters Unit, has remarked on the increasing tension between the Secretariat and the Parties to the NAAEC who in the end control the preparation of Factual Records. Markell notes that especially since the turn of the century, the Council has more frequently curtailed the scope of Factual Record Recommendations by the Secretariat (Markell 2005).

Markell argues that the NAAEC's citizen-complaint procedure, implemented by the CEC, is proving important to the development of a global civil society (Markell 2000). Others have joined Markell in that argument, noting that the CEC regime is "an example of transparency and public participation in an international environmental agreement's transparent submission process" that bodes well for the long-term, consistent enforcement of Party environmental laws (Goldschmidt 2002).

Concerns about transparency and the international rule of law underlie this paper. The rule of law means predictability, given certain facts, that legal determinations will be consistently applied from one case to the other. Legal determinations are transparent when they are published and therefore subject to public criticism and review (Knox 2001; Markell 2006). In the common law of the United States and elsewhere, these principles find judicial articulation and enforcement as the doctrine of stare decisis. The United States Supreme Court recently has summarized this doctrine in *Randall v. Sorrell,* in which the Court stated:

> The Court has often recognized the "fundamental importance" of stare decisis, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. . . . The Court has pointed out that stare decisis "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" . . . . Stare decisis thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm.

(citations omitted). Nevertheless, early in its history, the CEC Secretariat stated that it would not be bound by the doctrine of stare decisis (BC Hydro, SEM-97-001 (Apr. 27, 1998)).[4] The Secretariat has reiterated this point in several later Recommendations (Metales y Derivados, SEM-98-007 (Mar. 6, 2000); Lake Chapala I, SEM-97-007 (July 14, 2000); Aquanova, SEM-98-006 (Aug. 4, 2000); BC Mining, SEM-98-004 (May 11, 2001)).

In BC Hydro, SEM-97-001 (Apr. 27, 1998), the Secretariat explained its stance:

[4] The CEC maintains a website at http://www.cec.org/citizen/status/index.cfm?varlan=english where, except for some documents designated "confidential" by a Party, every document relating to every Submission is reproduced in pdf format.

> At a minimum, references to previous determinations will assist in ensuring that the Secretariat consistently applies the provisions of the *NAAEC*. Such a contextual approach to a treaty is suggested by general canons of statutory interpretation as well as Articles 31 and 32 of the Vienna Convention on the Law of Treaties. . . . The Vienna Convention is in force in both Canada and Mexico as of January 27, 1980. The United States signed the Vienna Convention on April 24, 1970 but has not ratified it. I.M. Sinclair notes in *The Vienna Convention on the Law of Treaties* (2nd ed., 1984) that since 1969, provisions of The Vienna Convention have frequently been cited in judgments of the Courts of the United States and in state practice as accurate statements of the customary rules in relation to interpretation of treaties.

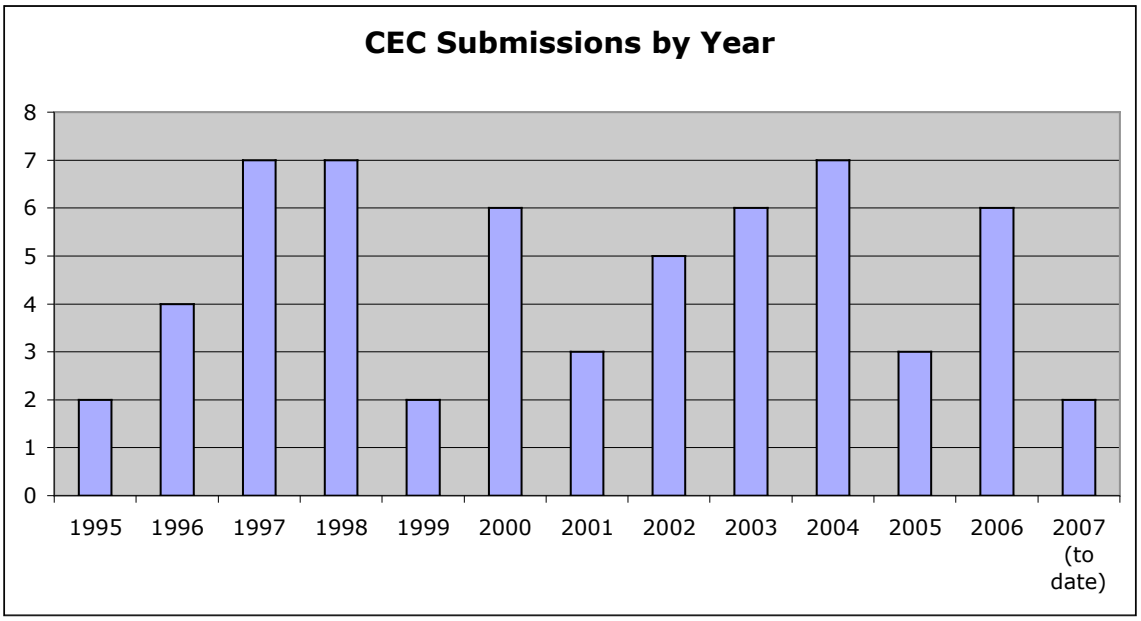
(citations omitted). Yet the question remains: While eschewing the doctrine of stare decisis, the CEC Secretariat claims that "references to previous determinations" will ensure that the Secretariat "consistently applies the provisions of the NAAEC." The Secretariat's position on this issue appears subject to undermining such that fairness and transparency in the Submission process could be jeopardized.

