

Secretariat of the Commission for Environmental Cooperation

Secretariat determination in accordance with Articles 24.27(2) and (3) of the Canada–United States–Mexico Agreement

Submitter: Stand Environmental Society
Party: Canada
Date of submission: 2 November 2023
Date of the determination: 4 December 2023
Submission no.: SEM-23-007 (*Vessel Pollution in Pacific Canada*)

I. INTRODUCTION

1. On 1 July 2020, the Canada-United States-Mexico Agreement (CUSMA) and the Environmental Cooperation Agreement (ECA) entered into force. After this date, the Submissions on Enforcement Matters (SEM) process originally established by Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) is governed by CUSMA Articles 24.27 and 24.28. The Secretariat of Commission for Environmental Cooperation (“CEC Secretariat”)¹ remains responsible for implementing the SEM process, as stipulated in the ECA.²
2. Articles 24.27 and 24.28 of the CUSMA provide a process for any national of a Party or entity organized under the laws of a Party to file a submission asserting that a Party to the CUSMA is failing to effectively enforce its environmental laws. The CEC Secretariat initially reviews submissions based on the requirements set out in CUSMA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements, it then determines, in accordance with the criteria of Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party’s response, the Secretariat then determines whether the matter warrants the preparation of a factual

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), an instrument signed by Canada, Mexico, and the United States (the “Parties”). The constituent bodies of the CEC are its Council, Secretariat, and Joint Public Advisory Committee (JPAC).

² The Secretariat takes the view that although the provisions governing the SEM process are set forth in Chapter 24 of the CUSMA, certain related procedures are also established under the Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada (ECA), namely: the Secretariat’s role in the implementation of the Submissions on Enforcement Matters process, the Council’s role in exchanging information with the Environment Committee, the preparation and publication of factual records, and the Council’s cooperation activities. The Secretariat is mindful of ECA Article 2(3) which states in part: “The Commission will continue to operate under the modalities in place as of entry into force of this Agreement, including its rules, policies, guidelines, procedures, and resolutions, to the extent these modalities are consistent with this Agreement.” Environmental Cooperation Agreement, Articles 2(3); 4(1)(l)–(m); 4(4); and 5(5).

record and, if so, it informs the CEC Council and the Environment Committee,³ providing its reasons as prescribed by CUSMA Article 24.28(1); otherwise, it terminates the review of the submission.⁴

3. On 30 October 2023, Stand Environmental Society, also known as Stand.earth, (“Submitter”) filed a submission with the CEC Secretariat, asserting that Canada is failing to effectively enforce its environmental laws, particularly Section 36(3) of the *Fisheries Act*, 1985 to prevent pollution of the marine environment by cruise ships and other vessels using “exhaust gas cleaning systems” along the Pacific coast of Canada.
4. On 2 November 2023, the Secretariat informed the Submitter of minor errors of form, specifically the length of the submission exceeded 15 typed pages.
5. The Submitter filed a corrected submission, condensing the submission down to 18 pages, on 15 November 2023.⁵
6. The Secretariat finds that the submission meets the eligibility requirements of CUSMA Articles 24.27(1) and 24.27(2), and also meets the criteria in Article 24.27(3)(a), (b), (d), but *does not* meet the criterion of Article 24.27(3)(c) to provide information on whether private remedies have been pursued. The Secretariat finds that additional information is required to continue the process. The Submitter may file a revised submission addressing this criterion within 60 days from the date of this determination (i.e. by 2 February 2024). The Secretariat’s reasoning is set out below.

II. ANALYSIS

7. Article 24.27(1) allows “[a]ny person of a Party” to file a submission with the CEC Secretariat “asserting that a Party is failing to effectively enforce its environmental laws.” The Secretariat bears in mind that the requirements of CUSMA Articles 24.27(1), (2), and (3) are not intended to be construed as an insurmountable procedural screening device, and they must therefore be given a broad interpretation consistent with CUSMA Chapter 24.

A. Article 24.27(1)

8. Under Article 24.27(1), the CEC Secretariat first determines whether the Submitter is a “person of a Party” under the CUSMA.
9. CUSMA Article 1.5 provides a series of relevant definitions to evaluate whether Stand Environmental Society is a “**person of a Party**” under CUSMA:
 - a. “**person of a Party** means a national of a Party or an enterprise of a Party;”
 - b. “**enterprise of a Party** means an enterprise constituted or organized under the law of a Party;”

³ The Environment Committee is established by CUSMA Article 24.26(2) and its role is to “oversee the implementation” of CUSMA Chapter 24.

⁴ More details on the various stages of the submissions on enforcement matters process, the public registry of submissions, and previous Secretariat determinations and factual records can be found on the CEC website at <<http://www.cec.org/submissions-on-enforcement/>>.

⁵ SEM-23-007 (*Vessel Pollution in Pacific Canada*), Submission (15 November 2023), [Submission], at <http://www.cec.org/wp-content/uploads/wpallimport/files/23-7-sub_corrected_redacted_en.pdf>.

- c. “**enterprise** means an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including, trust, partnership, sole proprietorship, joint venture, association or similar organization;”

10. Taken together, these definitions clarify that an entity organized under the law of a Party qualifies as a “person of a Party” eligible to make a submission.
11. The Submitter has indicated that Stand Environmental Society is a registered society under the laws of British Columbia with the incorporation number S0059653.⁶
12. Based on this information, the Secretariat determines that the Submitter is a “person of a Party” within the meaning of the CUSMA.

