COMMISSION FOR ENVIRONMENTAL COOPERATION

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CONSERVACIÓN DE MAMÍFEROS MARINOS A.C. (MARINE MAMMAL CONSERVATION, COMARINO)

HUMANE SOCIETY INTERNATIONAL (HSI)

As the Submitting Parties and

THE GOVERNMENT OF CANADA

As the Party of the Defendant

Submission filed by CENTRO MEXICANO DE DERECHO AMBIENTAL A.C. (CEMDA), CONSERVACIÓN DE MAMÍFEROS MARINOS A.C. (COMARINO) and HUMANE SOCIETY INTERNATIONAL (HSI) before the COMMISSION FOR ENVIRONMENTAL COOPERATION, based on Article 14 of the NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION for failing to effectively enforce environmental legislation on the part of the Canadian authorities during the annual seal hunt carried out in the Gulf of St. Lawrence and off the coast of Newfoundland and Labrador, Canada.

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EXHIBITS

★ Letters sent by CEMDA had been attached in the submission SEM-07-003 (Seal Hunt) as Appendix 1.
★ The study had been attached in the submission SEM-07-003 (Seal Hunt) as Appendix 7.
★ The study had been attached in the submission SEM-07-003 (Seal Hunt) as Appendix 8.
★ The study had been attached in the submission SEM-07-003 (Seal Hunt) as Appendix 9.

I. SUBMITTERS.

The organizations presenting this submission are the Centro Mexicano de Derecho Ambiental, A.C., (Mexican Center for Environmental Law, CEMDA), Conservación de Mamíferos Marinos A.C. (Marine Mammal Conservation, COMARINO) and Humane Society International (HSI).

CEMDA is an apolitical, non-governmental, non-profit organization, founded in August 1993, seeking to contribute to coordinating and bringing together national and international efforts on behalf of the environment and natural resources, through strengthening, consolidation, reconciliation, application and effective enforcement of the current environmental legal system.

COMARINO is an apolitical, non-governmental, non-profit organization, founded in August 2001 by Mexican citizens engaged in the conservation of marine wildlife in Mexico and other countries.

HSI operates as the international arm of The Humane Society of the United States (HSUS). Founded in 1954, The HSUS is the largest animal protection organization in the United States and in conjunction with HSI maintains a constituency of over 10 million. The HSUS and HSI work in the United States and abroad to reduce suffering and to create meaningful social change for animals by advocating for public policies to protect animals through programs and campaigns promoting the humane treatment of farm and companion animals, investigating animal cruelty, and the protection wildlife and their habitat. As the international arm of The HSUS, HSI works to promote the protection of all animals around the world by participating in programmatic activities in developing countries, advocating for the effective enforcement of international environmental treaties, and furthering humane and sustainable international trade policy. HSI maintains a significant global presence by operating offices in Asia, Australia, Canada, Central America and the European Union.

Collectively, CEMDA, COMARINO, and HSI are referred to as "Submitters" throughout the Submission.

II. THE CONCERNED PARTY.

This submission is formulated in response to the failures of the Government of Canada, specifically by Canada's Department of Fisheries and Oceans (DFO), to effectively enforce the environmental legislation specified in Section IV of this document during the annual commercial seal hunt that takes place every spring off the East coast of Canada – in the Gulf of St. Lawrence and off the coast of Newfoundland and Labrador.

III. THE SUBMISSION MEETS THE REQUIREMENTS OF ARTICLE 14(1).

Submitters assert the Submission meets the six requirements of Article 14(1) of the North American Agreement on Environmental Cooperation (NEEAC).

a. The Submission is in English.

b. The organizations making the Submission are clearly identified on the cover page and in Section I of the Submission.

c. The Submission provides sufficient information to allow the Secretariat to review the

Submission in Sections IV and V and in the attached Exhibits.

d. Submitters assert that the Submission is aimed at promoting enforcement rather than at harassing industry. The purpose of this Submission is for the Secretariat of the Commission for Environmental Cooperation (CEC) to accept and respond to this Submission, and to open a corresponding Factual Record, which fall under the powers granted to the Secretariat and are within the objectives of its mandate established in Article 1 of the NAAEC.

It is the position of Submitters that the Canadian commercial seal hunt involves a level of cruelty that no thinking, compassionate person would tolerate if they could see it for themselves. While cruelty may exist in other wildlife hunts and in domestic animal slaughters, this does not change the irrefutable fact that Canada's commercial seal hunt results in considerable, unacceptable, and needless suffering. Veterinary studies, video evidence and eye-witness testimony by independent journalists, scientists and parliamentarians, some of which is presented in the evidence section of this Submission in Exhibits 3-6, confirms that seals are often skinned alive, that conscious seal pups are routinely hooked with metal spikes and dragged across the ice, that injured seals are often thrown into stockpiles and left to suffocate in their own blood, that seals are shot and left to suffer in agony, and that wounded seals often slip beneath the surface of the water where they bleed to death slowly and are never recovered.