Although some authors have published summaries of Recommendations (Kibel 2001; Nogales 2002), and others have analyzed specific Submissions (Schiller 1996-97 (Cozumel); Yang 2005 (Metales y Derivados)), no precedential analysis of Recommendations has been found. Accordingly, this paper investigates the extent to which the Secretariat has consistently applied the NAAEC's provisions despite the Secretariat's rejection of the doctrine of stare decisis. This investigation delves into three subject areas: CEC Recommendations with respect to the requirement that projects obtain environmental clearance from Party governments; the extent to which the Secretariat has insisted that Submitters avail themselves of private remedies before filing a Submission with the CEC; and the extent to which Parties have successfully invoked the "pending judicial or administrative proceeding" defense that no Factual Record

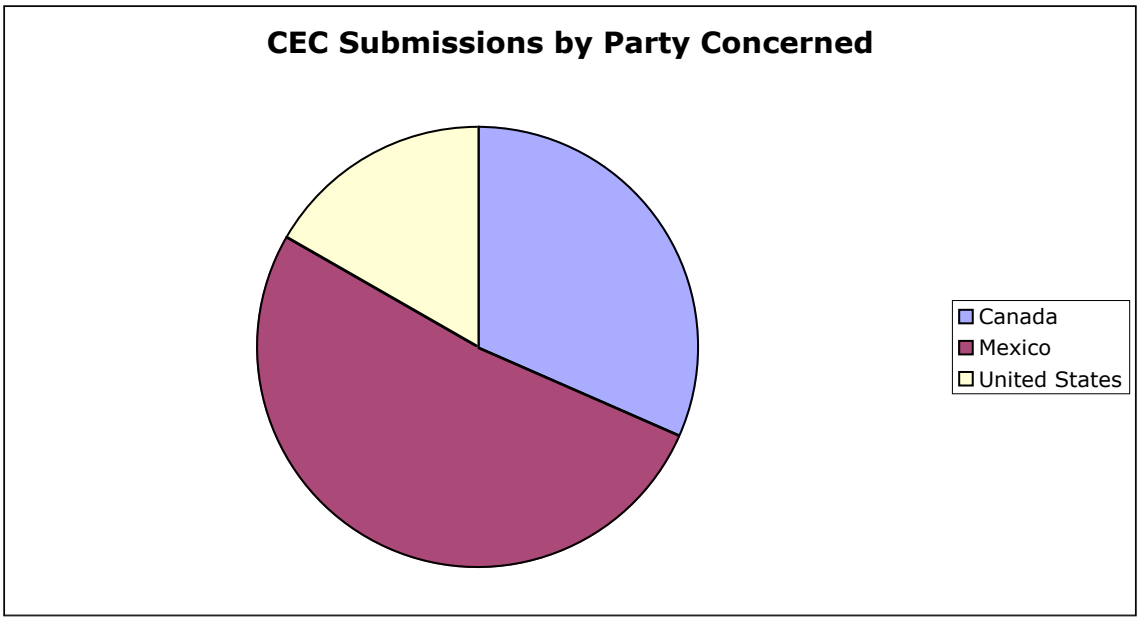
should be prepared because the Party is in the midst of enforcing its environmental laws in a way that would render a Submission moot, or at least require that consideration of it be delayed. As will be seen, although the CEC disavows stare decisis, the Secretariat follows the doctrine in all but name. The CEC is a model for international civil society.

CEC Submissions

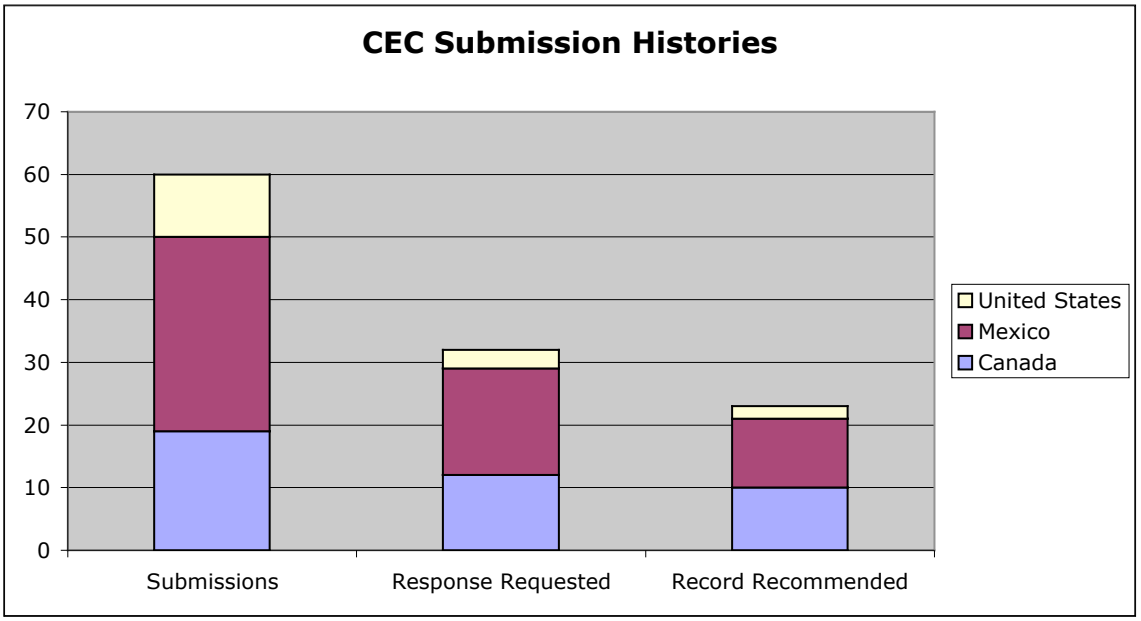
Prior to addressing stare decisis, a closer look at the number, origin and ultimate disposition of CEC Submissions is in order. As noted above, NAFTA and NAAEC became effective on January 1, 1994. However, the CEC did not receive its first submission - Spotted Owl, SEM-95-001 – until July 5, 1995. Since that time, the CEC has averaged nearly five submissions per year (4.83) over the period 1995-2006, with two submissions in 2007 as of March 1, 2007, for a total of sixty submissions overall.