B. Environmental laws in question

13. The next criterion in Article 24.27(1) is whether the submission identifies an “environmental law” within the meaning of the CUSMA.
14. CUSMA Article 24.1 provides the following definitions:

environmental law means a **statute or regulation** of a Party, or provision thereof, including any that implements the Party’s obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:

- (a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora or fauna,¹ including endangered species, their habitat, and specially protected natural areas,²

but does not include a statute or regulation, or provision thereof, directly related to worker safety or health, nor any statute or regulation, or provision thereof, the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources; and

statute or regulation means:

- (a) for Canada, an Act of the Parliament of Canada or regulation made under an Act of the Parliament of Canada that is enforceable by action of the central level of government. [footnotes 1 and 2 omitted]

15. The Secretariat finds the *Fisheries Act*, 1985⁷ is an Act of the Parliament of Canada that is enforceable by the central level of government. Specifically, the federal Minister of Fisheries and Oceans is responsible for administration and enforcement of the *Fisheries Act*⁸ and the federal Minister of Environment has been designated responsible for

⁶ Submission at page 1.

⁷ *Fisheries Act*, R.S.C. 1985, c F-19, [*Fisheries Act*], available at: <<https://canlii.ca/t/543j4>>.

⁸ *Fisheries Act*, s. 2(1) (“**Minister** means the Minister of Fisheries and Oceans...”)

administration and enforcement of the pollution prevention provisions, subsections 36(3) to (6), of the *Fisheries Act* pursuant to section 43.2 which allows for such designation.⁹

16. The Submitter alleges that Canada is failing to effectively enforce Section 36(3) of the *Fisheries Act*, which prohibits the deposit of deleterious substance in water frequented by fish:

Deposit of deleterious substance prohibited

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

17. This provision is intended to protect fish and fish habitat.¹⁰ The Secretariat determines that Section 36(3) of the *Fisheries Act* qualifies as environmental law in accordance with CUSMA Article 24.1 since it has a primary purpose of protecting the environment through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants and the protection or conservation of wild fauna and their habitat.
18. The Submitter also cites other provisions of the *Fisheries Act* that meet the definition of environmental law under CUSMA. The *Fisheries Act* is an Act of the Parliament of Canada that is enforceable by the central level of government. The following cited provisions have a primary purpose of protecting the environment through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants and the protection or conservation of wild fauna and their habitat:
- a. Section 2.1 sets out the purpose of the Act, “to provide a framework for (a) the proper management and control of fisheries; and (b) the conservation and protection of fish and fish habitat, including by preventing pollution.”
 - b. Section 2.2 establishes the territorial application of the Act in Canada and to “Canadian fisheries waters,” which includes “all waters in the fishing zones of

⁹ Order Designating the Minister of the Environment as the Minister Responsible for the Administration and Enforcement of Subsections 36(3) to (6) of the *Fisheries Act*, SI/2014-21, available at: <<https://canlii.ca/t/54cc1>>; *Fisheries Act*, s. 43.2; Letter from the Honourable Steven Guilbeault to Anna Barford of Stand.earth (18 August 2023) (“Environment and Climate Change Canada’s Enforcement Branch is responsible for enforcing the pollution prevention provisions of the *Fisheries Act* and associated regulations.”).

¹⁰ It should be noted that this provision is applied and enforced according to a Compliance and Enforcement Policy that “...lays out general principles for application of the habitat protection and pollution prevention provisions of the *Fisheries Act*...[and] explains what measures will be used to achieve compliance...It sets out principles of fair, predictable, and consistent enforcement that govern application of the law, and responses by enforcement personnel to alleged violations.” Environment Canada, *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (November 2001) [Compliance and Enforcement Policy] available at: <<https://www.canada.ca/en/environment-climate-change/services/environmental-enforcement/publications/compliance-enforcement-policy-fisheries-act.html>>.

Canada, all waters in the territorial sea of Canada and all internal waters of Canada;”¹¹

- c. Section 2.5 paragraphs (a), (c), (d), (e), (f), and (g) provide considerations for decision making by the Minister under the Act:¹²
- i. (a) the application of a precautionary approach and an ecosystem approach;
 - ii. (c) scientific information;
 - iii. (d) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister;
 - iv. (e) community knowledge;
 - v. (f) cooperation with any government of a province, any Indigenous governing body and any body — including a co-management body — established under a land claims agreement;
 - vi. (g) social, economic and cultural factors in the management of fisheries;
- d. Subsection 34(1) provides the definition of “deleterious substance” that applies in sections 34.1 to 42.5;
- e. Subsection 36(4) specifies types of deposits wastes, pollutants, and deleterious substances authorized by regulation;¹³
- f. Subsection 36(5) allows the Governor in Council to make regulations authorizing certain deposits;
- g. Subsection 36(5.5) (*sic*). In consulting the law in question, the Secretariat noted that subsection (5.5) does not exist and appears to be a typo. The Submitter seems to refer to Subsection 36(6) based on the text preceding the citation.¹⁴ The Submitter can clarify whether they meant to cite Subsection 36(6) in a revised submission;

¹¹ *Fisheries Act*, s. 2.2(1) (“This Act applies in Canada, and also to (a) Canadian fisheries waters....”) “Canadian fisheries waters” are defined under Section 2(1) as “all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada; (*eaux de pêche canadiennes*).”