Regardless of the killing implement used, the commercial seal hunt is inherently cruel because of the environment in which it operates. Canada's commercial seal hunt is an industrial scale slaughter conducted with over 1,000 fishing vessels over hundreds of thousands of square miles of ocean. Sealers compete against each other to fill quotas, killing as many animals as quickly as they can. Moreover, vessel owners want to spend as little time as possible in the ice because of very high deductibles imposed by insurance companies for fishing vessels operating in and around the ice flows. Fuel and other costs also add up quickly in the ocean environment. Weather conditions, ocean swell, the experience of the sealer, and many other factors contribute to the amount of time it takes to render the seal unconscious or dead. This environment places tremendous pressure on the sealers to kill fast and return to port encouraging them to disregard even the minimum standards of humane killing practices required by Canadian law. Not surprisingly, in 2005, more than 146,000 seals were killed in just two days in Newfoundland; another 101,000 were killed in a three day period in the Gulf of St. Lawrence.[1]

Based on these facts, it has been the position of Submitters that the Canadian commercial seal hunt be permanently stopped. It is our strong belief that the seal hunt cannot be carried out in an acceptably humane manner based on current law regardless of the level of enforcement. That being said, it is also the position of Submitters that by engaging in the CEC Submission in Enforcement Matters process, and it if results in the Canadian government actually attempting to enforce the provisions of the Canadian Marine Mammal Regulations (MMRs) discussed herein, the hunt could be carried out in a *slightly less inhumane* manner resulting in fewer seals suffering from cruel treatment at the hands of hunters.

Submitters, therefore, have determined that the Submission in Enforcement Matters process authorized by Article 14(1) of the NAAEC *provides one way in which Submitters can garner the attention of the Canadian government and have it not only take serious and decisive action to insist upon more humane*

[1] *See* http://www.hsus.org/marine_mammals/protect_seals/the_truth.html

treatment of seals as required under its environmental legislation but also be held accountable for its refusal to enforce the MMRs. Thus, the intent of this Submission is to promote enforcement of the MMRs and is not intended to harass industry.

e. The issue has been adequately communicated to the Canadian authorities. Exhibit 1 attached to the Submission includes a letter (in Spanish) from CEMDA to the Canadian Ambassador to Mexico on July 4, 2007, and a response from the embassy dated July 7, 2007.

In addition, Exhibit 1 also contains a letter from HSUS President and CEO Wayne Pacelle to Canadian Prime Minister Stephen Harper dated March 14, 2006, outlining the concerns of The HSUS regarding the unacceptable level of cruelty involved in the seal hunt and a response from Canadian Minster of Fisheries and Oceans Ms. Loyola Hearn that was received on July 24, 2006.

f. This Submission is being filed by three non-governmental organizations, CEMDA and COMARINO which are based in Mexico, and HSI which is based in the United States. Both Mexico and the United States are Parties to the NAAEC.

IV. ENVIRONMENTAL LEGISLATION NOT ENFORCED.

Based on documented actions surrounding the annual seal hunt, the Canadian government has repeatedly failed to effectively to enforce the Marine Mammal Regulations, specifically Articles 8, 28 and 29, which describe the legal instruments and methods for killing seals. This Section will first discuss the definition of "environmental law" for purposes of Article 14. The Section will then explain why the MMRs, and their enabling statute the Canadian Fisheries Act, fall under the ambit of NAAEC Article 45(2) defining an "environmental law."

A. Definition of "environmental law"

Pursuant to Articles 1(c) and (g) of the NAAEC, the Parties determined that the overarching objectives of the agreement included increasing "cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna," and enhancing "compliance with, and enforcement of environmental laws and regulations", respectively. The NAAEC provides a definition for "environmental law" in Article 45(2), which states, in relevant part,

> (a) **"environmental law"** means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
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> ***
>
> (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

In a prior decision, the Secretariat determined that consistent with Article 14(1) of the NAAEC governing consideration of Submissions in Enforcement Matters,

> the Secretariat is of the view that the term "environmental law" should be interpreted expansively. It would not be consistent with the purposes of the NAAEC to adopt an unduly restrictive view of what constitutes a statute or regulation which is primarily aimed at the protection of the environment or prevention of a danger to human life or health.[2]

Where a law has been determined to have a primary purpose of protecting the environment through the protection of wild flora or fauna, the Secretariat has found those laws to come within the definition of "environmental law" of Article 45(2).[3]

Indeed, it has only been in cases where the Secretariat determined that the law or regulation at issue concerned the international obligations of a Party not yet implemented by domestic law has it found a law or regulation not to meet the definition of an "environmental law."[4] The Fisheries Act and the MMRs have the primary purpose of protecting the environment. If the Secretariat were to find in this case that the relevant articles of the MMRs discussed herein did not fall under the definition of "environmental law" even though the overall regulations are meant to protect the environment through the protection of marine mammals, it would be the first and only time the Secretariat has rejected a domestic law or regulation on the grounds that it did not meet the definition found in Article 45(2).