More than half of these submissions are against Mexico as the Party (31), with Canada holding second place at nineteen and the United States having been the recipient of only ten submissions.



It also appears that on a percentage basis, Submissions against Mexico have fared most poorly in terms of being requested to provide Responses to Submissions. Nevertheless, the Secretariat has recommended nearly as many Factual Records be prepared for submissions against Mexico (11) than with respect to Canada (10) and the United States combined(2).



Note: The "Response Requested" and "Record Recommended" numbers are slightly exaggerated downward because sufficient time has not elapsed for all Submissions to make their way through CEC procedures. For example, the CEC has not yet concluded whether to request a Response to the two Submissions filed in 2007 (Minera San Xavier, SEM-07-001 (filed Feb. 5, 2007) & Mount Orford Park, SEM-07-002 (filed Feb. 22, 2007)).

A review of all Submissions for which the CEC Secretariat reached the stage of making a Recommendation reveals that the following Submissions substantively address the three areas to be discussed in this paper:

Environmental Impact Assessments	Aquanova, SEM-98-006 (Aug. 4, 2000) Coronado Islands, SEM-05-002 (Jan. 18, 2007) Cozumel, SEM-96-001 (June 7, 1996) Cytrar II, SEM-01-001 (July 2, 2002) Molymex II, SEM-00-005 (Dec. 20, 2001)
Pursuit of Private Remedies	Aquanova, SEM-98-006 (Aug. 4, 2000) BC Mining, SEM-98-004 (May 11, 2001) Coal-Fired Power Plants, SEM-04-005 (Dec. 5, 2005) Cytrar I, SEM-98-005 (Oct. 26, 2000) Lake Chapala I, SEM-97-007 (July 14, 2000) Lake Chapala II, SEM-03-003 (May 18, 2005) Metales y Derivados, SEM-98-007 (Mar. 6, 2000) Quebec Hog Farms, SEM-97-003 (Oct. 29, 1999) Rio Magdalena, SEM-97-002 (Feb. 5, 2002)
Judicial or Administrative Enforcement Proceedings	BC Hydro, SEM-97-001 (Apr. 27, 1998) BC Logging, SEM-00-004 (July 27, 2001) BC Mining, SEM-98-004 (May 11, 2001) Coal-Fired Power Plants, SEM-04-005 (Dec. 5, 2005) Coronado Islands, SEM-05-002 (Jan. 18, 2007) Cytrar I, SEM-98-005 (Oct. 26, 2000) Cytrar II, SEM-01-001 (July 2, 2002) El Boludo Project, SEM-02-004 (May 17, 2004) Lake Chapala II, SEM-03-003 (May 18, 2005) Oldman River I, SEM-96-003 (Apr. 2, 1997) Oldman River II, SEM-97-006 (July 19, 1999)

Environment Impact Assessments

A total of five Submissions have concerned Environmental Impact Assessments. The Party for all five submissions was Mexico. In chronological order, by date of Recommendation, the Submissions are Cozumel, SEM-96-001 (June 7, 1996); Aquanova, SEM-98-006 (Aug. 4, 2000); Molymex II, SEM-00-005 (Dec. 20, 2001); Cytrar II, SEM-01-001 (July 2, 2002); and Coronado Islands, SEM-05-002 (Jan. 18, 2007).[5] Each of these Submissions involved the *Ley General de Equilibrio Ecológico y Protección Ambiental* - the General Law of Ecological Balance and Environmental Protection – which often is abbreviated to its Spanish acronym "LGEEPA." LGEEPA Article 28 requires the preparation of an Environmental Impact Assessment for public or private works or activities that may cause ecological imbalance. Other articles within LGEEPA set forth standards and requirements for the preparation of Environmental Impact Assessments.