¹² Submission at page 3. When reprinting some of these considerations in the text of the submission, the Submitter mislabels some of them: (c), (d), (e) and (g), and omits (f) from the text. The Secretariat will consider the list of provisions as cited rather than as reprinted in the text due to these inconsistencies. This list of provisions is based on the citation provided: “(s. 2.5 (a), (c), (d), (e), (f), (g))”.

¹³ Submission at page 4. The sentence that mentions s. 36(4) ends with a citation to “s. 25(1)” but it does not indicate which Act or regulations are being cited. The sentence also mentions “Wastewater Systems Effluent Regulations, SOR/2012-139,” but does not cite any provision within those regulations. A revised submission could clarify the citation to s. 25(1) for the Secretariat’s consideration.

¹⁴ Submission at page 3.

- h. Subsection 38(1)¹⁵ gives the Minister the power to designate “inspectors for the purposes of the administration and enforcement of this Act;”
 - i. Subsection 38(3) authorizes inspectors to “enter any place or premises, including a vehicle or vessel... in which the inspector believes on reasonable grounds that
 - (a) there is anything that is detrimental to fish habitat; or
 - (b) there has been carried on, is being carried on or is likely to be carried on any work, undertaking or activity resulting or likely to result in
 - (i) the death of fish,
 - (i.1) the harmful alteration, disruption or destruction of fish habitat, or
 - (ii) the deposit of a substance in water frequented by fish or in any place under any conditions where the substance or any other substance that results from the deposit of the substance may enter any such water.”
 - j. Subsection 38(5) establishes the duty to notify if a deleterious substance occurs in water frequented by fish;
 - k. Subsection 38(6), establishes the duty to take corrective measures if a deposit of a deleterious substance occurs in water frequented by fish;
 - l. Paragraph 40(2)(a) sets out the offence and liability for contraventions to Section 36(3) on conviction on indictment;
 - m. Paragraph 40(2)(b) sets out the offence and liability for contraventions to Section 36(3) on summary conviction;
 - n. Section 88 confirms the jurisdiction of courts and justices with respect to offences under the Act.
19. The Submitter cites provisions of the *Canada Shipping Act, 2001* (“*Shipping Act*”) which is an Act of the Parliament of Canada that is enforceable by the central level of government. Specifically, the Minister of Transport, and thus, Transport Canada is primarily responsible for the administration and enforcement of the *Shipping Act* and its regulations.¹⁶
20. The Secretariat notes that the *Shipping Act* implements Canada’s commitments under the Protocol of 1978 Relating to the International Convention for the Prevention of

¹⁵ Id. The Submission references section 38 as a whole “The Fisheries Act contains strong enforcement provisions (at s. 38)” and then reprints and cites a few specific provisions from section 38: subsections 38(1), (3), (5) and (6). Given that the Secretariat evaluates whether the individual provisions of the laws and regulations cited in the submission are environmental laws within the meaning of the CUSMA, the Secretariat will only analyze the specific provisions from Section 38 that are referenced rather than the entire section, which contains multiple subsections and paragraphs. SEM-21-003 (*North Atlantic right whale*) Articles 24.27(2) and (3) Determination (4 November 2021) § 16-18.

¹⁶ *Canada Shipping Act, 2001*, SC 2001, c 26, s. 9 [*Shipping Act*], available at: <<https://www.canlii.org/en/ca/laws/stat/sc-2001-c-26/latest/sc-2001-c-26.html>> (“Except as otherwise provided in this Act, the Minister of Transport is responsible for the administration of this Act.”). See also Letter from the Honourable Steven Guilbeault to Anna Barford of Stand.earth (18 August 2023). See *Shipping Act*, ss. 10(2), 10(5), 35(3), 174.1(1) (sections designating the Minister of Fisheries and Oceans solely, or jointly with the Minister of Transport, responsible for certain actions and administration of certain parts of the *Shipping Act*).

Pollution from Ships, 1973 (MARPOL)¹⁷ which is one of the multilateral environmental agreements listed in CUSMA Article 24.8(4).¹⁸ Accordingly, the *Shipping Act* is also a statute “that implements the Party’s obligations under a multilateral environmental agreement” as referenced in the definition of environmental law in CUSMA Article 24.1.

