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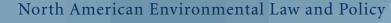
Commission for Environmental Cooperation

Citizen Submissions on Enforcement Matters

The Scope of the Secretariat's Powers Regarding the Submissions Procedure of the North American Agreement on Environmental Cooperation under General Principles of International Law

Secretariat Determinations under Articles 14 and 15 of the North American Agreement on Environmental Cooperation: September 2008 through August 2010

North American Environmental Law and Policy



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PROFILE

In North America, we share a rich environmental heritage and a complex network of ecosystems that sustains our livelihoods and wellbeing. Protecting the North American environment is a responsibility shared by Canada, Mexico, and the United States.

The Commission for Environmental Cooperation of North America (CEC) is an international organization created by Canada, Mexico, and the United States under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts, and promote the effective enforcement of environmental law. The Agreement complements the environmental provisions of the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the top environmental official from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of 15 citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

MISSION

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States.

NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY SERIES

Produced by the CEC, the North American Environmental Law and Policy (NAELP) series presents recent trends and developments in environmental law and policy in Canada, Mexico and the United States, including official documents related to the citizen submission procedure enshrined in NAAEC Articles 14 and 15.

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The Scope of the Secretariat's Powers Regarding the Submissions Procedure of the North American Agreement on Environmental Cooperation under General Principles of International Law

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February 4, 2009

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The following paper was originally developed as a memorandum in June 2000 for the Submissions on Enforcement Matters Unit of the CEC Secretariat. In January 2001, it was distributed to members of the Joint Public Advisory Committee (JPAC) and Alternate Representatives of the CEC Council. During preparation of the current volume in the NAELP series, it was updated to reflect developments in international law.

Given the importance of providing information materials to those interested in the citizen submissions process, the Secretariat wishes to make the updated paper available to the public in the three official languages of the CEC.

The information contained herein is the responsibility of the authors and does not necessarily reflect the views of the CEC, or the governments of Canada, Mexico or the United States of America.

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I. Issues

1. This opinion addresses two questions concerning the scope of the Secretariat's powers regarding the submissions procedure of the North American Agreement on Environmental Cooperation (NAAEC).¹ First, this opinion explicates the international legal principles governing the interpretation of treaties and describes the specific application of those principles by regional and global dispute resolution entities. Second, the opinion applies those principles, in light of the practice of other entities, in order to evaluate the scope of the Secretariat's powers under Article 15 of the NAAEC.²

II. Overview

2. A treaty is an agreement between states, codifying obligations that they have voluntarily undertaken. These obligations may run toward one another, toward third parties, and toward the international community at large. States choose entirely of their own volition whether to enter into a treaty; indeed, one of the cornerstones of sovereignty is the capacity to conclude agreements with other states. The terms of a particular treaty similarly reflect an often lengthy negotiation process and a bargain struck to satisfy or at least mollify many different constituencies.

3. Once states actually consent to a treaty, however, they also consent to an entire corpus of international legal rules and practices governing the interpretation and application of its terms. This is the process of bringing a treaty to life, transforming it from legal language to everyday practice. In both civil and common law systems, codes and caselaw reflect this dynamic process of determining the actual meaning of abstract formulations.

4. The international legal principles governing treaty interpretation defer to the sovereignty of the states party by looking both to text and the

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

^{2.} This opinion is an updated version of an opinion prepared in 2001 for the Secretariat of the Commission on Environmental Cooperation. It has been updated to reflect developments in the relevant law.

parties' intent, but at the same time hold the parties to their word in terms of the overarching purposes the treaty is supposed to serve. The treaty text remains supreme, but the precise meaning given to that text derives from an understanding of the language chosen in the context of the treaty as a whole. It thus prevents parties from promising in the Preamble only to take away in the text.

5. To the extent that states wish to circumscribe this process of interpretation, they must spell out clearly a list of prohibitions as well as obligations. They must be explicit about the precise parameters of the bargain they have struck, ruling out specific evolutionary paths over the life of the treaty. Enhancing the precision of the treaty along these lines will certainly complicate the negotiating process, however, and may alienate many of the domestic constituencies whose support is critical to striking the initial bargain. States thus often prefer broader and more open-ended provisions, which must be interpreted to be effective in light of the overarching object and purpose of the treaty.

6. The principle of effective interpretation and the doctrine of implied powers are intermediate principles that bridge the lofty formulations of the Vienna Convention and the outcomes in specific cases. A treaty cannot achieve its object and purpose unless it is effective; treaty interpreters must thus read specific treaty provisions to maximize their effectiveness. Similarly, entities established by treaty must possess the powers necessary to carry out the functions the parties intended them to exercise. If not explicit in the treaty text, such powers must be implied.

7. International institutions from courts to commissions have applied the principle of effectiveness and the doctrine of implied powers to achieve a wide range of substantive and procedural outcomes. The specific import of these principles depends on the nature and scope of the treaty subject to interpretation. But the process of applying these principles is the *practice* of interpretation, the actualization of the Vienna Convention. This practice offers a model for the Secretariat in exploring and defining the parameters of its role under the CEC.

8. The CEC is an unusual institution. Under the Preamble of the NAAEC, it is charged with "facilitat[ing] effective cooperation on the conservation, protection and enhancement" of the environment in the territories of the states party. It performs a variety of functions in the service of this goal, including overseeing the citizen submission process. Although the NAAEC provides for a fairly traditional inter-state dispute resolution process in Part V, relying on arbitral panels, the citizen submission process is a *sui generis* and highly innovative mechanism for

enhancing each party's enforcement of its environmental laws through increased public participation. Indeed, the Preamble explicitly recognizes the importance of public participation to enhanced environmental protection.

9. The citizen submission process allows complaints concerning lack of enforcement to be brought, but no part of the CEC actually resolves or adjudicates these complaints. Rather, where they meet specific criteria, the complaints become a trigger for the provision of information to the public, the specific complaint, the parties' responses to it, and related scientific and technical information that will allow *the public* to reach a conclusion on the merits. Such a conclusion might then motivate further political action.

10. This process might be described as a dispute resolution process for the information age. Understanding its nature and purpose is critical to interpreting the specific treaty provisions that give it life. In particular, by the terms of the treaty itself the Secretariat must be responsive not only to the Council but to the needs of the public both in disseminating information and placing it in sufficient context to aid public understanding. The Secretariat cannot itself offer a conclusion or a legal determination on the merits of the complaint. But, having committed themselves to the text, object and purpose of the NAAEC, the states party must acknowledge that the Secretariat has the powers necessary to do its job.

III. International Legal Principles for the Interpretation of Treaties

(a) The Vienna Convention on the Law of Treaties

11. The Vienna Convention on the Law of Treaties provides, in Article 31, that "[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."³ The Vienna Convention's principles on interpretation, as set out in Articles 31 to 33, reflect customary international law.⁴ The need to interpret a treaty with regard to its object and purpose, as expressed in Article 31 of the Vienna Convention,

^{3.} Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

^{4.} See Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, p. 153 (2d. ed. 1984). Article 33, dealing with the interpretation of treaties authenticated in two or more languages, is not discussed here.

is recognized as a general and fundamental international legal principle. $^{\rm 5}$

12. The "context" within which the terms of the treaty are to be understood is defined in Article 31(2) to include the preamble and annexes to the treaty in question, including "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty,"⁶ and "any instrument which was made by one or more parties in connection with the conclusions of the treaty and accepted by the other parties as an instrument related to the treaty."⁷ Subsequent practice, or agreement, between the parties regarding interpretation or application of its provisions, and any relevant rules of international law applicable in the relations between the parties, also form part of the context.⁸

13. Thus, in interpreting the terms of a treaty, the context and the object and purpose of that treaty are crucial elements. The object and purpose are not regarded as distinct from the ordinary meaning of a treaty's terms, to be referred to only in cases of ambiguity, but are, rather, a key factor in determining what that ordinary meaning is. The object and purpose of a treaty thus inform and condition the interpretation of that treaty from the outset.

14. The Vienna Convention's articles on interpretation reflect the underlying purpose of international legal principles of interpretation: to give effect to the intent of the parties.⁹ Article 31 does not spell out every principle of interpretation used to achieve this result. Rather, it sets out a means of determining the parties' intent, taking into account the actual words used, while ensuring that those words are understood in their context as the parties intended them to be understood.

15. The object and purpose of a treaty, reflected in its terms, are a key element in this process of determining intent. The parties are free to state

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^{5.} The Vienna Convention includes in its scope "any treaty which is the constituent instrument of an international organization and [...] any treaty adopted within an international organization without prejudice to any relevant rules of the organization." Vienna Convention, *supra* note 3, art. 5.

^{6.} Ibid., art. 31(2)(a).

^{7.} Ibid., art. 31(2)(b).

^{8.} *Ibid.*, art. 31(3)(a), (b) and (c).

^{9.} Lord McNair, *The Law of Treaties*, p. 365 (1961): "In our submission [the task of applying or construing or interpreting a treaty] can be put in a single sentence; it can be described as the duty of giving effect to the expressed intention of the parties, that is, their intention *as expressed in the words used by them in the light of the surrounding circumstances.*" (emphasis in original).

their intentions and codify their bargain, but they must understand that treaty interpreters will take them at their word when interpreting the express terms and determining the parties' intent. The international legal rules governing treaty interpretation thus acknowledge and respect the sovereignty of all states party to a treaty. At the same time, however, they assure the integrity of the agreement and the credibility and reputation of the parties to it.

16. Article 32 of the Vienna Convention adds supplementary means of interpretation, which include the preparatory work of the treaty and the circumstances of its conclusion. These supplementary sources can be used to confirm the meaning resulting from application of Article 31, to determine the meaning of the treaty's terms where Article 31's application results in ambiguity or obscurity, or where interpretation under Article 31 leads to a result that is "manifestly absurd or unreasonable."¹⁰ Thus, where the text alone does not render a clear answer, the intent of the parties can be sought in other sources, provided any sources used shed light on the intent of the parties. The means provided for in Article 32 are merely supplementary ways of finding that intent.

17. Reference is also made in Article 31 to "good faith." Since it is the parties that are usually called upon to interpret the treaty, Article 31 requires that such an interpretation be done in "good faith," so as not to contravene the intent of the parties at the time the treaty was created. While subsequent practice demonstrating agreement by the parties may affect the interpretation of the treaty's terms, as indicated in Article 31(3), even such subsequent practice is restrained by the general duty of "good faith" placed on parties to a treaty. Article 26 of the Vienna Convention provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."¹¹

(b) The Vienna Convention in Practice

18. The Vienna Convention provides a general framework for the interpretation of treaties, but it does not provide an operating manual. It requires that specific treaty terms be interpreted with reference to the parties' intent as set forth in the objectives of the treaty. In practice, however, intermediate principles are necessary to translate these general

^{10.} Vienna Convention, *supra* note 3, art. 32.

^{11.} See Sinclair, *supra* note 4, at 83 (citing the view of the International Law Commission, which drafted the Vienna Convention, that the principle of *pacta sunt servanda* embodied in Article 26 of the Vienna Convention is "the fundamental principle of the law of treaties").

principles into specific applications. Over time, interpreters of treaties have developed two principles that serve this purpose: the effectiveness principle and the doctrine of implied powers. These principles provide a kind of interpretive technology, enabling a wide range of tribunals to interpret their respective treaties in line with the framework set out in the Vienna Convention.¹²

19. A treaty cannot advance its express object and purpose if it is not effective. Conversely, in interpreting a treaty it is often necessary to determine which interpretation of a particular treaty provision will be most effective in advancing the treaty's object and purpose. This is the **principle of effectiveness** or **effective interpretation**.

20. The second form of concrete application of the Vienna Convention's general principle of interpretation is the **doctrine of implied powers**. The need to imply certain powers may arise from a need to ensure the effective operation of the treaty and its regime. In this sense, the doctrine of implied powers is the flip side of the principle of effective interpretation. In addition, implied powers are necessary where the means of carrying out the express powers and duties under the treaty are not specified or are ambiguous.

21. The precise import of both principles depends on the object and purpose of the agreement under question. For instance, the effective interpretation of the Treaty of Rome¹³ or the European Convention on Human Rights¹⁴ will clearly yield very different outcomes than the effective interpretation of the NAAEC. Similarly, the powers of the Secretariat of the CEC will depend not on the powers granted to or developed by the European Court of Justice or the European Court of Human Rights, but on the text of the NAAEC.

22. Nevertheless, the invocation of effectiveness and the need for implied powers in these institutions' interpretation of their constituent treaties is relevant to the Secretariat of the CEC. The practice of the Human Rights Committee, acting under the International Covenant on

^{12.} See McNair, supra note 9, at 385: "In short, we doubt whether this so-called rule [of effectiveness] means more than to say that the contracting parties obviously must have had some purpose in making a treaty, and that it is the duty of a tribunal to ascertain that purpose and do its best to give effect to it, unless there is something in the language used by the parties which precludes the tribunal from doing so."

^{13.} Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958).

^{14.} European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

Civil and Political Rights,¹⁵ is similarly relevant. The practice of all three bodies demonstrates the specific techniques of treaty interpretation. Thus, while the outcome of particular cases cannot provide a model for the Secretariat, the process by which these institutions reach those outcomes provides a model of interpretation that must guide the Secretariat in interpreting its role under the NAAEC.

23. Further, the entities discussed below, and the treaty regimes under which they function, are all concerned with more than the enforcement of reciprocal obligations between states. The aim of these regimes is not solely to benefit the signatory parties but also to achieve a neutral, commonly agreed goal, which can be identified as the object and purpose of the treaty. Human rights regimes, like regimes developed to further protection of the environment, are concerned not only with reciprocal obligations between states, but also with the progressive development of human rights in the signatory states.

24. The NAAEC has a similar aim with regard to the environment: the aim of protecting and improving the environment is stated as the first objective of Article 1.¹⁶ The NAAEC's objectives also include enhancing compliance with, and enforcement of, environmental laws and regulations, and promoting transparency and public participation in the development of environmental laws, regulations and policies.¹⁷ The application of the principle of effective interpretation and the doctrine of implied powers by these tribunals thus has direct relevance for interpretation of the NAAEC.

(i) Effective Interpretation

The European Court of Justice

25. The European Court of Justice (ECJ) has relied on arguments of effectiveness since 1962 to further the object and purpose of the EEC Treaty. In its foundational opinion, *Van Gend en Loos*, the Court pointed out that the objective of the Treaty was to "establish a Common Market," which in turn meant that the Treaty did not merely create mutual obligations between the contracting states, but also created both obligations

International Covenant on Civil and Political Rights and Optional Protocol, adopted Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 301 (1967) (entered into force Mar. 23, 1976) [hereinafter ICCPR and OP, respectively].

^{16.} NAAEC, supra note 1, art. 1(a). See also ibid., Preamble, ¶ 5.

^{17.} *Ibid.*, art. 1(g) and (h).

and rights for individuals.¹⁸ Referring to the objective of the EEC Treaty, the Court declared that to "ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of these provisions."¹⁹ Taking these considerations into account, the Court established the doctrine of direct effect, which allows individuals to invoke certain provisions of Community law before their domestic courts even before such provisions are incorporated into domestic law.

26. In *Costa* v. *ENEL*, the ECJ established that Community law prevailed over conflicting member state law. Although the Treaty did not specify this hierarchy in terms, the Court argued that the "executive force of Community law cannot vary from one State to another [...], *without jeopardizing the attainment of the objectives of the Treaty* set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7."²⁰

27. Addressing the same issue in *Administrazione delle Finanze dello Stato* v. *Simmenthal SpA (II)*, the ECJ refused to accord legal effect to national legislation that encroached on Community competences. It reasoned that to grant such effect "would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by the Member States pursuant to the Treaty and would thus imperil the very foundations of the Community."²¹ Here the logic of the effectiveness principle is very clear. If states mean what they say in undertaking an obligation, then what they say must be interpreted so as to advance their meaning.

28. In recent cases, the ECJ has found that a state can be liable for damage caused by its breach of Community law, even without an express provision to that effect in Community instruments. In *Francovich* v. *Italian Republic*, the Court reasoned that "[t]he full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress

^{18.} Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 12.

^{19.} Ibid.

^{20.} Case 6/64, *Costa* v. *ENEL*, 1964 E.C.R. 585, 594 (emphasis added). Article 5 read: "Member States shall take appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. ¶ They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty." This provision is now Article 10 of the Treaty of Amsterdam, 2 Oct. 1997, 37 I.L.M. 56 (1998).

Case 106/77, Administrazione delle Finanze dello Stato v. Simmenthal SpA (II), 1978 E.C.R. 629,
 ¶ 18.

when their rights are infringed by a breach of Community law for which a Member State can be held responsible."²²

29. This sentiment was echoed in 2003 in *Köbler* v. *Republik Österreich*,²³ as the ECJ extended the principle of state liability for breach of Community law to cover instances where a member state's court of last instance was the institution responsible for the breach. The Court argued that "[i]n the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules, the full effectiveness of those rules would be called in question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member States adjudicating at last instance."²⁴

30. In a recent decision in December 2008, the ECJ referred to effectiveness when considering the factors the European Commission must consider in applying particular provisions of the EC Treaty, arguing that the Commission should not be given an additional criterion to consider for fear of compromising "[t]he effectiveness of [the Commission's] exclusive power" in this particular area.²⁵

31. The ECJ has also consistently applied the principle of effectiveness in the context of how national courts apply Community law.²⁶ Thus, in *Unibet*, the Court observed that the Member States must ensure judicial protection of an individual's rights under Community law and affirmed that the domestic legal system of each Member State is responsible for designating the courts and tribunals that will have jurisdiction over an issue. It is also for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law.²⁷ However, these detailed procedural rules "must be no less favourable than those gov-

^{22.} Cases C-6 & 9/90, Francovich v. Italian Republic, 1991 E.C.R. I-5357, ¶ 33. The ECJ confirmed this approach in Brasserie du Pêcheur and Factortame III, noting the absence of an express provision in the Treaty concerning liability for failure to correctly implement Community law. Cases C-46 & C-48/93, Brasserie du Pêcheur and Factortame III, 1996 E.C.R. I-1134, ¶ 20.

^{23.} Case C-224/01, Köbler v. Republik Österreich, 2003 E.C.R. I-10,239.

^{24.} *Ibid.*, ¶ 33.

Case C-333/07, Société Régie Networks v. Direction de contrôle fiscal Rhône-Alpes Bourgogne, 2008 E.C.R. I-10807, ¶¶ 94-95.

^{26.} See, e.g., Case C-432/05, Unibet, 1997 E.C.R. I-2271, ¶ 43; Joined Cases C-222/05 to C-225/05, van der Weerd and Others, 2007 E.C.R. I-4233, ¶ 28.

^{27.} Case C-432/05, Unibet, 2007 E.C.R. I-2271, ¶¶ 38-39.

erning similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)."²⁸ The principle of effective judicial protection is a general principle of Community law.²⁹

The European Court of Human Rights

32. The principles of Articles 31 and 33 of the Vienna Convention have consistently and expressly guided the European Court of Human Rights (ECHR) in its interpretation of the provisions of the European Convention on Human Rights (European Convention), applying this principle of interpretation to the particular objects and purposes of that Convention.³⁰

33. *Golder* v. *United Kingdom* provides the most cogent explanation of the ECHR's approach, indicating that the object and purpose of the treaty are crucial factors in any determination of the ordinary meaning of its words:

In the way in which it is presented in the "general rule" in Article 3l of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of [Article 31 of the Vienna Convention].³¹

In *Golder*, the ECHR espoused the principle of objective interpretation of the rights protected under the Convention. Here again, "object and purpose" is not a subsidiary principle of interpretation, but rather a key parameter of meaning.

^{28.} Ibid., ¶ 43.

^{29.} Case C-268/06, Impact v. Minister for Agriculture and Food, 2008 E.C.R. 0000, ¶ 43.

See J.G. MERRILLS, The Development of International Law by the European Court of Human Rights, p. 69 (1993). See also Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A), ¶ 29 (1975) (stating that the Court should be guided by Articles 31 to 33 of the Vienna Convention on the Law of Treaties).

^{31.} Golder v. United Kingdom, supra note 30, ¶ 30. The four paragraphs of Article 31 of the Vienna Convention referred to by the ECHR in Golder can be summarized as follows: (1) A treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose (art. 31(1)); (2) Context includes the text, preamble and annexes, and also includes any agreement and instrument made in connection with the treaty by the parties (art. 31(2)); (3) Any subsequent agreement and subsequent practice between the parties, and any relevant rules of international law applicable between the parties are to be taken into account (art. 31(3)); (4) A special meaning shall be given to a term if it is established that the parties so intended (art. 31(4)). See Vienna Convention, supra note 3, art. 31. See also supra ¶¶ 11-17 (discussing Article 31 of the Vienna Convention).

34. In seeking to apply this general principle of interpretation, the Court has frequently invoked the effectiveness principle, both in determining its own role within the regime created by the European Convention, and in interpreting the substantive provisions of the Convention.

35. In *Loizidou* v. *Turkey*, for example, the Court, interpreting the Convention in the light of Article 31 of the Vienna Convention,³² noted that "the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective."³³ In the Court's opinion, states could not make a reservation to the Convention that would remove the jurisdiction of the Court, given the role of the Court in enhancing the effectiveness of the Convention. Allowing such reservations, the Court argued, "would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)."³⁴

36. Referring again to effectiveness, the ECHR has granted the admissibility of a case even where the would-be litigant cannot show specific harm from a measure due to its secrecy:

In the Court's view, the effectiveness (*l'effet utile*) of the Convention implies in such circumstances some possibility of having access to the Commission. If this were not so, the efficiency of the Convention's enforcement machinery would be materially weakened. The procedural provisions of the Convention must, in view of the fact that the Convention and its institutions were set up to protect the individual, be applied in a manner which serves to make the system of individual applications efficacious.³⁵

The Court has emphasized that the Convention must be "read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions."³⁶

^{32.} Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A), ¶ 73 (1995).

^{33.} Ibid., ¶ 72.

^{34.} Ibid., ¶ 75. See also ibid., ¶ 70: "The Court observes that Articles 25 and 46 of the Convention are provisions which are essential to the effectiveness of the Convention system since they delineate the responsibility of the Commission and Court "to ensure the observance of the engagements undertaken by the High Contracting Parties" (Article 19), by determining their competence to examine complaints concerning alleged violations of the rights and freedoms set out in the Convention. In interpreting these key provisions it must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms."

^{35.} Klass v. Germany, 28 Eur. Ct. H.R. (ser. A), ¶ 34 (1978).

^{36.} Stec v. United Kingdom, 2005-X Eur. Ct. H.R. 321, 340, ¶ 47 (2005).

37. In the interpretation of the substantive rights under the Convention, the Court has similarly emphasized effectiveness. Thus, in *Airey* v. *Ireland*, the Court rejected Ireland's argument that Mrs. Airey had access to the court because she could represent herself even if she could not afford a lawyer. As the Court said, "[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."³⁷ More recently, the Court has noted that "[t]he requirement of access to court must be entrenched not only in law but also in practice, failing which the remedy lacks the requisite accessibility and effectiveness."³⁸

38. This need to ensure that the rights protected under the Convention are practical and effective is evident throughout recent decisions by the European Court of Human Rights.³⁹ The Court has emphasized, in *Mamatkulov and Askarov* v. *Turkey*, that the provisions concerning the right of individual application is one of the fundamental guarantees of the effectiveness of the Convention system of human rights protection. In interpreting such a key provision, the Court must have regard to "the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms."⁴⁰ Further, in *Mamatkulov* the Court noted the importance of interpreting and applying the Convention "in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions."⁴¹

The Human Rights Committee

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39. The practice of the European Court of Justice and the European Court of Human Rights demonstrates both the necessity and value of the effectiveness principle in enabling them to carry out their tasks. But these entities are charged with interpreting treaties that impose a set of complex and far-reaching obligations on signatory states and are themselves granted the full panoply of judicial powers. Their construction of

Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A), ¶ 24 (1979). See also, The Belgian Linguistic Case, 6 Eur. Ct. H.R. (ser. A), ¶¶ 3 and 4 (1968); Golder v. United Kingdom, supra note 30, ¶ 35; Luedicke, Belkacem and Koç v. Germany, 29 Eur. Ct. H.R. (ser. A), ¶ 42 (1978); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A), ¶ 31 (1979); Artico v. Italy, 37 Eur. Ct. H.R. (ser. A), ¶ 33 (1980); Kamasinski v. Austria, 168 Eur. Ct. H.R. (ser. A), ¶ 65 (1989).

^{38.} Moldovan v. Romania (No. 2), 44 Eur. H.R. Rep. 16, ¶ 118 (2007).

^{39.} See, e.g., Al-Moayad v. Germany, 44 Eur. H.R. Rep. SE22, ¶¶ 124-125 (2007); Mamatkulov and Askarov v. Turkey, 41 Eur. H.R. Rep. 25, ¶ 100 (2005).

^{40.} Mamatkulov and Askarov v. Turkey, supra note 39, ¶ 100. See also ibid., ¶¶ 100-102.

^{41.} Ibid., ¶ 121. See also Sahin v. Turkey, 2005-XI Eur. Ct. H.R. 174, 210, ¶ 136 (2005).

the scope of these powers within the context of their respective treaties is correspondingly bold and broad. The Human Rights Committee stands on a different footing. Its application of the effectiveness principle thus leads to a different result.

40. Unlike the ECJ and the ECHR, the Human Rights Committee (HRC) is not a judicial body. The Committee was established by the International Covenant on Civil and Political Rights (ICCPR), under which it considers and studies national reports submitted by states pursuant to the ICCPR.⁴² It can also be declared competent to receive and consider communications regarding the inter-state complaint procedure under the ICCPR.⁴³

41. In addition, under the First Optional Protocol (OP) to the ICCPR,⁴⁴ the Committee considers written communications from individuals alleging personal harm due to a violation of the provisions of the ICCPR. In such cases it has taken on quasi-judicial functions in interpreting the treaty.⁴⁵ It has accordingly relied on the principle of effectiveness to further the object and purpose of the Optional Protocol.

42. In *Antonaccio* v. *Uruguay*, a submission was made to the HRC on behalf of Raúl Antonaccio, then in detention, by his wife. She requested that all written material pertaining to the proceedings be sent to the alleged victim. The Committee agreed.⁴⁶ The Committee also agreed that the victim should be given the opportunity to communicate directly with the Committee. There is no express provision for either in the Optional Protocol. The Committee explained:

If governments had the right to erect obstacles to contacts between victims and the Committee, the procedure established by the Optional Protocol would, in many instances, be rendered meaningless. It is a prerequisite for the effective application of the Optional Protocol that detainees should be able to communicate directly with the Committee.⁴⁷

^{42.} See ICCPR, supra note 15, art. 40.

^{43.} *See ibid.*, art. 41. The Committee's role and mandate under the ICCPR are set out in Articles 28 to 45 of the ICCPR.

^{44.} OP, *supra* note 15.

^{45.} Lawrence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication", (1997) 107 Yale L.J. 273, 341.

Antonaccio v. Uruguay, U.N. Human Rights Comm., Report of the Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40, at 114, 117-8, ¶¶ 10-11, U.N. Doc. A/37/40 (1982).

^{47.} Ibid., at 120, ¶ 18.

43. In considering burden of proof questions, the Committee has interpreted Article 4(2) of the OP to ensure that a state's failure to cooperate cannot interfere with the effectiveness of the OP procedure. Article 4(2)requires the state party against whom a complaint has been made "to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State." According to the Committee in *Bleier* v. *Uruguay*, "[i]t is implicit in article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities." Where the alleged victim has provided information supported by substantial witness testimony, and where further clarification depends on the state and is not forthcoming, the Committee "may consider [the] allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party."48 This approach to the burden of proof under the Optional Protocol has been applied consistently by the Human Rights Committee in recent years.49

(ii) Implied Powers

44. In the jurisprudence discussed above, the need to imply certain powers and rights arises from the need to ensure the effective operation of the applicable treaty.⁵⁰ In addition, however, the principle that an

Bleier v. Uruguay, U.N. Human Rights Comm., Report of the Human Rights Committee, U.N. GAOR, 37th Sess., Supp. No. 40, at 130, 135, ¶ 13.3, U.N. Doc. A/37/40 (1982). See also Birindwa and Tshisekedi v. Zaire, U.N. Human Rights Comm., Report of the Human Rights Committee (Volume II), U.N. GAOR, 45th Sess., Supp. No. 40, Annex IV (I), at 77, 83, ¶ 12.4, U.N. Doc. A/45/40 (1990); Romero v. Uruguay, U.N. Human Rights Comm., Report of the Human Rights Committee, U.N. GAOR, 39th Sess., Supp. No. 40, at 159, 162, ¶ 12.3, U.N. Doc. A/39/40 (1984); Scarrone v. Uruguay, U.N. Human Rights Comm., Report of the Human Rights Committee, U.N. GAOR, 39th Sess., Supp. No. 40, at 154, 157, ¶ 10.2, U.N. Doc. A/39/40 (1984).

See, e.g., Grioua v. Algeria, U.N. Human Rights Comm., Report of the Human Rights Committee (Volume II), U.N. GAOR, 62nd Sess., Supp. No. 40, at 228, 235, ¶ 7.4, U.N. Doc. A/62/40 (Vol. II) (2007); Zheikov v. Russian Federation, U.N. Human Rights Comm., Report of the Human Rights Committee (Volume II), U.N. GAOR, 61st Sess., Supp. No. 40, at 12, 15, ¶ 7.2, U.N. Doc. A/61/40 (Vol. II) (2006); Medjnoune v. Algeria, U.N. Human Rights Comm., Report of the Human Rights Committee (Volume II), U.N. GAOR, 61st Sess., Supp. No. 40, at 369, 375, ¶ 8.3, U.N. Doc. A/61/40 (Vol. II) (2006).

^{50.} As noted above, *supra* ¶ 20, the effectiveness principle and the doctrine of implied powers are often two sides of the same coin: the aim of ensuring that the intent of the parties are given effect in the interpretation of a treaty. They are, therefore, often indistinguishable in the practice of tribunals and international institutions. *See*, *e.g.*, Case 9/74, *Casagrande* v. *Landeshauptstadt München*, 1974 E.C.R. 773. Under E.C. Regulation 1612/68, Article 12, the children of nationals of a member state working in another member state were to be "admitted to the same general educational, apprenticeship and vocational training courses under the same conditions" as the nationals of that state if they resided in the new state. The European Court of Justice was asked, in *Casagrande*, whether this included a right for a child to be given the same grant

organization established under a treaty has the implied powers necessary to carry out its express powers stands as a doctrine in its own right, expressly recognized by the International Court of Justice.⁵¹ This doctrine is widely recognized in the law of international organizations.⁵²

The European Court of Justice

45. In addition to furthering the effectiveness of the Treaty through cases like those discussed above, the ECJ has also found it necessary to find implied powers for other institutions established by its founding Treaty. Thus, the Court decided in *Commission* v. *Council ('ERTA')* that, although the Treaty did not grant the Community express powers to enter into agreements with a non-member, this power might in particular cases be inferred from a general competence to deal with the issue concerned.⁵³ In addition, where this power could be found, either expressly or impliedly, the Court held that "the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules."⁵⁴

46. Similarly, the ECJ has found that where a particular Article of the Treaty "confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and *per se* the powers which are indispensable in order to carry out that task."⁵⁵ In *Germany and others* v. *Commission*, the ECJ concluded that the Article at issue, Article 118, "must be interpreted as conferring on the Commission all the powers which are necessary" to carry out its tasks under the Article.⁵⁶ This was true even

given to low-income families who were nationals of the host state. Although the Community had no competence in the area of education at the time, the Court found that the right to freedom of movement, and references in the Regulation to the need for obstacles to that right to be removed, including obstacles to the integration of the worker's family into the host country, meant that a right to receive the assistance was presupposed. *Ibid.*, ¶¶ 6-9. The Court continued, "[a]Ithough educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training." *Ibid.*, ¶ 12.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, 79 (July 8); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11).

^{52.} See José E. Alvarez, International Organizations as Law-Makers, p. 92 (2005).

^{53.} Case 22/70, Comm'n v. Council ('ERTA'), 1971 E.C.R. 263, ¶¶ 12-16.

^{54.} Ibid., ¶ 17.

^{55.} Joined Cases 281, 283, 284, 285, and 287/85, *Germany and Others* v. *Comm'n (Migration Policy)*, 1987 E.C.R. 3203, ¶ 28.

^{56.} Ibid.

though the Commission did not have the power under Article 118 to determine the result to be achieved in the consultation initiated under that Article – its powers were purely procedural.⁵⁷

The European Court of Human Rights

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47. In its first decision, Lawless v. Ireland, the European Court of Human Rights had to deal with a procedural challenge to the case at bar that concerned the powers of the Convention's European Commission on Human Rights.⁵⁸ After deciding to refer the case to the Court, the Commission had communicated its report to the original applicant and solicited comments that it could then represent to the ECHR. Under the Convention, the individual petitioner has no right to be heard by the ECHR; the Commission had developed the procedure at issue under its Rules of Procedure so that the individual complainant's views could be represented in the judicial proceeding. The state concerned, Ireland, objected and argued that due to the procedural violation, the Court could not hear the case. The ECHR, however, accepted the Commission's argument that "subject to the express provisions of the Convention, [the contracting states] had conferred on it the necessary powers to fulfill effectively the functions entrusted to it by Article 19 of the Convention."59 The Court noted the absence of a provision in the Convention forbidding the Commission from publishing its report or communicating it to anyone it wished when it considered that the fulfillment of its functions so required.60

The Human Rights Committee

48. The European Union and the European Convention on Human Rights created regimes with several institutions, a binding court, and specific obligations for the states party. Once again, the powers that must be implied for such systems to function will be different from the powers of an institution with limited functions under a simpler treaty regime. The use of implied powers by the Human Rights Committee is therefore very different from the interpretation of a doctrine of implied rights by the two courts discussed above. Yet the HRC's practice indicates that certain implied powers are necessary in order for the HRC to carry out its express functions.

^{57.} Ibid., ¶ 34.

^{58.} Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) (1960).

^{59.} Ibid., at 12.

^{60.} Ibid.

49. Under the Optional Protocol, the HRC has established procedural rules in order to allow it to perform its functions, since the Protocol did not elaborate those rules.⁶¹ Some of these rules adopt procedures not expressly provided for in the Protocol. A provision for interim measures, for example, is now contained in Rule 92. Under this rule, the Committee may inform the State of its views "as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation."⁶² Although these requests for interim measures, just like the final views of the Committee, are not legally binding on states, this implied power has been used to important effect. Stays of execution have been requested and, occasionally, granted, for a number of individuals.⁶³

Under Article 5(4) of the Optional Protocol, the HRC "shall for-50. ward its views to the State party concerned and to the individual."64 This is the final outcome of the Protocol's individual petition process, and the OP says nothing more about the content of these final views. However, the HRC has developed the content of its final views under the Optional Protocol procedure. Although the function of the HRC is not to act as a judicial body, it arrives at its decisions in a judicial spirit, with provisions on the impartiality and independence of Committee members.⁶⁵ The Committee's views that are communicated to the state party and the individual state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.⁶⁶ Under its Rules of Procedure, the Committee has also established a Special Rapporteur to follow up on its views under the OP, who urges compliance with the Committee's views and discusses factors that may be impeding their implementation.⁶⁷

See U.N. Human Rights Comm., International Covenant on Civil and Political Rights: Rules of Procedure of the Human Rights Committee, Rules 84-104, U.N. Doc. CCPR/ C/3/Rev.8 (Sept. 22, 2005) [hereinafter Rules of Procedure].