On June 7, 1996, the CEC Secretariat recommended the development of the Factual Record with respect to Cozumel, SEM-96-001 (June 7, 1996). This was the first time the Secretariat had recommended the development of a Factual Record. In Cozumel, the Submitters, who were three NGO's, complained that Mexico had failed to enforce its environmental laws by failing to require an Environmental Impact Assessment for construction of a pier and associated on-shore port terminal facilities on the island of Cozumel. In response, the Mexican government argued that an Environmental Impact

[5] This list includes some Submissions denominated "II." Some environmental problems have drawn more than one Submission. When there has been more than one Submission with respect to the same entity, place or issue, the CEC has labeled the Submissions I, II and III. To date, there never has been a fourth Submission with respect to the same entity, place or issue.

Assessment had been prepared for the pier and that as additional facilities were constructed, those facilities in turn would be subjected to preparation of an Environmental Impact Assessment. Central to the debate was the definition of a port under Mexican law. The Submitters pointed to a Mexican statutory definition of a port as consisting of:

> The facilities established in or outside of a port, consisting of works, installations and surfaces, including off-shore, which allow for the integral operation of the port in accordance with its intended uses.

Given the parties' dispute over what constituted a port under Mexican law, the Secretariat believed that development of a Factual Record on that subject would be salutary.

The Secretariat next examined an Environmental Impact Assessment in Aquanova, SEM-98-006 (Aug. 4, 2000). In Aquanova, the Submitters claimed that Mexico was failing to enforce its environmental law with respect to a shrimp farm located in Nayarit, Mexico. The Submitters claimed that the shrimp farm was causing "severe damage to wetlands, water quality, fisheries and to the habitat of a number of species under protection." In its Response, Mexico argued that an Environmental Impact Assessment had been prepared and was in place. However, the Secretariat concluded that the operator of the shrimp farm had largely ignored the Environmental Impact Assessment's requirements without much sanction by the Mexican government for the shrimp farm's violations. Therefore, preparation of a Factual Record was warranted.

The next two Submissions concerning development of Environmental Impact Assessments addressed the issue of retroactivity under Mexican law. In Molymex II, SEM-00-005 (Dec. 20, 2001), the Submitters, an NGO and its lawyer, argued that Mexico had failed to require the preparation of an Environmental Impact Assessment

under LGEEPA Article 28. The Submitters were concerned about the operation of a molybdenum plant in Cumpas, Sonora, Mexico. The molybdenum plant had opened in 1979 and operated until 1990, at which time it ceased operations temporarily. Beginning in 1994, the molybdenum plant began operating again using raw materials that caused substantially greater air pollution than had been the case during its earlier operations and with an expanded plant facility. Nevertheless, the molybdenum plant did not obtain an Environmental Impact Assessment until 1998.

The Submitters argued that the molybdenum plant should have had an Environmental Impact Assessment commencing in 1982 when that obligation became incorporated into Mexican law and especially when the company resumed its operations in 1994. The Mexican government argued in response that the Mexican constitution did not permit retroactive laws and that the Environmental Impact Assessments, in any invent, were of a preventive, rather than a curative, in nature. Finding that there were mutually contradictory judicial interpretations of the retroactivity provision of the Mexican constitution and that in fact certain regulations under LGEEPA permitted retroactive application, the Secretariat recommended development of a Factual Record.

In the other retroactivity case, Cytrar II, SEM-01-001 (July 2, 2002), the Submitters were the same as those for Molymex II. In Cytrar II, the Submitters argued that the Mexican government had failed to require an Environmental Impact Assessment for a hazardous waste landfill known as Cytrar located within Hermosillo, Sonora, Mexico. The landfill ceased operation in 1998 when the environmental authority denied renewal of its operating permit. The Submitters claimed that Mexico had failed to enforce LGEEPA by not requiring an Environmental Impact Assessment prior to the

landfill opening and by allowing the persons subsequently responsible for operating it to continue to operate it without proper authorization. Again, the Mexican government argued that applying LGEEPA to require an Environmental Impact Assessment of an existing project, especially one that had since closed, would violate its constitutional provision against retroactive application of a law. However, Mexico did not substantively respond to this argument, claiming it was prohibited under Mexican law by making a response because the issue was under arbitration. Mexico also requested that the Submission be terminated because of that pending arbitration. Again noting that Mexican law was contradictory on the issue of retroactive application of LGEEPA, the Secretariat recommended development of a Factual Record.

The final Recommendation dealing with Environmental Impact Assessments is Coronado Islands, SEM-05-002 (Jan. 18, 2007). This Submission, by several NGO's and individuals, attacked the adequacy of the Environmental Impact Assessment that had been prepared in connection with construction of a liquefied natural gas regasification terminal to be located adjacent to the Coronado Islands in the Pacific Ocean off the coast of Baja California near the United States border. The Submitters invoked LGEEPA Articles 78-83 which set forth numerous requirements for the scope of inquiry of the Environmental Impact Assessments including provisions related to wildlife, in this case Xantus's murrelet, a seabird listed as an endangered species under Mexican law. The Environmental Impact Assessment also was inadequate, much as the one in Cozumel had been, because it concentrated only on the terminal and not on the general area in which construction and operation of the terminal would have an effect. Despite Mexico's claim that the Environmental Impact Assessment had thoroughly scrutinized all pertinent,

required issues and that the government would continue to require conditions for the terminal to operate, the Secretariat recommended developing a Factual Record.