21. The following provisions of the *Shipping Act* cited in the submission have a primary purpose of protecting the environment through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants and the protection or conservation of wild fauna and their habitat:
- a. Subsection 10.1(1) authorizes the Minister of Transport to “make an interim order that contains any provision that may be contained in a regulation... if he or she believes that immediate action is required to deal with a direct or indirect risk to marine safety or to the marine environment;”
 - b. Paragraph 35(1)(d) authorizes the Governor in Council to make regulations, on the recommendation of the Minister of Transport, to implement an international convention, protocol or resolution that is listed in Schedule 1 of the Act;
 - c. Subsection 35.1(1) authorizes the Governor in Council, on the recommendation of the Minister of Transport, to “make regulations respecting the protection of the marine environment from the impacts of navigation and shipping activities;”
 - d. Paragraphs (a), (g), and (i) of subsection 35.1(1) set out some of the specific areas in which the Governor in Council may “make regulations respecting the protection of the marine environment from the impacts of navigation and shipping activities”:
 - (a) respecting the design, construction, manufacture and maintenance of vessels or classes of vessels;
 - (g) respecting the inspections and testing of vessels, or classes of vessels, and their machinery, equipment and supplies;
 - (i) respecting the development, maintenance and implementation of a management system that sets out the manner in which marine environment protection measures are to be integrated into day-to-day navigation and shipping operations and the criteria to which that management system is to conform as well as the components that are to be included in the system;
 - e. Subsection 38(1) establishes the offence and liability for contraventions of regulations made under paragraph 35(1)(d) or (3)(a);
 - f. Section 187 prohibits any person or vessel from discharging “a prescribed pollutant, except in accordance with the regulations made under this Part or a permit granted under Division 3 of Part 7 of the Canadian Environmental Protection Act, 1999;”

¹⁷ *Shipping Act*, s. 29(1), Schedule 1(23).

¹⁸ CUSMA Article 24.8(4)(c).

- g. Paragraph 189(1)(d)¹⁹ empowers the Minister of Transport “[i]f the Minister believes on reasonable grounds that a vessel may discharge, or may have discharged, a prescribed pollutant,” to “direct the vessel to proceed to the place that the Minister may select, by the route and in the manner that the Minister may specify, and to (i) unload the pollutant, or (ii) moor, anchor or remain there for any reasonable period that the Minister may specify.”
 - h. Subsection 190(1) authorizes the Governor in Council to make regulations, on the recommendation of the Minister of Transport, “respecting the protection of the marine environment;”
 - i. Subsection 191(1) establishes that it is an offence for persons or vessels to contravene various sections, subsections, and paragraphs of the Act;
 - j. Subsection 191(2) establishes punishment for committing an offence under subsection (1);
 - k. Subsection 191(3) establishes liability for a continuing offence;
 - l. Subsection 191(4) sets out the factors to be considered by the court in determining the punishment under subsection (2);
 - m. Subsection 227(1) provides the Minister’s powers where “the Minister has reasonable grounds to believe that a foreign vessel is in contravention of an international convention, protocol or resolution listed in Schedule 1;”
 - n. Subsection 256(1) sets out the two-year limitation period for summary conviction proceedings;
 - o. Section 257 establishes jurisdiction under the Act for offences and provides for a presumption of jurisdiction if “a question arises as to whether a vessel or person is within any of the provisions of this Act or the regulations... unless the contrary is proved;”
 - p. Section 258 establishes the jurisdiction of a court, justice of the peace or provincial court judge in a coastal district over vessels lying off the coast.
22. The Submission cites several sections of the *Vessel Pollution and Dangerous Chemicals Regulations*.²⁰ These regulations were made pursuant to the *Shipping Act*²¹ and the Minister of Transport is responsible for their administration and enforcement.²² Accordingly, these regulations were made under an Act of the Parliament of Canada and are enforceable by action of the central level of government. The opening words state that the regulations “set out standards that are additional or complementary to the standards set out in the International Convention for the Prevention of Pollution from

¹⁹ Submission at pages 7-8. The submission quotes from paragraph 189(1)(d), but erroneously denotes the paragraphs as (a) and (b) rather than (i) and (ii) perhaps due to confusion with subsection 189(2) given that the subparagraphs contain the same language.

²⁰ *Vessel Pollution and Dangerous Chemicals Regulations*, SOR/2012-69, [*Vessel Pollution and Dangerous Chemicals Regulations*] available at: <<https://www.canlii.org/en/ca/laws/regu/sor-2012-69/latest/sor-2012-69.html>>.

²¹ *Shipping Act*, ss. 7(2), 35(1)a, 120(1)-(2), 182(a), 190, 207(2)(a) and 244(a).

²² *Vessel Pollution and Dangerous Chemicals Regulations*, s. 1(1).

Ships, 1973 and the Protocols of 1978 and 1997 relating to the Convention.”²³ The following cited provisions²⁴ have a primary purpose of protecting the environment through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants and the protection or conservation of wild fauna and their habitat:

- a. Section 4 defines “prescribed pollutants” as “(a) oil and any oily mixture; (b) garbage; and (c) organotin compounds that act as biocides” for the purposes of Sections 187 and 189 of the *Shipping Act*;
- b. Section 30 provides the conditions for authorized discharge of an oily mixture from a vessel in Section I waters;
- c. Section 31 provides the conditions for authorized discharge of an oily mixture from a vessel in Section II waters and seaward;
- d. Section 84 provides the definition of existing vessel, application of the division, and discharge requirements;
- e. Subsection 96(1) authorizes the discharge of sewage under certain circumstances;
- f. Subsection 111(6) provides requirements for managing residues from a vessel’s exhaust gas cleaning systems if it operates a system that has been certified in accordance with Resolution MEPC.184(59);
- g. Section 111.2 provides requirements in paragraphs (a)-(e) related to maintaining documentation if a vessel operates an exhaust gas cleaning system;
- h. Section 126 prohibits vessels and persons on vessels in waters under Canadian jurisdiction from discharging a substance listed in Schedule 1 unless it meets the requirements in paragraphs (a) or (b) or is an authorized discharge of a noxious liquid substance or chlorine in accordance with subsections (2) and (3), respectively, and subsection (4) provides for limited application to pleasure crafts that are not Canadian vessels- only when they are in Canadian waters;
- i. Section 131.1 regulates greywater (drainage from sinks, laundry machines, bath tubs, shower-stalls or dishwashers) discharges;
- j. Section 132 governs pollutant discharge reporting for vessels in Canadian waters and Canadian vessels in other waters;
- k. Section 133 sets out oil discharge reporting requirements for oil handling facilities;

²³ *Vessel Pollution and Dangerous Chemicals Regulations*.