B. The MMRs and all provisions contained therein are "environmental laws"

It is the contention of Submitters that the Marine Mammal Regulations and their enabling statute, the Fisheries Act, are "environmental laws" for the purposes of NAAEC Article 14(1). Therefore, Submitters argue that Article 45(2) should be read to mean that *all* provisions contained within the Fisheries Act and the MMRs meet the definition of an "environmental law." This conclusion is supported by past Secretariat decisions regarding the definition of an "environmental law" and a

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[2] SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) at 4 (May 26, 1998). *See also* SEM-98-004 (BC – Mining), Determination pursuant to Article 14(1) at 2 (Nov. 30, 1998) ("Article 14 is not intended to be an insurmountable procedural screening device but instead it should be given a large and liberal interpretation, consistent with the objectives of the NAAEC and the provisions of the Vienna Convention on the Law of Treaties").

[3] *See, e.g.*, SEM-02-001 (Ontario Logging), Determination in accordance with Article 14(1) and (2) at 5 (Feb. 25, 2002) (finding a section of a law intended to protect migratory birds to qualify as an "environmental law"), *and* SEM-99-002 (Migratory Birds), Determination in accordance with Article 14(1) and (2) at 4 (Dec. 23, 1999) (concluding a particular provision to be an "environmental law" because its primary purpose was to protect and preserve wild birds).

[4] *See* SEM-07-004 (St. Clair River), Determination in Accordance with Article 14(1) at 4 (Aug. 1, 2007) (concluding Submitters made insufficient showing that a provision of an international treaty had been incorporated into Canadian domestic law); SEM-06-002 (Devil's Lake), Determination in Accordance with Article 14(1) at 7 (Aug. 21, 2006) (holding unable to determine if specific Article of international treaty had been adopted into domestic law and, thus, deciding additional clarifying information would be necessary to move process forward); SEM-01-002 (AAA Packaging), Determination pursuant to Article 14(1) at 3 (Apr. 24, 2001) (holding submission discussed an international obligation that had not been imported into Canada's domestic law and therefore did not meet the Article 45(2) definition of "environmental law"); SEM-00-04 (B.C. Logging), Determination pursuant to Articles 14(1) and 14(2) at 11 (May 8, 2000) (finding international obligation noted in submission had not been made part of domestic law and did not fit under definition of "environmental law"); SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2) at 4-5 (Sept. 8, 1999) (holding certain international agreements between the United States and Canada were not "environmental laws" for purposes of Article 45(2) because they had not been incorporated into domestic law); SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) at 4-5 (May 26, 1998) (deciding Biodiversity Convention did not qualify as an "environmental law" because it was an international obligation that had not been implemented into Canada's domestic law through statute or regulation).

plain reading of Article 45(2)(c) as interpreted in conjunction with the General Rule of Treaty Interpretation found in Article 31.1 of the Vienna Convention on the Law of Treaties.
The current Marine Mammal Regulations were promulgated in 1993 and have been amended on several occasions. Legal methods for killing seals during Canada's commercial seal hunt are outlined in Articles 8, 28 and 29.[5]

Article 8 of the MMR prohibitions section states that:

> 8. No person shall attempt to kill a marine mammal except in a manner that is designed to kill it quickly.

Article 28 of the MMRs stipulate, in relevant part, that:

> 28. ***
>
> (2) Every person who strikes a seal with a club or hakapik shall strike the seal on the forehead until its skull has been crushed and shall manually check the skull, or administer a blinking reflex test, to confirm that the seal is dead before proceeding to strike another seal.
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> (3) If a firearm is used to fish for a seal, the person who shoots that seal or retrieves it shall administer a blinking reflex test as soon as possible after it is shot to confirm that it is dead.
>
> (4) Every person who administers a blinking reflex test on a seal that elicits a blink shall immediately strike the seal with a club or hakapik on the forehead until its skull has been crushed, and the blinking reflex test confirms that the seal is dead.

Article 29 stipulates that:

> 29. No person shall start to skin or bleed a seal until a blinking reflex test has been administered, and it confirms that the seal is dead.[6]

As explained more fully below, it is the contention of Submitters that the whole of the MMRs, including the above-noted provisions, are environmental laws for the purposes of Article 45(2).