^{62.} Ibid., Rule 92. See also Dominic McGoldrick, The Human Rights Committee, p. 131 (1991).

^{63.} U.N. Human Rights Comm., Report of the Human Rights Committee, U.N. GAOR, 43rd Sess., Supp. No. 40, at 154, ¶ 655, U.N. Doc. A/43/40 (1988) (reporting that, pursuant to Rule 86, now Rule 92, stays of execution were requested of two states parties for a number of applicants with cases before the HRC in 1988, and that stays of execution were granted). See generally McGoldrick, supra note 62, at 131-132.

^{64.} OP, *supra* note 15, art. 5(4).

^{65.} U.N. Human Rights Comm., General Comment No. 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights (Advance Unedited Version), ¶ 11, U.N. Doc. CCPR/C/GC/33 (Nov. 5, 2008) [hereinafter General Comment No. 33].

^{66.} *Ibid.*, ¶ 12.

^{67.} Rules of Procedure, supra note 61, Rule 101; General Comment No. 33, supra note 65, ¶16.

51. In addition, the Human Rights Committee performs functions under the ICCPR.⁶⁸ Here, the Committee has established procedures in order to enhance the effectiveness of its mandate. The Committee has produced guidelines for the assistance of states party in complying with their reporting requirements under Article 40 of the ICCPR.⁶⁹ It has also developed a procedure for examining the reports it does receive by questioning representatives of the state concerned,⁷⁰ a procedure that has made the examination "in most cases more rewarding that the initial report itself."⁷¹

52. The HRC's mandate under the ICCPR does not expressly provide for the receipt of information other than from the signatory states. Initially, in order to supplement the inevitably subjective content of states' reports prepared under Article 40 of the ICCPR, individual Committee members frequently drew on their own personal knowledge, occasionally citing the source of their information, but more frequently making no reference to a source.⁷² Over time, and increasingly since 1986, it has become accepted practice for the Committee to cite non-state and non-UN sources of information, to maintain good relations with nongovernmental organizations, and to receive a wide range of material.73 The HRC relies on material received from the secretariat that will include non-governmental and international governmental organization information "and other relevant documents," written reports from specialized agencies and other bodies of the United Nations, and reports from non-governmental organizations and national human rights institutions.⁷⁴ The HRC also relies directly on non-governmental sources of information.⁷⁵ The use of outside information by Committee members is no longer regarded as controversial.⁷⁶ The receipt of information not

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^{68.} See ICCPR, supra note 15, arts. 23-45.

U.N. Human Rights Comm., Consolidated Guidelines for State Reports under the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/66/GUI/Rev.2 (Feb. 26, 2001).

^{70.} *See ibid.*, ¶ G.5.2.; *Rules of Procedure, supra* note 61, Rule 68.

^{71.} Torkel Opsahl, "The Human Rights Committee", in *The United Nations and Human Rights: A Critical Appraisal*, p. 369, 403 (Philip Alston ed., 1992).

^{72.} McGoldrick, supra note 62, at 77-78.

^{73.} Ibid., at 79.

^{74.} U.N. Human Rights Comm., Working Methods, Overview of the Working Methods of the Human Rights Committee, "I" VI-VIII, <http://www2.ohchr.org/english/bodies/ hrc/workingmethods.htm>. See also U.N. Human Rights Comm., Report of the Human Rights Committee Volume 1 (2002), U.N. GAOR, 57th Sess., Supp. No. 40, at 155, Annex III, "I 12, U.N. Doc. A/57/40 (Vol. 1) (2002).

^{75.} See, e.g., U.N. Human Rights Comm., Report of the Human Rights Committee Volume 1 (2006), U.N. GAOR, 61st Sess., Supp. No. 40, at 5, ¶¶ 13-14, U.N. Doc. A/61/40 (Vol. I) (2006).

^{76.} McGoldrick, supra note 62, at 79.

expressly referred to under its mandate is crucial to ensuring that the HRC does not have to rely only on the information received by the states. It is therefore a necessary corollary to the Committee's role of overseeing the implementation of the ICCPR.

IV. Applying Interpretive Principles to the NAAEC

53. A brief review may be helpful. Under international law, treaty terms are to be interpreted with reference to their context and their object and purpose. These injunctions are entirely consistent with the overarching duty of any treaty interpreter to determine the intent of the parties. That intent is itself expressed in the treaty as a whole; in its Preamble and statement of purpose just as much as in its substantive provisions. In order to ascertain that intent, interpreters of treaties have developed two interpretive technologies, the effectiveness principle and the doctrine of implied powers.

54. These interpretive technologies are highly context-specific. They are text-based and do not rely on any overriding view of what the parties *should* have agreed. Thus, while the interpretive principle remains the same from context to context, it is necessary to consider the object and purpose of the treaty at hand in order to determine what will make it effective and what powers may need to be implied. The object and purpose of the NAAEC are thus central to any consideration of the Secretariat's role under the NAAEC's submissions procedure.

55. The Secretariat of the CEC is an independent body,⁷⁷ entrusted in Article 14 with the power to develop a factual record, subject to the initial approval by a two-thirds vote of the Council and subject to the terms of the Agreement.

56. The NAAEC was established as an environmental side-agreement to the North American Free Trade Agreement (NAFTA). NAFTA includes in its Preamble a resolution to strengthen "the development and enforcement of environmental laws and regulations"⁷⁸ and the NAAEC makes express reference to this provision of NAFTA in its own

^{77.} Article 11(4) states: "In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities."

^{78.} North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, Preamble [hereinafter NAFTA].

Preamble.⁷⁹ The objectives of the NAAEC, set out in Article 1, include enhancing "compliance with, and enforcement of, environmental laws and regulations" and promoting "transparency and public participation in the development of environmental laws, regulations and policies."⁸⁰

57. Similarly, in the CEC Council's June 1999 *Revised Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*,⁸¹ the Preamble recognizes that "the revisions are designed to improve transparency and fairness of the public submissions process and are consistent with Article 11(4) of the [NAAEC]⁸² and the Council's commitment to a process that honors the Secretariat's decision-making role under Article 14 of the Agreement."⁸³

58. Continuous improvement of the environment, transparency and public participation, and effective enforcement of domestic environmental laws are therefore key objectives of the NAAEC. The preparation of a factual record under Article 15 of the NAAEC is a crucial means of achieving these objectives. The NAAEC provides for arbitration between the parties related to a complaint by one party about a persistent failure of effective enforcement by another party.⁸⁴ This process begins with consultations, first between the parties concerned, and, second, if necessary, at Council level, in order to reach a mutually satisfactory result.⁸⁵ No minimum criteria are specified for this result. If the complainant party is still unsatisfied, the Council, by a two-thirds vote, will convene an arbitral panel. However, this arbitral panel is limited to dealing with specified situations involving inter-state trade or competi-

^{79.} NAAEC, *supra* note 1, Preamble, ¶ 5. The Preamble to the NAAEC discusses both the importance of environmental protection and the sovereign right of states to pursue their own environmental and development policies. The Preamble also emphasizes "the importance of public participation in conserving, protecting and enhancing the environment." *Ibid.*, Preamble, ¶ 6. *See also ibid.*, ¶ 9, which recalls the parties' "tradition of environmental cooperation" and expresses the parties' "desire to support and build on international environmental agreements and existing policies and laws, in order to promote cooperation between them."

^{80.} Ibid., art. 1(g) and (h).

Commission on Environmental Cooperation, Revised Guidelines for Submission on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, adopted by Council Resolution 99-06, June 28, 1999, as amended by Council Resolution 01-06, adopted 29 June 2001 [hereinafter Revised Guidelines].

^{82.} *See supra* note 77.

^{83.} The Revised Guidelines are not intended to alter the meaning of the NAAEC in any way. *See Revised Guidelines, supra* note 81, ¶ 18.1.

^{84.} NAAEC, supra note 1, art. 22(1). See generally, ibid., arts. 22-36.

^{85.} Ibid., arts. 22 and 23.

tion.⁸⁶ Thus, the process is limited in scope. Further, experience with other tribunals shows that inter-state dispute resolution procedures generate far fewer cases than dispute resolution procedures involving individuals or private groups.⁸⁷

59. The mechanism for private parties to make submissions concerning a failure in effective enforcement and the possible preparation of a factual record thus provide a parallel path to achievement of effective enforcement. The Secretariat's role in this process is central. The factual record, through the gathering and publication of information, provides the means by which compliance can be monitored by the states party and by the public. As preparer of this factual record, the Secretariat must be credible to a variety of constituencies. To maintain this credibility, its autonomy must be preserved and must be seen to be preserved.

60. To fulfill its functions, the Secretariat has a range of powers. Some of these powers are expressly set forth in the treaty.⁸⁸ Under Articles 14 and 15 of the NAAEC the Secretariat may "consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law" if the Secretariat determines that certain specified criteria are fulfilled.⁸⁹

61. In deciding whether to request a response from the state party concerned, and in deciding whether to recommend to the Council the preparation of a factual record, the Secretariat has much discretion.⁹⁰ To

^{86.} *Ibid.*, art. 24(1). An arbitral panel will be convened on a two-thirds vote "where the alleged persistent pattern of failure by the Party complained against to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the Parties; or (b) that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party."

^{87.} See Helfer and Slaughter, supra note 45, at 286.

^{88.} In addition to the submissions procedure under Articles 14 and 15, the Secretariat also has wide-ranging power and discretion under Article 13 of the NAAEC to produce reports. The powers of the Secretariat to gather information and produce reports under Article 13 of the NAAEC demonstrate that among the Secretariat's most important roles is the gathering of information to enhance cooperation on protection of the environment and thus aid in the continuous improvement of the environment. NAAEC, *supra* note 1, art. 13. The Council can object to the preparation of a report by a two-thirds vote, but need not affirmatively approve it. The Secretariat may not produce a report that includes issues related to whether a party is failing to effectively enforce its environmental laws.

^{89.} *Ibid.*, art. 14(1). If the Secretariat determines that a submission merits a response from the party, such a response will be requested, and should be supplied by the party. *Ibid.*, art. 14(2) and (3). If the Secretariat then considers that the submission warrants developing a factual record, it will inform the Council, providing reasons for its view. *Ibid.*, art. 15(1).

^{90.} See ibid., arts. 14(2) and 15(1).

determine whether a submission warrants the preparation of a factual record, the Secretariat will have to assess and evaluate the substance of the claim as a preliminary matter to determine whether the allegations made have enough weight to go forward.

62. The Secretariat prepares a factual record if the Council, by a two-thirds vote, instructs it to do so.⁹¹ In preparing this factual record, the Secretariat shall consider any information furnished by a party, and is also given broad discretion to consider "any relevant technical, scientific or other information: that is (a) publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts."⁹²

63. The final draft of a factual record is submitted to the Council. Any party may submit comments "on the accuracy of the draft" within 45 days, which the Secretariat shall incorporate as appropriate. The final factual record is then submitted to the Council, which may, by a two-thirds vote, make this record publicly available.⁹³

64. In addition to its express powers, the Secretariat must have additional subsidiary powers that are clearly necessary for it to fulfill its prescribed function. In light of the goals of the NAAEC, and the express functions of the Secretariat as preparer of the factual record, the Secretariat must be able to determine what information is relevant and to gather such information. This power in turn requires that the Secretariat consider a range of issues that allow it to determine what is relevant and to present a complete picture. Thus, the Secretariat must be able to exercise the following powers as it gathers information:

- The ability to determine what information is relevant and to gather such information.
- The ability to consider alternatives to the enforcement activities actually undertaken by the state party.

^{91.} *Ibid.*, art. 15(2). The preparation of a factual record is without prejudice to any further steps that may be taken with respect to any submission. *Ibid.*, art. 15(3).

^{92.} *Ibid.*, art. 15(4). *Cf. ibid.*, art. 30. Article 30 deals with the powers of an arbitration panel set up under Part V of the NAAEC to gather information. Unlike the Secretariat, these panels' ability to gather information from experts is made expressly subject to the control of the Council: "On request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, *provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree.*" (emphasis added).

^{93.} Ibid., art. 15(5), (6) and (7).

- The ability to anticipate current and potential obstacles to effective enforcement.
- The ability to canvass the actual and likely outcome of any proposed enforcement action.
- The ability to perform its functions without interference, although subject to the overall control of the Council.

65. Under Article 15 of the NAAEC, the Secretariat may consider any relevant information.⁹⁴ Determining what is relevant, however, depends on both technical and legal context. It requires knowledge of which activities constitute enforcement activities and which activities are effective. For instance, it may require inquiry into the level of government activity, including the level of government investment, the results of such activity, and whether that activity is credible to the public as a good faith effort. Determining relevance may further require developing a standard of what effective enforcement would entail as a means of assessing what information regarding actual enforcement practices is relevant. The Secretariat must have the power to gather all such information.

66. More generally, the Secretariat must have the power to gather and consider information on alternatives to the enforcement actions actually undertaken. Implicit in the stated objectives of enhanced public participation and transparency is the requirement that a factual record, if made public, have sufficient context for evaluation of technical, scientific, and other information.⁹⁵ A particular course of action may appear to be effectively implemented; it may only be relatively ineffective in comparison with other possible and available practices. To this extent, the Secretariat must have the power to develop and publish such alternatives to ensure effective public participation.

67. The Secretariat must similarly be able to anticipate current and potential obstacles to a state's planned enforcement practices. To the extent such obstacles are readily apparent to environmental experts and policymakers, their emergence is a critical part of the context in which information regarding current practices must be assessed. The Secretariat must be able to gather and consider the information that provides this context. The public needs to know. Equally important, however, state officials need to know to improve their own performance.

^{94.} See supra ¶ 62.

^{95.} NAAEC, supra note 1, art. 15(4).

68. Conversely, the Secretariat must also be able to gather and consider information regarding the actual and potential impact of any enforcement action a party is taking or proposes to take. This may include possible effects on other environmental protection efforts, either due to environmental side-effects or due to a shift in the resources towards the matter under consideration. Or it may mean gathering information about the net impact of a proposed measure based on computer models or experience elsewhere. Information concerning the degree of compliance with environmental laws on the part of a regulated community is also clearly relevant in this regard.

69. The Secretariat is subject to the overall control of the Council.⁹⁶ However, in exercising such control, the Council cannot intervene in the necessary and effective performance of the Secretariat's mandate. Allowing the Secretariat to carry out its functions and to gather and present relevant information in a manner that will ensure its legitimacy, credibility and independence conforms with the duty of good faith in Article 26 of the Vienna Convention. The duty to allow the Secretariat to perform its functions without interference also flows from the requirement in Article 11(4) of the NAAEC, that "[e]ach Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities."⁹⁷

70. Overall, the preparation of a factual record that is responsive to the question raised under the submissions procedure, a question based on an allegation that a state party is failing to effectively enforce its environmental laws, is a complex task. It requires discretion on the part of the Secretariat and the ability to exercise such discretion in the gathering of relevant information. Safeguarding the Secretariat's autonomy to perform this function protects the credibility of the parties and advances the effectiveness of the NAAEC as a whole.

V. Conclusion

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71. At international law, a treaty must be interpreted in accordance with the ordinary meaning of its terms when viewed in their context and in the light of the treaty's object and purpose. These familiar cadences acquire concrete meaning through the application of two intermediate principles of interpretation: the principle of effectiveness and the doc-

^{96.} Ibid., art. 10(1)(c).

^{97.} Ibid., art. 11(4).

trine of implied powers. A wide range of international entities established under specific treaties have relied on these principles to achieve specific results when confronted with collisions between treaty provisions and the facts of actual cases. The results of these cases are generally inapposite to the CEC, but the practice of interpretation offers a model for the Secretariat in exploring and defining the scope of its own role within the CEC and under the NAAEC more generally.

72. The object and purpose of the NAAEC are expressly stated as including continuous improvement of environmental quality, effective enforcement of the states party's domestic environmental law, and enhancement of public participation and transparency. The submissions procedure under Articles 14 and 15 of the NAAEC is a key means of achieving these objectives, allowing citizens to make submissions directly to the Secretariat in an effort, subject to Secretariat and Council discretion, to trigger a process that will culminate in the provision of information back to the public.⁹⁸

Under Articles 14 and 15, the Secretariat is charged with preparing 73. a factual record when it has determined that a submission is credible under criteria specified in the NAAEC and when requested to do so by a two-thirds majority of the Council. The Secretariat has necessary discretion to determine what information is relevant to the question of effective enforcement and to public participation in enhancing the process of enforcement. Such information can include a hypothetical standard of effective enforcement, an elaboration of obstacles to effective enforcement, and alternatives to the enforcement mechanisms proposed by the defending party. It can also include an assessment of the actual and likely impact of a present or future course of action undertaken by a party. The Secretariat has the power to gather such information and include it in its factual record. What the Secretariat may not do, however, is to reach any final opinion or determination concerning whether a party's practice would constitute "effective enforcement" as a matter of law under the NAAEC. "Effective" in this sense is a term of art, to be determined only by an arbitrator or national legislator.

^{98.} The factual record will not be made public without the approval of two-thirds of the Council. *Ibid.*, art. 15(7). The Secretariat must safeguard from disclosure information that could identify a non-state party making a submission, where they so request or where the Secretariat considers it appropriate, and must safeguard from public disclosure any information designated as confidential or proprietary by the non-state party that provided it. *Ibid.*, art. 11(8). Article 39 protects State parties from being required to disclose certain information, including information that is confidential or proprietary. *Ibid.*, art. 39.

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74. The guiding principle for the Secretariat must be the needs of the public in accessing and digesting the factual record. What does the public need to know to participate more effectively in promoting enforcement of environmental laws and actually enhancing the environment? A patient cannot evaluate a proposed course of treatment without knowing the alternatives and the actual and potential outcomes of all the therapies proposed, or indeed of having some measure of health itself. No more can the public make sense of facts concerning a particular case without supporting information designed to create a context for evaluation.

75. The parties wish to engage the public in improving the enforcement of environmental laws. This aim is one of the objects of the NAAEC. Articles 14 and 15 must be interpreted in light of this object. The Secretariat must thus have the discretion to determine what kinds of information are relevant to effective enforcement in such a way as to facilitate the public in making its own assessment. The Council can always vote not to instruct the Secretariat to prepare a factual record or not to make the resulting record public. But it may not constrain or censor the preparation process beyond the limitations expressly set forth in the NAEEC.

76. The autonomy of the Secretariat safeguards the credibility of the entire citizen submission process. To the extent that the Secretariat is impartial and independent, and is *seen* to be impartial and independent, all parties to a dispute concerning effective enforcement of environmental laws have an incentive to resort to that process in accordance with the terms of the NAAEC. That is the intent of the states party to the NAAEC. Under the guiding principles of international law, as applied to the NAAEC, the Secretariat has the discretion to make its own function effective in light of the goals the treaty intends it to serve.

Secretariat Determinations under Articles 14 and 15 of the North American Agreement on Environmental Cooperation: September 2008 through August 2010



PREFACE

When Canada, Mexico and the United States (the Parties) entered into the NAFTA in 1994, they also concluded the NAAEC as a "side-agreement". The NAAEC supports the environmental goals and objectives of NAFTA and recognizes the importance of public participation in the conservation, protection and enhancement of the environment. The citizen submission process under NAAEC Articles 14 and 15 is an innovative mechanism allowing the public to take part in the pursuit of the goals set forth in the NAAEC. This volume of the NAELP series provides an update on the CEC Secretariat's activity on submissions on enforcement matters under Articles 14 and 15 since August 2008, as well as a research paper developed by experts on international environmental law in the context of NAAEC Articles 14 and 15.

The NAAEC citizen submissions process allows members of the public to request that the CEC investigate concerns regarding environmental law enforcement in Canada, Mexico or the United States. The Secretariat administers the process in accordance with NAAEC Articles 14 and 15 and the Guidelines for Submissions on Enforcement Matters, adopted by the Council in October 1995 and revised in June 1999 and June 2001. The Secretariat may consider a submission from any person or nongovernmental organization asserting that a Party to NAAEC is failing to effectively enforce its environmental law. Subject to certain conditions, the Secretariat may request a response from the concerned Party. The Secretariat may then inform the Council that it considers that the submission, in light of the response provided by the Party, if any, warrants developing a "factual record." Factual records provide information on alleged failures to effectively enforce the environmental law in North America that may assist the submitters, the Parties to the NAAEC, and other interested members of the public in taking any action they consider appropriate regarding the matters addressed. Preparation of factual records requires a two-thirds affirmative vote by the Council, as does publication of final factual records.

Through August 2010, the Secretariat has received 74 citizen submissions since 1995. Twenty-six concern Canada, thirty-eight concern Mexico, nine concern the United States, and one concerns both Canada and the United States. Some submissions—including most of those concerning Mexico—focus on a specific project or incident, while others allege a widespread failure to effectively enforce environmental provisions against an entire industry. The various submissions raise enforcement concerns regarding many different types of environmental laws, though habitat protection, pollution prevention and environmental assessment provisions are most frequently invoked. Sixty-one submissions were closed as of the end of August 2010, following either publication of a factual record or termination at an earlier stage.

Since 1994, fifteen factual records have been developed and made public, concerning the following submissions: SEM-96-001 (*Cozumel*); SEM-97-001 (*BC Hydro*); SEM-97-002 (*Rio Magdalena*); SEM-97-006 (*Oldman River II*); SEM-98-004 (*BC Mining*); SEM-98-006 (*Aquanova*); SEM-98-007 (*Metales y Derivados*); SEM-99-002 (*Migratory Birds*); SEM-00-004 (*BC Logging*); SEM-00-005 (*Molymex II*), SEM-00-006 (*Tarahumara*), SEM-02-001 and SEM-04-006 (*Ontario Logging and Ontario Logging II*), SEM-02-003 (*Pulp and Paper*), SEM-03-004 (*ALCA-Iztapalapa II*), and SEM-03-005 (*Montreal Technoparc*).

As of 31 August 2010, thirteen submissions were pending. The Secretariat was developing three factual records, as instructed by the Council, in connection with the following submissions: SEM-03-003 (Lake Chapala II), SEM-04-005 (Coal-fired Power Plants), and SEM-04-007 (Quebec Automobiles). The Secretariat was awaiting Council's decisions on the development of factual records for submissions SEM-05-003 (Environmental Pollution in Hermosillo II), SEM-06-003 and SEM-06-004 (Ex Hacienda El Hospital II and Ex Hacienda El Hospital III), and SEM-06-005 (Species at Risk). The Secretariat was reviewing two submissions in light of the concerned Party's responses to determine whether they warrant the development of factual records: SEM-09-005 (*Skeena River Fishery*) and SEM-09-001 (Transgenic Maize in Chihuahua). The Secretariat was awaiting a response from the Party for submission SEM-09-002 (Wetlands in Manzanillo). The Secretariat was reviewing three other submissions to determine whether they met the criteria of Article 14(1), and if so, whether they merited requesting a response from the concerned Party under Article 14(2): SEM-10-003 (Iona Wastewater Treatment), SEM-10-002 (Alberta Tailings Ponds), and SEM-09-003 (Los *Remedios National Park II).*

PREFACE

All submissions, Party responses, Secretariat determinations, factual records, and related documents are available on the CEC website at <www.cec.org> under Citizen Submissions on Enforcement Matters and can also be requested from <info@cec.org>. The Secretariat's determinations and other documents released through 31 August 1997 were compiled in the Winter 1998 issue of this series. Determinations and other documents released from September 1997 through 31 August 2000 were compiled in Volume 5; those from 1 September 2000 through 30 June 2002 were compiled in Volume 9; those from July 2002 through August 2004 were compiled in Volume 19, those from September 2004 through August 2006 were compiled in Volume 23, and those from September 2006 through August 2008 were compiled in Volume 26. Factual records published since the Cozumel factual record appear in Volumes 6, 8, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, 24, and 25. For information about previous issues, please contact Les Éditions Yvon Blais Inc. at <commandes@editionsyvonblais.qc.ca> or <http://www.editions yvonblais.qc.ca> or at (800) 363-3047 (Canada) or (450) 266-1086.

The following table captures the status of submissions and actions taken by the Secretariat at different stages of the process.

1 September 2010

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History	2010 (to 31 August)	2009	2008	2007	2006	2005	2004	2003
Submissions received	SEM-10-001 (<i>Sumidero</i> <i>Canyon</i>) (Mx) (25 February) SEM-10-002	SEM-09-001 SEM-08-001 (Transgenic Maize in Chihuahua) (La Ciudadela Project) (Mx) (Mx) (28 January) (22 February) SEM-09-002 SEM-08-002	SEM-08-001 (<i>La Ciudadela</i> <i>Project</i>) (MX) (22 February) SEM-08-002	SEM-07-001 (<i>Minera San</i> <i>Xaviei</i>) (Mx) (5 February) SEM-07-002	SEM-06-001 (<i>Ex Hacienda</i> <i>El Hospital</i>) (<i>M</i> x) (26 January) SEM-06-002	SEM-05-001 (Crushed Gravel in Puerto Peñasco) (Mx) (12 January)	SEM-04-001 (<i>Hazardous Waste</i> <i>in Arteaga</i>) (Mx) (27 January) SEM-04-002	SEM-03-001 (<i>Ontario Power</i> <i>Generation</i>) (1 May) SEM-03-002
	(Alberta Tailings Ponds) (Can) (13 April) SEM-10-003	(Wetlands in Manzanilo) (Mx) (4 February) SEM-09-003	(Air Pollution in Suburban Montreal) (Can) (29 August)	(Mount Orford Park) (Can) (22 February) SEM-07-003	(Devils Lake) (Can and US) (30 March) SEM-06-003 (<i>Ex</i> Hacienda	SEM-05-002 (<i>Coronado</i> Islands) (Mx) (3 May)	(Environmental Pollution in Hermosillo) (Mx) (14 July) SEM-04-003	(Home Port Xcaret) (Mx) (14 May) SEM-03-003 (Lake Chapala II)
	(Iona Wastewater Treatment) (Can) (7 May)	(Los Remedios National Park II) (Mx) (16 July)	SEM-08-003 (<i>Jetty</i> <i>Construction</i> <i>in Cancun</i>) (M×)	(<i>Seal Hunting</i>) (Can) (26 June) SEM-07-004	El Hospital II) (Mx) (17 July) SEM-06-004	SEM-05-003 (Environmental Pollution in Hermosillo II) (Mx)	(Gasoline Spill in Tehuantepec) (Mx) (7 September)	(M×) (23 May) SEM-03-004 (ALCA-
		SEM-09-004 (Quebec Mining) (Can) (3 September) (3 September) SEM-09-005 (Skeena River Fishery) (Can) (15 October)	(17 November)	(St. Clair River) (Can) (25 July) SEM-07-005 SEM-07-005 (Drilling Waste in Cunduacán) (Mx) (Mx)	(Ex Hacienda El Hospital III) (Mx) (22 September) (22 September) SEM-06-005 (Species at Risk) (Can) (10 October)	(30 August)	SEM-04-004 (Oldman River III) (Can) (10 September) SEM-04-005 (Coahfried Power Planis) (US) (20 September)	Iztapalapa II) (MX) (17 June) SEM-03-005 SEM-03-005 (Montreal Technoparc) (Can) (14 August)

Note: For a listing of determinations made in 2001-2002, 1999-2000, 1997-1998, and 1995-1996, see previous Volumes of the North American Environmental Law and Policy Series: Volume 26 (Fall 2008), Volume 23 (Fall 2006), Volume 19 (Fall 2004) and Volume 5 (Fall 2000), respectively.

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History	2010 (to 31 August)	2009	2008	2007	2006	2005	2004	2003
Submissions received (cont.)					SEM-06-006 (<i>Los Remedios</i> National Park) (9 November)		SEM-04-006 (Ontario Logging II) (12 October) SEM-04-007 (Quebec Automobiles) (Can) (3 November)	SEM-03-006 (<i>Cytrar II</i>) (Mx) (15 August)
14(1), 14(2)‡ and 14(3) Determinations continuing the process	SEM-09-001 (3 March) SEM-09-005 (18 May) SEM-09-002 (13 August)		SEM-08-001 (2 July)	SEM-06-006 (Revised) (20 April) SEM-07-001 (Revised) (29 June) SEM-07-005 (Hevised) (13 December)	SEM-06-001 SEM-05-001 (17 May) (16 February) SEM-06-003 SEM-04-005 (30 August) SEM-04-005 (30 August) (24 February) SEM-06-003 (24 February) (7 May) SEM-06-005 (7 May) SEM-06-002 (28 September) (30 September) (28 September) SEM-06-003 (11 December) SEM-06-005 (11 December) SEM-06-005	SEM-05-001 (16 February) SEM-04-005 (24 February) SEM-05-002 (Revised) (30 September) SEM-05-003 (9 November)	SEM-04-001 (Revised) (30 June) SEM-04-006 (14 October) SEM-04-007 (3 December)	SEM-03-006 (29 August) SEM-03-004 (9 September) SEM-03-005 (15 September) SEM-03-001 (19 September) (19 December)

t The Secretariat issued a single determination covering both Article 14(1) and 14(2) for several of these submissions.

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2003	SEM-03-001 (15 July – resubmitted on 14 August) SEM-03-002 (31 July) (31 July)
2004	SEM-04-001 (20 February – resubmitted on 16 March) SEM-04-001 (20 April – resubmitted on 25 May) SEM-04-002 (30 August – resubmitted on 28 September) SEM-04-003 (7 October) SEM-04-002 (14 October) SEM-04-002 (14 October) SEM-04-002 (14 October) SEM-04-005 (16 December – resubmitted on 13 December – resubmitted on 13 December – resubmitted on 13 December – resubmitted on 13 December –
2005	SEM-04-002 (Revised) (27 January) SEM-05-002 (2 June – resubmitted on 11 July)
2006	SEM-06-002 (8 June – resubmitted on 7 July) SEM-06-002 (Revised) (21 August)
2007	SEM-06-006 (19 January – resubmitted on 2 March) SEM-07-002 (12 March) SEM-07-003 (12 March) SEM-07-003 (13 July – resubmitted on 23 August) SEM-07-003 (13 July – resubmitted on 23 August) (1 August) SEM-07-003 (12 September – resubmitted on 3 October)
2008	SEM-08-002 (26 September) (8 December)
2009	SEM-09-002 (9 October) (20 October) (20 October)
2010 (to 31 August)	SEM-09-001 (6 January) SEM-10-001 (14 June)
History	14(1), 14(2) Dismissals

NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY

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History	2010 (to 31 August)	2009	2008	2007	2006	2005	2004	2003
Article 21(1)(b) Requests for additional information from the Party			SEM-07-001 (7 March) SEM-07-005 (15 May) SEM-08-001 (3 October)	SEM-06-006 (27 November)			SEM-04-001 (13 October)	
Dismissals following response	SEM-08-001 (12 August)	SEM-07-005 (8 April) SEM-07-001 (15 July)	SEM-06-006 (20 March)	SEM-05-002 (26 March)		SEM-04-001 (27 January) SEM-05-001 (24 October)	SEM-03-001 (28 May) SEM-03-006 (27 October)	
Notifications that a factual record is warranted			SEM-06-003 and SEM-06-004 (12 May)	SEM-05-002 (18 January) SEM-05-003 (4 April) SEM-06-005 (10 September)		SEM-04-007 (5 May) SEM-03-003 (18 May) SEM-04-005 (5 December)	SEM-03-005 (19 April) SEM-02-004 (17 May) SEM-03-004 (23 August) SEM-04-006 (17 December)	SEM-02-003 (8 October) SEM-02-001 (17 December – Cerond one after Council's deferrati and receipt of new information from the Submitters)

History	2010 (to 31 August)	2009	2008	2007	2006	2005	2004	2003
Draft Factual record				SEM-03-004 (6 August)	SEM-02-003 (28 March)	SEM-00-006 (6 April)	SEM-00-005 (17 May)	SEM-98-006 (7 March)
				SEM-03-005 (3 December)	SEM-02-001 and			SEM-98-004 (28 March)
					Consolidated) (Consolidated) (31 March)			SEM-00-004 (15 April)
								SEM-97-006 (17 April)
								SEM-97-002 (29 July)
Final factual records			SEM-03-004 (2 June)	SEM-02-003 (5 February)	SEM-00-006 (9 January)		SEM-00-005 (8 October)	SEM-99-002 (24 April)
compreted			SEM-03-005 (23 June)	SEM-02-001 and				SEM-98-006 (23 June)
				SEM-04-006 (Consolidated) (5 February)				SEM-97-006 (11 August)
								SEM-00-004 (11 August)
								SEM-98-004 (12 August)
								SEM-97-002 (11 December)

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SEM-07-001

(Minera San Xavier)

SUBMITTERS: PRO SAN LUIS ECOLÓGICO, A.C.

PARTY: MEXICO

DATE: 5 February 2007

SUMMARY: The Submitter asserts that Mexico is failing to effectively enforce its environmental laws with respect to the authorization of an open-pit mining project in the town of Cerro de San Pedro, San Luis Potosí.

SECRETARIAT DETERMINATION:

ART. 15(1)Determination under Article 15(1) that develop-(15 July 2009)ment of a factual record is not warranted.

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 15(1)

Submitter:	Pro San Luis Ecológico, A.C.
Represented by:	Mario Martínez Ramos
Party:	United Mexican States
Revised Submission:	4 May 2007
Original Submission:	5 February 2007
Date of this determination:	15 July 2009
Submission no.:	SEM-07-001 (Minera San Xavier)

I. EXECUTIVE SUMMARY

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement") set out a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat") initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with the NAAEC and the Guidelines for Submissions and Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "Guidelines"), the Secretariat may notify the Council that the matter warrants the development of a Factual Record, providing its reasons for such recommendation in

accordance with Article 15(1). Where the Secretariat decides to the contrary, it then proceeds no further with the submission.

2. On 5 February 2007, Mario Martínez Ramos, representing Pro San Luis Ecológico, A.C. (the "Submitter"), a Mexican organization, filed a submission (the "original Submission") with the Secretariat asserting that Mexico was failing to effectively enforce its environmental law in connection with an authorization issued to the company Minera San Xavier, S.A. de C.V. ("Minera San Xavier") for an open pit mining project located in Cerro de San Pedro, San Luis Potosí (the "Project"). The Submitter asserts that, by issuing an environmental impact authorization for the project in question, the Mexican Environmental Impact and Risk Office (Dirección General de Impacto y Riesgo Ambiental—DGIRA) violated a judicial decision that ordered an expanded analysis of the mining project. It further maintains that despite the fact that the environmental impact statement (EIS) anticipated significant impact in the environs of Cerro de San Pedro, the Project was authorized without the criteria, restrictions, and principles contemplated in the environmental law quoted by the Submitter having been observed by Mexico.

3. On 4 April 2007, the Secretariat determined that the Submission did not conform to certain criteria set out in Article 14(1), and so informed the Submitter, providing 30 days to file a revised Submission. On 4 May 2007, the Submitter filed a revised Submission (the "revised Submission") including additional information related to alleged remedies pursued by the Submitter as well as copies of correspondence with the authorities concerning the matter raised in the Submission.

4. On 29 June 2007, the Secretariat found that the Submission met the requirements of Article 14(1) and requested a response from Mexico pursuant to Article 14(2). On 25 September 2007, Mexico filed its Response, stating that certain information was confidential pursuant to NAAEC Article 39. On 5 June 2008, Mexico filed a summary for public disclosure of confidential information contained in the Response. Upon request from the Secretariat, on 24 March 2009 Mexico provided an update of the pending proceedings notified in its Response.