²⁴ The Secretariat evaluates whether the individual provisions of the laws and regulations cited in the submission are environmental laws within the meaning of the CUSMA. SEM-21-003 (*North Atlantic right whale*) Articles 24.27(2) and (3) Determination (4 November 2021) § 16-18. On page 9 of the Submission, the Submitter states that “Air pollution, including EGCSs as discussed above, is regulated at Division 6 (ss.108-125).” Since Division 6 includes many (more than 100) sections, subsections, paragraphs and subparagraphs, and given that the submission specifically cites one section (111.2) and one subsection (111(6)) from Division 6, the Secretariat will only analyze those two specifically cited provisions.

1. Schedule 1 lists pollutant substances covered by the regulations.
23. The Submission also cites an Interim Order Respecting the Discharge of Sewage and the Release of Greywater by Cruise Ships in Canadian Waters pursuant to Section 10.1(1) of the *Shipping Act*.²⁵ An order itself is not a “an Act of the Parliament of Canada or regulation made under an Act of the Parliament of Canada,” but the opening words state that “...the provisions of the annexed Interim Order may be contained in a regulation made under paragraph 35(1)(e), subsection 35.1 (1), paragraph 136(1)(f) and subsection 190(1) the *Canada Shipping Act, 2001*.”²⁶ Without information on which provisions, if any, of the order have been incorporated into regulations under the *Shipping Act*, the order alone does not meet the definition of environmental law under the CUSMA.
 24. The Submission cites several CUSMA provisions such as Articles 24.2, 24.3, 24.4 24.5(2), 24.15, 24.17, 24.18, 24.19, asserting that Canada is failing to uphold its commitments under the Agreement. The Secretariat finds these cited provisions of CUSMA do not qualify as environmental law within the meaning of Article 24.1, since CUSMA itself is not an Act of the Parliament of Canada enforceable by the central level of government.²⁷
 25. The Submission also cites several international instruments to support the idea that Canada has a “duty to conserve fisheries and protect wild fish species”:²⁸
 - a) The United Nations Convention on Law of the Sea (UNCLOS), done at Montego Bay, December 10, 1982;
 - b) the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, done at New York, December 4, 1995 (UN Fish Stocks Agreement);
 - c) the FAO Code of Conduct for Responsible Fisheries;
 - d) the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement), done at Rome, November 24, 1993;
 - e) the 2001 FAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (IUU IPOA), adopted at Rome, February 23, 2001; and

²⁵ Submission at page 9.

²⁶ Interim Order Respecting the Discharge of Sewage and the Release of Greywater by Cruise Ships in Canadian Waters (9 June 2023) available at: <<https://tc.canada.ca/en/ministerial-orders-interim-orders-directives-directions-response-letters/interim-order-respecting-discharge-sewage-release-greywater-cruise-ships-canadian-waters>>.

²⁷ See SEM-09-001 (Transgenic Maize in Chihuahua), Determination pursuant to Article 14(1) of NAAEC (6 January 2010), § 12 (“Concerning the alleged failure to enforce NAAEC Articles 5, 6, and 7, the Secretariat reiterates the position taken in previous determinations that these provisions cannot be considered for analysis within the citizen submissions process, unless an individual or non-governmental organization is authorized to demand their enforcement within Mexico’s legal regime, which in this case is not evident.”)

²⁸ Submission at pages 5-6.

- f) the 2009 Agreement on Port State Measures to Prevent, Deter, and Eliminate IUU Fishing (Port State Measures Agreement), done at Rome, November 22, 2009.
26. The Secretariat finds these international agreements do not qualify as environmental law under the CUSMA since they are not Acts of the Parliament of Canada enforceable by the central level of government within the definition in Article 24.1.
27. The Submission also cites the Treaty Between the United States and Great Britain Relating to Boundary Waters and Questions Arising Between the United States and Canada, 1909, stating that “Canada has a duty to prevent pollution ‘to the injury of health or property’ along the ‘boundary waters’ of Canada and the United States pursuant to the Boundary Waters Treaty of 1909.”²⁹ The Secretariat finds that this treaty does not qualify as environmental law within the meaning of CUSMA Article 24.1 since it is an international agreement and it is not an Act of the Parliament of Canada enforceable by the central level of government.³⁰
28. The Secretariat finds that the submission alleges that a Party is “failing to effectively enforce its environmental laws,” in accordance with Article 24.27(1), in so far as the Submitter asserts that Canada is failing to effectively enforce Section 36(3) of the *Fisheries Act* and cites provisions of laws and regulations that qualify as environmental law under Article 24.1. In a revised submission, the Submitter could clarify its assertions regarding how the Government of Canada is failing to effectively enforce the other environmental law provisions it cites in the submission.