1. <u>The MMRs and the Fisheries Act are "environmental laws"</u>

A review of past CEC decisions by the Secretariat demonstrates that provisions of the Canadian Fisheries Act (R.S., 1985, c. F-14), which is the enabling statute of the MMRs, have been found to meet the definition of "environmental law" a total of six times.[7] The MMRs have not been reviewed by the Secretariat to determine whether they meet the definition found in Article 45(2).

[5] The MMRs are attached as Exhibit 2.
[6] The "blinking reflex test" is defined in the Interpretation section of the MMRs as a "test administered to a seal to confirm that it has a glassy-eyed, staring appearance and exhibits no blinking reflex when its eye is touched while the eye is in a relaxed condition."
[7] SEM-04-004 (Oldman River II), Determination in accordance with Article 14(1) at 3 (Oct. 10, 2004); SEM-03-001 (Ontario Power Generation), Determination in accordance with Articles 14(1) and (2) at 4 (Sept. 19, 2003); SEM-03-005

For the purposes of the Canadian Fisheries Act, "fish" are defined in Article 2 as including marine animals. Among other areas, the Fisheries Act at Articles 43(b) and (c) provide that the Governor in Council may make regulations "respecting the conservation and protection of fish," including marine mammals, and "respecting the catching, loading, landing, handling, transporting, possession and disposal of fish," respectively.

The preamble to the MMRs state that pursuant to the authority given under Article 43 of the Fisheries Act, the regulations revoke and substitute a series of other regulations for the protection of marine mammals including the Seal Protection Regulations, the Beluga Protection Regulations, the Cetacean Protection Regulations, the Narwhal Protection Regulations and the Walrus Protection Regulations. Thus, taken as a whole, the MMRs were promulgated under the authority granted by the Fisheries Act to consolidate a number of regulations intended to protect the environment through the protection of wildlife into one set of regulations governing human interaction with marine mammals.

With respect to the seal hunt, the Canadian Department of Fisheries and Oceans (DFO) is charged with carrying out protections provided for in the MMRs. As part of its responsibilities regarding the seal hunt, the DFO notes on its website that specific amendments to the MMRs in 2003 were made in order to "**enhance conservation, improve management and ensure the seal hunt is conducted in a more humane manner.**"[8] Furthermore, in 2005 the DFO asserted that its efforts in accordance with the 2003 MMR amendments was to "help ensure proper conservation, . . . as well as ensure humane hunting practices, compliance with *Marine Mammal Regulations*, and the proper use of hunting instruments."[9]

Another website maintained by DFO[10] provides the following timeline highlighting the changes in the Seal Protection Regulations and the subsequent MMRs made by the Canadian government in an effort to make sure the hunt is humane according to their own standards:

> **1965** – The regulations give clear definition to humane killing; A ban is placed on the use of longlines in the seal harvest because this method is not considered to be humane.
>
> **1972** – A ban on the use of gaffs (pole with large hook on the end) to kill seals is further assurance that the hunt is being conducted in a humane manner; A precise regulation on size and weight requirements for clubs and hakapiks ensures that the animal is killed in a swift, humane fashion.
>
> **1978** – An amendment is made to the regulations to allow the use of hakapiks in the Gulf, because this tool is proven effective and humane; A clear definition of a

(Montreal Technoparc), Determination in accordance with Articles 14(1) and (2) at 3 (Sept. 15, 2003); SEM-02-003 (Pulp and Paper), Determination in accordance with Articles 14(1) and (2) at 5 (June 7, 2002); SEM-00-004 (BC – Logging), Determination pursuant to Articles 14(1) and (2) at 8 (May 8, 2000) ("The Fisheries Act qualifies as an 'environmental law' for purposes of the NAAEC in that its primary purpose is 'protection of the environment, or the prevention of a danger to human life or health. . . ."); SEM-98-004 (BC – Mining), Determination pursuant to Article 14(1) (Nov. 30, 1998).

[8] *Available at* http://www.dfo-mpo.gc.ca/media/newsrel/2003/hq-ac17_e.htm (emphasis added).

[9] *Available at* http://www.dfo-mpo.gc.ca/misc/Seal_briefing_e.htm (emphasis in original).

[10] *See* http://www.dfo-mpo.gc.ca/seal-phoque/faq_e.htm

> dead seal is outlined in the regulations; An amendment is made to the allowable size of a club to make it more efficient and humane.
>
> **1985** – To minimize physical and psychological distress, regulations specify the means and tools to quickly render the animal unconscious and to verify that it is dead before being handled and transported.
>
> **1993** – The *Marine Mammal Regulations* are adopted; More stringent rules are put in place governing the means and tools to quickly render the animal unconscious.
>
> **2003** – It is made mandatory that a blinking eye reflex text be performed in order to ensure that the seal is dead. In addition, sealers must land the pelt and/or carcass of any seal taken.