5. After analyzing the Submission in light of Mexico's Response, **the Secretariat determines that Submission SEM-07-001 does not warrant the development of a Factual Record**. In accordance with Section 9.6 of the Guidelines, the Secretariat explains below its reasons for this determination (the "Determination").

II. SUMMARY OF THE SUBMISSION

6. The Submitter asserts that Mexico is failing to effectively enforce its environmental law by granting an environmental impact authorization to Minera San Xavier company for an open mine project, underway at the time of the Determination, to exploit a gold and silver deposit located in the municipality of Cerro de San Pedro, San Luis Potosí (the "Project").¹

The Submitter maintains that by authorizing the Project, Mexico is 7. failing to effectively enforce its environmental law. The Secretariat perused the laws cited by the Submitter, including the fourth paragraph of Article 4 of the Political Constitution of the United Mexican States (Constitución Política de los Estados Unidos Mexicanos); Articles 3 paragraph XX, 15 paragraph XI, 28, 30, 35, 79 paragraph II, 98, 113, 145, 146, and 181 of the General Ecological Balance and Environmental Protection Act (Ley General del Equilibrio Ecológico y la Protección al Ambiente-LGEEPA); Articles 5, 9, 16 paragraph IV, and 20 of the Regulation to the LGEEPA respecting Environmental Impact (RIA); Article 36 of the Regulation to the LGEEPA respecting Hazardous Waste; Mexican Official Standard NOM-059-ECOL-1994, determining species and subspecies of terrestrial and aquatic flora and fauna that are endangered, threatened, rare, and subject to special protection, and establishing specifications for protection of species (the "NOM-059"); the administrative order approving the land use plan for San Luis Potosí and its metropolitan area (the "Land Use Plan" or POSLP); and, an order restricting water extraction from the San Luis Potosí valley aquifer (the "Restriction Order").2

8. The following sections summarize the assertions contained in the original Submission of 5 February 2007 and the revised Submission of 4 May 2007.

A. Assertions concerning the alleged illegality of the 2006 environmental impact authorization

9. On 1 August 1997, Minera San Xavier filed the environmental impact statement ("EIS") for the Project and requested a land use change from the National Institute of Ecology (*Instituto Nacional de Ecología*—

^{1.} Original Submission, Appendix 4, p. 15.

^{2.} A restriction order for an indefinite time on groundwater pumping in the region known as Valle de San Luis Potosí, SLP.

"INE").³ On 26 February 1999, INE issued an environmental impact authorization for a land use change for the territory of the Project ("AIA-1999").⁴ The Submitter pursued various legal actions against AIA-1999. On 5 October 2005, the Federal Tax and Administrative Court (*Tribunal Federal de Justicia Fiscal y Administrativa—*"TFJFA") overturned AIA-1999 and ordered DGIRA to issue a new decision on land use change and environmental impact observing the guidelines set out in its ruling,⁵ in particular on the re-examination of the applicable EIS requirements and category,⁶ the description and interpretation of the POSLP, and consideration of NOM-059.⁷

10. Pursuant to the TFJFA ruling, on 10 April 2006, DGIRA issued a new decision in which it again granted environmental impact authorization for the land use change ("AIA-2006").

11. The Submitter states that the TFJFA ordered DGIRA to "decide on the application for authorization" in accordance with the guidelines of the court's decision, but that during the assessment process, DGIRA allegedly improperly requested additional information in order to amend omissions in the EIS.⁸ The Submitter asserts that the TFJFA did not order DGIRA to "rectify omissions in the application" and that because of that, DGIRA failed to comply with the TFJFA ruling.⁹ In the Submitter's opinion, DGIRA "violated" the TFJFA's decision by not observing: (i) restrictions imposed by the Land Use Plan;¹⁰ (ii) protection of species listed under NOM-059; and (iii) requirements regarding the category of environmental impact statement applicable to the Project.¹¹

^{3.} Currently, the former responsibilities of INE in relation to the environmental impact assessment process are within the purview of the Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*—DGIRA) of the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat).

^{4.} Original Submission, Appendix 1: Doc. DOO.P.100.0330 issued by INE, granting environmental impact authorization to Minera San Xavier, S.A. de C.V., p. 1.

^{5.} Original Submission, p. 5.

^{6.} Mexican environmental law in force at that time included three categories for the preparation of an environmental impact statement: general, intermediate and specific, the latter being the one ordered by the TFJFA.

^{7.} Response, Exhibit 6: Doc. S.G.P.A./DGIRA.DG.0567/06 issued by DGIRA, granting environmental impact authorization to Minera San Xavier, S.A. de C.V., pp. 45, 50, 77, and 78.

^{8.} Original Submission, p. 13.

^{9.} *Ibid.*, p. 8.

^{10.} Revised Submission, p. 8.

Revised Submission, p. 8 and Appendix 3: Sentence on case 170/00-05-02-9/634/ 01-PL, October 5, 2005, TFJFA.

The Submitter concluded that the illegality of the Project was *res judicata*¹² and that DGIRA should therefore simply have denied authorization for the Project to Minera San Xavier.

12. According to the Submitter, DGIRA failed to enforce NOM-059, a standard applicable to the conservation of species identified on the Project site, by carrying out "a series of maneuvers with flora and fauna species and specimens designed to mislead us into thinking that there are no species in the municipality of Cerro de San Pedro that are either endangered or protected by the legal provisions of our country."¹³

13. The Submission further asserts that the Project does not observe land use restrictions imposed by the POSLP.¹⁴ The Submitter attached information about a complaint (recurso de queja) it filed on July 5, 2006 with the TFJFA against AIA-2006. In the complaint, the Submitter states that AIA-2006 was issued in violation of a TFJFA decision ordering DGIRA to decide the Minera San Xavier application in accordance with the guidelines set forth in the court's decision, and directing DGIRA among other things to ensure compliance with the POSLP.¹⁵ The Submitter argues that by issuing AIA-2006, DGIRA violated LGEEPA Article 35 paragraph III(a), since it did not observe the restrictions imposed by the POSLP, which designates the Project site as a "restoration area" and prohibits industrial activities in that area. In this regard, the Submitter maintains that DGIRA, incorrectly, justified the Project authorization by means of an interpretation of the POSLP which, according to the Submitter, concluded that "the mining industry is not an industry but a mining activity". DGIRA reasoned that "industry" is characterized as a secondary activity, while "mining" is rather a primary activity, not restricted by a POSLP.16 In the documentation provided, the Submitter observes that Mexican law adopts the term "mining industry" in referring to activities that are today being carried out by Minera San Xavier in Cerro de San Pedro,¹⁷ and adds that DGIRA adopted a radical interpretation of the TFJFA's decision-on a matter that had already

^{12.} Ibid., p. 3.

^{13.} Revised Submission, p. 12, and Appendix 14: Complaint of 3 July 2006 filed by Pro San Luis Ecológico, A.C. with the TFJFA, p. 32.

^{14.} Revised Submission, p. 11.

^{15.} Revised Submission, Appendix 14: Complaint of 3 July 2006 filed by Pro San Luis Ecológico, A.C. with the TFJFA, p. 9.

^{16.} Revised Submission, p. 11 and Appendix 4: Doc. S.G.P.A./DGIRA.DG.0567/06 issued by DGIRA, granting environmental impact authorization to Minera San Xavier, S.A. de C.V., p. 51.

Revised Submission, Appendix 14: Complaint of 3 July 2006 filed by Pro San Luis Ecológico, A.C. with the TFJFA, pp. 28-31.

been decided by the court—in order to justify issuing AIA-2006 in support of the Project.¹⁸

B. Assertions concerning the alleged inconsistencies in the information submitted in the EIS and irreversible harm to the environment

14. According to the Submitter, there are inconsistencies between the quantities of explosives indicated in AIA-1999 and the volumes requested from the Ministry of National Defense (*Secretaría de la Defensa Nacional*).¹⁹ This data, the Submitter asserts, "serves as a basis for quantifying the magnitude of the environmental impacts," and thus changing the data alters the expected impacts in the EIS.²⁰ The Submitter further states that the siting of the Project's tailings pond violates provisions of the RIA that establish a minimum distance for such facilities.

15. As to the water demand stated by Minera San Xavier, the Submitter asserts that the water balance presented by AIA-2006 does not correspond to the data contained in the EIS²¹ and notes that, if the Project were to be carried out, harm would be caused to the San Luis Potosí valley aquifer by virtue of the horizontal flow of pollutants.²²

16. Regarding the Project's other alleged environmental impacts, the revised Submission refers to some included in the EIS, about which the authorities had knowledge when they issued the 1999 and 2006 environmental impact authorizations. The Submitter states that the Project will have an adverse impact on the aquifer, due to the water demands of the Project,²³ and affirms that the Restriction Order limited extraction of the water from the San Luis Potosí aquifer.²⁴ According to the Submitter, the EIS also indicates that the landscape of Cerro de San Pedro is to be modified within a period of eight years, since the Project will cause the disappearance of a kilometer of mountainous terrain and will leave a crater approximately 200 m deep and tailings piles 65 m high.²⁵ According to the Submission, waste piles of 79 and 117 million tons will be located at a

^{18.} Original Submission, p. 5.

^{19.} Authorization for the use of explosives is under the authority of the Ministry of National Defense (*Secretaría de la Defensa Nacional*), pursuant to the Federal Law of Firearms and Explosives (*Ley Federal de Armas de Fuego y Explosivos*).

^{20.} Ibid., p. 5, and revised Submission, p. 13.

^{21.} Original Submission, p. 13.

^{22.} Ibid., pp. 13-14.

^{23.} Revised Submission, pp. 4-5.

^{24.} Ibid., p. 5.

^{25.} Ibid., p. 4.

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distance of 9 km from the state capital in an area surrounded by communities.²⁶ The Submission cites Article 36 of the Regulation to the LGEEPA respecting Hazardous Waste ("RRP") which imposes restrictions on the siting of tailings ponds upstream of potentially affected human settlements or bodies of water within a radius of 25 km.²⁷ The Submitter moreover asserts that the EIS predicts adverse atmospheric impacts due to machinery emissions and dust caused by the movement of equipment and materials, which will affect air quality, particularly in the city of San Luis Potosí.²⁸ The Submitter states that the EIS further predicts adverse impact on species located on the Project site, some of which are listed in NOM-059.

17. The Submitter asserts that by virtue of the alleged irregular environmental impact assessment and the issuance of AIA-2006 in favor of the Project, the provisions of environmental law cited in the Submission were not enforced, nor were the so-called "precautionary" and "sustainable development" principles observed.²⁹

III. SUMMARY OF THE RESPONSE

18. In accordance with NAAEC Article 14(3), Mexico filed its response with the Secretariat on 25 September 2007.

19. In its response, Mexico notified the Secretariat of the existence of an administrative proceeding and a judicial proceeding before the Mexican courts and because of these requested that the Secretariat, pursuant to Article 14(3)(a) of the Agreement, proceed no further with its review of the Submission.³⁰ Mexico alleges that the matter has previously been the subject of an administrative proceeding³¹ and that domestic remedies are available to the Submitter in relation to the matter raised in the Submission.³²

20. As to the assertion concerning the illegality of AIA-2006, Mexico states that in July 2007, the TFJFA ruled that DGIRA had issued the authorization in conformity with the guidelines laid down by the

^{26.} *Ibid.*, pp. 2 and 4. The Submitter indicates that the sizes of the piles will be 79 and 117 million tons of leachable cyanide-containing tailings and non-leachable sulfur-containing tailings, respectively.

^{27.} Revised Submission, p. 3.

^{28.} Ibid., p. 5.

^{29.} Ibid., p. 2.

^{30.} Response, p. 1.

^{31.} Ibid., pp. 6-7.

^{32.} Ibid., pp. 7-12.

court³³, and thus that the authorization was "no longer subject to analysis at that judicial instance".³⁴ Mexico adds that "the Submitter's argument that the admissible decision was to overturn the environmental impact authorization is groundless and contrary to the resolution of the judiciary".³⁵ Likewise, Mexico notes that not only was the assertion of violations of law during the environmental analysis of the Project determined to be groundless by the Mexican courts, it will also be the subject of an upcoming judicial proceeding before the TFJFA, as the Submitter's complaint is scheduled to be heard again in a new proceeding.³⁶ Mexico adds that the Mexican courts stated that the AIA-2006 "expanded the technical and legal analysis to assess fundamental environmental aspects and to identify the relevance of the Project's environmental impacts" and this serves to confirm the legal validity of AIA-2006.³⁷

21. Mexico did not explicitly respond to assertions related to the Project's alleged violation of restrictions imposed by the POSLP. None-theless, since the Secretariat has treated information enclosed with a submission or a response, as part of the respective document, it also examined a copy of AIA-2006 enclosed in Mexico's Response, and which sets out DGIRA's reasoning for authorizing the Project in accordance with the POSLP.

22. AIA-2006 notes that while "the POSLP establishes guidelines and criteria for programming and planning and does not derive in land use limitations or restrictions in the Municipality of Cerro de San Pedro",³⁸ the POSLP "is mandatory for the public and private sectors"³⁹, and that DGIRA is required to "observe the environmental aspects of the POSLP".⁴⁰

23. Furthermore, the Appendix of the Response states that DGIRA based part of its analysis on the North American Industry Classification System ("NAICS"), the Mining Act (*Ley Minera*), and the POSLP. In this regard, AIA-2006 emphasized that *mining* activities as opposed to industrial activities: "are construed as consisting of the extractive phase,

^{33.} Ibid., p. 16.

Decision on complaint in file 170/00-05-02-9/634/01-PL-05-04-QC of 4 July 2007, issued by the plenum of the upper chamber (*Sala Superior*) of the TFJFA. *In*: Response, p. 13.

^{35.} Response, p. 15.

^{36.} Ibid., pp. 13 and 16.

^{37.} *Ibid.*, p. 16.

^{38.} Response, Exhibit 6: Doc. S.G.P.A./DGIRA.DG.0567/06 issued by DGIRA, granting environmental impact authorization to Minera San Xavier, S.A. de C.V., p. 51.

^{39.} Ibid., p. 55.

^{40.} Ibid.

not the processing phase,"⁴¹ this latter phase corresponding to industry; that mining activity is classified in an economic sector of primary activities, not linked to industry;⁴² and, that the POSLP distinguishes "mining sector activities" from those corresponding to industrial sectors.⁴³ AIA-2006 maintained that the Project's mining activities are not restricted by the POSLP, since the POSLP only corresponds to industrial activities.

24. As to the assertion that the principles of sustainable development and precaution were ignored by AIA-2006, Mexico responds that the former was observed during the environmental impact assessment while the latter, emanating from the Rio Declaration, is not binding because it has not been incorporated into the LGEEPA.⁴⁴

25. Concerning the assertion that the Project was authorized despite the existence of adverse environmental impacts documented in the EIS, Mexico responds that AIA-2006 required measures designed to reduce and control the environmental impacts,⁴⁵ in accordance with the LGEEPA.⁴⁶ Mexico further states that the environmental impact assessment procedure adequately examined the impacts arising from the use of explosives,⁴⁷ the operation of the tailings pond,⁴⁸ and those relating to protected species and groundwater use.⁴⁹ In short, Mexico's Response documents its efforts to enforce the environmental laws at issue.

IV. REASONING OF THE SECRETARIAT

A. Consideration of Mexico's Notification of Pending Proceedings under Article 14(3)

26. NAAEC Article 14(3)(a) provides:

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

^{41.} Ibid., p. 67.

^{42.} Ibid., p. 70.

^{43.} Ibid., p. 68.

^{44.} Response, pp. 22-23.

^{45.} Ibid., p. 18.

^{46.} Ibid., p. 17.

^{47.} Ibid., pp. 23-25.

^{48.} Ibid., pp. 25-28.

^{49.} Ibid., pp. 35-40.

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(a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; [...]⁵⁰

27. The Secretariat recalls NAAEC Article 45(3)(a) which defines judicial or administrative proceedings for the purposes of Article 14(3) as:

[A] domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order [...]⁵¹

28. As noted above, on 10 April 2006 DGIRA issued a new decision (AIA-2006) in which it authorized the Project. In AIA-2006 DGIRA found that, according to the results of the Project's environmental impact assessment, the Project did not contravene any environmental law provisions, and that it "[did] not contribute to one or more species being declared threatened or endangered".⁵² LGEEPA Article 35 requires denial of an environmental impact authorization when:

- a) there is contravention of provisions of this Law, its regulations, official Mexican standards and other applicable regulations;
- b) the works or activities may cause one or more species to be listed as threatened or endangered or when one of these categories of species is affected;
- c) false information related to the environmental impacts of the works or activities is provided by the applicants.⁵³

29. The Submitter filed a complaint with the TFJFA against this second authorization (the AIA-2006) because DGIRA, in allegedly acting outside the guidelines set by the court in issuing the environmental impact authorization for the Project, allegedly also failed to adhere strictly to the TFJFA ruling.⁵⁴

^{50.} NAAEC Article 14(3)(a).

^{51.} NAAEC Article 45(3)(a).

^{52.} Submission, Appendix 4, p. 118.

^{53.} LGEEPA Article 35.

Submission, Appendix 14: Complaint of 3 July 2006 filed by Pro San Luis Ecológico, A.C. with the TFJFA.

30. On 5 July 2007, the TFJFA dismissed the complaint, finding that the matter had to be reconsidered in a new hearing.⁵⁵ In view of this decision, the Submitter filed an *amparo* action (*recurso de amparo*)⁵⁶ before a multi-judge court.⁵⁷ As of the date of filing of the Response, according to Mexico, both the complaint, which is being heard in a new hearing, and the *amparo* action, were pending. Before issuing this Determination, the Secretariat requested Mexico to provide an update of the proceedings notified in its Response. On March 24, 2009 Mexico informed the Secretariat that:

Through a sentence issued on April 20, 2008, the Tenth District Administrative Court of the Federal District resolved the *amparo* in favor of Pro San Luís Ecológico, A.C.

Contesting the court sentence, on May 20, 2008, [...], representing the third party "Minera San Xavier, S.A. de C.V.," filed a "review recourse" which was transmitted to the Tenth Collegiate Administrative Tribunal of the First Circuit and was recorded under the file number 215/2008.

On January 2, 2009 the Tenth Collegiate Administrative Tribunal of the First Circuit, declared it had no authority to review the issue and turned to the Ninth Collegiate Administrative Tribunal of the First Circuit, since the latter has already issued resolutions in connection with this matter.⁵⁸

31. Mexico maintains that the matter raised in the Submission is the subject of current pending proceedings, and therefore requests that the Secretariat proceed no further in accordance with NAAEC Article 14(3)(a).

32. Before proceeding to address Mexico's NAAEC 14(3)(a) Notification, it is important to note that there is no binding precedent that the Secretariat must follow arising from its previous Determinations.⁵⁹ Each Submission presents the Secretariat with a new set of considerations, which must be analyzed in accordance with the NAAEC and the Guidelines. The Secretariat reiterates that it is not a court, the Submissions on

^{55.} Response, Exhibit 1: Decision on complaint in file 170/00-05-02-9/634/01-PL-05-04-QC of 4 July 2007, issued by the plenum of the upper chamber (*Sala Superior*) of the TFJFA.

^{56.} The *amparo* is a constitutional action under articles 103 and 107 of the Constitution that—among other things—can be brought by individuals challenging laws or acts that allegedly violate constitutional guarantees. The Mexican Amparo Law (*Ley de Amparo*) implements this.

^{57.} Indirect amparo action of 1 August 2007 filed by Pro San Luis Ecológico, A.C.

^{58.} Update provided by Mexico on the proceedings related to Submission SEM-07-001 (*Minera San Xavier*), received by the Secretariat on 24 March, 2009 through e-mail.

^{59.} See SEM-97-001 (BC Hydro) Notification pursuant to Article 15(1) (27 April 1998), p.8.

Enforcement Matters ("SEM") process is not adversarial, and that the primary function of the Secretariat with regard to Articles 14 and 15 is to neutrally and efficiently facilitate and administer the process provided for in NAAEC and the Guidelines.

33. The above notwithstanding, the Secretariat must attempt to ensure a modicum of predictability and thus fairness in its practice with regard to Articles 14 and 15, for example, by taking into account lessons learned from previous Determinations and Factual Records⁶⁰. The Secretariat, in analyzing whether notification of a pending proceeding under NAAEC Article 14(3)(a) would require the Secretariat to proceed no further, has, in this and previous cases, considered factors such as:

- whether the proceeding in question qualifies as a judicial or administrative proceeding in accordance with Article 45(3)(a);
- whether it is being pursued by the Party in a timely fashion and in accordance with its law, and is also related to the same matter addressed in the submission; and,
- whether the proceeding invoked by the Party in its Response appears to have the potential to resolve the matter(s) raised in the submission.⁶¹

34. The Secretariat has also noted that key factors in deciding to proceed no further when proceedings fall within the scope of Article 45(3)(a) are the risks of duplication of efforts and interference with pending litigation.⁶²

^{60.} See regarding the Secretariat's practice with regard to a Party's Article 14(3) notification, for example, Council Resolution 08-03 (23 June 2008), recognizing the Secretariat's determination that certain matters should be excluded from the Factual Record regarding Submission SEM-04-005 (*Coal-Fired Power Plants*) due to the existence of pending proceedings pursuant to Article 14(3)(a), available at:<http://www.cec. org/files/pdf/sem/04-5-RES_en.pdf>, last visited 22 June 2009.

^{61.} The Secretariat recalls that Article 14(3)(a) notifications have always been thoroughly considered by the Secretariat, and "[i]n view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a Submission, on the mere assertion of a Party to that effect." SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (13 June 2001). *Cfr.* SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*), Article 15(1) Notification (18 May 2005); SEM-04-005 (*Coal-fired Power Plants*), Article 15(1) Notification (5 December 2005); SEM-05-002 (*Coronado Islands*), Article 15(1) Notification (18 January 2007).

^{62.} The Secretariat has observed that "[c]ivil litigation is a complex undertaking governed by an immensely refined body of rules, procedures and practices," and that the Factual Record process "may unwittingly intrude on one or more of the litigant's strategic considerations." There is thus a risk that proceeding in such circumstances

35. The Secretariat considers that the threshold of whether judicial or administrative proceedings are pending should be construed narrowly to give full effect to the object and purpose of the NAAEC,⁶³ and more particularly, to Article 14(3). Only those proceedings notified pursuant to Article 14(3) and categorized in Article 45(3)(a) may preclude the Secretariat from proceeding further.

The proceedings notified by Mexico in this matter were initiated by 36. the Submitter and not Mexico. They therefore, in part, fall outside of the definition of pending proceedings in Article 45(3)(a). The proceedings notified by Mexico in this matter are however being pursued in accordance with Mexican law, and can be characterized as administrative proceedings. The Secretariat must in any event, take seriously Mexico's notification of pending proceedings which deal with the same material subject matter as the Submission, even though these do not fit the definition in NAAEC Article 45(3)(a). The domestic recourse being pursued by the Submitter seeks the nullification of AIA-2006, which is at the heart of the Submission. In such a circumstance, there is a possibility that preparation of a Factual Record could-inadvertently-interfere with the pending proceedings initiated by the Submitter. Guideline 7.5 indeed admonishes the Secretariat to consider the possibility that proceeding (beyond Article 14(1)) in a situation where a submitter is also pursuing private remedies, could risk duplicating or interfering with such proceedings. Here, although the Submission has moved beyond Article 14(1), similar concerns exist.

37. However, only out of precaution and by exception have matters outside of Article 45(3)(a), such as criminal proceedings, been considered as requiring the Secretariat to proceed no further, and then only as long as they remain "active and ongoing".⁶⁴

38. In considering Mexico's Notification of pending proceedings (as requiring the Secretariat to proceed no further), the Secretariat must now consider whether factors such as potential interference and duplication of efforts are factors with SEM-07-001. The Secretariat is also informed by its previous practice in analogous circumstances.

could result in inadvertent interference with ongoing proceedings. See SEM-00-004 (*BC Logging*) Notification pursuant to Article 15(1) (27 July 2001); and SEM-96-003 (*Oldman River I*), Determination pursuant to Article 15(1) (2 April 1997).

^{63. &}quot;The Secretariat is given direction in various parts of the Guidelines and NAAEC to interpret and apply the provisions of Articles 14 and 15 of NAAEC in light of NAAEC's object and purpose" SEM-07-005 (*Drilling Waste in Cunduacán*) Determination pursuant to article 14(3) (8 April 2009) pp. 7-8.

^{64.} SEM-00-004 (BC Logging), Notification pursuant to article 15(1) (27 July 2001) p. 17.

39. A brief analysis of the concept of *lis pendens* may be useful in elucidating the idea of interference with and duplication of efforts in pending proceedings.⁶⁵

1. Interference and the doctrine of lis pendens

40. Under public international law *lis pendens* may arise when "proceedings involving the same cause of action and between the same parties are brought in the courts of different States [...]".⁶⁶ The Court of Justice of the European Communities has ruled that:

Lis Pendens within the meaning of that article^[67] arises where a party brings an action before a court in a contracting state for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another contracting state.⁶⁸

- 41. *Lis pendens* can be categorized as:
 - a. conflicts between courts and tribunals of general personal and subject-matter jurisdiction;
 - b. conflicts between courts and tribunals of general personal and subject matter jurisdiction and universal courts and tribunals of specialized competence;
 - c. conflicts between courts and tribunals of general personal and subject-matter jurisdiction and regional courts and tribunals with unlimited jurisdiction *ratione materiæ*;

^{65.} Where appropriate, the Secretariat may consider comparable practice in public international law in order to inform its application and interpretation of Articles 14 and 15. See the Secretariat's determination on Submission SEM-007-05 (*Drilling Waste in Cunduacán*), at paras. 23 and 24, available at: http://www.cec.org/files/pdf/sem/07-5-DET14_3_en.pdf>, last visited on 22 June 2009.

^{66.} Article 27 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters. Official Journal of the European Union, 21 December 2007.

^{67.} Article 21 of the Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters: "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. [...] Where the jurisdiction of the court first seised is established. [...] Where the jurisdiction of the court first seised is established. [...] Where the jurisdiction in favour of that court."

^{68.} *Gubisch Maschinenfabrik KG* v. *Giulio Palumbo*. Case Law No.C-144/86. Court of Justice of the European Communities.

 conflicts between courts and tribunals of general personal and subject-matter jurisdiction and regional courts and tribunals of specialized competence.⁶⁹

42. Concerns about parallel and conflicting outcomes have been expressed by the former President of the International Court of Justice:

[T]he dangers for international law, resulting from the increasing number of judicial institutions in the modern world, should be stressed. [...] [I]t would be most regrettable if, on specific problems, different courts were to take divergent positions.⁷⁰

43. The Arbitral Tribunal⁷¹ in the Ireland-UK *MOX Plant Case* considered the possibility of parallel and conflicting outcomes between itself and the European Court of Justice ("ECJ") on certain matters before both it and the ECJ, and decided that:

"further proceedings in the case shall remain suspended until the European Court of Justice has given judgment or the Tribunal decides otherwise."⁷²

44. Although potential interference with ongoing proceedings is something the Secretariat must be wary of when it issues Determinations, similarly to courts and tribunals when they are seized of matters before other courts and tribunals (i.e. *lis pendens* maters), the Secretariat is, as stated above, not a court or tribunal, and does not issue any judgments or take any actions which have legal effect. Secretariat Determinations are not binding on the Parties or submitters, and Factual Records are not rulings or judicial opinions on an asserted failure of effective enforcement of environmental law. Therefore, it is not evident how the Secretariat's proceeding with review of a matter under Article 14, or recommending a Factual Record pursuant to Article 15 could actually "interfere" with ongoing domestic proceedings in the same way that conflicting court judgments could.

The Competing Jurisdictions of International Courts and Tribunals. Ricardo Letelier, Reseña de libro. Estudios Internacionales – Vol. Nbr. 38-150, July 2005.

Gilbert Guillaume, *The Future of International Judicial Institutions*, ICLQ, Vol. 44, 1995, 848, pp. 861-862. In: Francisco Ortega Vicuña, *Lis Pendens Arbitralis*. Available at: http://www.arbitration-icca.org/media/0/12224290630120/lis_pendens_arbitralis.pdf, last visited 24 June 2009.

^{71.} Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention of the Law of the Sea for the Dispute Concerning the MOX Plant, International Movement of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea.

Ireland-UK, *The MOX Plant Case*, Tribunal Order No. 4 (14 November 2003), available at: http://www.pca-cpa.org/showpage.asp?pag_id=1148, last visited 22 June 2009.

45. The above considerations notwithstanding, the Secretariat has historically undertaken to avoid actions which could cause inadvertent non-judicial interference. The Secretariat must take into account the purpose of Guideline 7.5(a) and exercise caution in proceeding where the submitter is pursuing private remedies regarding matters raised in the submission.⁷³

2. Duplication of efforts

46. Another key question in the context of whether to proceed no further when pending proceedings exist is whether the development of a Factual Record in such circumstances might cause a duplication of administrative or judicial efforts. It is clear that if a Party would be actively seeking the kind of voluntary compliance, remedies, and administrative orders listed in Article 45(3)(a), or the examples of enforcement provided in Article 5(1), and, in developing a factual record, the Secretariat were to require the Party to undertake actions⁷⁴ with regard to the same matters raised in a submission, duplication of enforcement efforts might arise: the Secretariat could in such a case also unwittingly lead to commitment of additional resources or diversion of existing resources.

47. In the case of Minera San Xavier, the company in question is defending the legality of an administrative decision before the Mexican courts. Even if the administrative authorities that issued the decision were involved in this process as defendants, there would be little possibility to duplicate efforts because *the Party* is not "seeking" compliance with environmental law, *viz*. Article 45(3)(a). As mentioned above, the pending proceedings notified by Mexico do not fall within the definition of Article 45(3)(a), and the Secretariat as a consequence cannot, as Mexico requests, determine to proceed no further with SEM-07-001 pursuant to Article 14(3) as a formal procedural matter.

^{73.} It should be noted that the Secretariat, in reviewing its practice with regard to ongoing judicial or administrative proceedings, has also found no evidence that the recommendation or actual development of a Factual Record has ever obstructed or interfered with an ongoing judicial or administrative proceeding, even in situations when the concerned Party notified the Secretariat of the existence of such proceedings in its Response and the Secretariat nonetheless felt compelled to recommend a Factual Record. Neither have any of the Parties ever stated that development of a Factual Record where pending proceedings have been notified, caused such interference.

^{74.} *Cfr.* NAAEC Art. 21(1)(a) "On request of the Council or the Secretariat, each Party shall, in accordance with its law, provide such information as the Council or the Secretariat may require, including:

⁽a) promptly making available any information in its possession required for the preparation of a report or factual record, including compliance and enforcement data [...]"

48. The Submitter is though pursuing private remedies before Mexican courts regarding matters identical to those raised in the Submission. The necessary information for development of a Factual Record is confidential, i.e. not "publicly available" in accordance with Article 15(4)(a), and is before a Mexican court⁷⁵ considering action on the same assertions as those in the Submission.

49. The Secretariat bases its reasoning for this Determination, not on NAAEC Article 14(3), which for the grounds stated above, does not apply to the pending proceedings in this case. Rather, the Secretariat is exercising its discretionary powers under NAAEC Article 15(1) in having considered both the Submission and Response of the Party. The Secretariat concludes that a preponderance of the specific assertions raised by the Submitter do not warrant development of a Factual Record. In doing so, the Secretariat also considered certain other assertions that might have warranted development of a Factual Record in other circumstances. It is important to note in that connection, that the motivations for this Determination apply only to the facts before the Secretariat in SEM-07-001, and are not binding on future Determinations.

B. A Factual Record is not warranted with respect to the assertions on the EIS category, NOM-059, water extraction, use of explosives and location of the tailings pond

Listed Species under NOM-59

50. The Submitter asserts that AIA-2006 manipulates information on flora and fauna species to conclude that there are no endangered or protected species under NOM-059 in the areas selected for the Project location.⁷⁶ NOM-059 lists species falling under several protection categories and specifies their respective protection requirements.⁷⁷ Among these provisions, NOM-059 provides that species "may be extracted from their natural environment" for restoration purposes, provided that reporting and prior authorization for taking listed species is obtained.⁷⁸ Mexico responded that AIA-2006 identified five cactacean species with protection status under NOM-059⁷⁹ and that it conditioned the authori-

NAAEC Article 15(4)(a) notes that the Secretariat may consider relevant information that is "publicly available".

^{76.} Revised Submission, p. 12, and Appendix 14: Complaint of 3 July 2006 filed by Pro San Luis Ecológico, A.C. with the TFJFA, p. 32.

^{77.} Guideline 1 NOM-059-ECOL-1994.

^{78.} Guideline 6.2 NOM-059-ECOL-1994.

^{79.} Response, p. 32.

zation on implementation of programs in order to rescue and relocate listed flora and fauna.⁸⁰ Mexico also reported that the Project proponent operates a plant nursery and a botanical garden where a number of species (included those listed in NOM-059) are being protected.⁸¹ Mexico maintains that it observed a policy aimed at preventing environmental impacts in issuing AIA-2006 and that conditions imposed upon the Project were consistent with the objectives in Guideline 6.2 of NOM-059, which is "ensuring 96% survival of individuals".⁸²

51. The Secretariat considers that a Factual Record is not warranted with regard to assertions as to species under NOM-59, and conditions included in AIA-2006 also appear to satisfy one of the Submitter's central concerns: identification and conservation of listed species under NOM-059.

Water Balance

52. The Submitter also asserts that the water balance of the Project was not established in AIA-2006. LGEEPA Article 30 requires that an environmental impact assessment shall contain a description of possible effects considering the elements that are present in particular ecosystems. The Submitter contends that the Project violated the Restriction Order (*Decreto de Veda*) that restricted additional water extraction from the Valle de San Luis aquifer. The Restriction Order restricts issuing water concessions and limits availability to existing permits. Mexico contends that the Project will not modify the existing water balance in the Valle de San Luis aquifer, because water will be obtained through concessions previously granted to third parties, and assigned by contract to Minera San Xavier.⁸³ Mexico concludes that there will be no additional water extraction from the Valle de San Luis aquifer to the water extraction processes in the valley.⁸⁴

53. The Secretariat finds no open questions that warrant the development of a Factual Record with regard to the alleged failure to provide a water balance and the restrictions to water extraction in the Valle de San Luis aquifer. Mexico's Response leaves no questions open as to the assertions regarding water balance.

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^{80.} Response, pp. 29-30.

^{81.} Response, p. 31.

^{82.} Response, p. 35.

^{83.} Response, p. 36.

^{84.} Response, p. 36.

The EIS Category

The Submitter maintains that during the authorization process of 54. AIA-2006, DGIRA required additional information from the Project developer to correct defects in AIA-1999 and, more specifically, to conform the EIS to the applicable category for the size of the Project. Article 9 of the RIA - in force at that moment - classified an EIS into three categories: general, intermediate and specific, and states that intermediate and specific EIS are filed when project characteristics require more precise information. The Submitter contends that at the time of the environmental impact authorization application, the nature of the project merited a Specific EIS and that instead, Minera San Xavier filed a General EIS. The information provided in the annexes to the Response, reflects that during the process to authorize AIA-2006, Mexico requested and obtained additional information from the Project proponent, administrative units within Semarnat and from the National Commission for the Knowledge and Use of Biodiversity (Comisión Nacional para el Conocimiento y Uso de la Biodiversidad—"Conabio")85 in order to obtain information for the assessment of the environmental impacts of the Project and to improve the quality and quantity of the information originally included in the EIS.