Despite the Secretariat's claim that it does not adhere to the doctrine of stare decisis, nevertheless the substance of that doctrine can be found in four of the Submissions that address Environmental Impact Assessments. The Secretariat recommended preparation of a Factual Record in Cozumel because of a dispute between the Submitters and the Party over what part of the surrounding area should be included within the definition of a port. That ruling is echoed in Coronado Islands, where the Environmental Impact Assessment was attacked on the ground that it did not cover the entire proposed facility. Likewise, Cytrar II is reminiscent of Molymex because in both Submissions the Secretarial recommended the preparation of a Factual Record when the Submitters and the Party disagreed over what Mexican law provided with respect to Mexico's prohibition on retroactive legislation.

Pursuit of Private Remedies

One of the factors that the Secretariat must consider when determining whether to request a Response to a Submission is whether "private remedies available under the Party's law have been pursued" (NAAEC Art. 14(2)(c). This provision is especially noteworthy given the familiar requirements of United States law that preliminary – particularly administrative – remedies must be exhausted prior to proceeding in court. (*E.g., McCarthy v. Madigan* 1992). As will be seen, however, the CEC's private-remedy requirement is not one of exhaustion but one of consideration.

Of the three signatories to the NAAEC, one – Mexico - is a civil law jurisdiction. Canada's law is mostly common law with the exception of Quebec. Finally, the United

States uses common law except in Louisiana and in limited aspects of state law such as the civil community property law in some Western states. Several Recommendations in which the private-remedy consideration has been discussed are from Mexico with two from Canada and one from the United States. Given the substantial differences between the Mexican legal system and that extant in the United States and Canada, the Mexican Recommendations will be reviewed, followed by the Recommendations made under the laws of the other two Parties. As will be seen, however, when it comes to the availability of private remedies, the law of all three states is remarkably similar.

The Mexican experience with the private-remedy requirement began with Metales y Derivados, SEM-98-007 (Mar. 6, 2000), in which the Submitters followed the *denuncia popular* procedure set forth in LGEEPA. The *denuncia popular* procedure

> allows any person to denounce with the environmental authorities alleged violations of environmental laws and regulations or harm to the environment. It requires the government, among other things, to consider the complaint, take action if applicable and inform the petitioner of any resolution on the matter.

(Aquanova, SEM-98-006 (Aug. 4, 2000)). The government entity responsible for considering *denuncias populares* is the *Procuraduría Federal de Protección al Ambiente* – the Federal Attorney for Environmental Protection – for which the Spanish acronym is "PROFEPA."

Metales y Derivados concerned the alleged failure of the Mexican government to require the cleanup of a lead smelter in Tijuana, Baja California, Mexico. The Submitters claimed to have utilized the *denuncia popular* procedure to appeal to the PROFEPA. These complaints resulted in the filing of a criminal complaint and an order to shut down the smelter. Later, however, when the Submitters requested information about the status

of the criminal proceeding, the Mexican government told them that no information could be provided because a judicial proceeding was pending. The Submitters did not indicate whether they had pursued remedies other than the *denuncia popular*. Nevertheless, the Secretariat concluded that the Submitters had satisfied the private-remedy requirement. On this issue, the Secretariat tartly concluded: "The government refused to provide this information on the basis that it was taking an enforcement action, so it is not reasonable to expect the Submitters to have done much more."

In three additional Recommendations issued that same year, Mexico did respond to the private-remedy issue. (Lake Chapala I, SEM-97-007 (July 14, 2000); Aquanova, SEM-98-006 (Aug. 4, 2000); Cytrar I, SEM-98-005 (Oct. 26, 2000)). These Submissions involved, respectively, pollution in Lake Chapala exacerbated by the construction of a dam; the operation of a shrimp farm; and an abandoned hazardous waste landfill. In response to each of these Submissions, Mexico argued that the *denuncia popular* is not a private remedy but is merely a mechanism for informing the government about environmental matters. Accordingly, claimed Mexico, the filing of a *denuncia popular* does not demonstrate compliance with the private-remedy requirement. Moreover, Mexico claimed

> that Article 14(2)(c) establishes a *requirement* that the submitters *exhaust* available private remedies. In the Secretariat's view, who respectfully disagrees with the Party, the language of the NAAEC is clear on this aspect. As provided by Article 14(2), the factors listed there should *guide the Secretariat in deciding* whether a submission warrants requesting a response from the Party, as opposed to Article 14(1), that establishes the criteria that a submission must meet for the Secretariat to consider it further.

(Aquanova, SEM-98-006 (Aug. 4, 2000)) (emphasis original).

Although the Secretariat recommended the preparation of a Factual Record in

only one of these three Submissions (Aquanova), the Secretariat found that the Submitters had satisfied the private remedy requirement by utilizing the *denuncia popular*. In Aquanova, the Secretariat stated that it was "clear"

> that for purposes of Article 14 of the NAAEC, the citizen complaint (*denuncia popular*) is a private remedy contemplated in the Party's law and available for submitters to seek remedy with that Party prior to making a submission.