Taken together, the statements made by the DFO on its own websites make clear that one of the primary purposes of the MMRs and the mission of the DFO, including all humane treatment provisions, is to ensure the conservation and protection of the seals.

As noted above, in past decisions the Secretariat has found laws and regulations to fall under the ambit of Article 45(2) where the provision has been determined to have a primary purpose of protecting the environment through the protection of wild flora or fauna. For example, in *Ontario Logging*[11] Section 6(a) of the Canadian Migratory Bird Regulations, which provided that "…no person shall (a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird . . . except under a permit therefore", was found to fall within the definition of an "environmental law." Similarly, in *Migratory Birds*,[12] section 703 of the U.S. Migratory Bird Treaty Act, which prohibited the killing or "taking" of migratory birds, including the destruction of nests, the crushing of eggs, and the killing of nestlings and fledglings "by any means or in any manner," unless the U.S. Fish & Wildlife Service issued a valid permit, was also found to meet the definition of "environmental law" for purposes of Article 45(2).

It is instructive to note that the both of the provisions discussed in the above cases stem from the implementing legislation passed in Canada and the United States, respectively, based upon the Migratory Bird Convention. Similar to the seals protected by the Canadian MMRs, not all of the migratory birds protected by the Convention are considered endangered species. Indeed, the Convention explicitly states that the signatories were "desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless," and, therefore, resolved to adopt a "uniform system of protection" for the birds.[13] Just as the Migratory Bird Convention, and the implementing domestic laws in the U.S. and Canada, sought to protect a non-endangered species from "indiscriminate slaughter," the MMRs seek to protect seals from inhumane and cruel treatment by hunters. It is the view of Submitters, therefore, that the MMRs as developed from the authority given under the Fisheries Act, including the humane

[6] SEM-02-001 (Ontario Logging), Determination in accordance with Article 14(1) and (2) at 2, 5 (Feb. 25, 2002).
[12] SEM-99-002 (Migratory Birds), Determination in accordance with Article 14(1) and (2) at 3-4 (Dec. 23, 1999).
[13] *See* Convention between the United States and Great Britain for the Protection of Migratory Birds, Signed at Washington August 16, 1916, 39 Stat. 1702 (U.S.); Schedule to Migratory Birds Convention Act, 1994 (1994, c. 22) (Canada).

protection provisions contained therein, should be found by the Secretariat to fall within the definition of "environment law" in Article 45(2)(a)(iii).

2. Article 45(2)(c) should be construed broadly under the Vienna Convention

Article 45(2)(c) of the NAAEC reads:

> The primary purpose of a particular statutory or regulatory provision . . . shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

Submitters acknowledge that this provision can be construed in two different manners, one narrowly and one broadly. It is the position of Submitters, however, that based on the object and purpose of the NAAEC, consistency with past Secretariat decisions, and in accordance with Article 31.1 of the Vienna Convention on the Law of Treaties that the Secretariat should construe this provision **broadly** when a particular provision raised in a submission is part of a law or regulation that has a primary purpose of protecting the environment.

Under a narrow reading, Article 45(2)(c) could be understood to mean that only the particular provision(s) raised in an Article 14 submission, and not the entire law or regulation of which it is part, should be evaluated in isolation as to whether it meets the definition of "environmental law." Such a reading would not permit the Secretariat to look at the broader purpose or context of the statute or regulation in which the particular provision(s) was only part, including the enabling legislation of any regulations.

For example, under this reading the Secretariat could reach the illogical conclusion to disqualify particular provisions, or any regulations promulgated there under, of the U.S. National Environmental Protection Act or the Canadian Environmental Protection Act as not fitting within the definition of an "environmental law." In addition, this reading would endorse the selective enforcement by Parties to the NAAEC of provisions under laws or regulations with a primary purpose to protect the environment on the theory that a particular provision was not "environmental" in nature and, therefore, could not be subject to an Article 14 submission. Such a conclusion is incongruent with the main objectives of the NAAEC, past Secretariat decisions, and Article 14 generally.

Under a **broad** reading of this provision, however, *all* provisions contained within a law or regulation that has a primary purpose of protecting the environment would meet the definition of an "environmental law" for purposes of Article 45(2). This reading would not only be consistent with the objectives of the NAAEC and past Secretariat decisions, it would also help to reinforce the obligation undertaken by all the parties to the NAAEC to "effectively enforce its environmental laws and regulations through appropriate government action" found in Article 5 of the agreement, and would discourage selective enforcement of provisions found in environmental laws.