55. While there could be a legal question with regard to curing an EIS by DGIRA when such a process is not explicitly provided for, the Secretariat considers that there are no relevant facts beyond those which have been brought to light by the Submission and Response, and there are no central open questions in DGIRA's information request process which would warrant development of a Factual Record.

Volume of Explosives

56. The Submitter asserts that there are inconsistencies in the volumes of explosives authorized by the Ministry of Defense and those authorized by DGIRA. They contend that the volume of explosives is an indication of the magnitude of environmental impacts caused by the Project. Mexico reports that the Ministry of Defense granted permit for 5,000 kg of explosives (from October 2 to December 31, 2004) and not 25,000 kg of explosives *per day*, as asserted by the Submitter. Mexico states that even if Minera San Xavier would have requested more explosives from the Ministry of Defense than those eventually authorized by DGIRA, the company is only authorized to use explosives in the amounts provided

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Response, Exhibit 6: Doc. S.G.P.A./DGIRA.DG.0567/06 issued by DGIRA, granting environmental impact authorization to Minera San Xavier, S.A. de C.V., pp. 8-10.

by environmental authorities and this set of circumstances cannot be construed as a failure to effectively enforce environmental laws.

57. The Secretariat considers that the Submitter's assertion regarding alleged inconsistencies among authorized volumes of explosives has been adequately addressed by Mexico in its Response and determines it can proceed no further with this particular assertion.

Location of the Project

58. The Submitter asserts that the Project is located at approximately 8 km from the city of San Luis Potosí, violating RRP Article 36 that limits the location of tailing ponds. The second paragraph of RRP Article 36 in force in 1999 provides that:

Tailing ponds may be located where tailings are generated, except where upstream to communities and receiving bodies [i.e. aquifer] that may be affected are located at a distance of 25 km.⁸⁶

59. Mexico responds that the Project is actually located at 20 km from the city of San Luis Potosí⁸⁷ and contends that AIA-2006 included a detailed risk assessment that defined risk mitigation actions incorporated in the environmental impact authorization. Thus, even if the tailings pond is not located at the minimal distance required by RRP, the risk assessment found no risk to the nearby communities. Mexico adds that current development of standards applicable to tailings hazardousness.⁸⁸ Finally, Mexico describes conditions imposed in AIA-2006 which included a monitoring and contingency program for cyanide and heavy metals management.⁸⁹

60. The Secretariat considers that the Response addresses the Submitter's concerns relative to the location and hazardousness of the Project's tailing ponds and finds no open matters which warrant the development of a Factual Record for this particular assertion.

C. The POSLP and impacts to soil

61. In accordance with NAAEC Article 15(1), the Secretariat considers there are open questions regarding the POSLP and impacts to soil and

^{86.} RRP Article 36, second paragraph.

^{87.} Response, p. 25.

^{88.} Mexico refers to NOM-141-SEMARNAT-2003 published in the Official Journal of the Federation on 13 September 2004. Response, p. 27.

^{89.} Response, p. 27.

environmental degradation allegedly occurring as a result of the Project's authorization.

62. The Secretariat notes that the assertions made in the Submission are coincident with those made in the complaint (*recurso de queja*) filed by the Submitter on July 5, 2006, particularly, those related to alleged DGIRA non-compliance with several legal provisions, including principles of Mexican law when evaluating the environmental impacts to Cerro de San Pedro and with the POSLP. Information with respect to Submitter assertions on the environmental impact authorization of the Minera San Xavier project, is *also* under consideration by the Mexican courts, according to Mexico's Response.

With respect to the Submitter's assertion that the Project will cause 63. irreparable harm to the Cerro de San Pedro environment, the Secretariat considers that AIA-2006 recognizes that the current environmental degradation of Cerro de San Pedro is a factor for authorizing the Project,⁹⁰ and this leaves open questions not fully addressed by Mexico's Response. The Secretariat notes that DGIRA analyzes the environmental quality of a natural protected area located in the surroundings of the Project site to support its views on the current degradation level at Cerro de San Pedro. The Secretariat considers that ad perpetuam soil impact in the Project site and the conclusion under the AIA-2006 that the Project improves the environmental conditions of Cerro de San Pedro, might, in other circumstances, merit inclusion in a Factual Record. Both of these matters also raise questions regarding how precautionary and sustainable development principles were observed when issuing AIA-2006. In this regard, even though Mexico contends that LGEEPA has not incorporated the precautionary principle, reference made to it by DGIRA in AIA-2006 as mandatory⁹¹ clearly suggests some applicability to the environmental impact assessment process.

64. The Secretariat notes that there are open questions on how an open-mining project, considering long-term soil impacts, affects environmental restoration efforts. However, such matters are currently before Mexican courts, and information likely to be crucial for developing a Factual Record, even if one were warranted, is not publicly available.

^{90.} Response, Exhibit 6: Doc. S.G.P.A./DGIRA.DG.0567/06 issued by DGIRA, granting environmental impact authorization to Minera San Xavier, S.A. de C.V., pp. 105-108.

^{91.} DGIRA "has complied with the precautionary principle, which the authority responsible of conducting the environmental impact assessment shall invariably observe" Response, Exhibit 6: Doc. S.G.P.A./DGIRA.DG.0567/06 issued by DGIRA, granting environmental impact authorization to Minera San Xavier, S.A. de C.V., p. 100.

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65. The Secretariat also considered the Submitter's assertion of an alleged violation committed by DGIRA in authorizing the Project without having observed the restrictions imposed by the POSLP. A Factual Record, were one to be warranted, could include information concerning: the use of the NAICS in the assessment of the Project's processing components;⁹² DGIRA's issuance of reference guides referring to industrial components of the mining projects;⁹³ the use of the terms *extractive industry* and *mining industry* in documents prepared by DGIRA for authorization of the Project;⁹⁴ and the conclusion by DGIRA that the implementation of environmental programs for the Project will meet the purposes of the government of San Luis Potosí stated in the POSLP.⁹⁵

66. The Submitter asserts that DGIRA violated a court ruling which imposed measures requiring the issuance of a new environmental impact permit, considering, among other factors, the POSLP. Analysis included in AIA-2006 shows that: DGIRA conducted a review of the legal status and enforceability of the POSLP; determined that the POSLP is a binding administrative act; and concluded that the POSLP did not impose limitations on the feasibility of the Project in Cerro de San Pedro. The Submitter questions DGIRA's rationale when considering the POSLP's restrictions on mining activities in both SEM-07-001 and in a complaint filed before TFJFA.

67. The matters in the preceding paragraph are questions about the interpretation of a court ruling under Mexican law, and those matters are not issues for the CEC Secretariat. What the CEC Secretariat can do in a Factual Record is to examine assertions regarding alleged failures to effectively enforce environmental law in accordance with NAAEC and the Guidelines, and consider facts related to those assertions. The Submitter's legal assertions regarding the POSLP apparently concern

^{92.} For example, in the heap leaching, cyanidation, chemical precipitation, rotary furnace smelting, and liquid concentrate retrieval processes. Response, Exhibit 6: Doc. S.G.P.A./DGIRA.DG.0567/06 issued by DGIRA, granting environmental impact authorization to Minera San Xavier, S.A. de C.V., pp. 15-29.

Guía para elaborar la manifestación de impacto ambiental modalidad regional de proyectos mineros, Semarnat, Dirección General de Impacto y Riesgo Ambiental, online at <http://www.semarnat.gob.mx/tramitesyservicios/informaciondetramites/Im pacto%20ambiental/GUIAS/REGIONALES/GUIAS/RMIA(minero).doc>(viewed 13 February 2009).

M. Logsdon, K. Hagelstein, and T. Mudder, *The Management of Cyanide in Gold Extrac*tion, International Council on Metals and the Environment, online at <http://www.icmm.com/page/1616/the-management-of-cyanide-in-gold-extractions/ (viewed 13 February 2009).

^{95.} Response, Exhibit 6: Doc. S.G.P.A./DGIRA.DG.0567/06 issued by DGIRA, granting environmental impact authorization to Minera San Xavier, S.A. de C.V., p. 73.

the dissatisfaction of the Submitter with how an administrative body interprets a court mandate, which is an issue beyond the scope of a Factual Record.

68. Development of a Factual Record does not entail a legal restatement or interpretation, application, or revision of how domestic courts and/or a branch of government interpret domestic environmental laws. The latter are the activities of Mexican State branches including the judiciary. The Submitter is in essence asking the Secretariat for a legal restatement, interpretation, and application of AIA-2006, which is something the Secretariat has no authority to do.

69. In light of the foregoing, the Secretariat determines that the assertions regarding the POSLP do not warrant the development of a Factual Record.

D. Conclusion

70. Finally, the Secretariat notes that, in accordance with the NAAEC and the Guidelines, factors motivating this Determination include: 1) the existence of ongoing proceedings pursued by the Submitter and regarding the same matters raised in the Submission; 2) regarding the latter, a consequential lack of publicly available information and a concomitant concern about the efficient use of resources for development of a Factual Record;⁹⁶ 3) a paucity of central open questions warranting development of a Factual Record; and, 4) the possibility of inadvertent duplication of efforts in a situation where the assertions in the Submission before the Secretariat are simultaneously before the concerned Party's courts.⁹⁷

V. DETERMINATION

71. Without opining on any legitimacy the assertions expressed by the Submitter may have with regard to the Project, and on the basis of the reasons set out above, the Secretariat determines in accordance with Article 15(1) of the NAAEC, that a Factual Record is not warranted for

^{96.} The existence of private remedies for a number of the Submitter's assertions which have not yet been pursued has also been considered by the Secretariat. *Supra* note 32.

^{97.} The accessibility of environmental information has been a factor in developing a Factual Record and the types of information that a Factual Record could include. *See*, for example, SEM-04-007 (*Quebec Autos*), Notification pursuant to Article 15(1) (15 May 2005), p. 14; SEM-04-005 (*Coal-Fired Power Plants*), Notification pursuant to Article 15(1) (5 December 2005), p. 2; and SEM-03-003 (*Lake Chapala II*), Notification pursuant to Article 15(1) (May 18 2005), p. 19.

submission SEM-07-001 (*Minera San Xavier*). In accordance with section 9.6 of the Guidelines, the Submitter and the Council of the Commission for Environmental Cooperation are hereby notified that the process relating to this Submission is terminated.

Secretariat of the Commission for Environmental Cooperation

per: Dane Ratliff, Director, Submissions on Enforcement Matters Unit

and

Paolo Solano, Legal Officer

ccp: Enrique Lendo, Semarnat David McGovern, Environment Canada Scott Fulton, US-EPA Submitter

SEM-07-005

(Drilling Waste in Cunduacán)

SUBMITTERS:	ASOCIACIÓN ECOLÓGICA SANTO TOMAS, ET AL.
PARTY:	MEXICO
DATE:	26 July 2007
SUMMARY:	The Submitters assert that Mexico is failing to effectively enforce its environmental laws with respect to a sludge treatment and disposal project being carried out by <i>Consorcio de Arquitectura y Ecología</i> (Caresa) in the municipality of Cunduacán, Tabasco.

SECRETARIAT DETERMINATION:

ART. 14(3)Dismissal following Party's response.(8 April 2009)

Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation

Submitters:	Comité de Derechos Humanos de Tabasco Asociación Ecológica Santo Tomás
Represented by:	Efraín Rodríguez León José Manuel Arias Rodríguez
Party:	United Mexican States
Revised submission:	3 October 2007
Original submission:	26 July 2007
Date of this determination:	8 April 2009
Submission no.:	SEM-07-005 (Drilling Waste in Cunduacán)

I. EXECUTIVE SUMMARY

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement") set out a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with the NAAEC and the "Guidelines for Submissions and Enforcement Matters under Articles 14 and 15 of the North American 70

Agreement on Environmental Cooperation" (the "Guidelines"), the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1); otherwise, it then terminates the submission. Pursuant to Article 14(3), the Party may notify the Secretariat of the existence of pending judicial or administrative proceedings in which case, the Secretariat shall proceed no further.

2. On 26 July 2007, Comité de Derechos Humanos de Tabasco and Asociación Ecológica Santo Tomás (the "Submitters") filed a submission (the "original Submission") with the Secretariat, asserting that Mexico was failing to effectively enforce its environmental law in connection with a drilling sludge treatment and disposal project being developed by the company Consorcio de Arquitectura y Ecología ("Caresa") in the municipality of Cunduacán, Tabasco. On 12 September 2007, the Secretariat determined that the Submission did not conform to certain criteria set out in Article 14(1) including providing information on the environmental law in question, and so informed the Submission (the "revised Submission") including information on the environmental law in question and information supporting their assertions.

3. On 13 December 2007, the Secretariat found that the submission met the requirements of NAAEC Article 14(1) and requested a response from Mexico pursuant to Article 14(2). On 12 May 2008, Mexico filed its Response (the "Response"), informing the Secretariat that it contained certain information confidential pursuant to NAAEC Article 39. On 15 May 2008, Mexico filed a summary for public disclosure of confidential information contained in the Response.

4. After analyzing the submission in light of the Response, the Secretariat terminates submission SEM-07-005 pursuant to Article 14(3)(a), due to the existence of pending proceedings. In accordance with Section 9.4 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the "Guidelines"), the Secretariat explains below its reasons for terminating the process with respect to this Submission.

II. SUMMARY OF THE SUBMISSION

5. The Submitters assert that Mexico is failing to effectively enforce Articles 28 paragraph IV, 35 *Bis* 1, 170, and 170 *Bis* of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio*

SEM-07-005

Ecológico y la Protección al Ambiente—"LGEEPA") and Article 5(M) paragraph I of the Regulation to the LGEEPA respecting Environmental Impact Assessment (*Reglamento de la LGEEPA en Materia de Evaluación del Impacto Ambiental*—"REIA"). The Submitters assert that the Government of Mexico is failing to effectively enforce the latter environmental laws with regard to a project for construction and operation of a treatment plant for sludge, drill cuttings, wastewater, and industrial waste (the "Project") being developed by Caresa.¹ The Submitters assert that the Project in question is being carried out at a distance of 25 meters from human settlements in Cunduacán, Tabasco, without the required safety measures ordered in the environmental impact authorization having been put in place, thereby causing "health problems" to residents in the locality.²

6. According to the Submitters, Caresa initiated the Project on 6 September 2004, without holding the proper environmental impact authorization, and in order to obtain said authorization, Caresa allegedly provided false information concerning the commencement of activities in an Environmental Impact Statement (EIS), which was not submitted for review until December 2004.³

7. The Submitters further state that in April 2005 the Office of the Federal Attorney for Environmental Protection (Procuraduría Federal de Protección al Ambiente—"Profepa") informed the Environmental Impact and Risk Branch (Dirección General de Impacto y Riesgo Ambiental-"DGIRA") responsible for reviewing and approving the EIS, that for backfilling at the site Caresa used drill cuttings with total petroleum hydrocarbon concentrations in excess of permitted levels.⁴ On 3 June 2005, DGIRA issued an environmental impact authorization, in which execution of the Project is made conditional upon cleanup work at the site consisting of removal, treatment and final disposal of sludge used for backfilling of the site in question.⁵ According to the Submitters, despite this condition of prior site restoration imposed by DGIRA, the branch did not set a deadline for compliance, nor did it consider other measures for environmental and human health protection.⁶ The Submitters assert that in August 2005 the matter was communicated in writing

^{1.} Revised Submission, p. 10.

^{2.} Original Submission, pp. 2, 3, 6.

^{3.} Ibid., pp. 3-4.

^{4.} Appendix to original Submission: Doc. EOO.-DGIFC.-0321/2005 of 26 April 2005, issued by the Industrial Inspection Branch (*Dirección General de Inspección Industrial*) of Profepa.

^{5.} Original Submission, p. 6.

^{6.} Ibid.

to the Profepa office in the state of Tabasco, requesting enforcement of the conditions of the environmental impact authorization, but allegedly the Submitters did not receive a satisfactory response.⁷ They moreover indicate that they were not properly notified with regard to fines and safety measures applied by Profepa.⁸

III. SUMMARY OF MEXICO'S RESPONSE

A. Existence of pending proceedings

8. In its Response, Mexico notifies the Secretariat of the existence of an administrative proceeding before Profepa, an administrative action (*procedimiento contencioso administrativo*) in Federal Tax and Administrative Court (*Tribunal Federal de Justicia Fiscal y Administrativa*), and a criminal proceeding before the Office of the Attorney General of the Republic (*Procuraduría General de la República*—"PGR"),⁹ all of which according to Mexico are directly related to the matter raised in the Submission. For this reason, Mexico requests that, pursuant to Article 14(3)(a) of the Agreement, the Secretariat proceed no further in processing the Submission.

B. Inadmissibility of the Submission

9. Mexico asserts that submission SEM-07-005 was inadmissible because the Submission does not clearly identify the submitting person and organization,¹⁰ and therefore failed the test of NAAEC Article 14(1)(b) and Section 2.2 of the Guidelines. Mexico further asserts that since no documents were provided for proof of the domicile indicated in the Submission,¹¹ the Submission did not meet the requirements of NAAEC Article 14(1)(f). Finally, Mexico challenges the Secretariat's decision to allow the Submission, arguing that the Submission did not provide sufficient information to support the Submitters' assertions, as required by NAAEC Article 14(1)(c). Specifically, Mexico asserts that the Submission did not contain a succinct narrative of the facts on which the allegation of Mexico's failure to enforce is based, and included no documentary evidence to support its contentions.¹²

^{7.} Ibid., pp. 6-7.

^{8.} *Ibid.*, p. 9.

^{9.} Response, p. 1.

^{10.} Ibid., p. 15.

^{11.} Ibid., pp. 19-20.

^{12.} Ibid., pp. 21, 40-42.

C. Alleged failures to effectively enforce the environmental law

Mexico indicates that it investigated whether, at the site in ques-10. tion, works or activities were being carried out that could have caused serious ecological harm, and it verified whether Caresa held the required authorizations, licenses, and permits, and whether the company was in compliance with the safety measures applied in the environmental impact authorization. Mexico instituted an administrative proceeding that included two fines, one for violations under environmental impact law and one for non-compliance with the measures ordered by Profepa;¹³ it verified compliance with corrective measures ensuing from an order issued as part of the administrative proceeding, and it requested that the tax authority undertake an administrative proceeding for collection of the second fine, filing a report of criminal conduct with the PGR against officials of Caresa for facts that may constitute an offence defined in Article 420 Quater, paragraph V of the Federal Criminal Code (Código Penal Federal—"CPF").14

11. Concerning the Submitters' allegation of failure to address and process two citizen complaints, Mexico states that both were duly processed and the Submitters were kept notified of their status.¹⁵ As to the assertion that the Project was environmentally hazardous, Mexico contends that hazardous materials and wastes were considered in the EIS and that the processes and technologies associated with the Project were duly analyzed by DGIRA.¹⁶ Mexico adds that through the issuance of the environmental impact authorization, the Project's execution was made conditional upon compaction and impermeabilization of the soil as well as placement of clay and a high-density polyethylene geomembrane in each of the waste treatment ponds in order to prevent infiltration of contaminants into the subsoil.¹⁷

12. Mexico refers to Caresa's disposal of contaminant-containing materials without prior authorization. It asserts in this regard that, as a condition for the Project, Mexico required a prior site restoration in order to prevent or minimize the Project's harmful environmental impacts.¹⁸ Mexico maintains that it was effectively enforcing LGEEPA

^{13.} The first fine, in the amount of P\$1,658,673.60, was assessed on 11 August 2006, while the second, for P\$1,719,380, was assessed on 15 January 2007.

^{14.} Response, pp. 43-44.

^{15.} Ibid., pp. 46-49.

^{16.} Ibid., p. 54.

^{17.} Ibid., p. 56.

^{18.} Ibid., p. 64.

Article 28, which establishes the obligation to obtain environmental impact authorization prior to the performance of works or activities.

13. As to the Submitters' assertion that Mexico failed to penalize Caresa for disposal of drilling sludge without adequate preventive measures, Mexico notes that it ordered the necessary safety measures and applied sanctions for non-compliance with these measures. Mexico further states that Profepa filed a report of environmental offenses committed by Caresa with the PGR.¹⁹ The foregoing facts substantiate, in Mexico's view, the assertion that Profepa ordered Caresa to take a set of urgent measures and that non-compliance with these measures gave rise to administrative penalties and a criminal proceeding against the company.²⁰

IV. REASONING OF THE SECRETARIAT

14. This determination corresponds to the stages of the citizen submission procedure contemplated in NAAEC Article 14(3). The Secretariat has considered Mexico's procedural objections in its Response concerning the admissibility of the submission, and does not find compelling reasons to modify its determination of 13 December 2007. Now, in light of information provided in Mexico's Response regarding the existence of pending proceedings, the Secretariat, in accordance with Article 14(3)(a), determines that it can proceed no further with Submission SEM-07-005 and sets out its reasons for such determination as follows.

A. Admissibility of the submission with reference to NAAEC Article 14(1)(b), (c), and (f)

15. Mexico asserts that the Secretariat should not have allowed submission SEM-07-005 because it does not meet the requirements of NAAEC Article 14(1)(b), (c), and (f).

16. NAAEC Article 14(1)(b) and Section 2.2 of the Guidelines provide that the Secretariat is authorized to consider a submission that "clearly identifies" the person or organization making it. Mexico asserts that the submission does not clearly identify the persons and organizations making it, since no documents were attached that clearly identify Efraín Rodríguez León, José Manuel Arias Rodríguez, and the associations Comité de Derechos Humanos de Tabasco, A.C. and Asociación

^{19.} Ibid., pp. 66-69.

^{20.} Ibid., pp. 71-74.

Ecológica de Santo Tomás, A.C.; nor were the charters of these associations or their entries in the Public Register of Property (*Registro Público de la Propiedad*) included.²¹

17. The Secretariat found in its determination of 13 December 2007, that it is sufficient for the person or organization making a submission to state their name and address in order for the Secretariat to clearly identify the Submitters and ascertain their residence or establishment in the territory of a Party. Neither the NAAEC nor the Guidelines set out the requirements for confirming the identification and residence of a submitter as Mexico asserts in its Response.

18. NAAEC Article 14(1)(c) stipulates that a submission must provide "sufficient information to allow the Secretariat to review [it], including any documentary evidence on which the submission may be based". Section 5.3 of the Guidelines specifies that a submission must contain a "succinct account of the facts" on which it is based. Mexico alleges that the submission does not meet this requirement, because the assertions the Submitters make are not substantiated in a "succinct account of the facts".²²

19. The Secretariat found that the facts described and the documentary evidence attached to the Submission were however sufficient to allow the Secretariat to review the Submission, as well as to support the central assertion therein, which was Mexico's alleged failure to effectively enforce the conditions of the environmental impact permit governing the execution of a drilling waste treatment and final disposal project in Cunduacán, Tabasco. For example, the Submitter supplied the Secretariat with:

- a) Official communication PFPA.27.07/00073/2005, dated 10 January 2005, issued by the Profepa branch office in Tabasco and official Communications SPADS/1189/2004, dated 19 November 2004, and issued by the Direction of Environmental Assessment and Protection of Sedespa. These documents relate to site visits at the Project site and the assertion that neither Profepa nor Sedespa found evidence of soil contamination.
- Executive summary of the Project's environmental impact statement. This document—filed before DGIRA on December 2004—indicates that the status of the Project was at zero per cent

^{21.} Ibid., p. 16.

^{22.} *Ibid.*, p. 21.

progress and is related to the Submitters' assertion of the alleged false information filed by the company to obtain the environmental impact authorization.

c) Official communication EOO.-DGIFC.-0321/2005, dated 26 April 2005, issued by Profepa's Industrial Inspection Branch. In this document Profepa requested DGIRA to:

[d]eny the environmental impact authorization to the company Caresa for the Project located in the Municipality of Cunduacán, Tabasco, until [the company can] demonstrate to this Ministry that it has removed said materials and, in any case, conducted cleanup work, since the company initiated the construction of the project without the referred authorization.

d) Official communication S.G.P.A./DGIRA.DDT.0337.05, dated 3 June 2005, issued by DGIRA, asserting that Caresa:

> [U]sed drilling cuts with concentrations of petroleum hydrocarbons in a greater quantity than allowed by Profepa [and that] said cuts were used for backfilling of the proposed site for developing the project.

e) Administrative decision in file PFPA/SII/DGIFC/47/0003-06, dated 11 August 2006, issued by Profepa's Industrial Inspection Branch, which documents a fine imposed on Caresa for failing to conduct the required measures in the environmental impact authorization.

20. Thus, the Submission included information to support central assertions made by the Submitters.

21. NAAEC Article 14(1)(f) stipulates that a submission must be "filed by a person or organization residing or established in the territory of a Party". Mexico contends that fulfillment of this requirement must be demonstrated by presentation of a certificate of domicile or residence, or any other document serving as authentic proof of domicile or residence. In Mexico's view, mere assertion of domicile on the part of the Submitter is insufficient to meet the requirements of Article 14(1)(f). Mexico further states that the Submitters gave indication of domicile but did not attach any proof thereof,²³ and that for this reason the Submission should not have been admitted.

^{23.} Ibid., pp. 20-21.

22. Nothing in the Guidelines or NAAEC indicates that proof of domicile must be given in the manner indicated by Mexico in its Response.

23. The Secretariat is required by the opening sentence of Article 14(1) and guided in Guideline 7 to determine whether or not a submission meets the six criteria set out in Article 14(1). In order to make such determination, it is often necessary for the Secretariat to interpret the meaning of the provisions of Article 14(1). That the Secretariat may interpret its constitutive instruments is supported by the doctrine of "effectiveness" in public international law, which has been described in a recent international arbitral award as follows:

[I]nternational organisations have regularly approached the interpretation of their constituent instruments [...] by way of the concept of institutional "effectiveness". Even though the governing text may not explicitly empower the organisation to act in a particular manner, international law authorizes, indeed requires, the organisation, should it find it necessary, if it is to discharge all its functions effectively, to interpret its procedures in a constructive manner directed towards achieving the objective the Parties are deemed to have had in mind. The same is true of international judicial organs. (Territorial Dispute (Libyan Arab Jamahiriya/Chad) Judgment, ICJ Reports 1994, pp. 6, 25 and the cases there cited in support of "one of the fundamental principles of the interpretation of treaties, consistently upheld by international jurisprudence, namely, that of effectiveness. [...]").²⁴

The Secretariat, although neither a court nor a dispute resolution 24. body, is an integral part of an international organization, the CEC, and in order to make determinations as required by Articles 14 and 15 and thus effectively carry out its mandate, considers that it must necessarily be able to interpret the provisions of Articles 14 and 15, and related sections of NAAEC such as Article 45. The Secretariat is further informed in the Guidelines para. 5.6(b) to consider "whether further study of the matters raised [in a submission] would advance the goals of [NAAEC]." The Secretariat, in assessing whether a submission meets the requirements of Article 14(2), must also consider pursuant to Article 14(2)(b) whether "the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of [the] Agreement." In accordance with Article 31(1) of the 1969 Vienna Convention on the Law of Treaties²⁵ (the "Vienna Convention"), "A treaty shall be interpreted in good faith in accordance with the ordinary

^{24.} Eritrea-Ethiopia Boundary Commission, Statement of 27 November 2006, UN Security Council Doc. S/2006/992, 15 December 2006, 9-34, at 14.

^{25.} Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Secretariat is given direction in various parts of the Guidelines and NAAEC to interpret and apply the provisions of Articles 14 and 15 of NAAEC in light of NAAEC's object and purpose; i.e. "the goals of NAAEC." Article 31(1) of the Vienna Convention is helpful in elucidating this task.

25. In light of the foregoing, and having carefully reviewed Mexico's Response regarding application of NAAEC Article 14(1)(b), (c), and (f), the Secretariat considers that:

The ordinary meaning of the words "clearly identify the person or a) organization making the submission" in Article 14(1)(b) taken in the context of that Article, do not explicitly require the types of documentation that Mexico asserts in its Response, rather the Submitters in this case could be clearly identified through the information supplied to the Secretariat, such as names, addresses, and contact details which the Secretariat also verified in subsequent correspondence. The object and purpose of Article 14(1)(b) to clearly identify the submitter appears to be at least three-fold: first, to help establish whether a submission is *bona fides*, and together with Article 14(1)(f) whether it is from a person or organization residing in or established in the territory of a Party; second, to enable the Secretariat to communicate as necessary with the submitter in accordance with the applicable provisions of the Agreement and the Guidelines, particularly those requiring the Secretariat to communicate in writing by reliable means (Guideline 3.7) and to inform the submitter of the progress of its submission (Guideline 3.9); and third, to allow the Party concerned to ascertain whether there are any pending proceedings or matters involving the submitter. There was in this Submission, no doubt of the Submitters' identity which would have warranted a request for the types of documents that Mexico now asserts would be necessary for proper application of Article 14(1)(b). Mexico's Response did not include evidence or argument refuting the Submitter's identity. However, had a doubt regarding the identity of the Submitters been raised either in its initial review of the Submission or during analysis of Mexico's Response, the Secretariat would have undertaken to clarify the Submitters' identity, possibly through a request for the types of information Mexico set out. Where the Submitters' identity could not have been clearly established in accordance with Article 14(1)(b), the Secretariat would have proceeded no further with the Submission;

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- b) Article 14(1)(c) requires that a submission "provide sufficient information to allow the Secretariat to review the submission [emphasis added]," but Mexico in challenging the Secretariat's decision to request a Response from Mexico, appears to be asking the Secretariat to apply deeper levels of review found in later stages of the process to an Article 14(1)(c) review. Article 14(1)(c) does not appear however, to be concerned with consideration of the merits of assertions raised in a submission, as Article 15(1) does for the purpose of determining whether a factual record is warranted. Moreover, there is no definition in the Guidelines or the Agreement for what constitutes either a "succinct account of the facts" or what "documentary evidence" might be necessary to review a submission. Here again, the Secretariat must use its discretion in interpreting the ordinary meaning of Article 14(1)(c). The requirement in Article 14(1) that a submission must contain "sufficient information" to allow the Secretariat to "review" it, appears to mean simply that the submission must include information such that the Secretariat can ascertain whether it satisfies the criteria in the checklist of Article 14(1)(a) through (f) or not; most of which criteria could reasonably be characterized as administrative in nature. As to Mexico's contention that the Submission contained no succinct account of the facts, it is important to consider that Guideline 3.3 limits the length of the submission to no more than 15 typed pages of letter-size paper. A submission is required to recount the facts pertaining to items (a) through (f) of Article 14(1) within those 15 pages, and to address the criteria set out in Guidelines paragraph 5. The Submission in this case was 11 pages in length including citations, and contained assertions relating to a time-span of over two years. The Secretariat considers that the Submitters in this matter provided a succinct account of the facts such that the Secretariat could conduct an initial review of the Submission in accordance with Article 14(1);
- c) In the same vein as the discussion above in point a), the Secretariat does not consider that the ordinary meaning of Article 14(1)(f) carries with it a requirement of producing to the Secretariat documentary evidence proving that the submitter is residing in or established in the territory of a Party.²⁶ Nothing in the Guidelines

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^{26.} The Secretariat finds further support for the view that it is within the Secretariat's discretion to interpret Article 14(1)(b) and (f) in this manner, because of the duty of the Secretariat to safeguard the identity of a submitter, should the submitter so wish, pursuant to NAAEC Article 11(8)(a), and Guideline 17.1 When the Secretariat must safeguard the identity of the Submitter in accordance with NAAEC Article 11(8)(a) and

or in the Agreement specify that any such proof be provided for the Secretariat to be able to ascertain whether a submission meets the criteria of Article 14(1)(f). Article 14(1)(f) appears to be concerned simply with establishing that the submitter is from a Party to NAAEC, and not some other State outside NAAEC. In this submission, the Submitters provided names, telephone numbers, an address, and e-mail addresses in Mexico, and the original Submission was apparently stamped by an official in the municipality of Cunduacán. The Secretariat thus had no information on the face of the Submission which could have led it to believe that the Submitters were not a "person or an organization residing in or established in the territory of a Party." However, had a doubt regarding the identity of the Submitters been raised either in the Secretariat's initial review of the Submission or in light of Mexico's Response, the Secretariat would have promptly undertaken to clarify the Submitters' residence or establishment in the territory of a Party. Where the Submitters' residences or establishment in the territory of a Party could not be clearly determined in accordance with Article 14(1)(f), the Secretariat would have proceeded no further with the submission.

26. In light of the above discussion, the Secretariat recalls previous determinations regarding Article 14(1), namely that "a submission is not expected to contain extensive discussion of each criterion and factor in order to qualify under Article 14(1) [...] for more in-depth consideration."²⁷

B. Existence of pending proceedings

27. Mexico requested that information concerning pending proceedings relating to this matter be kept confidential and proprietary as permitted by NAAEC Article 39(1) and (2). Section 17.3 of the Guidelines states, "confidential or proprietary information provided by a Party [...] may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted" and encourages the Party to "furnish a summary of such information or a general explanation of why the information is considered confidential or proprietary." On 15 May 2008,

Guideline 17.1, it appears to be within the sole discretion of the Secretariat to determine the identity of the Submitter, as the identity of the Submitter may not be revealed to a third party.

SEM-98-003 (*Great Lakes*) Determination Pursuant to Article 14(1) and (2) (8 September 1999), at p. 3, available from http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=50>, site last checked on 27 February 2009.

Mexico filed a summary of the confidential information for public disclosure relating to pending proceedings involving the same matter raised by the Submitters.

28. In its Response, Mexico requested that pursuant to Article 14(3)(a), the Secretariat dismiss submission SEM-07-005 due to the existence of pending judicial or administrative proceedings. In the latter connection, Mexico cited an administrative proceeding before Profepa, an administrative action in Federal Tax and Administrative Court, and a criminal proceeding before the PGR.

29. NAAEC Article 45(3)(a) defines a judicial or administrative proceeding as:

a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order;

30. The Secretariat has found in previous determinations²⁸ that where it applies these exceptional grounds for terminating a submission, it must verify whether the proceeding in question qualifies as a judicial or administrative proceeding in the sense of Article 45(3); whether it is being pursued by the Party in a timely fashion and in accordance with its law and is related to the same matter addressed in the submission, and whether the proceeding invoked by the Party in its response has the potential to resolve the matter raised in the submission. The Secretariat has also found that the exclusion of proceedings within the scope of Article 45(3)(a) helps avoid duplication of effort and prevent interference with pending litigation.

31. The Secretariat has previously determined that the NAAEC Article 45(3)(a) concepts of "judicial or administrative proceeding" and the

^{28. &}quot;In view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect"; SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (13 June 2001). Cfr. SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*), Article 15(1) Notification (18 May 2005); SEM-04-005 (*Coal-fired Power Plants*), Article 15(1) Notification (18 Juneary 2007).

words "pursued by a Party" must be construed as those judicial or administrative proceedings that are initiated by one of the Parties:

In other words, where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination of the allegations of non-enforcement. The examples listed in Article 45(3)(a) support this approach, since the kinds of actions enumerated [in the article] are taken almost exclusively by the official government bodies charged with enforcing or implementing the law.²⁹

32. The Submitters assert that Caresa did not comply with condition 2 of the environmental impact authorization, which makes execution of the Project conditional upon site restoration and installation of a geomembrane.