(Aquanova, SEM-98-006 (Aug. 4, 2000)).

Undaunted at receiving the same adverse ruling on this issue three times in 2000, Mexico raised the same argument in Rio Magdalena, SEM-97-002 (Feb. 5, 2002), in which the Submitter contended that Mexico failed to effectively enforce its environmental laws because of discharge of wastewater from Imuris, Magdalena de Kino and Santa Ana in Sonora, Mexico, into the Magdelena River without proper treatment. In recommending the development of a Factual Record, the Secretariat noted that the Submitter had filed three *denuncias populares* under LGEEPA to alert the authorities to the alleged violations of environmental law. The Secretariat concluded that, as it had previously stated in other Recommendations, the *denuncia popular* procedure was a remedy contemplated by Mexican law "and available to the Submitter to be used before filing a submission."

Finally, in Lake Chapala II, SEM-03-003 (May 18, 2005), the Submitters complained of the deteriorating condition of Lake Chapala and in particular the construction of the Arcediano Dam on the Santiago River, which would further increase the lake's level of pollution. Mexico reiterated its argument that the Submission should not proceed because the Submitters had not pursued all the legal remedies available to them. Mexico claimed that the factors listed in NAAEC Art. 14(2) "are not simple or

mere considerations by which the Secretary should be guided, but rather mandatory requirements." The Recommendation continued:

> Mexico also asserts that the citizen complaint *(denuncia popular)* procedure cannot and should not be considered a remedy under Mexican law. It states that this procedure gives rise to a recommendation by the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—PROFEPA) which, because it is nonbinding, cannot and should not in any way be considered a remedy. Mexico further states that PROFEPA issues these recommendations in its capacity as a specialized ombudsman on environmental matters and that in this capacity it does not carry out acts of authority.

(Lake Chapala II, SEM-03-003 (May 18, 2005)) (citations omitted).

The remedies the Submitters should have followed, according to Mexico, included an administrative appeal, the *juicio de nulidad* ("action in nullity") provided by the Federal Fiscal Code, or an action under the Amparo Act, which is a statute that protects "the constitutional rights of individuals and companies against violations from public authorities." (Vargas 2004). However, Mexico did not explain how these various remedies "would be applicable to each of the assertions made in the submission." Furthermore, some of the several Submitters had pursued administrative appellate remedies without success. One of the Submitters had filed a *denuncia popular* with PROFEPA that addressed some issues similar to those raised in the Submission.

On these facts, the Secretariat concluded:

> The Secretariat has considered numerous submissions in which citizen complaints were the sole remedy pursued, including several for which the Council authorized the development of factual records. In view of the actions taken by the Submitters and others with regard to the watershed and Lake Chapala and described in the submission the possible availability of other remedies does not provide reasonable grounds not to recommend a factual record.

(Lake Chapala II, SEM-03-003 (May 18, 2005)) (citation omitted).

Turning now to the Canadian-United States experience with the private remedy issue, the first of three cases to be discussed is Quebec Hog Farms, SEM-97-003 (Oct. 29, 1999). In this case, the Submitters claimed that a livestock operation produced so much manure that it had caused significant harm to the environment and human populations, particularly with respect to watercourses, in the province of Quebec. Although the Canadian government apparently argued that the Submitters should have filed individual lawsuits as a prerequisite to making their Submission, the Secretariat found that the Submitters had adequately pursued private remedies: They had communicated numerous times with governmental officials about the issues, and they argued to the Secretariat that the initiation of private lawsuits would be inadequate to address the numerous violations the Submitters claimed existed. In short, the Submitters claimed that there was a persistent pattern of violations throughout the province of Quebec, such that individual lawsuits would not be effective to resolve the problems they identified.

In BC Mining, SEM-98-004 (May 11, 2001), the Submitters complained of destructive environmental impacts caused by the mining industry in British Columbia, including specifically water pollution caused by acid mine damage and contamination by heavy metals. The Submitters argued that they had urged Canada to enforce its laws with respect to these mining concerns but that the government of Canada had not responded to their communication. Under Canadian law, private prosecutions are available to citizens under the Fisheries Act in a manner similar to the *denuncia popular* procedure in Mexico. However, the Submitters claimed that the private prosecutions did not constitute an effective remedy. Several private prosecutions had been commenced by the Sierra Legal

Defense Fund but shortly thereafter had been taken over and then terminated by the Attorney General for British Columbia. The Secretariat, in recognition of the widespread failure-to-enforce allegations, the burden on the Submitters of initiating private prosecutions concerning the numerous mines and the inefficacious result of the private prosecutions that had been undertaken, concluded that reasonable actions had been taken to invoke private remedies to resolve these issues.

Finally, in Coal–Fired Power Plants, SEM-04-005 (Dec. 5, 2005), the Submitters averred that the Environment Protection Agency had not enforced United States law with respect to coal-fired power plants which were, in turn, discharging dangerous amounts of mercury into United States waterways, both directly into the water and through air pollution that fell back into the water via precipitation. The United States claimed that under the Clean Water Act, the Submitters had numerous private remedies. These remedies included judicial or administrative review of administrative actions, as well as citizen-suit provisions under the Clean Water Act, a remedy that sounds much like Mexico's *denuncia popular*. Although the Submitters acknowledged that these administrative and judicial remedies were open to them, the Submitters claimed that they were simply not practical remedies because they possessed "limited resources to seek redress through private remedies for a transnational problem of such scope and complexity." The Secretariat found that the Submitters were not barred from proceeding despite the fact that they had not initiated private remedies.