The Secretariat has previously addressed the relationship between Article 5 and the Submission in Enforcement Matters process stating that "one of the Parties' fundamental purposes in establishing a citizen submission process under the NAAEC was 'to enlist the participation of the North American public to help ensure that the Parties abide by their obligation to enforce their respective

environmental laws.'"[14] This statement is in line with other Secretariat decisions described above adopting a broad reading of the "environmental law" portion of Article 45(2).

Finally, it is the position of Submitters that a broad reading of Article 45(2)(c) is required under Article 31 of the Vienna Convention.[15] Article 31.1 states that as a general rule of interpretation, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." As already noted, Article 5 of the NAAEC notes each Party's commitment to effectively enforce their environmental laws, Article 1(c) expresses the overarching objective to "increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna," and Article 1(g) notes the objective to "enhance compliance with, and enforcement of environmental laws and regulations."

Also as noted above, the Secretariat has previously expressed its support for the view that the term "environmental law" should be interpreted expansively. Thus, the object and purpose of the NAAEC envisions a broader reading of Article 45(2) to include *all* provisions of laws or regulations that have a primary purpose to protect the environment. Therefore, it is the contention of Submitters that Article 31.1 requires the Secretariat to adopt the broader reading of Article 45(2)(c) discussed herein and that *all* the provisions of the MMRs, including the humane treatment requirements, be considered "environmental laws" under Article 45(2).

V. FACTS

This Section provides evidence as to how Canada is failing to effectively enforce Articles 8, 28 and 29 of the MMRs. Pursuant to these Articles no person shall kill a marine mammal except in a manner that is designed to kill it quickly and all sealers must administer the "blinking reflex test" before moving on to strike another seal or beginning to bleed or skin a seal. Thus, according to Canadian legislation, the blinking reflex test is an indispensable requirement, a *sine qua non* condition for the seal hunt to be carried out properly. The procedures outlined in these specific articles are designed to minimize the cruelty of the hunt and the suffering endured by the harp seals for their protection. Nevertheless, Submitters observe *de facto*, and it is argued below, that due to the conditions under which the hunt is carried out, the prescribed methods are not followed by the vast

[14] SEM-99-002 (Migratory Birds), Article 15(1) Notification to Council that Development of a Factual Record is Warranted at 26 (Dec. 15, 2000), *citing to* Raymond MacCallum, Comment, Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation, 8 COLO. J. INT'L ENVTL. L. & POL'Y 395, 400 (1997).

[15] When looking to examine the object and purpose of the NAAEC in order to seek guidance on the interpretation of the scope of particular NAAEC Article, the Secretariat has previously pointed to Article 31 of the Vienna Convention. *See* SEM-97-001 (BC – Hydro), Recommendation of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 at 9 (Apr. 27, 1998). *See also* SEM-99-002 (Migratory Birds), Article 15(1) Notification to Council that Development of a Factual Record is Warranted at 10 (Dec. 15, 2000) (Finding that "[i]f the citizen submission process were construed to bar consideration of alleged widespread enforcement failures, the failures that potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far-reaching threats of harm to the environment, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC. The Secretariat declines to adopt a reading of the Agreement that would yield such a result", and citing to Article 31 of the Vienna Convention); SEM-98-003 (Great Lakes), Determination pursuant to Articles 14(1) and 14(2) at 4-5 (Sept. 8, 1999) ("Recourse to the plain language of the Agreement is consistent with the Vienna Convention on the Law of Treaties, Article 31(1), . . .").

majority of hunters, evidencing that the DFO authorities have failed to effectively enforce the aforementioned portions of the MMRs.

Every year, when spring comes to the ice in the Gulf of St. Lawrence and off the coast of Newfoundland and Labrador, the largest marine mammal hunt in the world takes place; this is due to the fact that hundreds of thousands of harp seals between 12 days and three months may be hunted with the authorization of the Canadian Government. In recent years, the Total Allowable Catch (TAC) has been set at levels higher than what Canadian government scientists estimate to be sustainable and, in four of the five years from 2002-2006, the TAC was exceeded.

As described above, Articles 8, 28, and 29 of the MMRs set out a procedure established by the Canadian authorities in an effort to make the seal hunt more humane from their perspective. Nevertheless, year after year, the hunting of seals gives rise to criticism from non-governmental organizations, the general public, intellectuals and governments condemning the cruelty with which it is performed and the apparent violations by sealers of the internal legal regime. Numerous forms of evidence demonstrate that the hunt is not carried out within the parameters and methods established for it. In this regard, the following sets forth relevant information from reports made by three veterinary committees in recent years that document the failure to effectively enforce the MMRs.