33. On 6 October 2005, Profepa made an inspection of Caresa to verify compliance with the environmental law and, in particular, the status of compliance with the conditions of the environmental impact authorization. As a result of the inspection, on 10 February 2006, Profepa ordered Caresa to take urgent measures including the actions necessary to clean up the site where the Project was being developed and to remove all backfilling material used on the site. As a consequence of the company's noncompliance with these orders, on 11 August 2006, Profepa assessed a fine of 1,658,673.60 pesos and ordered the company to take corrective measures to remediate the site in question and, in particular to fulfill condition 2 of the environmental impact authorization.

34. On 23 October 2006, Profepa found that Caresa had failed to comply with the measures ordered. Consequently, on 15 January 2007, Profepa issued an order in which it assessed a second fine of P\$1,719,380. On 23 April 2007, Profepa made another inspection visit to Caresa during which it confirmed noncompliance with the corrective measures ordered. Mexico notes that the administrative proceeding is currently stayed, since Caresa appealed the order of 11 August 2006.

35. Caresa filed an administrative action in Federal Tax and Administrative Court. On 18 January 2008, the court set aside the order of 11 August 2006. On 5 March 2008, Profepa appealed for review of that decision. Mexico notes in its Response that the appeal filed by Profepa is still pending.

^{29.} SEM-96-003 (*Oldman River I*), Secretariat Determination under Article 15(1) (2 April 1997).

36. Mexico further states in its Response that a criminal investigation against Caresa is now being conducted by the Federal Justice Department (*Ministerio Público de la Federación*) as a result of a report of criminal conduct filed by Profepa in connection with facts related to the offense defined by CPF Article 420 *Quater*, paragraph V, which provides as follows:

Anyone who commits any of the following acts is liable to one to four years of imprisonment and 300 to 3000 days' fine:

[...]

V. Failure to perform or comply with technical, corrective, or safety measures necessary to avert environmental harm or risk that are ordered or imposed by an administrative or judicial authority.

37. While an ongoing criminal investigation into the possible commission of environmental offenses does not fall within the definition of NAAEC Article 45(3), the Secretariat has determined that it can proceed no further with its analysis of the Submission. The Secretariat has previously found that criminal investigations of the matters at the heart of a submission entail a degree of confidentiality and sensitivity, and therefore the preparation of a factual record in these circumstances also poses the potential risk of interfering with any criminal investigation.³⁰

38. As to the proceedings to which Mexico refers in its Response, these were initiated by the relevant authorities of Mexico; they are based in the Party's law, and they fit—with the exception of a criminal investigation—within the concept of an administrative proceeding under NAAEC Article 45(3)(a). Additionally, from the information provided to the Secretariat it is evident that these proceedings are at a procedural stage where, if preparation of a factual record were to be recommended, the result could be to interfere with or duplicate the proceedings. Finally, the Secretariat observes that the matters addressed by these pending proceedings relate to the assertions made in the Submission.

V. DETERMINATION

39. Without opining on the merits of the concern expressed by the Submitters with regard to the possible environmental impacts of the Project, and in particular, that DGIRA issued the required environmental impact authorization subsequent to commencement of work on the Project; for

^{30.} SEM-00-004 (BC Logging), Article 15(1) Notification (27 July 2001).

the reasons stated herein, the Secretariat has determined that it can proceed no further with its review of Submission SEM-07-005 (*Drilling Waste in Cunduacán*) in view of the existence of pending proceedings initiated by Mexico. In accordance with Section 9.4 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Submitters and the Council of the CEC are hereby notified that the process relating to this submission is now terminated.

Secretariat of the Commission for Environmental Cooperation

- *per*: Dane Ratliff Director, Submissions on Enforcement Matters Unit
- ccp: Enrique Lendo, Semarnat David McGovern, Environment Canada Scott Fulton, US-EPA Submitters

SEM-08-001

(La Ciudadela Project)

- SUBMITTERS: INSTITUTO DE DERECHO AMBIENTAL, A.C., ET AL.
- PARTY: MEXICO
- DATE: 22 February 2008
- **SUMMARY:** The Submitters assert that Mexico is failing to effectively enforce its environmental law in connection with a contaminated site located in Zapopan, Jalisco, on which construction of the La Ciudadela development is planned.

SECRETARIAT DETERMINATION:

ART. 15(1)	Determination under Article 15(1) that develop-
(12 August 2010)	ment of a factual record is not warranted.

Secretariat of the Commission for Environmental Cooperation

Determination under Article 15(1) that Development of a Factual Record is not Warranted

Submitters:	Instituto de Derecho Ambiental, A.C. Asociación Vecinal Jardines del Sol, A.C. Colonos de Bosques de San Isidro, A.C.
Represented (respectively) by:	Raquel Gutiérrez Nájera Ludger Wilhelm Kellner Skiba Héctor Javier Berrón Autrique
Party:	United Mexican States
Submission received:	22 February 2008
Date of the determination:	12 August 2010
Submission no.:	SEM-08-001 (La Ciudadela Project)

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement") provide for a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the "Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation" (the "Guidelines"). Where the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with NAAEC Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission.¹

2. On 22 February 2008, Instituto de Derecho Ambiental, A.C., Asociación Vecinal Jardines del Sol, A.C., and Colonos de Bosques de San Isidro, A.C. (the "Submitters"), represented by Raquel Gutiérrez Nájera, Ludger Kellner Skiba, and Héctor Javier Berrón Autrique, respectively, filed a submission with the Secretariat of the CEC in accordance with NAAEC Articles 14 and 15.

3. The Submitters assert that Mexico is failing to effectively enforce its environmental law in connection with a site allegedly contaminated with heavy metals in Zapopan, Jalisco on which the La Ciudadela real estate development project (the "Project" or "La Ciudadela") is to be carried out.

4. The Submitters state that the environmental authorities are failing to restore the "Labna" lot where, as the Submitters note, an electronic component production facility operated for over thirty years, allegedly causing the site to be contaminated.² The Submitters assert that the company SSC Inmobiliaria selected the Labna lot for construction of La Ciudadela and that, even after the company disposed of contaminated soil, the lot continues to be contaminated with heavy metals.³

5. On 2 August 2008, the Secretariat determined that the submission meets the eligibility requirements of NAAEC Article 14(1) and, guided by the criteria enunciated in Article 14(2), requested a response from the government of Mexico, which was received by the Secretariat pursuant to NAAEC Article 14(3) on 26 September 2008.

6. Having analyzed the submission in light of Mexico's response (the "Response"), the Secretariat finds that submission SEM-08-001 does not warrant the preparation of a factual record. Pursuant to section 9.6 of the Guidelines, the Secretariat hereby explains its reasons for this determination.

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^{1.} Full details regarding the various stages of the process as well as previous Secretariat determinations and factual records can be found on the CEC's Submissions on Enforcement Matters website at http://www.cec.org/citizen/>.

^{2.} Submission, p. 8.

II. SUMMARY OF THE SUBMISSION

7. The Submitters assert that Mexico is failing to effectively enforce Articles 1, 2 paragraph IV, 5 paragraphs III, IV, V, VI, XVIII and XIX, 150, 151, 152 *Bis*, and 189-199 of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA); 1, 4, 5, and 8 of the Hazardous Waste Regulation to the LGEEPA (*Reglamento de la LGEEPA en materia de Resíduos Peligrosos*—RRP); 1, 2, 3 paragraphs II and VI, 68, 69, 71, 73, 75, 78, and 79 of the General Integrated Waste Prevention and Management Act (*Ley General para la Prevención y Gestión Integral de Residuos*—LGPGIR), and 126, 127, 128, and 132-153 of the LGPGIR Regulation (*Reglamento de la LGPGIR*) in connection with the La Ciudadela project slated to be developed in the city of Zapopan, Jalisco.⁴

8. The Submitters state that Empresas Motorola and ON Semiconductores (collectively, "Empresas Motorola") engaged in the production and manufacturing of semiconductors and electronic devices on the Labna lot for over 30 years and that these activities ceased around 1999 when the companies interrupted their production at the site. The Submitters further assert that the operational phase of Empresas Motorola included the use of hazardous materials and substances and that, as a result, both companies qualify as hazardous waste generating industrial facilities under the legislation in force at the time.⁵ According to the Submitters, companies generating waste were required to notify the environmental authority of that fact so that sound management could take place in accordance with the provisions of the LGEEPA and the RRP then "in force and applicable."⁶

9. The Submitters also note that when Empresas Motorola ceased operating at the site, the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat) and the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) failed to guarantee the environmental safety conditions required in view of the abandonment of the Labna lot.⁷

^{3.} Ibid., p. 12.

^{4.} *Ibid.*, pp. 12-13. *N.B.* The LGPGIR Regulation was published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) on 30 November 2006 and came into force on 30 December 2006.

^{5.} Submission, p. 8.

^{6.} *Ibid*.

^{7.} Ibid., pp. 1, 11.

10. The Submitters assert that the contamination on the lot was not reported to the authorities during subsequent purchase and sale transactions, nor by the notaries public who notarized the transactions. Therefore, in the Submitters' opinion, there was a failure to fulfil the obligations established by the provisions cited in the submission as regards reporting the transfer of a lot having environmental liabilities, and remediating the contamination.⁸ The Submitters attach copies of various notarized documents attesting to the sale of the Labna lot, the text of which—according to the Submitters—reveals that the parties to those transactions were aware of the contamination at the site.⁹

11. The Submitters state that in March 2007 one of the Submitters filed a citizen complaint with Profepa concerning the alleged existence of such environmental liabilities on the Labna lot and that it then began to request information to verify the sound management of the waste generated by the industrial processes of the companies found there.¹⁰ In response to the request for information, according to the Submitters, Semarnat stated that it possessed no records or documentary evidence of hazardous waste management on the site.¹¹

12. The Submitters further assert that in July 2007 Semarnat approved a proposal by SSC Inmobiliaria to carry out final disposal of thallium-contaminated soil from the Labna lot. After soil disposal was implemented by SSC Inmobiliaria, in November 2007 the environmental authority certified the soil disposal as completed.¹² In this regard, and with reference to a study attached to the submission, the Submitters state that:

From the foregoing information it is evident that the study submitted by SSC Inmobiliaria concerning the soil analysis performed on the lot known as "[C]iudadela" is incomplete and not compliant with the applicable Mexican Official Standards, namely, NOM-147-SEMARNAT/SSA1-2004, Establishing criteria for determination of remediation concentrations for metal-contaminated soils; NMX-AA-123SCFI-2006, Soil sampling for identification and quantification of metalloids, and handling of the sample; NOM-133-SEMARNAT-2000, Polychlorinated biphenyls (PCB), management specifications, and NOM-052-SEMARNAT-2005, Establishing the characteristics and the identification and classification procedure for hazardous waste.¹³

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^{8.} *Ibid*.

^{9.} Ibid., p. 7.

^{10.} Ibid., pp. 8-9.

^{11.} Ibid., p. 8.

^{12.} Ibid., pp. 10-11.

^{13.} Ibid., p. 9.

13. The Submitters assert that the study attached to the submission indicates that the remediation proposal for the Labna lot should have considered not only thallium but also other hazardous waste still present on the site of the La Ciudadela project.¹⁴

14. According to the Submitters, the environmental authorities did not fundamentally resolve the public concerns expressed in regard to the remediation of the site, since they declared it "free of contaminants" knowing that the lot selected for the Project was still contaminated.¹⁵ The submission makes reference to certain studies allegedly demonstrating that the Labna lot continues to be contaminated by "activated cadmium (*sic*) and other chemical elements such as nickel, silver, gold, lead, coal sulfate (*sic*), tetrachloride (*sic*), mercury, and other substances".¹⁶

15. The Submitters assert that despite the conditions persisting on the Labna lot, construction began on La Ciudadela without the proper environmental impact authorization.¹⁷

III. SUMMARY OF THE RESPONSE

16. On 2 August 2008, Mexico filed its response to submission SEM-08-001 pursuant to NAAEC Article 14(3). Mexico requested that the Secretariat proceed no further with its consideration of the submission because the matter is the subject of four pending judicial proceedings,¹⁸ an ongoing criminal investigation,¹⁹ and three administrative proceedings²⁰ which, according to Mexico, concern the same matters raised in the submission. Mexico requests that the Secretariat keep the information relating to these proceedings confidential²¹ and states that, if consideration of SEM-08-001 proceeds further:

The States Parties would be denied the possibility of guaranteeing access to private remedies made available under domestic law to combat failures of law enforcement.²²

19. Ibid., p. 14.

^{14.} Ibid., p. 11.

^{15.} Ibid., p. 13.

^{16.} *Ibid*.

^{17.} Ibid.

^{18.} Response, pp. 5-14.

^{20.} Ibid., pp. 14-15.

^{21.} *Ibid.*, p. 4.

17. Mexico asserts that the submission is not aimed at promoting environmental law enforcement and therefore does not meet the requirement of NAAEC Article 14(1)(d). Mexico states that "the Secretariat has allowed a submission that is manifestly improper, being aimed at harassing a real estate company,"²³ since "it does not center around acts or omissions of the Party but around the behavior of a particular company,"²⁴ and Mexico indicates that the website of one of the Submitters expresses concerns that are not of an environmental nature.²⁵ Mexico further asserts that the Submitters allege, without any evidence and without stating the reasons for these assertions, that the remediation proposal and the final sampling are non-compliant with the law, thus demonstrating that their intent is to "harass the company SSC Inmobiliaria, S.A. de C.V."²⁶

18. The Party asserts the Submitters' alleged ties to the company Cigarrera Mexicana ("Cigatam"), indicating that it is cited on the website of one of the Submitters²⁷ as a company that may possibly support the cause promoted by Asociación Vecinal Jardines del Sol. Mexico attests to the fact that Cigatam belongs to the Carso group, a consortium operating businesses that compete in the same sector as SSC Inmobiliaria,²⁸ demonstrates that the submission is not aimed at promoting the effective enforcement of environmental law, since "if there are ties between the Submitters and Cigatam and they themselves consider it to be the ace up their sleeve, it is relevant to ask whether their interest in blocking construction of the 'La Ciudadela' project is aimed at favoring one of the Grupo Carso companies."²⁹

19. Mexico maintains that the submission should not have been allowed under NAAEC Article 14(1)(c) because it does not include documentary evidence to support it.³⁰ In Mexico's judgment, "the submitters only proved one of the 17 assertions made, [and they attached] nine documents that do not constitute conclusive evidence."³¹

^{23.} Ibid., pp. 15-16.

^{24.} Ibid., pp. 21.

^{25.} Ibid., pp. 20-21.

^{26.} Ibid., p. 18.

The Secretariat was able to verify this information at "Público 19 de mayo de 2007," http://www.noalproyectociudadela.com.mx/Pub_19_05_07.htm> (viewed 3 December 2009).

^{28.} Response, p. 19.

^{29.} Ibid., pp. 19-20.

^{30.} *Ibid.*, p. 22.

^{31.} Ibid., p. 30.

20. Concerning the environmental law cited in the submission, the Party indicates that some of the provisions are inapplicable,³² while others have been repealed³³ or it is not possible to enforce them retroactively, for that would contravene Mexican law.³⁴

21. As to the Submitters' assertions relating to the Labna lot, Mexico clarifies that the companies cited in the submission were the owners of the lot from 1968 to 1999.35 Concerning the environmental liability that allegedly can be deduced from the notarized documents, Mexico states that this evidence is insufficient to demonstrate the existence of an environmental liability in the legal sense of the term.³⁶ It further states that the existence of soil contamination is not asserted or proven in the notarized documents concerning the transfer of the property:³⁷ these documents contain no technical references indicating the existence of environmental liabilities;38 they do not include information which, if environmental liabilities were present, would make it possible to identify the contaminant or determine the degree of contamination;³⁹ and while the word saneamiento is used, its meaning in context has nothing to do with the environmental cleanup of a contaminated lot.⁴⁰ In regard to one of the documents,⁴¹ Mexico argues that its scope is limited in any event since it only establishes the environmental liability of the parties entering into a purchase and sale transaction.⁴²

^{32.} Articles 145-147 of the LGPGIR Regulation, since the first refers to remediation plans for lots in which the human population is indicated as affected by the contamination, while the two others are applicable in the case of emergencies. Neither of these situations obtains in the case of the Labna lot. Response, pp. 71-72.

^{33.} LGEEPA Article 152 *Bis* was repealed by LGPGIR Articles 68, 69, and 70. *Cf.* Response, p. 62.

^{34.} Articles 126-128 of the LGPGIR Regulation. Response, p. 66.

^{35.} Response, p. 35.

^{36.} In this regard, Mexico cites Article 134 of the LGPGIR Regulation, which, in its definition of the concept of "environmental liability," specifies that the existence and release of hazardous materials and waste on the site must take place without timely remediation. Response, p. 30.

^{37.} Response, p. 31: "Therefore, the existence of environmental liabilities is neither asserted nor proven, as the Submitters state."

^{38.} Ibid., pp. 32-34.

^{39.} Ibid., p. 33.

^{40.} *Ibid.*, p. 34. "[...] the Party considers it important to clarify that in the aforementioned notarized documents, the phrase *'saneamiento para el caso de evicción'* is employed; it should be emphasized that this refers to the seller's obligation under Mexican law to guarantee the purchaser's legal and peaceable possession of the *res vendita.*"

^{41.} Notarized document no. 3042, before Notary Public no. 96 of the city of Guadalajara, Jalisco.

^{42.} Response, p. 32.

22. Mexico adds that the parties participating in the transfer of ownership of the Labna lot established procedures to identify whether or not contamination was present at the site;⁴³ that the environmental authorities only learned of the existence of contaminants when Empresas Motorola was no longer occupying the Labna lot;⁴⁴ that the authorities proceeded in accordance with the joint and several liability mechanism prescribed by the LGPGIR when they learned of the environmental situation on the lot;⁴⁵ that it would be illegal to determine the existence of a site abandonment,⁴⁶ and that therefore, it would be impossible to order the registration of the lot as a contaminated site, as the Submitters insist.⁴⁷

23. Concerning the activities carried out on the Labna lot, Mexico specifies that the law in force at the time Empresas Motorola was operating did not establish which activities were considered hazardous waste generators;48 that the Party does not possess information sufficient to determine whether these companies were indeed engaging in activities with hazardous waste or materials,49 and that it is impossible to conclude whether Empresas Motorola were engaging in high-risk activities⁵⁰ or generating hazardous waste.⁵¹ Mexico emphasizes that the obligation to register as a hazardous waste generator originated in 1988 and that, in any event, the activities of Empresas Motorola fell outside the scope of the legislation in force.⁵² The Party adds that it duly responded to a request for information on hazardous waste management and transportation from one of the Submitters⁵³ and that any hazardous waste carriers that Empresas Motorola may have hired had no obligation to provide the names of their clients to the authorities.54

24. Concerning the alleged existence of radioactive contaminants, Mexico argues that the National Nuclear Safety and Safeguards Commission (*Comisión Nacional de Seguridad Nuclear y Salvaguardias*— CNSNS) found that the samples taken on the Labna lot show normal

44. Response, pp. 63, 65. Cf. LGPGIR Articles 68 and 69.

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^{43.} Ibid., p. 65. Cf. LGPGIR Article 71.

^{45.} Response, p. 63. Cf. LGPGIR Article 70.

^{46.} Response, p. 65. Cf. LGPGIR Article 73.

^{47.} Response, p. 66. Cf. LGPGIR Articles 75 and 76.

^{48.} Response, p. 37.

^{49.} Ibid., p. 36.

^{50.} Response, pp. 36-38. *Cf*. List of high-risk activities published in the DOF on 28 March 1990 and 4 May 1992.

^{51.} Response, pp. 39-40.

^{52.} Response, p. 39. Cf. LGEEPA Articles 28 and 29; RRP Articles 7 and 8 paragraph I.

^{53.} Response, p. 38.

^{54.} Ibid., p. 40.

values of radiation of natural origin present in the soils and water at the site, and thus pose no risk to human health.⁵⁵ It further points out that Profepa informed the Submitters of the results of those studies.⁵⁶

25. Concerning remediation of the Labna lot, Mexico states that Profepa verified the process as prescribed by the LGPGIR Regulation;⁵⁷ that it made inspection visits to the Labna lot on 30 May, 30 August, 14 September, and 5 December 2007⁵⁸ and that, in due course, it instituted an administrative proceeding to order restoration of the lot.⁵⁹

26. In relation to the soil analysis study of the Labna lot, Mexico denies that it was left incomplete or that it was performed in violation of Mexican law, as asserted in the submission. The Party indicates that the study submitted by the Submitters in support of their assertions was done by someone who is not an expert on this matter and is not independent, and that it does not include sampling to support its conclusions, since only a documentary review was performed.⁶⁰ Mexico states that Profepa supervised the analysis of samples taken from 19 points on the Labna lot and that the results indicated contamination with thallium, and hence the site restoration took place only pursuant to the standard applicable to thallium-contaminated soils⁶¹ and not pursuant to the provisions applicable to the management of PCBs62 and to hazardous waste characterization standards,⁶³ which the submission claims to be applicable. Concerning the production of an environmental risk assessment as requested by the Submitters, Mexico clarifies that such a study is relevant in the absence of legal provisions, which is not the case here since the contaminants of interest are covered by standards.64

27. Mexico reports that since the soil analysis indicated the presence of thallium in excess of the values set out in the applicable provi-

^{55.} Ibid., pp. 40-42.

^{56.} Ibid., p. 42.

^{57.} Ibid., pp. 42 and 56. Cf. Articles 132-151 of the LGPGIR Regulation.

^{58.} Response, pp. 42-44.

^{59.} Response, p. 44. Cf. LGPGIR Article 70; Articles 132-151 of the LGPGIR Regulation.

^{60.} Response, p. 46.

^{61.} Mexican Official Standard NOM-147-SEMARNAT/SSA1-2004, Establishing criteria for determining the remediation concentrations for soils contaminated with arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, selenium, thallium, and/or vanadium.

Response, p. 45. Cf. Mexican Official Standard NOM-133-SEMARNAT-2000, Environmental protection – polychlorinated biphenyls – management specifications.

^{63.} Mexican Official Standard NOM-052-SEMARNAT-2005, Establishing the characteristics and procedures for identification and classification as well as the lists of hazardous wastes.

^{64.} Response, p. 67. Cf. Articles 132, 140, 141 and 142 of the LGPGIR Regulation.

sions,⁶⁵ Profepa instituted an administrative proceeding⁶⁶ and ordered urgent enforcement measures consisting of site characterization as well as random sampling on the portion of the Labna lot that had not been characterized. In both cases, the presence of Profepa personnel was required.⁶⁷ Likewise, Profepa ordered the production of a site remediation proposal; presentation of hazardous waste delivery, transportation, and receipt manifests,⁶⁸ and temporary suspension of activities and permits granted by the municipality of Zapopan for works, applicable until 15 June 2007.⁶⁹

28. Mexico maintains that the Management of High-Risk Materials and Activities Branch (*Dirección General de Gestión Integral de Materiales y Actividades Riesgosas*—DGGIMAR) approved the remediation proposal subject to conditions including measures such as transportation and final disposal of thallium-contaminated soil at a controlled containment facility; production and delivery of the required manifests, and prior notification to DGGIMAR and Profepa for purposes of monitoring and supervision of the work.⁷⁰

29. The Party explains that at the conclusion of the remediation process, point-source analysis including at least six sampling series was conducted with Profepa's involvement. DGGIMAR certified the completion of the removal of 102 tons of thallium-contaminated soil on 9 November 2007.⁷¹ Mexico asserts that at the time of filing of the submission, SSC Inmobiliaria had complied with the corrective measures ordered by Profepa and with the conditions ordered by DGGIMAR.

30. The Party contradicts the alleged failure to enforce in relation to attestation of transportation and final disposal of thallium-contaminated soil, since the Profepa file contains the delivery, transportation, and receipt manifests for 113 tons of earth,⁷² 200 cubic metres of materi-

^{65.} Mexican Official Standard NOM-147-SEMARNAT/SSA1-2004, Establishing criteria for determining the remediation concentrations for soils contaminated with arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, selenium, thallium, and/or vanadium.

^{66.} Notice of irregularities detected during inspection visit (*acuerdo de emplazamiento*) of 22 May 2007, issued by the Profepa officer in Jalisco. Response, pp. 52-53.

^{67.} Response, p. 54.

^{68.} Ibid., p. 55.

^{69.} Ibid., p. 56.

^{70.} Ibid., pp. 69-70.

^{71.} Ibid., pp. 17, 46.

^{72.} Note: The figure of 113 tons is the one appearing in the response signed by the director of the Legal Affairs Coordinating Unit (*Unidad Coordinadora de Asuntos Jurídicos*)

als ensuing from the soil disposal, and two tons of asbestos-containing materials, among others.⁷³

31. Mexico contradicts the alleged failure to process the citizen complaint filed by one of the Submitters, stating that Profepa allowed the complaint for processing; fulfilled its obligation to notify the complainant and the respondent of their respective rights; took the necessary measures on the Labna lot, and notified other authorities, including CNSNS.⁷⁴ Mexico reports that Profepa made an inspection visit to the Labna lot on 12 April 2007 and ordered SSC Inmobiliaria to conduct sampling in order to detect the presence of heavy metals, which gave rise to the soil analysis submitted by the company.⁷⁵

32. In its response, Mexico states that CNSNS issued a report on 19 July 2007 that concludes:

The environmental dose rate values obtained from the monitoring work as well as the activity concentration values obtained from the samples analyzed at the CNSNS laboratories show normal values due to natural radiation present in the soils and well water.⁷⁶

33. Finally, Mexico denies that any works associated with La Ciudadela existed prior to its environmental impact authorization, as the Submitters claim, stating that the "dismantlement and earth removal work" to which the Submitters refer may have corresponded to authorized activities carried out in the context of site remediation.⁷⁷

IV. ANALYSIS

34. The Secretariat proceeds to explain why there is no scope for Mexico's procedural objections to the submission's eligibility and that the Secretariat's determination of 2 August 2008 stands. Also, pursuant to NAAEC Article 14(3), the Secretariat considered the information concerning the alleged existence of pending proceedings and found that the proceedings in progress are not likely to interfere with an analysis to determine whether the Secretariat should recommend a factual record. Finally, after analyzing the submission in light of the response of Mexico

⁽p. 17) but it does not correspond to the figure appearing in the electronic version of the response sent by Mexico, which refers to 102 tons.

^{73.} Response, p. 46.

^{74.} Response, p. 48-50. Cf. LGEEPA Articles 191-3 and 198.

^{75.} Response, p. 51.

^{76.} Ibid.

^{77.} Ibid., p. 40.

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pursuant to Article 15(1), the Secretariat finds that no central questions remain open that would warrant the development of a factual record. Pursuant to section 9.6 of the Guidelines,⁷⁸ the Secretariat hereby presents its reasons for this determination.

A. Mexico's argument regarding the alleged ineligibility of the submission under Article 14(1)

35. On 2 August 2008, the Secretariat found that the submission meets all the NAAEC Article 14(1) requirements and that, pursuant to NAAEC Article 14(2), it warranted requesting a response from Mexico. The Party is of the view that the Secretariat should not have allowed submission SEM-08-001.

36. Mexico asserts that the submission is not admissible since it does not include documentary evidence to support it, pursuant to NAAEC Article 14(1)(c),⁷⁹ and because it is not aimed at promoting law enforcement, pursuant to NAAEC Article 14(1)(d).⁸⁰ It should be noted at the outset that the Agreement does not foresee the Secretariat retroactively changing a determination it has made pursuant to Article 14(1) regarding the admissibility of a submission. The Secretariat may though, in light of a any response, determine whether to recommend a factual record.

37. In regard to the Article 14(1)(c) requirement, the Secretariat has previously found that NAAEC Article 14(1) is not intended as an insurmountable procedural screening device,⁸¹ as it is not oriented to make an unreasonably narrow interpretation of the eligibility requirements for a

^{78. &}quot;If the Secretariat considers that the submission, in light of any response provided by the Party, does not warrant development of a factual record, the Secretariat will notify the Submitter and the Council of its reason(s) in accordance with section 7.2 of these guidelines, and that the submission process is terminated with respect to that submission."

^{79. &}quot;The Secretariat may consider a submission from any non-governmental organization or person [...] if the Secretariat finds that the submission: [...]

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

^{80. &}quot;The Secretariat may consider a submission from any non-governmental organization or person [...] if the Secretariat finds that the submission:

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

See, in this regard, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

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submission.⁸² In its determination of 2 August 2008, the Secretariat found that the submission presents a succinct account of the facts and contains sufficient information to review it, since the Submitters provide copies of various notarized documents that substantiate transactions related to the Labna lot and indicate the possible existence of an environmental liability.⁸³ The Secretariat found that the Submitters attached studies to support their assertion of the alleged substances causing contamination to the Labna lot,⁸⁴ and included copies of correspondence with the authorities in which they complain of alleged failures to effectively enforce the environmental law.⁸⁵

38. Concerning Mexico's view that the documents attached to the submission do not constitute conclusive evidence, the Secretariat finds that its task is to determine, for a given submission, whether the documentation contemplated in NAAEC Article 14(1)(c), to which section 5.3 of the Guidelines refers, can allow the Secretariat to review it, and support the central assertions in the submission. In the case of submission SEM-08-001 the Secretariat found that the supporting information is sufficient to study the Submitters' central assertions and, after considering the remaining requirements and criteria of NAAEC Articles 14(1) and (2), allowed the submission and requested a response from Mexico.

39. Concerning the Party's assertion that the submission is aimed at harassing SSC Inmobiliaria, and thus allegedly does not satisfy Article 14(1)(d), the Secretariat found that the submission focuses on failures to enforce by the Mexican authorities and not on compliance by a particular company, and noted that the Submitters are not competitors who stand to benefit economically from the submission.⁸⁶ The latter determination follows from section 5.4(a) of the Guidelines.⁸⁷

^{82.} In previous determinations the Secretariat has acknowledged that submitters may not always possess the financial and human resources to monitor compliance with environmental laws and regulations and to collect evidence of specific violations; SEM-98-004 (*BC Mining*), Article 15(1) Notification (11 May 2001), pp. 14-15.

^{83.} SEM-08-001 (La Ciudadela Project), Article 14(1) Determination (2 July 2008), p. 7.

^{84.} Ibid.

^{85.} Ibid.

^{86.} Ibid.

^{87. &}quot;A submission must appear to be aimed at promoting enforcement rather than at harassing industry. In making that determination, the Secretariat will consider such factors as whether or not:

⁽a) the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission;"

40. Mexico asserts that the Submitters have ties to a cigarette manufacturer belonging to a group that allegedly competes with SSC Inmobiliaria. It asserts that these ties prove that the submission is not aimed at promoting the effective enforcement of environmental law.⁸⁸ Without taking any position on the alleged ties between the Submitters and a competitor of SSC, the Secretariat notes that Mexico's assertion provides no documentation demonstrating that the Submitters are competitors of SSC Inmobiliaria who stand to benefit economically from the submission.

41. Furthermore, the Secretariat does not concur with Mexico's argument about non-environmental concerns expressed against the La Ciudadela project on the website of one of the Submitters.⁸⁹ These concerns are not included in submission SEM-08-001 and, in any case, do not support Mexico's assertion of an alleged intent to harass SSC Inmobiliaria. The Secretariat is authorized to analyze the submission in question solely on its own merits, and centers its analysis around the assertions made in SEM-08-001.

B. Mexico's argument regarding pending proceedings pursuant to NAAEC Article 14(3)

42. NAAEC Article 14(3)(a) stipulates:

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

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

43. NAAEC Article 45(3)(a) defines the term "judicial or administrative proceeding" as:

a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; [...]

^{88.} Response, p. 19.

^{89.} Ibid.

44. In analyzing the notification from Mexico of the existence of ongoing proceedings,⁹⁰ the Secretariat accordingly considers whether the proceeding was initiated by the Party; whether it is timely in accordance with its law; whether it is related to effective enforcement matters raised in the submission, and whether the proceeding invoked has the potential to resolve the matter raised in the submission.⁹¹

45. With reference to section 7.5 of the Guidelines, the Secretariat has furthermore indicated that when an ongoing proceeding was not initiated by the Party – and thus falls outside the Article 45(3)(a) definition—the Secretariat must examine the possibility of whether further consideration of the submission could duplicate or interfere with the proceeding,⁹² meaning duplication of effort in terms of measures the Party may be taking to enforce the environmental law or interference with domestic legal process.⁹³

46. Mexico asserts that further analysis of submission SEM-08-001 would "deny the possibility of ensuring access to private remedies available under domestic law."⁹⁴ In this regard, the Secretariat reiterates that neither the citizen submissions mechanism nor the production of a factual record constitutes an adjudicatory proceeding concerning the effective enforcement of environmental law. Thus, NAAEC Article 15(3)⁹⁵ leaves open the possibility of "any further steps that may be taken with respect to any submission," which could include, for example, domestic legal proceedings.

47. The Party notifies the Secretariat of the existence of four pending judicial proceedings, a pending criminal investigation, and three

^{90.} On past practice with regard to pending proceedings, see: SEM-07-001 (*Minera San Xavier*), Article 15(1) Notification (15 July 2009), p. 10, § 33.

^{91.} The Secretariat is mindful that it has always analyzed Party responses on the merits pursuant to Article 14(3) and that its "commitment to the principle of transparency pervading the NAAEC [entails that it] cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a Submission, on the mere assertion of a Party to that effect"; SEM-01-001 (*Cytrar II*), Article 14(3) Determination (13 June 2001). *Cf.* SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*), Article 15(1) Notification (18 May 2005); SEM-04-005 (*Coal-Fired Power Plants*), Article 15(1) Notification (5 December 2005), and SEM-05-002 (*Coronado Islands*), Article 15(1) Notification (18 January 2007).

^{92.} SEM-97-001 (BC Hydro), Article 15(1) Notification (28 April 1998), p. 9.

^{93.} SEM-07-001 (Minera San Xavier), Article 15(1) Notification (15 July 2009), p. 14, § 46.

^{94.} Response, p. 22.

^{95. &}quot;The preparation of a factual record by the Secretariat pursuant to this Article shall be without prejudice to any further steps that may be taken with respect to any submission."

pending administrative proceedings which, it asserts, concerns the same matters raised in the submission.⁹⁶

The Secretariat has analyzed these proceedings and concludes that 48. their existence does not terminate the process with respect to the submission. Section 9.4 of the Guidelines obliges the Secretariat to state its reasons when it finds that the existence of pending proceedings justifies termination of the submission process. However, Mexico classified the information concerning the pending proceedings as confidential under NAAEC Article 19(2) and section 17.2 of the Guidelines. On 3 October 2008, the Secretariat requested that Mexico provide a summary of the confidential information for public disclosure.⁹⁷ On 2 June 2010, the Legal Affairs Coordination Unit of Semarnat responded to the information request from the Secretariat.98 The information contains a list of proceedings and its procedural stage. Notwithstanding the above, the list of proceedings provided by Mexico does not suffice to make public the reasons why the Secretariat rejects Mexico's argument on the existence of pending proceedings pursuant to NAAEC Article 14(3). With the sole exception of a criminal investigation initiated by the Attorney General of the Republic (Procuraduría General de la República)-which information disclosed by Mexico does not differ from the response-the summary of the remaining proceedings is not sufficient for the Secretariat to make public its reasoning. Thus, the Secretariat must keep the section below of paragraphs 50 to 57 confidential.