C. Article 24.27(2) Requirements

29. Article 24.27(2) provides five more requirements for a submission must satisfy to be admissible:
- The CEC Secretariat may consider a submission under this Article if it finds that the submission:*
- a) *is in writing in English, French, or Spanish;*
30. The submission is in writing in English; thus the Secretariat finds that the submission meets the requirement of CUSMA Article 24.27(2)(a).
- b) *clearly identifies the person making the submission;*
31. The submission clearly identifies Stand Environmental Society as the Submitter and provides sufficient information to communicate with the Submitter and determine that the Submitter is a person of a Party within the meaning of CUSMA Article 1.5. The Secretariat finds that the submission meets CUSMA Article 24.27(2)(b).
- c) *provides sufficient information to allow for the review of the submission, including any documentary evidence on which the submission may be based*

²⁹ Id. at page 6.

³⁰ See SEM-20-001 (*Loggerhead Turtle*), Article 24.27(2) and (3) Determination (8 February 2020), § 14 at: <[http://www.cec.org/wp-content/uploads/wpallimport/files/20-1-det_24.27\(2\)\(3\)_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/20-1-det_24.27(2)(3)_en.pdf)> (“Thus, the Secretariat finds that it is only authorized within the USMCA framework to consider a Party’s obligations under a multilateral environmental agreement where these are made effective by a law of Congress or its regulations and are under the jurisdiction of the federal authorities.”).

and identification of the environmental law of which the failure to enforce is asserted;

32. The submission identifies legal provisions from the *Fisheries Act* and the *Shipping Act* and associated regulations that qualify as environmental law in accordance with the definition provided by CUSMA Article 24.1.³¹ The Submitter also presents several sources of documentary evidence on which the submission is based, including studies and reports on the impacts of wastewater discharges from vessel exhaust gas cleaning systems (also known as “scrubbers”) on the marine environment that were produced by environmental law organizations, intergovernmental organizations, the Vancouver Port Authority, as well as environmental and public health advocacy organizations.³² Also, the Submitter provides correspondence between the Submitter and the Minister of the Environment and Climate Change of Canada regarding the issues raised in the submission.³³ The Secretariat finds that the submission meets CUSMA Article 24.27(2)(c).

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

33. The Secretariat finds that the submission meets CUSMA Article 24.27(2)(d) since it is evident from the information and documentation included in the submission that it is aimed at promoting the effective enforcement of the environmental law and focused on the protection of habitat for marine species and the prevention of marine pollution.

e) indicates whether the matter has been communicated in writing to the relevant authorities of the Party and the Party’s response, if any.

34. The submission indicates that the matter has been communicated in writing to the Minister of the Environment and Climate Change of Canada, the Honourable Steven Guilbeault, on 12 April 2023.³⁴ The Submitter provided a copy of the letter sent to Minister Guilbeault which seeks information on the enforcement of subsection 36(3) of the *Fisheries Act*, including information on any investigations and prosecutions initiated against cruise ship operators, as well as any penalties imposed, between January 1, 2018 and December 31, 2022. The letter also discusses the impacts of marine pollution from vessel exhaust gas cleaning systems and concerns about the Government of Canada’s compliance with its commitments under MARPOL, as implemented through the *Shipping Act*, and other international agreements like CUSMA.³⁵ The Minister responded to the letter on 18 August 2023.³⁶ The Secretariat finds that the submission meets CUSMA Article 24.27(2)(e).

D. Article 24.27(3) Criteria

³¹ See paragraphs 15-22 above.

³² Submission at pages 11-16.

³³ Schedules A and B to the Submission.

³⁴ Submission at page 1.

³⁵ Schedule A to the Submission.

³⁶ Schedule B to the Submission.

35. Having determined the submission meets the five criteria of Article 24.27(2), the Secretariat must now determine whether the submission merits a response from the Party based on the following criteria set out in Article 24.27(3):
- a) *the submission alleges harm to the person making the submission;*
36. The Secretariat has found in previous determinations that, when considering the question of harm, it must determine whether the harm asserted is due to the alleged failure to effectively enforce environmental law and whether the harm is related to environmental protection.³⁷
37. The submission asserts that “[s]crubbers remove sulfur dioxides, heavy metals, polycyclic aromatic hydrocarbons (“PAHs”), and other toxins from ships’ air-borne exhaust emissions and put these toxins into the ocean through washwater discharges.”³⁸
38. The Submitter cites scientists with the International Council for Exploration of the Sea who explain the problem with the growing use of scrubber systems as one of cumulative impacts, “While a single ship with an installed scrubber may pose limited, local risk to marine ecosystem health, a global shipping community employing scrubbers to meet air emission limits is of serious concern.”³⁹
39. The Submitter also cites the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection who serve as the International Maritime Organization’s Task Team on Exhaust Gas Cleaning Systems who identified data gaps regarding the effects of exhaust gas effluent contaminants and concluded that “it appeared that large scale uses of these systems may lead to deterioration of environmental status, especially in the ecologically vulnerable and sensitive areas such as coastal waters, semi-enclosed seas and also in ports and harbours.⁴⁰ The Submitter points to “sensitive Canadian and transnational waters of the Salish Sea, Kwakwaka’wakw Sea and Great Bear Sea ecoregions along the Pacific coast” as being at risk of harmful pollution from scrubbers on cruise ships and other vessels.⁴¹
40. Regarding the relationship between climate change and this type of pollution, the Submitter cites the World Wildlife Fund which indicates:

Washwater is acidic and contains large amounts of heavy metals and polycyclic aromatic hydrocarbons, which can be toxic and have carcinogenic properties. It also reduces the ocean’s ability to buffer climate change — for every tonne of sulfur

³⁷ SEM-20-001 (*Loggerhead Turtle*) Article 24.27(2) and (3) Determination (8 February 2020), § 58; SEM-21-001 (*Fairview Terminal*) Determination (27 April 2021); SEM-19-004 (*Barred Owl*), Article 14(1) and (2) Determination (21 November 2019), § 28; SEM-11-002 (*Sumidero Canyon II*), Article 14(1) and (2) Determination (6 September 2012), § 36; SEM-13-001 (*Tourism Development in the Gulf of California*), Article 14(1) and (2) Determination (23 November 2013).

³⁸ Submission at page 11.

³⁹ Id. at page 12.

⁴⁰ Id. citing Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP), EXHAUST GAS CLEANING SYSTEMS: A Roadmap to Risk Assessment (December 2019), p. 96, available at: <https://www.gob.mx/cms/uploads/attachment/file/534554/PPR_7-INF.23_-_Report_of_the_GESAMP_Task_Team_on_exhaust_gas_cleaning_systems_Secretar_a_.pdf>.

⁴¹ Submission at page 18.

dioxide discharged by scrubbers, the ocean will be unable to absorb about half a tonne of carbon dioxide from the atmosphere.⁴²

41. The Submitter points to an analysis of "...impacts of scrubber washwater discharged from cruise ships in the critical habitat of the endangered Resident Killer Whale [] population..."⁴³ The Submitter also references a report that it produced with West Coast Environmental Law that discusses the harmful effects of marine pollution, including scrubber washwater, and the threat it poses "...to aquatic wildlife and the habitat and food webs on which they depend, including the recovering but threatened sea otter populations and threatened and critically endangered populations of resident killer whales that live off the coast of British Columbia."⁴⁴ The submission also cites a report commissioned by the Port Authority of Vancouver that raises concerns regarding the impacts of washwater on marine life particularly through bioaccumulation.⁴⁵
42. In sum, the submission alleges that Canada's failure to effectively enforce environmental laws to regulate scrubber washwater discharges off the Pacific Coast is causing harm to the marine environment and aquatic wildlife, including threatened and endangered species.⁴⁶ For this reason, the Secretariat finds that the submission meets the criterion of CUSMA Article 24.27(3)(a).
 - b) *the submission, alone or in combination with other submissions, raises matters about which further study would advance the goals of this Chapter;*
43. CUSMA Article 24.2(2) establishes that the objectives of Chapter 24 are "to promote mutually supportive trade and environmental policies and practices; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation, in the furtherance of sustainable development."
44. CUSMA Article 24.8(1) indicates that "[t]he Parties recognize the important role that multilateral environmental agreements can play in protecting the environment and as a response of the international community to global or regional environmental problems" and therefore "[e]ach Party shall adopt, maintain, and implement laws, regulations, and all other measures necessary to fulfill its respective obligations under [seven] multilateral environmental agreements..."⁴⁷ One of the "covered agreements" listed is the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL).⁴⁸
45. CUSMA Article 24.10 is focused on the issue of protection of the marine environment from ship pollution as "[t]he Parties recognize the importance of protecting and preserving the marine environment" and agree that "each Party shall take measures to prevent the pollution of the marine environment from ships."⁴⁹ Furthermore, "the Parties shall cooperate to address matters of mutual interest with respect to pollution of the

⁴² Id. at page 12.

⁴³ Id. at page 13.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Submission at page 1.

⁴⁷ CUSMA Article 24.8(4).

⁴⁸ CUSMA Article 24.8(4)(c).

⁴⁹ CUSMA Article 24.10.

marine environment from ships” and there is a list of potential areas of cooperation including “pollution from routine operations of ships,” “development of technologies to minimise ship-generated waste,” “emissions from ships,” “adequacy of port waste reception facilities,” and “increased protection in special geographic areas.”⁵⁰

46. The Secretariat finds that the Parties have agreed to fulfill their respective obligations under MARPOL and that the issue of pollution of the marine environment from ships is important to the Parties. The submission raises matters that relate directly to Canada’s efforts to implement and enforce laws and regulations adopted to fulfill of its obligations under MARPOL and in turn, its commitment in CUSMA Article 24.8. Study of this submission would seek to promote high levels of environmental protection for the marine environment and the effective enforcement of environmental law. Additionally, studying this submission could facilitate the Parties’ efforts to cooperate to address matters related to pollution of the marine environment from ships. The Secretariat finds that the submission meets the criterion of CUSMA Article 24.27(3)(b).

c) private remedies available under the Party’s law have been pursued;

47. The Secretariat has found that pursuing private remedies can be interpreted broadly and this criterion can be met by filing a complaint or referencing a complaint filed by another person, organization, or entity.⁵¹ The Secretariat found in past determinations that this criterion is evaluated according to a standard of reasonableness, keeping in mind that in some cases barriers exist to pursuing such remedies.⁵²
48. In this sense, the Secretariat considers that it is sometimes impossible to initiate judicial or administrative proceedings in relation to a multiplicity of violators,⁵³ so litigation may not be a suitable strategy to deal with certain alleged violations;⁵⁴ that seeking specific remedies available to individuals with respect to the alleged widespread failure to enforce environmental law may be difficult;⁵⁵ that when the alleged failure to effectively enforce is of a generalized nature, the burden on the submitter to pursue

⁵⁰ CUSMA Article 24.10(3)(b), (d), (e), (f), and (g).