1. Burdon *et al.* 2001.[16]

   - "Based on our observations, it is obvious that there is a tremendous lack of consistency in the treatment of each seal and the existing regulations are neither respected nor enforced. There is undoubtedly an obvious need to reduce suffering and improve the welfare of these animals by alterations in the existing regulations and increasing their enforcement. The DFO proposals address some of our concerns. However, we are making additional recommendations that will further reduce this unnecessary suffering. If the Canadian commercial seal hunt is to be considered as an 'industry', it is imperative that every effort is made to comply with Canadian animal production regulations. However, it is quite clear from our personal observations that the present seal hunt fails to comply with these basic animal welfare regulations." (p. 1-2).
   - In 79 per cent of 179 cases examined from 1998-2000,[17] sealers did not check for a blinking reflex (as required by the Marine Mammal Regulations) indicating that many of these seals potentially could have been hooked or skinned while still conscious.
   - In 72 cases (40 per cent) seals were shot or clubbed and left to suffer.
   - At least 30 seals were hooked while still alive.
   - At least 5 seals were bled alive.
   - At least 4 seals were skinned alive.

2. Daoust *et al.* 2002.[18]

[16] *See* Exhibit 3, Burdon, R., J. Gripper, J.A. Longair, I. Robinson, and D. Ruehlmann. 2001. Observation of the Canadian Commercial Seal Hunt. Prince Edward Island, Canada. Report of an International Veterinary Panel, March 2001. 36 pp.
[17] *Ibid.* at p. 9 *and* Appendices 3-5 therein.
[18] *See* Exhibit 4, Daoust, P-Y, A. Crook, T.K. Bollinger, K.G. Campbell, and James Wong. 2002. Animal welfare and the harp seal hunt in Atlantic Canada. Special Report. Can. Vet. J. 43:687-694.

- 87% of the sealers observed failed to palpate the skull or perform a blinking reflex test to ensure that the seal was unconscious or dead before proceeding to hook or bleed the seal, or go to another seal, as required by the Marine Mammal Regulations (p. 691).
- Concurred with Burdon *et al.* that up to 24% of the seals observed in videotape footage of the 2001 seal hunt were not killed according to the provisos of the Marine Mammal Regulations.
- Concurred with Burdon *et al.* that a number of seals were conscious after receiving the first shot and that still living seals were hooked and dragged across the ice while still conscious.
- Found that 5.6 per cent of harp seals clubbed or shot escape and are not recovered. Such animals generally slip away and seek refuge by submerging with serious wounds. Most die a slow, painful death because of their injuries. These seals are called "*struck and lost*." The Canadian government also estimates that 5% of harp seal pups that are struck are not recovered, suggesting that an average of 26,000 harp seals have suffered and died annually in this fashion during recent hunts.
- Concluded that the number of animals not killed efficiently justifies continued attention to this industry (p. 693).

3. Smith 2005.[19]

- "DFO appears to lack sufficient dedicated capacity to monitor and enforce regulation of the hunt, especially at the Front. It is the Group's understanding that Coast Guard vessels are often called away from monitoring and enforcement of the hunt to perform other duties. DFO officers are often resident in the small communities that have social and economic links to the seal hunt. The Working Group believes that DFO should consider bringing in officers from outside communities who are not faced with monitoring and potentially laying charges against friends and neighbours. The Group further notes that there may be an element of conflict of interest in DFO being both an advocate for the seal hunt and its regulator." (p. 13)
- Noted that the competitive nature of this hunt creates an atmosphere of racing against the clock in which speed is the rule and the hunters are forced to slaughter the seals quickly.
- Issued 11 recommendations in favor of improving the humaneness of this hunt, including a recommendation that seals should not be shot in the water or in any circumstance when it is possible that the carcass cannot be recovered, "due to the high potential for struck and loss events, suffering resulting from the inability to confirm irreversible unconsciousness, and potential for the loss of wounded animals."

The three veterinary reports cited above thus document the omissions in the enforcement of the environmental legislation pertaining to the harp seal hunt on the part of the Government of Canada. Specifically, the methods established by the Marine Mammal Regulations are not followed. Therefore, the apparent violations by sealers and the failure to enforce the legislation in question on behalf of the DFO should be changed in order for the hunt to be carried out within the guidelines set forth in the abovementioned legal stipulations.