49. The Secretariat reiterates that section 17.3 of the Guidelines⁹⁹ encourages the Parties to provide a summary of the confidential information, since its absence limits the possibility of making public the Secretariat's reasons concerning the existence of pending proceedings in an Article 14(3) determination.

[CONFIDENTIAL SECTION: paragraphs 50 to 57]

^{96.} Response, p. 4.

Acknowledgment of receipt of Mexico's response to submission SEM-08-001 (*La Ciudadela Project*) dated 3 October 2008. The same request was made on 24 February 2010 and on 16 March 2010.

Letter 112. 00002363 dated 26 May 2010 issued by the Legal Affairs Coordination Unit of Semarnat. URL: http://www.cec.org/Storage/88/8536_08-1-55-PTS_es.pdf>.

^{99. &}quot;Given the fact that confidential or proprietary information provided by a Party [...] may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted, contributors are encouraged to furnish a summary of such information [...]."

3. The criminal investigation

58. In its response, Mexico gives notice of the existence of a pending criminal procedure, without specifying the offense in question.

59. The Secretariat has previously found that criminal investigations are not judicial or administrative proceedings in the sense of NAAEC Article 45(3), being "[a]ctivities that are solely consultative, information-gathering or research-based in nature, without a definable goal, and that are not designed to culminate in a specific decision, ruling or agreement within a definable period of time [...]."¹⁰⁹ While, in particular circumstances, a criminal investigation has been considered an argument for terminating the submission process,¹¹⁰ in this case, without more information, the Secretariat cannot reach that conclusion.

60. Section 9.5 of the Guidelines states:

Upon receipt of a response from the Party or following the expiration of the response period, the Secretariat may begin its consideration of whether it will inform the Council that the submission warrants developing a factual record.

61. Furthermore, section 17.3 of the Guidelines¹¹¹ requests the Party in question to provide a summary of the confidential information so that this information "may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted." Given the lack of specificity in Mexico's response and guided by section 9.5 of the Guidelines, which authorizes the Secretariat to begin its consideration of whether a factual record is warranted following the expiration of the response period, the Secretariat proceeds with the further analysis of submission SEM-08-001.

C. NAAEC Article 15(1) analysis of the Submitters' assertions in light of Mexico's response

62. Having determined pursuant to NAAEC Article 14(3) that the proceedings adduced by Mexico in its response are not an impediment to

^{109.} SEM-00-004 (BC Logging), Article 15(1) Notification (27 July 2001), pp. 19-20.

^{110.} Ibid., p. 21.

^{111. &}quot;Given the fact that confidential or proprietary information provided by a Party, a nongovernmental organization or a person may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted, contributors are encouraged to furnish a summary of such information or a general explanation of why the information is considered confidential or proprietary."

further analysis of SEM-08-001, the Secretariat proceeds to consider whether, in the light of Mexico's response, the submission warrants preparation of a factual record.

1. Assertions concerning hazardous waste management by Empresas Motorola and its registration as a hazardous waste generator

63. The Submitters assert that it was public knowledge that for more than thirty years (from 1968 to 1999), Empresas Motorola produced and manufactured semiconductors and electronic devices at its facility on the Labna lot.¹¹² They add that Empresas Motorola used hazardous substances and materials in their production processes and were therefore hazardous waste generators. Consequently, the Submitters assert, Semarnat should have ensured Empresas Motorola's compliance with RRP Article 8¹¹³ respecting the obligations of hazardous waste generators, as well as ensuring that the companies were compliant with their obligations under LGEEPA Article 151,¹¹⁴ relating to the management,

• Register with the registry established for such purpose by the Ministry;

^{112.} Submission, p. 8.

^{113.} Submission, p. 8. Cf. RRP Article 8: "The hazardous waste generator shall:

[•] Keep a monthly log on generation of its hazardous waste;

[•] Manage hazardous waste in the manner prescribed by the Regulation and the relevant environmental technical standards;

[•] Accord separate management to hazardous wastes that are incompatible under the relevant environmental technical standards;

[•] Pack its hazardous waste in containers meeting the safety conditions set out in this regulation and in the relevant environmental technical standards;

[•] Identify its hazardous waste with the inscriptions prescribed by this Regulation and the relevant environmental technical standards;

[•] Store its hazardous waste under safety conditions and in areas meeting the requirements set out in this Regulation and in the relevant environmental technical standards;

[•] Transport its hazardous waste in such vehicles as the Ministry of Communications and Transportation shall determine and under the conditions prescribed by this Regulation and the applicable environmental technical standards;

Provide appropriate treatment for its hazardous waste pursuant to the provisions
of this Regulation and the applicable environmental technical standards;

[•] Provide appropriate final disposal for its hazardous waste in accordance with the methods prescribed by the Regulation and with the provisions of the applicable environmental technical standards;

[•] Submit to the Ministry, in such form as the latter shall determine, a semiannual report on any movement of its hazardous waste during that period, and

[•] Any further requirements set out in the Regulation and in other applicable provisions."

^{114. &}quot;The responsibility for management and final disposal of hazardous waste rests with the generator. Where hazardous waste management and final disposal services are obtained from companies authorized by the Ministry and the waste is given to such companies, the responsibility for the operations rests with them, regardless of any responsibility that may rest with the generator.

storage, transportation, treatment, and final disposal of hazardous waste.

64. The LGEEPA came into force on 28 January 1988, and the RRP on 25 November 1988. LGEEPA Article 151 and RRP Article 8 were both in force during the operations of Empresas Motorola on the Labna lot. The Submitters assert that on 9 August 2007 Semarnat wrote to them stating that it had no records or documentary evidence of hazardous waste management on the Labna lot.¹¹⁵

65. Mexico maintains that there is no information in submission SEM-08-001 to indicate the type of raw materials used in the operations of Empresas Motorola,¹¹⁶ nor whether hazardous materials were handled or hazardous waste generated.¹¹⁷ The Party further states that the applicable law did not establish which activities were considered high-risk,¹¹⁸ since the lists applicable to high-risk activities were not published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) until 28 March 1990 and 4 May 1992. Mexico maintains that, in any event, the obligation to register as a hazardous waste generator under RRP Articles 7 and 8 only applied to persons engaging in works or activities requiring environmental impact authorization under LGEEPA Articles 28 and 29, which—it asserts—was not the case of Empresas Motorola's activities.

66. Concerning the information about Empresas Motorola that allegedly should have been in the possession of hazardous waste management service providers, Mexico maintains that:

Procurement of hazardous waste management services is granted after consideration of the information and documentation that each company is required to file. These legal requirements describe processes, activities, equipment, machinery, and facilities employed in the provision of such services but not the names of the clients to whom the services are provided [...].

Anyone who generates, reuses, or recycles hazardous waste shall so notify the Ministry as prescribed by the Regulation to this Act. Authorizations for the establishment of hazardous waste containment facilities shall only include waste that is not technically and economically fit for reuse, recycling, or thermal or physicochemical destruction, and containment of hazardous waste in the liquid state shall not be permitted."

^{115.} Submission, pp. 8-9.

^{116.} Response, p. 36.

^{117.} Ibid., p. 62.

^{118.} Ibid., p. 37.

67. From the information in the submission and the response it may be observed that, in principle, Empresas Motorola may have generated hazardous waste. For example, the appendices to the response make reference to a neutralization pit and hazardous waste storage facility on the Labna lot where sampling was done and thallium was found in excess of the reference concentration. Furthermore, the response leaves open the matter of the origin of the 102 tons of soil removed during the remediation process.

68. Nor does the response directly address the reason why the activities of Empresas Motorola were not considered hazardous waste-generating under the applicable law. RRP Article 7, invoked only by Mexico, refers to works and activities that may have an impact on the environment pursuant to the provisions of LGEEPA Articles 28 and 29. It is clear that the latter provisions were not applicable to Empresas Motorola, as the Party states. However, the Submitters do not assert any failure to effectively enforce them, while they do assert the failure to enforce RRP Article 8, which lists the obligations of hazardous waste generators.

69. The Secretariat is also mindful that despite the foregoing considerations, the concerns raised by the submission regarding the registration of Empresas Motorola as hazardous waste generators correspond to a period running from 26 November 1988, the date that RRP Article 8 came into force, to 31 July 1999, the date when the Labna lot ceased to belong to Empresas Motorola. Thus, at most, the development of a factual record on this issue could consider the matter as from the entry into force of the NAAEC on 1 January 1994,¹¹⁹ making manifest the time limitation on the collection of relevant factual information.

70. Even if the Secretariat were to recommend to Council the preparation of a factual record in regard to enforcement on the Labna lot between 1 January 1994 and 31 July 1999, it appears that the assertion of alleged failures to effectively enforce RRP Article 8 and LGEEPA Article 151 is not a matter that continues to produce effects today. In this regard, the Secretariat has previously found that the ongoing nature of an alleged failure to effectively enforce the environmental law is a criterion for determining the eligibility of a submission.¹²⁰ In light of Mexico's response, the matter raised by the Submitters concerning registration of

^{119.} *Cf.* NAAEC Article 47: "This Agreement shall enter into force on January 1, 1994, immediately after entry into force of the NAFTA, on an exchange of written notifications certifying the completion of necessary legal procedures."

^{120.} In this regard, see SEM-97-004 (*CEDF*), Article 14(1) Determination (25 August 1997), p. 3; and SEM-09-005 (*Skeena River Fishery*), Article 14(1)(2) Determination (18 May 2010), § 22-23.

the company as a hazardous waste generator does not warrant further investigation, since Empresas Motorola ceased to operate on the site more than ten years ago, relevant factual information is likely not to be on a current matter and thus, relevant. While the alleged failure of effective enforcement concerning the obligations set out in RRP Article 8 could have resulted, as SEM-08-001 asserts, in the contamination of the Labna lot, that alleged consequence is analyzed in a different section of this determination dedicated to effective enforcement in relation to its environmental remediation.

71. The Secretariat thus concludes that the assertions concerning registration as a hazardous waste generator and the effective enforcement of the obligations ensuing from that situation do not, in light of Mexico's response, constitute a matter in which a failure to effectively enforce LGEEPA Article 151 and RRP Article 8, in force during the period of Empresas Motorola's operations, could be *ongoing* and therefore decides not to devote further study to this assertion.

2. Assertions concerning alleged abandonment of the Labna lot, documentation of the Labna lot in notarized documents of transfer of ownership, and alleged existence of an environmental liability

(i) Assertions concerning alleged abandonment of the Labna lot

72. The Submitters assert that Semarnat is failing to enforce LGPGIR Article 73, in force since 8 October 2003, relating to the obligation to remediate sites contaminated with hazardous waste that are abandoned or whose owner is unknown.¹²¹

73. Mexico responds that the conditions described in LGPGIR Article 73 do not obtain in this case, since the site was not abandoned and the Labna lot, it asserts, has a "known, well-identified owner."¹²² In its response, Mexico states that when it learned of the existence of contaminants on the site, Empresas Motorola was operating on the Labna lot and Mexico proceeded to enforce LGPGIR Article 70, which provides for the joint and several liability of the owners of a contaminated lot, without prejudice to the power to recover against the party causing the contamination, in accordance with the "polluter pays" principle contemplated in LGPGIR Articles 68 and 69. The Party asserts that, on the basis of this provision, it proceeded to take site remediation measures.

^{121.} Submission, p. 12.

^{122.} Response, p. 66.

74. The Secretariat notes that the notarized documents to which the Submitters and the Party refer indeed demonstrate the uninterrupted transfer of the lot between its sale by Empresas Motorola 31 July 1999 and its ultimate purchase by Deutsche Bank Mexico, S.A. on 20 April 2006. Therefore, the Secretariat observes that there is no issue of effective enforcement warranting the preparation of a factual record with respect to the enforcement of LGPGIR Article 73, and decides to devote no further analysis to this particular assertion.

(ii) Notarized documents of transfer of the Labna lot

75. The Submitters indicate that the notaries public and the director of the Public Registry of Property and Business (*Registro Público de la Propiedad y Comercio*) of the state of Jalisco failed to require Semarnat authorization for transfer of the Labna lot as prescribed by LGPGIR Article 71,¹²³ in force as of 6 January 2004. They add that at the time of the transactions transferring the property, the Parties were aware that the Labna lot was contaminated with hazardous waste, and Semarnat authorization was therefore necessary.¹²⁴ They also assert the alleged failure to effectively enforce Articles 126 to 128 of the LGPGIR Regulation (in force as of 30 December 2006), specifying remediation-related activities ensuing from environmental liabilities.¹²⁵

76. Mexico responds that it is not evident from the documents attached to the submission that the Parties involved in the various purchase and sale processes were aware of the contamination on the Labna lot.¹²⁶ It states that, in any event, the purchase and sale agreements contain procedures for determining liability in the event of hazardous waste being detected in the soil of the Labna lot subsequent to the transaction.¹²⁷ Furthermore, it notes that the Semarnat authorization to which LGPGIR Article 71 refers is only required when the lot is contaminated, not when it is presumed to be contaminated.¹²⁸ Mexico notes further that Articles 126 to 128 of the LGPGIR Regulation are not applicable in this case, since they came into force on 30 November 2006 while the last purchase and sale transaction occurred on 20 April 2006.¹²⁹

^{123.} Submission, p. 14.

^{124.} Ibid., p. 7.

^{125.} Ibid., p. 14.

^{126.} Response, pp. 30-34.

^{127.} Ibid., p. 32.

^{128.} Ibid., p. 30.

^{129.} Ibid., p. 66.

77. LGPGIR Article 71 provides as follows:

The ownership of sites contaminated with hazardous waste may not be transferred without the express authorization of the Ministry.

Persons transferring to third parties real property contaminated by hazardous materials or waste as a result of activities carried out on said real property must so inform the persons to whom they transfer ownership or possession of said properties.

In addition to remediation, anyone found responsible for contamination of a site is liable to the corresponding penal and administrative sanctions.

78. The Secretariat notes that the authorization contemplated in LGPGIR Article 71 is required in the case of a transfer of real property contaminated with hazardous waste "as a result of activities carried out on them," in this case the production and manufacturing of semiconductors and electronic devices that may have generated hazardous waste.

79. Articles 126 to 128 of the LGPGIR Regulation establish the procedures of notification and application for Semarnat authorization, and provide clarity as to the scope of LGPGIR Article 71, since that provision "has as its only effect that of defining the party responsible for taking remediation measures in regard to the transferred site."¹³⁰ While it is true that these provisions of the LGPGIR Regulation came into force subsequent to the transfer of ownership transactions relating to the Labna lot, it is clear that the purpose of this authorization procedure is to establish environmental liability during the transfer of lots contaminated with hazardous waste in Mexico.

80. The Secretariat recalls that the notarized documents give indication of acts to establish liability in the event that hazardous materials or waste should be found on the Labna lot, and that, except for document no. 79,713 of 31 May 2004, substantiating the existence of contamination on the Labna lot,¹³¹ there is no other information in the submission indicating the status of contamination on the site. Mexico maintains that the notarized documents in question do not contain information sufficient to determine the degree of contamination and the specific remediation measures.¹³² However, document 79,713 contains the following clause:

The PURCHASER acknowledges that the real property is contaminated, as is evident from the environmental assessment reports (phase one), the

^{130.} LGPGIR Regulation, Article 127, third paragraph.

^{131.} Submission, p. 5.

^{132.} Response, p. 33.

limited investigation (phase two), and the soil investigation (phase three), the hazardous waste quantification, and the detailed report of asbestos-containing materials, prepared by Consultores en Tecnología Ecológica, S.A. de C.V. on 25 September and 14 November 2003, complete copies of which the SELLER has given to the PURCHASER, who acknowledges receiving and taking full cognizance of them.

The PURCHASER represents that it is aware of the environmental remediation required to be carried out on the real property and the cost associated with said remediation $[...]^{133}$

81. It is clear that the parties to the transaction recorded in document 79,713 were aware of the contamination of the Labna lot, since they both received copies of environmental assessment reports of the site that included quantification of hazardous waste. Thus, in that document the purchaser undertook to indemnify and hold harmless the seller for any measure taken in relation to the environmental condition of the Labna lot,¹³⁴ which appears to satisfy the second paragraph of LGPGIR Article 71. A systematic reading indicates that the only matter that could, in any case, warrant analysis of effective enforcement is the one relating to the Semarnat authorization to transfer ownership of the property, prescribed by the first paragraph of LGPGIR Article 71, since the seller of the Labna lot expressly informed the purchaser of the contamination of the Labna lot and the purchaser purchased the lot with knowledge of the restoration measures to be taken, pursuant to the second paragraph of that provision.

82. The Secretariat finds that the lack of Semarnat authorization alone does not warrant the preparation of a factual record in relation to the effective enforcement of the first paragraph of LGPGIR Article 71, since no more information would be obtained than what is already contained in the submission and the response. In this regard, it must be kept in mind that both the Submitters and the Party in question acknowledge that notarized document 79,713 contains mechanisms for determining environmental liability and indicates the studies conducted with a view to taking restoration measures. The Secretariat is also mindful that Article 127 of the LGPGIR Regulation (in force) recognizes that the sole

^{133.} Submission, unnumbered appendix: Notarized document no. 79,713 of 31 May 2004 before Carlos de Pablo Serna, notary no. 137 of the Federal District, p. 18.

^{134.} *Ibid.* "[...] The PURCHASER hereby gives the SELLER [...] the broadest legal release for any claim that the PURCHASER may bring against it for any issue relating to the environmental condition of the real property. The PURCHASER hereby undertakes to [...] indemnify and save them harmless from any action that may be brought against them [...]."

purpose of the Semarnat authorization is to "identify who is responsible for taking remediation measures." 135

83. Therefore, the Secretariat finds that a factual record would not present more information than what is already set out in the submission and the response in regard to the acts of effective enforcement of LGPGIR Article 71 during the transfer of ownership of the Labna lot, substantiated by notarized document 79,713.

(iii) Alleged existence of environmental liability on the Labna lot and alleged lack of action to inventory it as a contaminated site

84. The Submitters repeatedly maintain that the notarized documents corresponding to the transfer of ownership of the Labna lot substantiate the existence of environmental liabilities¹³⁶ and that an obligation arises under Mexico's environmental law to restore the lot. They further affirm that despite knowing the kind of activities carried out on the site for over 30 years, Semarnat failed to fulfill its obligations to take action to identify and register the Labna lot as a site contaminated with hazardous waste for the purpose of determining whether remediation was necessary, pursuant to LGPGIR Article 75.

85. Mexico responds that it was unaware of the existence of contaminants on the site when Empresas Motorola owned the Labna lot¹³⁷ and that, given the order ultimately issued by the environmental authorities to remediate the site, the condition of LGPGIR Article 75 does not obtain. Furthermore, it clarifies that the concept of environmental liability does not apply in the case of the Labna lot, since for such a situation to exist the site would have to be: i) contaminated with hazardous waste, and ii) not remediated in a timely manner.

86. LGPGIR Article 75, in force as of 6 January 2004, provides as follows:

The Ministry and the local competent authorities, as the case may be, shall be responsible for taking measures to identify, inventory, register, and categorize sites contaminated with hazardous waste with a view to determining whether their remediation is necessary, pursuant to the criteria established in the Regulation for that purpose.

^{135. &}quot;The Ministry's authorization does not stand in the way of acts of commerce or civil law; its sole effect is to define who is responsible for taking remediation measures for the transferred site." LGPGIR Regulation Article 127, third paragraph.

^{136.} Submission, pp. 2, 7, 8, 13, 14, and 15.

^{137.} Response, p. 65.

87. Article 134, third paragraph, of the LGPGIR Regulation, in force since 30 November 2006, provides as follows:

Those sites contaminated by the release of hazardous materials or waste that were not remediated in a timely manner with a view to preventing the spread of contaminants but entail an obligation of remediation are considered environmental liabilities. This definition includes contamination generated by an emergency having effects on the environment.

88. The Secretariat finds that, while not all the notarized documents attached to the submission indicate that there is indeed contamination on the Labna lot, document 79,713 substantiates the existence of contamination on the site and mentions an environmental assessment that apparently quantifies hazardous waste on the property. Concerning whether the environmental remediation was timely, the Secretariat observes that document 79,713 substantiated the soil contamination on the Labna lot on 31 May 2004 and that not until 12 April 2007 did Profepa make an inspection visit during which the taking of soil samples was noted. This inspection visit was conducted further to a citizen complaint of 29 March 2007 concerning the alleged existence of environmental liabilities on the Labna lot. Profepa requested information on the operations of Empresas Motorola and, on 22 May 2007, instituted an administrative proceeding against SSC Inmobiliaria, which gave rise to the subsequent site remediation.

89. This chronology of the facts confirms that, while the environmental authorities may not have been aware of the contamination of the Labna lot since 31 May 2004, the relevant authorities responded on 12 April 2007 to a citizen complaint filed fourteen days earlier in relation to restoration of the Labna lot. Therefore, the assertion of the persistence of environmental liabilities on the Labna lot is not, in light of Mexico's response, an open question.

90. Concerning whether Mexico failed to effectively enforce LGPGIR Article 75, since it did not, pursuant to the Regulation, identify the Labna lot as a contaminated site with a view to undertaking remediation thereof, it is relevant to consider that the LGPGIR Regulation, insofar as it prescribes the mechanisms to be used in carrying out such work, was only in force as of 30 November 2006. As well, Mexico reported in its response that it proceeded to take environmental remediation measures in accordance with LGPGIR Article 70 (in force as of 6 January 2004) and the principle of joint and several liability.¹³⁸

^{138.} Response, p. 63. *Cf.* LGPGIR Article 70: "Private property owners or holders and holders of areas under concession whose soils are found to be contaminated shall

91. While Mexico argues that it was unaware of the contamination on the site, the response indicates that once the situation was reported to Profepa through the filing of a citizen complaint that noted the possible contamination of the Labna lot with heavy metals, Profepa made an inspection visit fourteen days later and instituted an administrative proceeding. Even though Mexico's response does not present information on a process of *inventory* and *registration* of the Labna lot, the response to the citizen complaint appears to respond to central issues raised in the submission concerning measures to remediate the Labna lot.

92. Therefore, the Secretariat does not find open central questions in regard to the alleged abandonment of the Labna lot and the existence of environmental liability, as defined by Mexican law. Nor does it find that the facts described in notarized document 79,713 itself constitute a compelling reason to develop a factual record. Therefore, the Secretariat does not recommend to the CEC Council an investigation into the effective enforcement of LGPGIR Article 75, since the response of the Party evidences various acts of enforcement by Profepa further to a citizen complaint concerning the contamination of the Labna lot.

3. Characterization and environmental remediation of the Labna lot

93. The Submitters maintain that on 31 July 2007 Semarnat approved a remediation proposal for the Labna lot.¹³⁹ They assert a failure by Mexico to enforce provisions relating to the requirements and procedure for the drafting of environmental restoration plans, the taking of remediation measures, and the mechanism for declaring the remediation process to be completed.¹⁴⁰

94. According to the Submitters, the remediation proposal for the Labna lot was based on an incomplete soil analysis, since various Mexican Official Standards were not considered during the drafting of the proposal.¹⁴¹ The remediation proposal, they note, only considered thal-

be jointly and severally liable for taking any remediation measures that may prove necessary, without prejudice to the right to recover against those who caused the contamination."

^{139.} Submission, pp. 9-11.

^{140.} LGPGIR Regulation, Articles 132-153.

^{141.} Submission, p. 9. The Mexican Official Standards (NOM) and Mexican Standards (NM) to which the submission refers are NOM-147-SEMARNAT/SSA1-2004, Establishing criteria for determination of remediation concentrations for metalcontaminated soils; NMX-AA-123SCFI-2006, Soil sampling for identification and quantification of metalloids, and handling of the sample; NOM-133-SEMARNAT-2000, Polychlorinated biphenyls (PCB), management specifications, and NOM-

lium, omitting other components that may have been found on the site.¹⁴² The Submitters maintain that Semarnat should not have declared the remediation to be complete since the documents attesting to completion are insufficient, and they criticize Profepa for having declared the site free of contaminants, since "only a search for thallium was performed, not a remediation of the entire lot."¹⁴³

Concerning the alleged deficiencies in the soil analysis performed 95. in connection with restoration of the Labna lot, relating to the alleged lack of consideration of certain Mexican Official Standards, Mexico responds that the NOM applicable to the determination of soils contaminated with heavy metals, including thallium, was enforced,¹⁴⁴ and that it was not relevant to consider the other standards to which the Submitters refer, since these apply to the determination of polychlorinated biphenyls¹⁴⁵ and to the procedure for identifying a waste as hazardous.¹⁴⁶ Concerning the polychlorinated biphenyls standard, Mexico finds that its application to the characterization of contaminants in the soil on the Labna lot was not necessary,147 since "its purpose is to establish environmental protection specifications for equipment, electrical equipment, contaminated equipment, liquids, solids, or waste containing or contaminated with polychlorinated biphenyls, and in the case at hand there was no reason to apply it."148 As for the hazardous waste standard, "it essentially applies to processes"149 and not to soil characterization.

96. The appendices to the response substantiate that from 18 to 23 April 2007, sampling was done at 19 points on the Labna lot and the samples were analyzed for arsenic, barium, beryllium, cadmium, hexava-

⁰⁵²⁻SEMARNAT-2005, Establishing the characteristics and procedure for identification and classification of hazardous waste.

^{142.} Submission, p. 11.

^{143.} *Ibid.*, p. 12.

^{144.} Mexican Official Standard NOM-147-SEMARNAT/SSA1-2004, Establishing the criteria for determination of remediation concentrations for soils contaminated with arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, selenium, thallium, and/or vanadium.

^{145.} Mexican Official Standard NOM-133-SEMARNAT-2000, Environmental protection: polychlorinated biphenyls, management specifications.

^{146.} Mexican Official Standard NOM-052-SEMARNAT-2005, Establishing the characteristics and procedure for identification and classification of hazardous waste.

^{147.} The object of NOM-133-SEMARNAT reads as follows: "This Mexican Official Standard establishes environmental protection specifications for the management of equipment, electrical equipment, contaminated equipment, liquids, solids, and hazardous waste containing or contaminated with polychlorinated biphenyls, and timetables for their elimination through decommissioning, reclassification, and decontamination."

^{148.} Response, p. 45.

^{149.} Response, p. 46.

lent chromium, mercury, nickel, silver, lead, selenium, and vanadium, in addition to thallium. $^{\rm 150}$

97. In view of the thallium concentrations obtained from the soil analyses performed to determine the presence of chemical elements contemplated in NOM-147-SEMARNAT/SSA1-2004, Profepa instituted an administrative proceeding against SSC Inmobiliaria.¹⁵¹ According to the Party, these studies revealed that thallium was the only chemical detected in excess of the allowable concentration.¹⁵² Mexico asserts that since the results of the analysis were not sufficient to determine the volume of contaminated soils,¹⁵³ Profepa ordered urgent enforcement measures including characterization of the site with respect to thallium; random sampling on the unassessed portion of the lot to determine the presence of thallium; drafting of a site remediation proposal based on the results obtained, and filing of the delivery, transportation, and receipt manifests for the waste.¹⁵⁴

98. The remediation measures supervised by Profepa included site characterization pursuant to NOM-147-SEMARNAT/SSA1-2004; random sampling; drafting of a remediation proposal; documentation of waste generated by the removal of contaminated soil, and application of an administrative penalty.¹⁵⁵ The appendices to the response indicate that DGGIMAR evaluated the remediation proposal and the characterization. That authority noted the deficiencies that the study was to consider and approved the performance of the study, subject to compliance with certain conditions.¹⁵⁶ On this basis, from July to September 2007, remediation work took place on the Labna lot with the removal of 102.915 tons of thallium-contaminated soil.¹⁵⁷ Once the soil was removed, sampling for the contaminants covered by NOM-147-SEMARNAT/SSA1-2004 was repeated and it was found that they did

^{150.} Response, p. 54.

^{151.} Response, Appendix 9: Doc. no. PFPA-JAL/SJ/1285/07/2337 of 22 May 2007, issued by the Profepa office in the state of Jalisco, p. 2.

^{152.} Response, p. 53.

^{153.} Response, p. 53 and Appendix 9: Doc. no. PFPA-JAL/SJ/1285/07/2337 of 22 May 2007, issued by the Profepa office in the state of Jalisco, p. 4.

^{154.} Response, p. 55 and Appendix 9: Doc. no. PFPA-JAL/SJ/1285/07/2337 of 22 May 2007, issued by the Profepa office in the state of Jalisco, pp. 7-11.

Response, Appendix 50: Technical report for decision no. PFPA/DJAL/DT/36.4/ 169/07 of 20 August 2007, issued by the Profepa office in the state of Jalisco, pp. 17-25.

^{156.} Response, Appendix 7: Doc. no. DGGIMAR.710/005163 of 31 July 2007, issued by the Management of High-Risk Materials and Activities Branch of Semarnat.

^{157.} Response, Appendix 66: Doc. no. DGGIMAR.710/007243 of 9 November 2007, issued by the Management of High-Risk Materials and Activities Branch.

not exceed the parameters set out in the standard for agricultural/residential/commercial land uses.¹⁵⁸

99. Therefore, on 21 January 2008, the Profepa office in Jalisco declared the remediation of thallium-contaminated soil on the Labna lot to be completed.¹⁵⁹

100. The Secretariat finds that the appendices to the response reflect the soil analysis conducted to determine the possible presence of arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, vanadium, selenium, and thallium¹⁶⁰ and, further to any findings, to determine the relevant remediation measures. The foregoing appears to respond to the Submitters' concern that there was no analysis of other heavy metals under Mexican law. The Secretariat has not identified open central questions that warrant the development of a factual record in regard to this particular assertion. Concerning the consideration of other Mexican Official Standards applicable to the hazardous waste generation processes and management of polychlorinated biphenyls on the Labna lot, Mexico's response appears to respond adequately to these issues, since Mexico enforced the NOM relating to characterization of contaminated soils.

101. Concerning the assertion of an alleged failure to enforce in connection with the verification of transportation and final disposal of thallium-contaminated soil from the Labna lot, the Profepa file contains the delivery-receipt manifests for 102 tons of earth from the lot as well as 200 m³ of exhaust ducts and fiberglass material, PVC pipe, and two tons of asbestos-containing sheets and asbestos-containing materials, among other things, from the facility dismantled on the Labna lot.¹⁶¹

102. Therefore, Mexico's response to the Submitters' assertion concerning the characterization and environmental remediation of the Labna lot leaves no central open questions. In the absence of other, more specific assertions concerning Mexico's alleged failure to enforce in this regard, the Secretariat does not recommend the preparation of a factual record.

^{158.} Ibid.

^{159.} Response, Appendix 69: Doc. no. PFPA-JAL/SJ/0313/08 of 21 January 2008, issued by the Profepa office in the state of Jalisco.

^{160.} Response, Appendix 50: Technical report for decision no. PFPA/DJAL/DT/36.4/ 169/07 of 20 August 2007, issued by the Profepa office in the state of Jalisco.

^{161.} Response, p. 18.

V. DETERMINATION

103. The Secretariat has reviewed submission SEM-08-001 (La Ciudadela Project), filed by Instituto de Derecho Ambiental, A.C., Asociación Vecinal Jardines del Sol, A.C., and Colonos de Bosques de San Isidro, A.C. in accordance with NAAEC Articles 14 and 15. The Submitters allege failures to effectively enforce Mexican environmental law in connection with an alleged contaminated site in Zapopan, Jalisco, where La Ciudadela real estate project is located. Having considered SEM-08-001 and in light of the response of Mexico, the Secretariat finds that a factual record would not present more information than what is already contained in the submission and the response. Furthermore, after analyzing the Submitters' assertions in light of the Party's response, the Secretariat finds that some assertions were either adequately addressed in the response or correspond to alleged failures to enforce that are not taking place. Therefore, and as explained in the body of this determination, the Secretariat finds that development of a factual record is not warranted in regard to submission SEM-08-001 (La Ciudadela Project) and hereby terminates the process relating to the submission.

Respectfully submitted for your consideration on this 12th day of August, 2010.

Secretariat of the Commission for Environmental Cooperation

- Per: Evan Lloyd Executive Director
- c.c.: Enrique Lendo, Mexico Alternate Representative David McGovern, Canada Alternate Representative Michelle DePass, US Alternate Representative Submitters

SEM-08-002

(Air Pollution in Suburban Montreal)

SUBMITTERS:	YVON OTIS
PARTY:	CANADA
DATE:	29 August 2008
SUMMARY:	The Submitter alleges that the government of Quebec, and more precisely, the <i>Communauté métropolitaine de Montréal</i> is failing to effectively enforce its environmental law with regard to gasoline vapour emissions from service stations in suburban Montreal.

SECRETARIAT DETERMINATION:

ART. 14(1)Determination that criteria under Article 14(1)(26 September 2008)have not been met.

Secrétariat de la Commission de coopération environnementale

Décision en vertu du paragraphe 14(1) de l'Accord nord-américain de coopération dans le domaine de l'environnement

Auteur de la communication : Yvon Otis

Nº de la communication :	SEM-08-002 (Pollution atmosphérique en banlieue de Montréal)
Date de décision :	Le 26 septembre 2008
Date de réception :	Le 29 août 2008
Partie :	Canada

I. INTRODUCTION

Le 28 août 2008, M. Yvon Otis (ci-après l'« auteur »), un résident de Repentigny, en banlieue de Montréal, Québec, a déposé auprès du Secrétariat de la Commission de coopération environnementale (CCE) une communication aux termes de l'article 14 de l'*Accord nord-américain de coopération dans le domaine de l'environnement* (« ANACDE » ou « Accord »). En vertu de l'article 14 de l'ANACDE, le Secrétariat pourra examiner toute communication présentée par une organisation non gouvernementale ou une personne et alléguant qu'une Partie à l'Accord omet d'assurer l'application efficace de sa législation de l'environnement, s'il juge que la communication répond aux critères énoncés au paragraphe 14(1). Lorsqu'il juge que la communication justifie la demande d'une réponse à la Partie.

L'auteur de la communication allègue que le Canada, et plus précisément la province de Québec, omet d'assurer l'application efficace de « la loi de l'Assemblée nationale du Québec créant la Communauté métropolitaine de Montréal et confiant à cette dernière la juridiction sur l'assainissement de l'atmosphère¹ ». Selon l'auteur, l'omission réside dans le fait qu'on néglige d'adopter un règlement sur les émissions atmosphériques, et ce, pour l'ensemble du territoire de la Communauté métropolitaine de Montréal (CMM).

Le Secrétariat a déterminé que la communication ne satisfait pas aux critères énoncés au paragraphe 14(1). L'auteur disposera maintenant de 30 jours pour présenter une communication qui satisfasse aux critères mentionnés au paragraphe 14(1). Les motifs du Secrétariat sont exposés dans la Section III de la présente décision.

II. RÉSUMÉ DE LA COMMUNICATION

Dans la communication SEM-08-002 (*Pollution atmosphérique en banlieue de Montréal*), l'auteur allègue que la CMM a été créée en 2001 par la *Loi sur la Communauté métropolitaine de Montréal*, L.R.Q., chapitre C-37.01. L'auteur allègue que la CMM a compétence pour planifier et contrôler l'application d'un règlement sur l'assainissement de l'atmosphère à l'échelle de son territoire, y compris le pouvoir de « régir ou prohiber l'émission de substances polluantes ; exiger la possession d'un permis pour toute personne qui exerce une activité susceptible de causer une émission de polluant dans l'atmosphère ; déterminer les méthodes de prélèvement, d'analyse et de calcul d'un polluant ; prescrire les dispositifs dont doivent être munis les immeubles, les équipements, les installations et autres objets dont l'usage ou le fonctionnement est susceptible de causer l'émission d'un polluant »².