These Recommendations demonstrate the building of a body of law. Not only is the same analysis applied in each Recommendation, but the later Recommendations sometimes cite to the earlier Recommendations. Moreover, the body of law constructed

is consistent: This point is perhaps best exemplified by the Secretariat's refusal to budge from its position that the *denuncia popular* is a private remedy despite Mexico's repeated assertions to the contrary. As with the Recommendations involving Environmental Impact Assessments, it appears that the Secretariat is applying the doctrine of stare decisis.

Judicial or Administrative Enforcement Proceedings

If the Secretariat informs a Party that a Response to a Submission is warranted, as part of that Response the Party may advise the Secretariat "whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further." (NAAEC Art. 14(3)(a)). Article 45 of the NAAEC ("Definitions") describes a "judicial or administrative proceeding" as follows:

> (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and
>
> (b) an international dispute resolution proceeding to which the Party is party.

(NAEEC Art. 45(3)).

In BC Hydro, SEM-97-001 (Apr. 27, 1998), in which the Submitters complained of injuries to fish and fish habitats caused by Canadian hydroelectric dams, the Secretariat analyzed this provision, observing that the definition contains four elements:

> In order to constitute a "judicial or administrative proceeding", the action must accordingly be pursued (i) by a Party; (ii) in a timely fashion; (iii) in accordance with the Party's law; and (iv) comprise one of the prescribed categories of activities.

The Secretariat continued:

> Only proceedings which are designed to culminate in a specific decision, ruling or agreement within a definable period of time should be considered as falling within Article 14(3)(a). Activities that are solely consultative, information-gathering or research-based in nature, without a definable goal, should not be sufficient to trigger the automatic termination clause. If such proceedings were included within the definition, a Party could effectively shield non-enforcement of its environmental laws from scrutiny simply by commissioning studies or holding consultations.

Later, in BC Logging, SEM-00-004 (July 27, 2001), in which the Submitters also alleged harm to Canadian fisheries, the Secretariat expanded further as to what constitutes a pending judicial or administrative proceeding:

> In previous determinations, the Secretariat has stated that the threshold consideration of whether an administrative or judicial proceeding is pending should be construed narrowly to give full effect to the object and purpose of the NAAEC, and more particularly, to Article 14(3). Only those proceedings specifically delineated in Article 45(3)(a), pursued by a Party in a timely manner, in accordance with a Party's law, and concerning the same subject matter as the allegations raised in the submission should preclude the Secretariat from proceeding further under Article 14(3). Activities that are solely consultative, information-gathering or research-based in nature, without a definable goal, and that are not designed to culminate in a specific decision, ruling or agreement within a definable period of time should not be considered as falling within Article 45(3)(a).

In support of this statement, BC Logging cited to BC Hydro, SEM-97-001 (Apr. 27, 1998), and BC Mining, SEM-98-004 (May 11, 2001). The Secretariat reiterated the element of timeliness in El Boludo Project, SEM-02-004 (May 17, 2004), in which the Secretariat stated that a judicial or administrative proceeding must be pursued in accordance with time limits established by the law of the jurisdiction within which it takes place, and it must proceed without undue delay.

The Secretariat has repeatedly stated that judicial or administrative proceedings must be brought by Parties:

> By limiting the ambit of "judicial or administrative proceedings" to those actions pursued by governments, the provision appears to contemplate the peremptory nature of directed efforts undertaken by a government in a timely manner to secure compliance with environmental law. In other words, where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination of the allegations of non-enforcement. The examples listed in Article 45(3)(a) support this approach, since the kinds of actions enumerated are taken almost exclusively by the official government bodies charged with enforcing or implementing the law.

(Oldman I, SEM-96-003 (Apr. 2, 1997)). Further, "there must be a reasonable expectation that the 'pending judicial or administrative proceeding' invoked by the Party will address and potentially resolve the matters raised in the submission." (Cytrar II, SEM-01-001 (July 2, 2002)).

A review of the relevant Secretariat Recommendations results in the following list of activities that have not been considered pending judicial or administrative proceedings:

- A suit by a company attacking the constitutionality of a minimum flow order under Canada's Fisheries Act is not a judicial or administrative proceeding because it does not relate to enforcement of the Fisheries Act. (BC Hydro, SEM-97-001 (Apr. 27, 1998)).

- A criminal prosecution of a polluter that has been resolved by the Party's highest court is not a "pending" judicial or administrative proceeding because the proceeding has concluded. (BC Hydro, SEM-97-001 (Apr. 27, 1998)).

- Canada's Water Use Planning Initiative, which is a project to review water licenses and to develop water use plans, is not a judicial or administrative proceeding because it does not seek assurance of voluntary compliance or a compliance plan with respect to environmental regulations. (BC Hydro, SEM-97-001 (Apr. 27, 1998)).