Not only is there documented veterinary evidence of these omissions, but the photographs and videos taken by seal hunt observers confirm and supplement these veterinary reports.[20] The video

[19] *See* Exhibit 5, Smith, B. 2005. Improving humane practice in the Canadian harp seal hunt. A report of the Independent Veterinarians' Working Group on the Canadian harp seal hunt. BLSmith Groupwork. 26 pp.
[20] *See* Exhibit 6 (Video evidence).

evidence demonstrates the unnecessary pain, suffering, and injury to seals. Specifically, these practices include: stockpiling of live, injured animals; failing to ensure animals are dead before hooking, dragging, bleeding, or skinning; hooking and dragging live animals; requiring several strikes or shots to kill animals, shooting seals from too great a distance, using underpowered ammunition, and shooting seals in the water or on broken ice. Regardless of the fact that such practices might make seal hunting more convenient or financially rewarding for sealers, they cannot be defended as "necessary," and constitute the kind of cruelty to animals that cannot be defended.

VI. CONCLUSION

Based on the arguments and factual considerations presented in the above submission, Submitters respectfully request that the Secretariat find the Submission to meet the requirements of NAAEC Article 14(1). Upon making such a finding, Submitters also respectfully request that the Secretariat move to request a response from the Concerned Party, the Government of Canada, pursuant to NAAEC Article 14(2).

Submitters assert that the Secretariat should make such a finding considering that the facts stated in this document come primarily from scientists, conservation biologists, veterinarians, and animal welfare organizations with expertise in the field, and are not based on mass media reports.

In addition, Submitters assert that, specifically in the case of HSI, they have been a strong advocate for the humane treatment of seals in Canada for the past 30 years. As part of these efforts, HSI maintains an office in Canada whose work is almost solely devoted to alerting the public to the inhumane nature of the seal hunt. As part of HSI's seal campaign, two websites (www.protectseals.org and www.hsicanada.ca) are maintained and focus on protecting seals in Canada. Seals make up an important part of a vibrant ecosystem off the Eastern coast of Canada. Their indiscriminate and inhumane slaughter sanctioned by the Canadian government only serves to harm this fragile ecosystem.

Active conservation of these animals is the responsibility of all humans just as the liability and negative environmental effect of for their exploitation by one country a falls on all of us. Thus, it is the position of Submitters that the failure of the Government of Canada to effectively enforce the MMRs harms our attempts to increase the humane treatment and conservation of the seals living off the Eastern coast of Canada. This type of harm has been recognized by the Secretariat, which has stated that the type of "public" harm asserted by Submitters in this submission meets the requirements of Article 14(2)(a) of the NAAEC.[21]

To the best of Submitter's knowledge, there have not been any court actions or administrative proceedings requesting the Government of Canada to enforce the humane provisions of the MMRs. Submitters confirm that we have not attempted to bring a lawsuit in Canada asking the government to enforce the aforementioned laws. It is the opinion of Submitters that the process offered by Article 14(1) of the NAAEC provides a very favorable opportunity to bring attention to the failure of Canada to effectively enforce the MMRs. Based on Canada's history of strong support for

[21] *See, e.g.*, SEM-96-001 (Cozumel), Recommendation of the Secretariat to Council for the development of a Factual Record at 5 (June 7, 1996) ("While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.").

continuation of the seal hunt and limited resources to mount an effective legal challenge, Submitters have no reason to believe that bringing a lawsuit in Canada would result in effective enforcement of the laws discussed in the Submission.

Furthermore, based on past Secretariat decisions, submitters are not required to exhaust *all* private remedies.[22] The Secretariat has found that the language in Article 14(2) of the NAAEC lists factors that should *guide* the Secretariat in deciding whether a submission merits the request of a response from the Party, as opposed to Article 14(1) that establishes hard and fast requirements submitters must meet for the Secretariat to consider a submission.[23] In addition, the Secretariat has also agreed with one submitter that it may be "impractical and unrealistic for individuals and non-governmental entities with limited resources to seek redress through private remedies for a transnational problem" of great scope and complexity.[24]

Finally, Submitters assert that the Submission raises matters with respect to annual seal hunt in Canada whose further study under the Submission in Enforcement Matters process will contribute to the conservation and protection of the seal population, as well as the ecological integrity of the marine ecosystem, and habitat of this species, thus achieving the goals of the North American Agreement on Environmental Cooperation.

[22] *See* SEM-98-006 (Aquanova) Article 15(1) Notification to Council that Development of a Factual Record is Warranted (Aug. 4, 2000) at 7-8 (disagreeing with Mexico's argument that Article 14(2) of the NAAEC establishes a requirement that Submitters exhaust *all* private remedies before the Secretariat can make a determination that the submission warrants a response from the Party).
[23] *Ibid.* at 8.
[24] SEM-04-005 (Coal-Fired Power Plants), Article 15(1) Notification to Council that Development of a Factual Record is Warranted at 15-16 (Dec. 5, 2005).

Based on the above, Submitters respectfully request that the Secretariat find the Submission to meet the requirements of NAAEC Articles 14(1) and 14(2)

Sincerely,

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