L'auteur allègue que, malgré cette loi, le territoire de la CMM est actuellement « soumis à deux règlements distincts sur les émissions atmosphériques : [l'] un pour l'île de Montréal, l'autre pour les quatre autres secteurs de la région métropolitaine³ ». L'auteur allègue que le règlement en vigueur sur l'île de Montréal est celui adopté et mis en vigueur par l'ancienne Communauté urbaine de Montréal, tandis que la banlieue de Montréal faisant partie de la CMM est soumise aux règles du ministère du Développement durable, de l'Environnement est des Parcs (MDDEP) du Québec. L'auteur allègue que le règlement qui s'applique à Montréal est plus sévère que les règles qui s'appliquent à la banlieue. Il allègue, par exemple, « que les gens de l'île sont à l'abri des émissions de vapeurs d'essence qui sont émises lorsque les camions-citernes font le

^{1.} Communication à la p. 1.

Communication à la p. 1. La loi, qui est annexée à la communication, décrit en détail ces pouvoirs. L.R.Q., c. C-37.01, paragr. 159.1.

^{3.} Communication à la p. 1.

ravitaillement des stations-service » tandis qu'à Repentigny, où habite l'auteur, « les vapeurs d'essence ne sont pas captées et nous devons subir leur impact potentiel sur notre santé »⁴.

L'auteur allègue que le Québec, et vraisemblablement la CMM, omet d'assurer l'application efficace de la *Loi sur la Communauté métropolitaine de Montréal* en n'adoptant pas, après sept ans, un règlement unique sur les émissions atmosphériques pour tout le territoire de la CMM. Le 28 juillet 2008, l'auteur a envoyé une lettre au MDDEP lui exprimant son point de vue à savoir que « la CMM tarde à exécuter une tâche cruciale qui lui a été confiée par la loi⁵ ». L'auteur allègue qu'il n'avait pas reçu de réponses substantielles ni du MDDEP ni du maire de Montréal avant de déposer sa communication.

III. ANALYSE

Aux termes de l'article 14 de l'ANACDE, le Secrétariat peut examiner toute communication présentée par une organisation non gouvernementale ou une personne en alléguant qu'une Partie omet d'assurer l'application efficace de sa législation de l'environnement. Lorsque le Secrétariat est d'avis que la communication satisfait aux critères énoncés au paragraphe 14(1) de l'ANACDE, il entame un processus susceptible de mener à la constitution d'un dossier factuel. Tel que souligné par le Secrétariat dans des décisions antérieures rendues aux termes du paragraphe 14(1), ce dernier n'est pas censé constituer un obstacle procédural insurmontable dans l'examen des communications⁶.

Dans le cas présent, le Secrétariat a déterminé que l'allégation contenue dans la communication ne satisfait pas aux exigences du début du paragraphe 14(1) qui stipule qu'une communication doit alléguer qu'« une Partie omet d'assurer l'application efficace de sa législation de l'environnement ». De fait, dans sa communication, l'auteur n'allègue pas une omission dans *l'application* des dispositions réglementaires citées⁷; il estime que la CMM n'a pas adopté un règlement malgré son pouvoir discrétionnaire (et non pas obligatoire) de le faire. Le Secrétariat a déjà noté une distinction entre une allégation ciblant l'application des normes existantes et une allégation voulant que les normes soient

^{4.} Communication à la p. 2.

^{5.} Lettre de l'auteur à la ministre du MDDEP, annexe à la communication à la p. 1.

^{6.} Voir, à ce sujet, la Décision du Secrétariat en vertu du paragraphe 14(1) (26 mai 1998) concernant la communication SEM-97-005 (*Biodiversité*), ainsi que la Décision en vertu des paragraphes 14(1) et (2) (8 septembre 1999) concernant la communication SEM-98-003 (*Grands Lacs*).

^{7.} Ibid.

inadéquates et a conclu qu'une allégation selon laquelle une norme est inadéquate ne peut pas être considérée comme une allégation concernant une omission d'assurer l'application de la loi aux termes de l'article 14 de l'ANACDE⁸. En effet, dans la présente communication, l'auteur allègue que le règlement en vigueur sur l'île de Montréal et les dispositions du MDDEP qui s'appliquent à la banlieue en matière d'émissions atmosphériques sont dans l'ensemble inadéquats, et que la CMM doit exercer son pouvoir discrétionnaire de les remplacer par un seul règlement pour l'ensemble du territoire de la CMM⁹. Par conséquent, le Secrétariat conclut que l'allégation voulant que la CMM omette d'adopter un règlement sur les émissions atmosphériques ne peut pas être considérée comme une omission d'assurer l'application efficace de la loi qui prescrit le pouvoir discrétionnaire de l'adopter.

IV. CONCLUSION

Pour les motifs exposés ci-dessus, le Secrétariat a décidé que la communication SEM-08-002 (*Pollution atmosphérique en banlieue de Montréal*) ne satisfait pas aux critères énoncés au paragraphe 14(1) de l'ANACDE. Toutefois, conformément au paragraphe 6.2 des *Lignes directrices relatives aux communications sur les questions d'application visées aux articles 14 et 15 de l'ANACDE*, les auteurs disposent d'un délai de 30 jours pour présenter au Secrétariat une communication conforme aux critères énoncés au paragraphe 14(1).

Respectueusement soumis ce 26 septembre 2008.

Secrétariat de la Commission de coopération environnementale

Paolo Solano Directeur par intérim Unité des communications sur les questions d'application

c.c. : David McGovern, Environnement Canada Scott Fulton, US EPA Enrique Lendo, Semarnat Adrián Vázquez-Gálvez, directeur exécutif du Secrétariat de la CCE Yvon Otis, auteur de la communication

^{8.} SEM-98-003 (Grands Lacs), Décision en vertu du paragraphe 14(1) (14 décembre 1998).

^{9.} Communication à la p. 2.

SEM-08-003

(Jetty Construction in Cancún)

SUBMITTERS: CARLOS ÁLVAREZ FLORES

PARTY: MEXICO

DATE: 17 November 2008

SUMMARY: The submission asserts that the Attorney General's branch office for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*, "Profepa") in Quintana Roo is failing to investigate and prosecute the actions of a local hotel involving the construction of a jetty on the Cancun coast where the hotel is located, in violation of Mexico's environmental impact assessment laws.

SECRETARIAT DETERMINATION:

ART. 14(1)Determination that criteria under Article 14(1)(8 December 2008)have not been met.

Secretariado de la Comisión para la Cooperación Ambiental de América del Norte

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Peticionario:	Carlos Álvarez Flores
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	17 de noviembre de 2008
Fecha de la determinación:	8 de diciembre de 2008
Núm. de petición:	SEM-08-003 (Construcción de espigón en Cancún)

El 17 de noviembre de 2008, Carlos Álvarez Flores (el "Peticionario") presentó ante el Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") una petición ciudadana en conformidad con el artículo 14 del Acuerdo de Cooperación Ambiental de América del Norte ("ACAAN" o el "Acuerdo"). En ella el Peticionario asevera que la delegación en Quintana Roo de la Procuraduría Federal de Protección al Ambiente (la "Profepa") no está aplicando efectivamente la legislación en lo referido a la investigación de infracciones y aplicación de sanciones por la presunta violación a la normatividad cometida por un hotel local al construir un espigón en Cancún, Quintana Roo.

El Secretariado puede examinar las peticiones de cualquier persona u organización sin vinculación gubernamental que cumplan con los requisitos establecidos en el artículo 14(1) del Acuerdo. Cuando el Secretariado considera que una petición satisface tales requisitos, el Secretariado determina si la petición amerita solicitar una respuesta de la Parte del ACAAN (la "Parte"). Para llegar a esta determinación, el Secretariado se orienta por las consideraciones listadas en el artículo 14(2) del ACAAN. Tras haber analizado la petición SEM-08-003, el Secretariado considera que ésta no cumple con todos los requisitos del artículo 14(1) del Acuerdo, en particular puesto que no identifica la legislación ambiental que supuestamente México está dejando de aplicar efectivamente, no proporciona información documental suficiente que sustente las aseveraciones contenidas en la petición, no contiene información para determinar que el Peticionario no es un competidor que pueda beneficiarse económicamente con la petición, ni señala si el asunto ha sido comunicado por escrito a las autoridades pertinentes de México.

I. RESUMEN DE LA PETICIÓN

El Peticionario asevera que México incurre en omisiones en la aplicación efectiva de los artículos 1, 2, 5, 6 y 7 del ACAAN porque no está investigando las supuestas infracciones por la construcción de un espigón en Cancún, Quintana Roo, ni imponiendo las sanciones correspondientes. El Peticionario señala que en 2004 la Dirección General de Impacto y Riesgo Ambiental (DGIRA) de la Secretaría de Medio Ambiente y Recursos Naturales (la "Semarnat") negó la debida autorización en materia de impacto ambiental para la construcción "de un espigón de rocas y materiales pétreos para retener las arenas de las playas"¹ del hotel Gran Caribe Real, ubicado en la zona hotelera de Cancún.

El Peticionario señala que la Semarnat "[...] ordenó el retiro de todo tipo de estructuras como estos espigones [...] las cuales, está demostrado, ponen en riesgo la estabilidad de las playas en su conjunto y afectan la vida [y] la salud de los [c]orales en el Parque Marino Cancún".² Pese a ello, según aseveraciones del Peticionario, la construcción de dicho espigón se llevó a cabo en abril de 2008 sin autorización en materia de impacto ambiental. La presunta infracción se reportó ante la delegación estatal de la Profepa en el estado, sin que —según el Peticionario—, se emprendieran acciones al respecto.

II. ANÁLISIS

El artículo 14 del ACAAN autoriza al Secretariado a considerar las peticiones de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte del ACAAN está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental.

^{1.} Petición, p. 1.

^{2.} Ibid., p. 6.

A. Párrafo inicial del artículo 14(1)

La oración inicial del artículo 14(1) permite al Secretariado considerar peticiones "de cualquier persona u organización sin vinculación gubernamental." Al respecto, el Peticionario parece cumplir con este requisito. Por cuanto a las afirmaciones que se hacen en la petición, el Secretariado concluye que cumplen con el requisito de temporalidad en la medida en que aseveran que está teniendo lugar una omisión de la Parte en la aplicación efectiva de la legislación ambiental.

Sin embargo, el Secretariado estima que la petición no cita la legislación ambiental que —supuestamente— México no está aplicando con efectividad. En lugar de ello, el Peticionario asevera que México está incurriendo en omisiones en la aplicación efectiva de los artículos 1, 2, 5, 6 y 7 del ACAAN, disposiciones que no encuadran con la definición "legislación ambiental" en los términos del Acuerdo.³ El Peticionario tampoco hace cita de otros instrumentos legales aplicables a las aseveraciones contenidas en la petición.

Por las razones expuestas, la petición no cumple con los requisitos del párrafo inicial del artículo 14(1) del ACAAN.

B. Los seis requisitos del artículo 14 (1) del ACAAN

El Secretariado encuentra también que la petición no satisface los incisos c), d) y e) tal como se explica a continuación:

- a. La petición cumple con el requisito del artículo 14(1)(a) porque se presenta por escrito en un idioma designado por las Partes para la presentación de peticiones, en este caso español.⁴
- b. La petición satisface el artículo 14(1)(b), ya que la información proporcionada permite identificar a la persona que presenta la petición.

^{3.} Véase a este respecto el artículo 45(2) del ACAAN.

^{4.} El artículo 19 del ACAAN establece que los idiomas oficiales de la CCA son indistintamente el español, el francés y el inglés. En este mismo sentido, el punto 3.2 de las Directrices para la presentación de peticiones ciudadanas relativas a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte (las "Directrices") establece: "Las peticiones podrán presentarse en español, francés o inglés, que son los idiomas designados por las Partes para las peticiones".

c. La petición no cumple el requisito del artículo 14(1)(c), dado que no proporciona información suficiente que permita al Secretariado revisarla. Aunque contiene un anexo fotográfico con imágenes de la construcción de un espigón, la petición carece de información que sustente todas las aseveraciones: no proporciona documentación sobre la supuesta negativa de la DGIRA a la autorización en materia de impacto ambiental para la estructura en cuestión, ni tampoco mayor información sobre la prohibición legal de erigir espigones en las playas de Quintana Roo.⁵

Además, de conformidad con el inciso 5.6 de las *Directrices para la presentación de peticiones ciudadanas relativas a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte (las "Directrices"), una petición debe abordar los factores enlistados en el artículo 14(2) del ACAAN. Al respecto, si bien la petición se refiere al daño al ambiente que supuestamente ocasiona la construcción del espigón, no proporciona mayor información sobre dicha aseveración;⁶ tampoco incluye documentos sobre la presentación de una denuncia popular en abril de 2008 o sobre otros recursos intentados conforme a la legislación en México. Lo anterior, habría permitido al Secretariado evaluar si se han tomado las acciones razonables para acudir a los recursos previstos en México previos a la petición.⁷*

- d. La petición no satisface el artículo 14(1)(d), ya que si bien las aseveraciones se refieren a la supuesta omisión de México en cuanto a investigar violaciones y aplicar sanciones por la construcción de obras sin la debida autorización en materia de impacto ambiental (y, por tanto, la petición parecería encaminada a promover la aplicación de la ley), el Secretariado no puede determinar con base en la información proporcionada si el Peticionario no es un competidor que pueda beneficiarse económicamente con la petición. Al respecto, el Peticionario puede presentar una declaración escrita en la que aclare su posición.
- e. La petición no cumple el requisito del artículo 14(1)(e), puesto que el Peticionario no adjuntó información que indique que el asunto en cuestión haya sido comunicado por escrito a las autoridades pertinentes de la Parte ni tampoco, si la hay, la respuesta de dicha autoridad.

^{5.} Petición, p. 1.

^{6.} ACAAN, artículo 14(2)(a), e inciso 7.4 de las Directrices.

^{7.} ACAAN, artículo 14(2)(c), e inciso 7.5 de las Directrices.

f. Por último, la petición cumple con el artículo 14(1)(f), toda vez que ha sido presentada por una persona establecida en el territorio de una de las Partes.

III. DETERMINACIÓN

Por las razones expuestas, el Secretariado considera que la petición SEM-08-003 (*Construcción de espigón en Cancún*) no cumple con los requisitos de admisibilidad del artículo 14(1). De acuerdo con el apartado 6.1 y 6.2 de las Directrices, el Secretariado notifica al Peticionario que cuenta con 30 días para presentar una petición que cumpla con todos los criterios del artículo 14(1). Si tal petición revisada no se recibe a más tardar el **7 de enero de 2009**, el Secretariado dará por terminado el trámite con respecto a SEM-08-003.

Secretariado de la Comisión para la Cooperación Ambiental

- por: Paolo Solano Oficial jurídico Unidad sobre Peticiones Ciudadanas
- ccp: Sr. Enrique Lendo, Secretaría de Medio Ambiente y Recursos Naturales (Semarnat)
 - Sr. David McGovern, ministerio de Medio Ambiente de Canadá (Environment Canada)
 - Sr. Scott Fulton, Agencia de Protección Ambiental de Estados Unidos (EPA)
 - Sr. Dane Ratliff, Director de la Unidad sobre Peticiones Ciudadanas, CCA

Peticionario

SEM-09-001

(Transgenic Maize in Chihuahua)

SUBMITTERS: GREENPEACE MEXICO, A.C., ET AL.

PARTY: MEXICO

DATE: 28 January 2009

SUMMARY: The Submission asserts that the Government of Mexico is failing to effectively enforce its environmental laws with regard to control, inspection, investigation, and risk assessment of transgenic maize in Chihuahua, Mexico.

SECRETARIAT DETERMINATIONS:

ART. 14(1)Determination that criteria under Article 14(1)(6 January 2010)have not been met.

ART. 14(1)&(2)Determination that criteria under Article 14(1)(3 March 2010)have been met, and that the submission merits
requesting a response from the Party.

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 14(1) of the North American Agreement on Environmental Cooperation

Submitters:	Greenpeace Mexico, A.C. Frente Democrático Campesino Unión Nacional de Productores Agropecuarios, Comerciantes, Industriales y Prestadores de Servicio El Barzón, A.C. ("El Barzón, A.C.") Centro de Derechos Humanos de las Mujeres, A.C.
Represented by:	Greenpeace Mexico, A.C.
Party:	United Mexican States
Date of submission:	28 January 2009
Date of this determination:	6 January 2010
Submission no.:	SEM-09-001 (Transgenic Maize in Chihuahua)

I. EXECUTIVE SUMMARY

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement") provide for a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the "Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation" (the "Guidelines"). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a Factual Record, providing its reasons for such recommendation in accordance with NAAEC Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission.¹

2. On 28 January 2009, Frente Democrático Campesino, El Barzón, A.C., Centro de Derechos Humanos de las Mujeres, A.C., Greenpeace Mexico, A.C., and others² (the "Submitters"), filed a citizen submission with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") in accordance with Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or the "Agreement"). The Submitters assert that Mexico is failing to effectively enforce its environmental laws in connection with the control, inspection, investigation, and risk assessment of transgenic maize in Chihuahua, Mexico.

3. Upon analysis of submission SEM-09-001 (*Transgenic Maize in Chi-huahua*, the "Submission"), the Secretariat has determined that it does not meet all the admissibility requirements of Article 14(1) of the Agreement. The Secretariat presents its reasons for this determination, below.

II. SUMMARY OF THE SUBMISSION

4. The Submitters assert that the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*— Semarnat); the Office of the Attorney General of the Republic (*Procuraduría General de la República*—PGR); the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa); the Ministry of Agriculture, Livestock Production, Rural Development, Fisheries, and Food (*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación*—Sagarpa); the Ministry of the Treasury and Public Credit (*Secretaría de Hacienda y Crédito*

^{1.} Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records can be found on the CEC's Citizen Submissions on Enforcement Matters website at: http://www.cec.org/citizen/index.cfm?varlan=english>.

^{2.} Between the filing date of submission SEM-09-001 and 27 March 2009, the Secretariat received 5728 petitions claiming to join the submission. All of these petitions came from the same email address: <write-a-letter@smtp-gw.greenpeace.org>.

Público—SHCP), and the Interministerial Commission on the Biosafety of Genetically Modified Organisms (*Comisión Intersecretarial de Bioseguridad de los Organismos Genéticamente Modificados*—Cibiogem), are all failing to effectively enforce the environmental laws cited in the submission.³

5. The Submitters state that the above Mexican authorities are failing to effectively enforce Articles 4 and 17 of the Political Constitution of the United Mexican States (the "Mexican Constitution"); NAAEC Articles 5, 6, and 7; Articles 1, 2, 8, 9, 10, 15 and 16 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (the "Cartagena Protocol"); Articles 2 paragraphs I, II, VI, VII, XI, XII and XIII, 9 paragraphs I, 29, 32 paragraph I, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, 49, 60, 61, 62, 63, 65, 66, 86, 87, 88, 101, 102, 110, 111, 112, 113, 114, 115, 117, 119, and 120 of the Biosafety of Genetically Modified Organisms Act (Ley de Bioseguridad de los Organismos Genéticamente Modificados—"LBOGM"); Articles 1, 2 paragraph III, 15, 160, 161, 164, 165, 166, 170, 170 Bis, 182, 189, 190, 191, 192, 193, 198, 201, 202, 203, and 204 of the General Ecological Balance and Environmental Protection Act (Ley General del Equilibrio *Ecológico y la Protección al Ambiente*—LGEEPA), and Articles 420 *Ter*, 421, and 422 of the Federal Criminal Code (Código Penal Federal-CPF). The Submitters further assert that Mexico has not implemented various recommendations contained in Maize and Biodiversity: the Effects of Transgenic Maize in Mexico, a report produced by the CEC Secretariat in accordance with NAAEC Article 13.4

6. The Submitters note that for the state of Chihuahua, classified by the National Institute of Ecology (*Instituto Nacional de Ecología*—INE) as a region of high maize diversity, there are records of the occurrence of 23 landraces of native maize and two of teocintle.⁵ They state that despite the existence of a documented case of gene flow from transgenic maize to conventional maize varieties, the biosafety measures prescribed by the environmental laws cited in the submission are not being enforced.⁶

7. The Submitters refer to "the failure of the Mexican authorities to take measures ensuring an adequate level of protection of native and hybrid maize varieties from GM [genetically modified] seeds" entering the country and being planted in Chihuahua.⁷ They assert a lack of

^{3.} Submission, p. 2.

^{4.} *Ibid.*, pp. 5, 7, 9, 10, 11, 12, 13.

^{5.} *Ibid.*, p. 14.

^{6.} *Ibid.*, p. 1.

measures to control and supervise storage, distribution, and commercialization of genetically modified maize. They further contend that measures contemplated in the environmental law that are necessary for adequate customs inspection and control of transgenic maize imported into Mexico have not been taken, citing risk assessment and prior informed agreement as examples.⁸ According to the Submitters, there is evidence of the importation, distribution, and cultivation of transgenic maize in the state of Chihuahua, in violation of the environmental law provisions cited in the submission. The Submitters assert that they were not notified of the status of a complaint filed with the PGR in connection with illegal growing of transgenic maize.⁹

III. ANALYSIS

8. NAAEC Article 14 authorizes the Secretariat to consider submissions from any person or non-governmental organization asserting that an NAAEC Party is failing to effectively enforce its environmental laws. As the Secretariat has found in previous Article 14(1) determinations,¹⁰ Article 14(1) is not intended to be an "insurmountable screening device". This means that the Secretariat will interpret every submission in accordance with the Agreement and the Guidelines, yet without an unreasonably narrow interpretation and application of those Article 14(1) criteria. The Secretariat analyzed submission SEM-09-001 with the latter perspective in mind.

A. Opening Sentence of Article 14(1)

9. The opening sentence of Article 14(1) allows the Secretariat to consider submissions "from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]." The Submitters are nongovernmental organizations residing in Mexico. In addition, at the date of this determination, the Secretariat received 5728 emails from persons wishing to join the Submitters of SEM-09-001;¹¹ however, it was not possible in all cases to confirm this interest, not only because most did not include contact information as

^{7.} Ibid., p. 8.

^{8.} *Ibid.*, p. 8.

^{9.} Ibid., pp. 4-6.

See, in this regard, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998), and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

^{11.} Until 27 March 2009. These e-mails were almost all generated by an e-mail petition campaign from Greenpeace Mexico.

per Section 3.4 of the Guidelines, but the Submitters did not confirm joinder of any persons writing in support of the Submission.¹²

10. As to the requirement in Article 14(1) that submissions concern matters which are ongoing, all of the assertions are in connection with a continuing alleged failure to ensure adequate levels of protection against alleged damage to biodiversity for conventional maize varieties as well as the alleged lack of capacity to investigate and process complaints regarding such alleged damage. The Secretariat considers that the assertions made in the Submission therefore concern the alleged existence of an ongoing failure by a Party to effectively enforce its environmental law.

1. Environmental law in question

11. The Secretariat analyzed the provisions cited in the submission and determines that some of them cannot be reviewed within the procedure established by NAAEC Articles 14 and 15 since they do not meet the definition of environmental law under NAAEC Article 45(2)(a).¹³ In making this determination, the Secretariat considers the primary purpose of the law in question, as defined by Article 45(2)(b) and (c).¹⁴ For purposes of Article 14(1), provisions that do not meet the definition of "environmental law" in Article 45(2) and thus, are not subject to further

^{12. &}quot;Submissions must include the complete mailing address of the Submitter." Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "Guidelines"), Section 3.4.

^{13.} Article 45(2)(a) of NAAEC provides:"2. For purposes of Article 14(1) and Part Five:

⁽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

⁽i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,

⁽ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or

⁽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."

^{14.} Article 45(2)(b) and (c) of NAAEC provides:

[&]quot;2. For purposes of Article 14(1) and Part Five:

⁽b) For greater certainty, the term "environmental law" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

⁽c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) 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."

analysis are: Article 17 of the Constitution; Articles 5, 6 and 7 of NAAEC; Articles 1, 2, 12, sections II, III, IV, V, VI and VII; 28, 29, 102, 110 and 111 of the **LBOGM**; and Articles 1 and 2 of **LGEEPA**. With respect to the provisions of the **Cartagena Protocol**, the Secretariat requires, *inter alia*, further information from the Submitters in order to determine whether it meets the NAAEC definition of Environmental Law, and provides its reasons for this finding below.

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.¹⁵ As to the recommendations contained in *Maize and Biodiversity: the Effects of Transgenic Maize in Mexico*, a report produced by the CEC Secretariat pursuant to Article 13(1) of the Agreement, cannot be considered for analysis under Article 14, since that Article 13(1) report is not part of the Party's environmental law as defined by Article 45(2) of the Agreement.¹⁶

13. Regarding Article 4 of the **Political Constitution of the United Mexican States**, the Secretariat has determined that it can analyze portions of this provision where the analysis is conducted in relationship with the environmental law in question. However, such an analysis would be limited to the fourth paragraph of Article 4 of the Mexican Federal Constitution.¹⁷ Also, such article is only considered where there is a necessary element in effective enforcement of the environmental law at issue. Concerning Article 17 of the Mexican Constitution, the Secretariat considers that this law does not meet the requirements of Article 45(2),

^{15.} SEM-98-001 (Guadalajara), Article 14(1) Determination (13 September 1999).

^{16.} NAAEC Article 13(1) provides: "The Secretariat may prepare a report for the Council on any matter within the scope of the annual program. Should the Secretariat wish to prepare a report on any other environmental matter related to the cooperative functions of this Agreement, it shall notify the Council and may proceed unless, within 30 days of such notification, the Council objects by a two-thirds vote to the preparation of the report. Such other environmental matters shall not include issues related to whether a Party has failed to enforce its environmental laws and regulations. Where the Secretariat does not have specific expertise in the matter runder review, it shall obtain the assistance of one or more independent experts of recognized experience in the matter to assist in the preparation of the report."

^{17.} A circuit court has stated with respect to this that "[...] specifically, its content must be defined on the basis of a systematic, coordinated, and complementary interpretation [...]." ADEQUATE ENVIRONMENT FOR ENVIRONMENT AND WELL-BEING: CONCEPT, REGULATION AND REALIZATION OF THIS GUARANTEE. Novena época, Tribunales Colegiados de Circuito, *Semanario Judicial de la Federación* and *Gaceta*, vol. XXI, January 2005, *Tesis* [Decision] I.4o.A.447 A, p. 1799 administrative matter, isolated decision (*tesis*).

and its primary purpose is not "protection of the environment or the prevention of a danger to human life or health". 18

The Submitters assert that Mexico is failing to effectively enforce 14. the Cartagena Protocol. The Secretariat must determine whether the Cartagena Protocol is environmental law as defined in the Agreement; however it proceeds cautiously in doing so, as the Cartagena Protocol is an international legal instrument that may not be fully enforceable at the domestic level in Mexico. The Secretariat therefore requires additional information from the Submitters to determine whether their assertions on effective enforcement under the Cartagena Protocol meet the definition of Environmental law in NAAEC Article 45(2). The Secretariat notes that while the Submission describes alleged failures in effective enforcement of some parts of the Mexican Federal Laws quoted in the Submission, it fails to fully do so with regard to the Cartagena Protocol. The Submitters may further elaborate on their assertions concerning the Cartagena Protocol, having due regard to Guideline 5.1 by focusing on "any acts or omissions of the Party asserted to demonstrate such failure", in a revised submission.

15. Concerning the **LBOGM**, the Secretariat considers in accordance with Article 45(2) that the law in question contains provisions the primary purpose of which is to regulate activities concerning genetically modified organisms with a view to protecting the environment and preventing a danger to human health viz. LBOGM Articles 1 and 2.19 In that regard, LBOGM provisions related to the following are considered for further analysis: principles guiding biosafety policy,²⁰ particularly for enforcing LBOGM; the relevant powers of Sagarpa,²¹ except those with no connection to the matter raised in the submission;²² coordination among the authorities in the event of an accidental release of genetically modified organisms ("GMOs");²³ exercise of the SHCP powers as regards inspection of GMOs entering Mexico;²⁴ permit application for GMO release, the processing, issuance, validity, and effects of such permits, and the measures contained in such permits, as well as modifications to the conditions that originated a permit and concomitant permit

^{18.} SEM-98-001 (Guadalajara), Article 14(1) Determination (13 September 1999).

^{19.} LBOGM Articles 1 and 2 however, are only taken into consideration to guide the Secretariat in its analysis of enforceable provisions of the LBOGM noted in paragraph 15 of this determination, since the purpose of LBOGM Articles 1 and 2 is merely to define the nature, object, and scope of the LBOGM itself.

^{20.} LBOGM Article 9.

^{21.} *Ibid.*, Articles 12 paragraph I and 13.

^{22.} Ibid., Article 12 paragraphs II, III, IV, V, VI and VII.

^{23.} *Ibid.*, Article 17.

^{24.} Ibid., Article 18 paragraphs I, II, IV, and V.

holder obligations;²⁵ restrictions on the importation of GMOs;²⁶ requirements for risk assessment;²⁷ rules applicable to centers of origin;²⁸ labeling requirements for GMOs intended for planting in Mexico;²⁹ enforcement of Mexican Official Standards;³⁰ rules applicable to the conduct of inspection visits;³¹ establishment of safety measures or urgent measures,³² and infractions and fines for violations of the law.³³

16. Finally, the Secretariat proceeds no further with LBOGM provisions related to promotion of scientific and technological research, since the submission lacks any assertions in this regard.³⁴ Likewise, no further consideration is required for provisions related to the characteristics of Mexican Official Standards³⁵ since the submissions on enforcement matters process is not oriented to analyze alleged deficiencies in environmental law such as those the Submitters assert.

17. Concerning the **LGEEPA**, provisions related to the purpose of the act³⁶ and with the designation of biodiversity as a public good,³⁷ although these may guide the Secretariat in its analysis of the environmental law in question, are not considered for effective enforcement purposes. As to the provisions on the following: principles for law enforcement;³⁸ rules applicable to inspection and monitoring;³⁹ application of safety measures;⁴⁰ commission of environmental offenses;⁴¹ processing of citizen complaints;⁴² processing of requests for information;⁴³ authorization for Profepa to institute proceedings before judicial bodies;⁴⁴ responsibility of persons who affect biodiversity;⁴⁵ and formula-

- 25. *Ibid.*, Articles 32, 33, 34, 36, 37, 38, 39, 42, 45, 46, 47, 48, and 49.
- 26. *Ibid.*, Articles 40, 43.
- 27. Ibid., Articles 60, 61, 62, 63, 64, 65, and 66.
- 28. Ibid., Articles 86, 87, and 88.
- 29. Ibid., Article 101.
- 30. *Ibid.*, Articles 112 and 113.
- 31. Ibid., Article 114.
- 32. *Ibid.*, Articles 115 and 117.
- 33. Ibid., Articles 119 and 120.
- 34. Ibid., Articles 28 and 29.
- 35. Ibid., Articles 102, 110, 111.
- 36. LGEEPA Article 1.
- 37. Ibid., Article 2.
- 38. Ibid., Article 15.
- 39. Ibid., Articles 160, 161, 164, 165, 166.
- 40. Ibid., Articles 170 and 170 Bis.
- 41. Ibid., Article 182.
- 42. Ibid., Articles 189, 190, 191, 192, 193, 198.
- 43. Ibid., Article 201.
- 44. Ibid., Article 202.
- 45. Ibid., Article 203.

tion of technical opinions and reports;⁴⁶ these are all considered for further analysis, to the extent these provisions concern assertions regarding alleged failure to effectively enforce the LGEEPA.

18. In regard to the **CPF** provisions cited in the submission, the Secretariat considers that their primary purpose is the protection of the environment and the prevention of danger to human life or health.⁴⁷ The Secretariat considers Article 420 *Ter* in its analysis while provisions cited in the submission which establish applicable penalties and safety measures are considered only to the extent such provisions have not been enforced in court proceedings such as criminal prosecutions.⁴⁸

2. Assertions for further analysis by the Secretariat

19. The Secretariat hereby determines that the submission contains certain assertions on the effective enforcement of environmental law as opposed to alleged deficiencies of the law itself. In making this determination, the Secretariat is cognizant of Article 5 of the Agreement, which sets out certain measures that the Parties may take for effective enforcement of their environmental law.⁴⁹

i) Assertions concerning the lack of measures ensuring an adequate level of protection for conventional maize varieties

20. The Submitters assert that on 19 September 2008, the National Food and Agriculture Inspection Service (*Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria*—Senasica) "detected and scientifically confirmed the presence of genetically modified maize" in the locality of Valle de Cuauhtémoc, Chihuahua.⁵⁰ They state that, despite having detected this situation, the authorities "took no effective measures to stop this crop in the state of Chihuahua"⁵¹ nor took "measures to inspect and supervise seed storage, distribution, and sales centers supplying the region's farmers."⁵² They further assert that customs authori-

^{46.} Ibid., Article 204.

See other determinations on this topic: SEM-06-003 (*Ex Hacienda El Hospital II*) and SEM-06-004 (*Ex Hacienda El Hospital III*) (consolidated), Notification pursuant to Article 15(1) (12 May 2008).

^{48.} CPF Articles 421 and 422.

^{49.} Cfr. SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) and (2) (8 September 1999).

^{50.} Submission, p. 5.

^{51.} Ibid., p. 5. Cfr. LBOGM Article 9, Section XV.

^{52.} *Ibid.*, p. 8. *Cfr.* LBOGM Articles 2, Sections VII and VIII, IX; 9, Section III, 18, Section III; and 36. CPF Article 420 *Ter*.

ties are not exercising their authority to prevent the entry into Mexico of genetically modified maize, particularly maize bound for the state of Chihuahua.⁵³

21. The Submitters allege the absence of mechanisms to safeguard biosafety in Mexico,⁵⁴ since the special protection regime for maize has not been made operational, centers of origin and genetic diversity have not been determined, and the areas in which the species occur have not been located.⁵⁵ They add that the permitting system for experimental planting of genetically modified maize⁵⁶ is not being implemented and that the release of these organisms has not been subject to adequate risk analysis and assessment,⁵⁷ nor to measures that could be taken in relation to control of accidental releases,⁵⁸ labeling,⁵⁹ public consultation,⁶⁰ access to information⁶¹ and, in general, mechanisms to protect centers of origin and genetic diversity.⁶² The Submitter's assertion concerning the alleged lack of measures ensuring an adequate level of protection for conventional maize varieties presented in the Submission, may be revised through the NAAEC articles 14 and 15 mechanism.

ii) Assertions concerning the alleged lack of timely processing of complaints and the alleged lack of capacity to investigate and prosecute infractions related to the illegal presence of genetically modified seeds in maize crops

22. The Submitters assert that they filed complaints with the PGR and Sagarpa but did not obtain a satisfactory response.⁶³ They note that on 26 September 2007, representatives of the Submitters filed a complaint with the Sagarpa official in the state of Chihuahua in which they requested an investigation of impacts on sites where transgenic seed has been planted.⁶⁴ They state that on 2 October 2007, one of the Submitters filed a complaint with the PGR for possible commission of the offense under CPF Article 420 *Ter* and that on 1 November 2007 and 25 September

^{53.} Ibid., p. 8. LBOGM Articles 9, Section III; and 18.

^{54.} Ibid., p. 10. Cfr. LBOGM Article 9, Sections III and IV.