⁵¹ SEM-21-001 (*Fairview Terminal*) Determination (27 April 2021), § 30-31, at: <http://www.cec.org/wp-content/uploads/wpallimport/files/21-det2_en.pdf> (finding that filing a complaint with the Canadian Transportation Agency met the criterion of CUSMA Article 24.27(3)(c)).

⁵² SEM-18-001 (*Transboundary Agricultural Burning*) Article 14(1) and (2) Determination (19 February 2018) (“In similar situations, the Secretariat has considered if reasonable actions were taken prior to file a submission. It has also considered that in some cases, the lack of resources may limit a submitter’s ability to undertake private remedies before filing a submission. The Secretariat considers that a barrier to a private remedy may include economic and social factors.”); SEM-23-002 (*Avocado Production in Michoacán*) Determination (6 March 2023), § 74-77, at: <http://www.cec.org/wp-content/uploads/wpallimport/files/23-2-det_translation_en.pdf> (finding that the submission complies with Article 24.27(3)(c) since the Submitter provided a reasonable explanation of the impossibility of seeking remedies in relation to the issue under Mexican law).

⁵³ SEM-97-003 (*Quebec Hog Farms*), NAAEC Article 15(1) Notification (29 October 1999), p. 9, at: <<http://www.cec.org/wp-content/uploads/wpallimport/files/97-3-adv-e.pdf>>.

⁵⁴ SEM-98-003 (*Great Lakes*) Determination pursuant to Article 14(1) and (2) (8 September 1999), p. 10, at: <https://bit.ly/DET14_1_2_98-003>.

⁵⁵ SEM-98-004 (*BC Mining*), NAAEC Article 15(1) Notification (11 May 2001), p. 16, at: <<http://www.cec.org/wp-content/uploads/wpallimport/files/98-4-acf11-e.pdf>>.

remedies in relation to all violations is an important element in determining whether “reasonable actions” have been taken,⁵⁶ and that an explanation may be available.

49. In the submission, the Submitter provides information on a letter sent to the Minister of the Environment inquiring about enforcement efforts related to Section 36(3) of the *Fisheries Act* regarding marine pollution by cruise ships. There is no mention in the submission of complaints or other filings raising these issues by Submitter or others. Nor is there a discussion of why it would be impossible to pursue private remedies in this situation. The referenced letter alone is not sufficient to satisfy this criterion. The Submitter should point to a complaint or legal filing raising these issues or explain why it is impossible to file such a complaint or action.
50. The Secretariat finds that the submission does not meet the criterion of CUSMA Article 24.27(3)(c).
 - d) *the submission is not drawn exclusively from mass media reports.*
51. The Secretariat finds that the submission meets the criterion of CUSMA Article 24.27(3)(b) since it is not drawn exclusively from mass media reports. The submission cites a wide range of information from government sources as well as from studies and reports on the impacts of wastewater discharges from vessel exhaust gas cleaning systems on the marine environment that were produced by environmental law organizations, intergovernmental organizations, the Vancouver Port Authority, as well as environmental and public health advocacy organizations.⁵⁷

III. DETERMINATION

52. For the foregoing reasons, the Secretariat finds that submission SEM-23-007 (*Vessel Pollution in Pacific Canada*) meets the eligibility requirements of CUSMA Articles 24.27(1) and 24.27(2), and also meets the criteria in Article 24.27(3)(a), (b), (d), but *does not* meet the criterion of Article 24.27(3)(c). The Secretariat finds that additional information is required to continue the process and to potentially request a response from the Government of Canada in accordance with Article 24.27(3).
53. The Submitter must submit information on the pursuit of private remedies under Canadian law or the reasons why it has not been able to do so or why it is impossible to do so.
54. The Submitter has 60 calendar days from the date of this determination (i.e. until 2 February 2024) to submit a revised submission containing the requested information. It is not necessary resubmit the information or documents already provided. The Secretariat will then proceed to reconsider whether the SEM-23-007 (*Vessel Pollution in Pacific Canada*) submission meets the criterion of Article 24.27(3)(c) and determine whether to request a response from the Government of Canada in accordance with CUSMA Article 24.27(3).

⁵⁶ SEM-09-005 (*Skeena River Fishery*), Determination in accordance with Articles 14(1) and (2) of the NAAEC (18 May 2010), § 44, at: <https://bit.ly/DET14_1_2_09-005>; SEM-04-005 (Coal-fired Power Plants), Determination in accordance with Articles 14(1) and (2) of the NAAEC (24 February 2005), p. 12, at: <<https://bit.ly/3N0Egm3>>.

⁵⁷ Submission at pages 11-16.

Respectfully submitted for your consideration.

Secretariat of the Commission for Environmental Cooperation

(original signed)

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