- Participating in Regional Technical Committees, which identify and document areas of concern for fish and fish habitats, does not constitute judicial or administrative proceedings because the goal of these committees is not enforcement of the Fisheries Act. (BC Hydro, SEM-97-001 (Apr. 27, 1998)).

- Inspections, testing and warning letters are not judicial or administrative proceedings. (BC Mining, SEM-98-004 (May 11, 2001)).

- A criminal investigation is not a judicial or administrative proceeding. (BC Logging, SEM-00-004 (July 27, 2001)).

- An arbitration before the International Center for Settlement of Investment Disputes, between a private company and Mexico, did not constitute a judicial or administrative proceeding because, although the arbitration concerned the same hazardous waste landfill, the issues before the arbitrator and those set forth in the Submission were not the same. (Cytrar II, SEM-01-001 (July 2, 2002)).

- An administrative proceeding that has lapsed because the period within which a decision must be handed down is not a pending judicial or administrative proceeding. (Coronado Islands, SEM-05-002 (Jan. 18, 2007); El Boludo Project, SEM-02-004 (May 17, 2004)).

- A judicial or administrative proceeding must be brought by a Party to seek enforcement of the Party's environmental laws. For that reason, the proceeding must be pursued by the Party, not against the Party. (Oldman River II, SEM-97-006 (July 19, 1999)).

- Lawsuits by NGOs against a Party are not judicial or administrative proceedings because they are not brought by a Party. (Cytrar I, SEM-98-005 (Oct. 26, 2000); Oldman River II, SEM-97-006 (July 19, 1999); Oldman River I, SEM-96-003 (Apr. 2, 1997)).

- The *denuncia popular* procedure is not a judicial or administrative procedure because it is not instituted by a Party. (Lake Chapala II, SEM-03-003 (May 18, 2005)).

In contrast, the following activities have been considered pending judicial or administrative proceedings within the meaning of NAAEC Articles 14(3)(a) & 45(3):

- An administrative order that contains "a directive with immediate legal effect that compels or enjoins an activity so as to promote compliance with the law" is a judicial or administrative proceeding because it "is a ruling from which legal rights and obligations flow." (BC Mining, SEM-98-004 (May 11, 2001)).

- A criminal prosecution is a judicial or administrative proceeding. (BC Mining, SEM-98-004 (May 11, 2001)).

Finally, depending on the context, EPA obligations under consent decrees with Alabama, Ohio, Pennsylvania and West Virginia, relating to air pollution, are not necessarily

judicial or administrative proceedings. (Coal-Fired Power Plants, SEM-04-005 (Dec. 5, 2005)).

In the context of what is and is not a pending judicial or administrative proceeding, it is again clear that the Secretarial is following the doctrine of stare decisis. Although the Secretariat has been aided by the specific definition of what constitutes a pending judicial or administrative proceeding set forth in NAAEC Article 45, the Secretariat nevertheless has been required to apply that definition to a variety of factual situations which the Secretariat has done consistently. Perhaps of more importance to the conclusion that the Secretarial is following the doctrine of stare decisis is the repeated and increasingly common practice, seen in these Recommendations, of citing to and explicitly following rules set forth in prior Recommendations.

Conclusion

Transparency and the rule of law are critical to the development of international civil society. One way in which transparency and the rule of law can be enhanced is by following the doctrine of stare decisis, which requires that later dispute-resolution decisions adhere to rules and principles set forth in earlier decisions. As the United States Supreme Court recently noted, stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (*Randall v. Sorrell* 2006). In a similar vein, Lord Hewart famously articulated a venerable legal principle when he said that "justice should not only be done, but should manifestly and undoubtedly be seen to be done." *(Rex v. Sussex Justices, Ex parte McCarthy* 1923). This review of CEC Recommendations has demonstrated that the

CEC has admirably followed Lord Hewart's dictum by incorporating the doctrine of stare decisis into the development of international environmental law – whether the CEC perceives that it has adopted that doctrine, or not.

Appendix A – Articles 14 & 15
North American Agreement on Environmental Cooperation

Article 14: Submissions on Enforcement Matters

1. The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

(a) is in writing in a language designated by that Party in a notification to the Secretariat;

(b) clearly identifies the person or organization making the submission;

(c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;

(d) appears to be aimed at promoting enforcement rather than at harassing industry;

(e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and

(f) is filed by a person or organization residing or established in the territory of a Party.

2. Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:

(a) the submission alleges harm to the person or organization making the submission;

(b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;

(c) private remedies available under the Party's law have been pursued; and

(d) the submission is drawn exclusively from mass media reports.

Where the Secretariat makes such a request, it shall forward to the Party a copy of the submission and any supporting information provided with the submission.

3. The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:

(a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and

(b) of any other information that the Party wishes to submit, such as

i) whether the matter was previously the subject of a judicial or administrative proceeding, and

ii) whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.

Article 15: Factual Record

1. If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

2. The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.

3. The preparation of a factual record by the Secretariat pursuant to this Article shall be without prejudice to any further steps that may be taken with respect to any submission.

4. In preparing a factual record, the Secretariat shall consider anyinformation 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 Committee; or

(d) developed by the Secretariat or by independent experts.

5. The Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter.

6. The Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council.

7. The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission.

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