^{55.} Ibid., p. 10. Cfr. LBOGM Articles 86, 87 and 88.

^{56.} Ibid., p. 10. Cfr. LBOGM Articles 13, Section III, 34, 42, 45, 46, 47, 48 and 49.

^{57.} Ibid., p. 10. Cfr. LBOGM Articles 13, Section II; 61, 62, 63, 65, 66.

^{58.} Ibid., p. 10. Cfr. LBOGM Articles, Section XIV; 115, Section III; and 117.

^{59.} Ibid., p. 10. Cfr. LBOGM Article 101.

^{60.} Ibid., p. 11. Cfr. LBOGM Article 33.

^{61.} Ibid., p. 11. Cfr. LBOGM Articles 9, Section XI; 33 and 61, Section I.

^{62.} *Ibid.*, p. 10. *Cfr.* LBOGM Articles 9, Sections I, III, IV, V, X, XV and XVI; 13, Sections II, IV and VI; 17 and 86.

^{63.} Ibid., p. 5. Cfr. LGEEPA Articles 182 and 189.

^{64.} Submission, pp. 3-4.

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2008, the same Submitter filed additional information with the investigative agency of the Office of the Public Prosecutor (*Ministerio Público*).⁶⁵ They allege that despite their complaints, they have not observed or been notified of any progress on the investigations. In this regard, the Secretariat notes that the Submission does note cite a provision requiring the PGR to notify the complainant on the progress or status of an ongoing criminal investigation. The Submitters may cite any such relevant provision in a revised version of their submission, failing which the Secretariat cannot consider the assertion of the alleged obligation of the PGR to inform the complainant of the status of its complaint.

23. The Submitters refer to the lack of capacity to inspect and verify the presence of genetically modified seeds in maize crops.⁶⁶ They allege that Profepa inspectors do not have sufficient capacity to perform adequate sampling, nor is there allegedly adequate coordination with the specialized biosafety authorities.⁶⁷ They add that the investigative procedures carried out under the responsibility of the PGR and Profepa have been dilatory, deficient as regards the gathering of evidence, and lacking in terms of their investigative and intelligence capacity. The Submitters assert that as a consequence of the alleged lack of technical and legal capacity, there have been no results from the investigations,⁶⁸ nor has there been any order of safety measures available under the law, such as closures, seizures, or neutralization, in light of the alleged risk that such activities pose.⁶⁹ The Secretariat considers that the assertion concerning the alleged lack of capacity to investigate and prosecute infractions related to the illegal presence of genetically modified seeds in maize crops may be further considered.

B. The six requirements of NAAEC Article 14(1)

24. While the submission in part meets the requirement of the opening sentence of Article 14(1), the Secretariat notes that the Submission as a whole does not meet all the requirements listed in that article. The Secretariat hereby explains its reasons for having reached this conclusion.

^{65.} Ibid., p. 4.

Ibid., pp. 6, 10-11. Cfr. LBOGM Articles 9, Section XV; 13, Sections VII and VIII; 112, 113, 114 and 115.

^{67.} Submission, pp. 5-6. *Cfr.* LBOGM Article 17, 18, Section IV, 66 and 86. LGEEPA Article 15, Section IX.

^{68.} Submission, p. 6.

Ibid., p. 13. Cfr. LBOGM Articles 115, 117 and 120. LGEEPA Articles 160, 161, 164, 165, 166, 170, 170 Bis and 202. CPF Article 421.

- a. The submission meets the requirement of Article 14(1)(a)⁷⁰ since it is made in writing in a language designated by the Party for the purpose of submissions, in this case Spanish.⁷¹
- b. The submission satisfies Article 14(1)(b),⁷² since the information provided clearly identifies the persons making the submission. However, as regards persons who sent emails expressing their wish to join submission SEM-09-001, it was impossible to identify them pursuant to Section 3.4 of the Guidelines, and they therefore do not qualify as submitters. Moreover, the Submitters did not express any wish to enjoin further submitters, nor did they endorse the aforementioned emails as forming part of the Submission.⁷³
- c. The submission does not completely meet the requirement of Article 14(1)(c),⁷⁴ since although it provides sufficient information to allow the Secretariat to review it, it is lacking certain pieces of documentary evidence on which it appears to be based.

Section 5.3 of the Guidelines provides as follows:

Submissions must contain a succinct account of the facts on which such an assertion is based and *must provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based.* (emphasis added)

Submission SEM-09-001 does in fact present a summary of the alleged practices of importation, distribution, and cultivation of

^{70. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:(a) is in writing in a language designated by that Party in a potification to the Secretariation of the S

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

^{71.} NAAEC Article 19 stipulates that the official languages of the CEC are Spanish, French, and English, all having equal status. Likewise, Section 3.2 of the Guidelines stipulates that "Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions."

^{72. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

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

^{73.} The requests by 5728 persons to join and be given the status of the Submitters were sent through a single complaints page available on the Internet at http://www.greenpeace.org/mexico/participa-como-ciberactivista/maiz. The email address in all cases was write-a-letter@smtp-gw.greenpeace.org.

^{74. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

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

transgenic maize in the state of Chihuahua without the corresponding authorization,⁷⁵ and provides documentary copies of two complaints filed by the Submitters with the PGR⁷⁶ and of representations made to this body.⁷⁷

The Secretariat notes however that, when the Submitters cite provisions applicable to the citizen complaint process and to administrative proceedings, they state that they pursued remedies before Profepa⁷⁸ and that Mexico has allegedly not properly processed "administrative proceedings and remedies filed by the Submitters,"⁷⁹ yet they do not include the corresponding documentary evidence. The foregoing consideration is further informed by Section 5.6 of the Guidelines, which establishes that during the Secretariat's initial review of a submission, it must ascertain *prima facie* whether the submission addresses the criteria listed in NAAEC Article 14(2).

Sections 5.6(c) and (d) of the Guidelines provide as follows:

The Submission should address the factors for consideration identified in Article 14(2) to assist the Secretariat in its review under this provision. Thus, the Submission should address:

[...]

(c) The actions, including private remedies, available under the Party's law that have been pursued (Article 14(2)(c));

(d) The extent to which the Submission is drawn exclusively from mass media reports (Article 14(2)(d)).

In relation to Guideline 5.6(c), the Secretariat requests that the Submitters provide copies of the administrative remedies or citi-

^{75.} Submission, pp. 3-5.

^{76.} Submission, Appendix 6, Complaint filed with the Specialized Unit for the Investigation of Environmental Offenses and Offenses Defined in Special Laws (*Unidad Especializada en Investigación de Delitos contra el Ambiente y Previstos en Leyes Especiales*) of the PGR on 2 October 2007; Appendix 10, complaint filed with the PGR official in the state of Chihuahua on 29 September 2008.

^{77.} Submission, Appendices 7, 8, 9, 11, Appearance of complainant before PGR, clarifying motion, provision of evidence and amendment of the complaint filed with the Specialized Unit for the Investigation of Environmental Offenses and Offenses Defined in Special Laws of the PGR.

^{78.} Submission, p. 6.

^{79.} Ibid., p. 13.

zen complaints filed with Profepa or Semarnat mentioned in the Submission.

As to paragraph Section 5.6(d) of the Guidelines, the Secretariat finds that, apart from documents supporting that complaints were made before authorities in relation to the matter raised in the submission, and the transgenic maize report published by the Secretariat in 2004 (prior to the entry into force of the LBOGM), the Submitters do not attach other documentary information not drawn from mass media reports to support their assertions.⁸⁰ While the inclusion of information appearing in journals does not-by itself-justify the Secretariat's not considering a submission further, the Secretariat notes that the Submitters mentioned other documents related to their assertions, such as the Senasica report,⁸¹ information about the maize landraces and species of teocintle found in Chihuahua,⁸² or information about the alleged consequences of the release of genetically modified organisms for human health and biodiversity. Such information was not included with the Submission.83

Moreover, the submission suggests that the relevant authorities have not provided information related to the matter raised by the Submitters, despite the Submitters' requests.⁸⁴ The Submitters may specify in any revised version, the nature of these requests and provide copies thereof, so that in conformance with Guideline 7.5, the Secretariat can determine whether other sources of information relevant to the assertions in the submission were reasonably available to the Submitter.⁸⁵

d. The submission satisfies Article 14(1)(d),⁸⁶ since the assertions refer to Mexico's alleged failure to effectively enforce its environ-

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

^{80.} The Submitters attach a press release announcing Senasica's findings concerning genetically modified maize on four lots in the Rural Development District (*Distrito de Desarrollo Rural*—DDR) of Valle de Cuauhtémoc, as well as various press clippings reporting the alleged presence of transgenic maize crops in Chihuahua.

^{81.} Cfr. Submission, p. 5.

^{82.} Cfr. Submission, p. 14.

^{83.} Cfr. Submission, p. 12.

^{84.} Submission, p. 5.

^{85.} Guidelines, Section 7.6: "In considering whether a response from the Party concerned should be requested when the submission is drawn exclusively from mass media reports, the Secretariat will determine if other sources of information relevant to the assertion in the submission were reasonably available to the Submitter."

^{86. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

mental law in connection with the importation, storage, planting and, in general, the marketing of transgenic maize in the state of Chihuahua. It is also not evident from the submission that the Submitter is either a competitor that "may stand to benefit economically from the submission", or that the Submission is not aimed at promoting enforcement "rather than harassing industry", in accordance with Guideline 5.4.

- e. The submission satisfies Article 14(1)(e),⁸⁷ and the Submitters attach information indicating that the matter at issue has been communicated in writing to the relevant authorities. The Submitters attach copies of the complaints filed with the PGR and Sagarpa, entities that are responsible for the enforcement of provisions relating to the biosafety of genetically modified organisms, and these are entitities which qualify as "relevant authorities" of the Party in accordance with Guideline 5.5. The Secretariat notes however that the Submitters did not attach information about responses to these communications, if any, and finds that they should provide such information in a revised version of their submission to the extent it exists.
- f. Finally, the submission meets Article 14(1)(f),⁸⁸ since it is filed by organizations established in the territory of a Party.

^{87. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

⁽e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response".

^{88. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

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

IV. DETERMINATION

25. For the foregoing reasons, the Secretariat finds that submission SEM-09-001 (*Transgenic Maize in Chihuahua*) does not meet all the admissibility requirements under Article 14(1). Pursuant to Sections 6.1 and 6.2 of the Guidelines, the Secretariat hereby notifies the Submitters that they have 30 days in which to file a submission that meets all the requirements of Article 14(1). If the revised submission is not received by **5 February 2010**, the Secretariat will proceed no further with respect to SEM-09-001.

Secretariat of the Commission for Environmental Cooperation

Paolo Solano Legal Officer, Submissions on Enforcement Matters Unit

Dane Ratliff Director, Submissions on Enforcement Matters Unit

c.c.: Mr. Enrique Lendo, Mexico Alternate Representative Mr. David McGovern, Canada Alternate Representative Ms. Michelle DePass, US Alternate Representative Mr. Evan Lloyd, Acting Executive Director, CEC Submitters

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con los artículos 14(1) y (2) del Acuerdo de Cooperación Ambiental de América del Norte

Peticionarios:	Greenpeace México, A.C. Frente Democrático Campesino Unión Nacional de Productores Agropecuarios, Comerciantes, Industriales y Prestadores de Servicio El Barzón, A.C. ("El Barzón, A.C.") Centro de Derechos Humanos de las Mujeres, A.C.
Representados por:	Greenpeace México, A.C.
Parte:	Estados Unidos Mexicanos
Petición revisada:	5 de febrero de 2010
Petición original:	28 de enero de 2009
Fecha de la determinación:	3 de marzo de 2010
Núm. de petición:	SEM-09-001 (Maíz transgénico en Chihuahua)

I. ANTECEDENTES

1. Los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte ("ACAAN" o el "Acuerdo") establecen un proceso que permite a cualquier persona u organismo sin vinculación gubernamental presentar una petición en la que asevere que una Parte del ACAAN está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental. El Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado" de la "CCA") examina inicialmente las peticiones con base en los requisitos establecidos en el artículo 14(1) del ACAAN y las *Directrices para la presentación de peticiones relativas a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del ACAAN* (las "Directrices"). Cuando el Secretariado considera que una petición cumple con tales requisitos, entonces determina, conforme a lo señalado en el artículo 14(2), si la petición amerita una respuesta de la Parte en cuestión. A la luz de cualquier respuesta de la Parte —si la hubiere— y en conformidad con el ACAAN y las Directrices, el Secretariado determina si el asunto amerita la elaboración de un expediente de hechos y, de ser así, lo notifica al Consejo, exponiendo sus razones en apego al artículo 15(1); en caso contrario —o bien, ante la existencia de ciertas circunstancias— da por terminado el trámite de la petición.¹

2. El 28 de enero de 2009 el Frente Democrático Campesino, El Barzón, A.C., el Centro de Derechos Humanos de las Mujeres, A.C., y Greenpeace México, A.C.,² (los "Peticionarios"), presentaron ante el Secretariado de la CCA una petición ciudadana en conformidad con el artículo 14 del Acuerdo de Cooperación Ambiental de América del Norte ("ACAAN" o el "Acuerdo"). En ella, los Peticionarios aseveran que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental por cuanto respecta al control, inspección, investigación y evaluación de riesgos del maíz transgénico en Chihuahua, México.

3. El 6 de enero de 2010, el Secretariado determinó que la petición no cumplía con todos los requisitos de admisibilidad del artículo 14(1) y, con base en el apartado 6.2 de las Directrices, notificó a los Peticionarios que contaban con 30 días —es decir hasta el 5 de febrero de 2010— para presentar una petición que cumpliera con los criterios del artículo 14(1) del ACAAN. En particular, el Secretariado determinó que la petición aludía en algunos casos a instrumentos que no califican como legislación ambiental en los términos del ACAAN;³ no cita las disposiciones que obligaba a la Procuraduría General de la República (PGR) a informar a un denunciante sobre el avance de una investigación,⁴ y no cumplía del todo con el inciso c) del artículo 14(1), pues no proporcionaba informa-

^{1.} Para conocer más detalles relativos a las diversas fases del proceso, así como las determinaciones y expedientes de hechos del Secretariado, se puede consultar el sitio de la CCA en: http://www.cec.org/citizen/?varlan=es>.

^{2.} Entre la fecha de presentación de la petición SEM-09-001 y el 27 de marzo de 2009, el Secretariado recibió 5,728 correos electrónicos de personas que solicitaron adherirse y formar parte de la petición. Todas las solicitudes vinieron de la misma dirección de correo electrónico: <write-a-letter@smtp-gw.greenpeace.org>.

^{3.} SEM-09-001 (*Maíz transgénico en Chihuahua*), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 13, 16-17. *Cfr.* ACAAN artículo 45(2).

^{4.} *Ibid.*, § 22.

ción suficiente para revisarla. Asimismo, al hacer una revisión *prima facie* de la petición a la luz de los requisitos conforme al artículo 14(2),⁵ el Secretariado encontró que la petición no contaba con información sobre los recursos intentados en relación con el asunto planteado en la petición,⁶ y que parecía basarse exclusivamente en noticias de los medios de comunicación.⁷

4. El 5 de febrero de 2009, los Peticionarios presentaron ante el Secretariado una petición revisada en conformidad con los artículos 14 y 15 del Acuerdo.

5. El Secretariado ha determinado que la petición ahora satisface los requisitos del artículo 14(1) del ACAAN y que, con base en las consideraciones listadas en el artículo 14(2), amerita solicitar una respuesta del gobierno de México. Teniendo en mente la determinación del 6 de enero de 2010 respecto de la petición original, esta determinación se enfoca al análisis de cuestiones que quedaron sujetas a la presentación de una petición revisada.

II. RESUMEN DE LA PETICIÓN

A. La petición original

6. Los Peticionarios aseveran que la Secretaría de Medio Ambiente y Recursos Naturales (Semarnat); la Procuraduría General de la República (PGR); la Procuraduría Federal de Protección al Ambiente (Profepa); la Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación (Sagarpa); la Secretaría de Hacienda y Crédito Público (SHCP), y la Comisión Intersecretarial de Bioseguridad de los Organismos Genéticamente Modificados (Cibiogem) están incurriendo en omisiones en la aplicación efectiva la legislación ambiental.⁸

^{5.} A este respecto, en la sección dedicada al examen inicial de una petición sobre el Secretariado, el inciso 5.6 de las Directrices se precisa que la petición "deberá abordar los factores a ser considerados y que se encuentran identificados en el artículo 14(2) del Acuerdo". El Secretariado informó que *prima facie* la petición parecía basarse exclusivamente en noticias de los medios de comunicación. SEM-09-001 (*Maíz transgénico en Chihuahua*), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 24(c).

SEM-09-001 (Maíz transgénico en Chihuahua), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 24(c). Cfr. ACAAN artículo 14(2)(c).

SEM-09-001 (*Maíz transgénico en Chihuahua*), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 24(c). *Cfr.* ACAAN artículo 14(2)(d).

^{8.} Petición original, p. 2.

En la petición, los Peticionarios señalan que tales dependencias 7. mexicanas omiten la aplicación efectiva de los artículos 4 y 17 de la Constitución Política de los Estados Unidos Mexicanos (la "Constitución Federal"); 5, 6, y 7 del ACAAN; 1, 2, 8, 9, 10, 15 y 16 del Protocolo de Cartagena sobre la Seguridad de la Biotecnología (el "Protocolo de Cartagena"); 2: fracciones I, II, VI, VII, XI, XII y XIII, 9: fracciones I, II, III, IV, V, VIII, IX, X, XI, XIV, XV, XVI, XVII y XVIII, 12, 13, 17, 18, 28, 29, 32: fracción I, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, 49, 60, 61, 62, 63, 65, 66, 86, 87, 88, 101, 102, 110, 111, 112, 113, 114, 115, 117, 119 y 120 de la Ley de Bioseguridad de Organismos Genéticamente Modificados (LBOGM); 1, 2: fracción III, 15, 160, 161, 164, 165, 166, 170, 170 Bis, 182, 189, 190, 191, 192, 193, 198, 201, 202, 203 y 204 de la Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA), y 420 Ter, 421 y 422 del Código Penal Federal (CPF). Los Peticionarios aseveran, además, que México no ha puesto en marcha diversas recomendaciones incluidas en el informe Maíz y biodiversidad: efectos del maíz transgénico en México, elaborado por el Secretariado de la CCA conforme al artículo 13 del ACAAN.9

8. Los Peticionarios apuntan que en el estado de Chihuahua, supuestamente clasificado por el Instituto Nacional de Ecología (INE) como una región de alta diversidad de maíz, se tiene registro de la presencia de 23 razas de maíz criollo y dos de teocinte.¹⁰ Afirman que, a pesar de que se tiene documentado un caso de flujo génico de maíz transgénico hacia las variedades convencionales, no se están aplicando medidas de bioseguridad previstas en la legislación ambiental citada en la petición.¹¹

9. Los Peticionarios aluden a la supuesta "omisión por parte de las autoridades mexicanas para adoptar medidas que garanticen un nivel adecuado de protección de las variedades nativas e híbridas de maíz frente a semillas GM [genéticamente modificadas]" ingresadas al territorio mexicano y sembradas en Chihuahua.¹² Aseveran también la supuesta ausencia de medidas para controlar y supervisar centros de almacenamiento, distribución y comercialización. Asimismo, señalan que no se han puesto en marcha medidas previstas en la legislación ambiental, tales como la evaluación de riesgo y el consentimiento fundamentado previo, necesarias para una adecuada revisión y control aduanal del maíz transgénico importado a México.¹³ Los Peticionarios aseguran que en el estado de Chihuahua se realiza la importación, distri-

^{9.} *Ibid.*, pp. 5, 7, 9, 10, 11, 12 y 13.

^{10.} Ibid., p. 14.

^{11.} Ibid., p. 1.

^{12.} Ibid., p. 8.

^{13.} Ibid., p. 8.

bución y cultivo de maíz transgénico, en contravención a la legislación ambiental citada en la petición. Por último, los Peticionarios aseveran que no han sido notificados del avance de una denuncia presentada ante la PGR, relacionada con el supuesto cultivo ilegal de maíz transgénico.¹⁴

B. La petición revisada

10. En respuesta a la determinación del Secretariado del 6 de enero de 2010, los Peticionarios presentaron el 5 de febrero de 2010 una versión revisada de su petición. Además de las disposiciones citadas en la petición original,¹⁵ los Peticionarios aseveran en su versión revisada que México está omitiendo la aplicación efectiva de los artículos 3 y 12 de la LBOGM; y 161, 162, 163, 164, 167, 169 y 171 de la LGEEPA.

11. Los Peticionarios reiteran las aseveraciones centrales de la petición original e incluyen información adicional. En particular, los Peticionarios precisan información relativa a dos denuncias presentadas ante la PGR por supuestos hechos que pueden constituir los delitos tipificados en el CPF;¹⁶ incluyen documentos sobre una denuncia presentada ante la Sagarpa y remitida ante la Profepa;¹⁷ amplían sus explicaciones sobre cómo supuestamente se está omitiendo la aplicación de la Constitución Federal, la LBOGM, la LGEEPA y el CPF, y presentan argumentos para la consideración del Protocolo de Cartagena como legislación ambiental en los términos del ACAAN.¹⁸

12. Los Peticionarios citan información relativa a una averiguación previa con la que buscan poner en evidencia la supuesta falta de capacidad técnica por parte de agentes de la PGR para recabar información sobre predios en los que —aseveran— se siembra maíz transgénico;¹⁹ relatan la supuesta falta de capacidad de inspectores de la Profepa para obtener muestras de material genético;²⁰ aluden a la supuesta dilación

^{14.} Ibid., pp. 4-6.

^{15.} El Secretariado nota que la petición revisada ya no hace cita de los artículos 17 de la Constitución Federal; 5, 6 y 7 del ACAAN; 2: fracciones I, II, VI, VII, XII y XIII; 12, 28, 29, 102, 110 y 111 de la LBOGM; y 1 y 2: fracción III de la LGEEPA. Asimismo, los Peticionarios no refieren como legislación ambiental las recomendaciones del informe *Maíz y biodiversidad: efectos del maíz transgénico en México*, publicado por el Secretariado de la CCA en conformidad con el artículo 13 del ACAAN.

^{16.} Petición revisada, pp. 3-6.

^{17.} Ibid., p. 4.

^{18.} Ibid., pp. 7-10.

^{19.} Ibid., p. 4.

^{20.} Ibid.

para integrar adecuadamente una averiguación previa;²¹ indican que a dos años de haber interpuesto denuncias ante la autoridad penal investigadora, desconocen cuál es el estado que éstas guardan;²² y aseveran que dada la supuesta falta de transparencia, no hay certidumbre sobre las acciones y medidas de mitigación que esté realizando el gobierno de México.²³

13. En la petición revisada, los Peticionarios sostienen que a partir de la entrada en vigor del Protocolo de Cartagena, las autoridades mexicanas han estado obligadas a aplicar las disposiciones del tratado internacional, en este caso mediante la LBOGM, que funciona como su instrumento de aplicación. Los Peticionarios reiteran que México "se comprometió a adoptar medidas legislativas, administrativas y de otro tipo [...] a fin de contribuir a garantizar un <u>nivel adecuado de protección</u>",²⁴ pero que ello no ha ocurrido así, pues no se han tomado las "medidas administrativas y de otro tipo, como podrían ser penales [...] lo que estaría conduciendo a la extensión de casos de contaminación transgénica".²⁵

14. Los Peticionarios aseveran que a pesar del supuesto ingreso y siembra de maíz genéticamente modificado en la región de Chihuahua, no se han realizado evaluaciones de riesgo ni se ha aplicado el principio del consentimiento fundamentado previo; tampoco se cuenta con medidas adecuadas para controlar y supervisar centros de almacenamiento, distribución y comercialización, ni con procesos de revisión, monitoreo y vigilancia por parte de autoridades aduanales.²⁶ Los Peticionarios dan cuenta de que —supuestamente— tales hechos suceden en los municipios de Cuahutémoc, Namiquipa, Buenaventura y Ascensión del estado de Chihuahua.²⁷

III. ANÁLISIS

15. El artículo 14 del ACAAN autoriza al Secretariado a considerar peticiones de cualquier persona u organismo sin vinculación gubernamental en las que se asevere que una Parte del ACAAN está omitiendo la

^{21.} *Ibid.* Los Peticionarios agregan que luego de 14 meses de presentada la denuncia, la agencia investigadora emite un acuerdo por el que declaró no ser competente para conocer del asunto, remitiéndolo a la delegación de la PGR en Chihuahua.

^{22.} Ibid., p. 6.

^{23.} *Ibid.*, p. 7.

^{24.} Ibid., p. 9 (subrayado en el original).

^{25.} Ibid.

^{26.} Ibid.

^{27.} Ibid.

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aplicación efectiva de su legislación ambiental. Tal y como el Secretariado lo ha expresado en anteriores determinaciones elaboradas con base en el artículo 14(1) del ACAAN, éste no se erige como un instrumento de examen procesal que imponga una gran carga a los peticionarios. Ello quiere decir que el Secretariado interpreta cada petición en conformidad con el Acuerdo y las Directrices, sin caer en una interpretación y aplicación de los requisitos del artículo 14(1) irrazonablemente estrecha.²⁸ El Secretariado revisó la petición en cuestión con tal perspectiva en mente.

A. Párrafo inicial del artículo 14(1)

16. La oración inicial del artículo 14(1) permite al Secretariado considerar peticiones "de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental." En su determinación del 6 de enero 2010, el Secretariado determinó que los Peticionarios son personas u organizaciones sin vinculación gubernamental²⁹ y que la petición cumple con el requisito de temporalidad, al tratarse de una situación actual. El Secretariado determinó que las siguientes disposiciones califican como legislación ambiental en los términos del artículo 45(2) del ACAAN:³⁰ artículos 4º de la **Constitución Federal**; 9, 12: frac-

Cfr., SEM-97-005 (*Biodiversidad*), Determinación conforme al artículo 14(1) (26 de mayo de 1998), SEM-98-003 (*Grandes Lagos*), Determinación conforme al artículo 14(1) y (2) (8 de septiembre de 1999) y SEM-09-001 (*Maíz transgénico en Chihuahua*), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 8.

^{29.} Si bien la versión revisada de la petición hace referencia clara a los Peticionarios y autoriza la adhesión de terceros solicitantes, todas las comunicaciones de apoyo a la petición provinieron de una misma dirección de correo electrónico: <write-a-letter @smtp-gw.greenpeace.org>, fuente en la que no se incluyeron datos mínimos para identificar a los interesados. Al momento de recibir la petición original, el Secretariado respondió a algunas de las solicitudes hechas por medio de dicho correo electrónico, sin haber obtenido respuesta.

^{30.} El artículo 45 del ACAAN define "legislación ambiental como:

^{2.} Para los efectos del Artículo 14(1) y la Quinta Parte:

⁽a) "legislación ambiental" significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de:

⁽i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales,

⁽ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o

⁽iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.

⁽b) Para mayor certidumbre, el término "legislación ambiental" no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración

ción I, 13, 17, 18: fracciones I, II, IV y V, 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, 49, 60, 61, 62, 63, 64, 65, 66, 86, 87, 88, 101, 112, 113, 114, 115, 117, 119 y 120 de la **LBOGM**; 15, 160, 161, 164, 165, 166, 170, 170 *Bis*, 182, 189, 190, 191, 192, 193, 198, 201, 202, 203 y 204, de la **LGEEPA**; y 420 *Ter* del **CPF**.

17. En su determinación del 6 de enero de 2010, el Secretariado consideró que las siguientes disposiciones no califican como legislación ambiental: artículos 17 de la Constitución Federal; 5, 6 y 7 del ACAAN; 12: fracciones II, III, IV, V, VI y VII; 28 y 29, 102, 110 y 111 de la LBOGM, y 1 y 2 de la LGEEPA.³¹ Con base en la información de la petición revisada, el Secretariado analiza en esta ocasión si los artículos 1, 2, 8, 9, 10, 15 y 16 del Protocolo de Cartagena referidos en la petición original; y los artículos 3 y 12: fracción I de la LBOGM, añadidos en la petición revisada, califican como legislación ambiental.

1. Legislación ambiental en cuestión

18. En su determinación del 6 de enero de 2010, el Secretariado solicitó información adicional a los Peticionarios para determinar si el Protocolo de Cartagena encaja dentro de la definición de legislación ambiental y, de ser así, en qué medida se vincula con aseveraciones en materia de aplicación efectiva.³² Dado que la petición revisada contiene información a este respecto, el Secretariado procede a analizarla. En la petición revisada, los Peticionarios citan un dictamen de la Cámara de Diputados publicado en la Gaceta Parlamentaria emitido en torno al proceso legislativo de la LBOGM. En dicho instrumento se estima que:

[E]l Estado Mexicano en su conjunto quedó obligado frente a la comunidad internacional, a dar cumplimiento a los compromisos establecidos en el Protocolo de Cartagena, por lo que dicho tratado forma, desde esa fecha, parte del sistema jurídico mexicano, [...]³³

de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.

⁽c) El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte."

Empero sirven para orientar el análisis del Secretariado. *Cfr.* SEM-09-001 (*Maíz transgénico en Chihuahua*), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 17.

^{32.} *Ibid.*, § 14.

^{33.} Petición revisada, anexo 20: Dictamen de las Comisiones Unidas de Medio Ambiente y Recursos Naturales, de Agricultura y Ganadería, y de Ciencia y Tecnología, respecto a la minuta del proyecto de Decreto por el que se expide la Ley de Bioseguridad de Organismos Genéticamente Modificados (LBOGM).

19. El dictamen agrega en sus consideraciones que:

[L]a entrada en vigor del Protocolo de Cartagena, implica para México que sus autoridades apliquen las disposiciones de ese tratado internacional sin contar con reglas jurídicas específicas.³⁴

20. Asimismo, la petición transcribe el texto de una tesis del Pleno de la Suprema Corte de Justicia de la Nación en la que se lee:

TRATADOS INTERNACIONALES. SON PARTE INTEGRANTE DE LA LEY SUPREMA DE LA UNIÓN Y SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES GENERALES, FEDERALES Y LOCALES. INTERPRETACIÓN DEL ARTÍCULO 133 CONSTITUCIONAL

La interpretación sistemática del artículo 133 de la Constitución Política de los Estados Unidos Mexicanos permite identificar la existencia de un orden jurídico superior, de carácter nacional, integrado por la Constitución Federal, los tratados internacionales y las leyes generales. Asimismo, a partir de dicha interpretación armonizada con los principios de derecho internacional dispersos en el texto constitucional, así como con las normas y premisas fundamentales de esa rama del derecho, se concluye que los tratados internacionales se ubican jerárquicamente abajo de la Constitución federal y por encima de las leyes generales, federales y locales, en la medida en que el Estado mexicano al suscribirlos, de conformidad con lo dispuesto en la Convención de Viena sobre el Derecho de los Tratados entre los Estados y Organizaciones Internacionales o entre Organizaciones Internacionales y, además atendiendo al principio fundamental de derecho internacional consuetudinario pacta sunt servanda, contrae libremente obligaciones frente a la comunidad internacional que no pueden ser desconocidas invocando normas de derecho interno y cuyo incumplimiento supone, por lo demás, una responsabilidad de carácter internacional.35

21. En virtud del citado mecanismo de incorporación, el Protocolo de Cartagena parece constituir derecho interno en México.³⁶ Ahora bien, para determinar cuáles disposiciones del Protocolo de Cartagena citadas en la petición se enfocan a la protección del medio ambiente a través de "la protección de la flora y fauna silvestres",³⁷ el Secretariado con-

^{34.} Ibid.

^{35.} Petición revisada, anexo 19: Tesis Jurisprudencial. Localización: novena época, instancia: pleno; fuente: *Semanario Judicial de la Federación*, XXV; abril, 2007; tesis: IX-2007; tesis aislada; materia: constitucional.

^{36.} El Secretariado actúa con precaución en este punto, limitando su análisis a las aseveraciones de los Peticionarios relativas a la aplicación del Protocolo de Cartagena, sin hacer una consideración sobre el estatus de dicho instrumento en el derecho internacional.

^{37.} Cfr. ACAAN, artículo 45(2)(a)(iii).

sulta su artículo 1 que dice: "el objetivo del presente Protocolo es contribuir a garantizar un nivel adecuado de protección en la esfera de la transferencia, manipulación y utilización seguras de los organismos vivos modificados resultantes de la biotecnología moderna <u>que puedan</u> tener efectos adversos para la conservación y la utilización sostenible de la diversidad biológica, teniendo también en cuenta los riesgos para la salud humana [énfasis añadido]".³⁸

22. En vista de lo anterior, el Secretariado estima que las disposiciones relativas a la adopción de medidas para cumplir con sus obligaciones;³⁹ reglas aplicables a la notificación de organismos vivos modificados;⁴⁰ el procedimiento para la adopción de decisiones para el movimiento transfronterizo de un organismo vivo modificado⁴¹ y la evaluación y gestión del riesgo,⁴² se consideran —en principio— legislación ambiental en los términos del artículo 45(2) ACAAN y ameritan ulterior análisis. En cuanto a las disposiciones que establecen el conflicto con la soberanía de los Estados;⁴³ la no restricción en la adopción de medidas adicionales,⁴⁴ y la consideración sobre los instrumentos de aplicación,⁴⁵ sólo se estiman para orientar el análisis del Secretariado, sin que se haga un examen de su aplicación efectiva.

23. A este respecto, México puede —si estima necesario— exponer en una respuesta a la petición, sus consideraciones respecto de las aseveraciones sobre la incorporación del Protocolo de Cartagena al sistema jurídico mexicano, así como información respecto de las aseveraciones sobre la supuesta falta de aplicación efectiva de dicho instrumento que se identifican en esta determinación.

24. Respecto de los artículos 3 y 12: fracción I de la LBOGM añadidos a la petición revisada, el Secretariado estima que las disposiciones que establecen definiciones,⁴⁶ aunque pueden orientar al Secretariado en un

Se aclara que no se hace un análisis de la aplicación efectiva de este artículo, ya que sólo sirve para orientar al Secretariado.

^{39.} *Ibid.*, artículo 2, incisos 1 y 2.

^{40.} *Ibid.*, artículos 8 y 9, a excepción del inciso 3 del artículo 9, ya que establece requisitos para la adopción del marco jurídico nacional, lo cual está fuera del alcance del procedimiento de peticiones ciudadanas.

^{41.} *Ibid.*, artículo 10, a excepción del inciso 7 que incluye reglas que corresponde adoptar en el seno de la Conferencia de las Partes.

^{42.} *Ibid.*, artículos 15 y 16, a excepción de lo que pudiera entenderse como el establecimiento de medidas legislativas.

^{43.} Protocolo de Cartagena, artículo 2, inciso 3.

^{44.} *Ibid.*, artículo 2, inciso 4.

^{45.} Ibid., artículo 2, inciso 5.

^{46.} LBOGM, artículo 3.

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análisis de aplicación efectiva, no califican como legislación ambiental en los términos del artículo 45 del ACAAN. Respecto del artículo 12 de la LBOGM, éste otorga a la Sagarpa facultades para aplicar dicha ley cuando se trate de actividades con organismos genéticamente modificados de vegetales que se consideren especies agrícolas, incluidas semillas, por lo que califica para su análisis, siempre que el ejercicio de tales facultades esté orientado a la protección del medio ambiente o la salud humana.

2. Aseveraciones sobre la omisión en la aplicación efectiva de la legislación ambiental

25. Respecto de las aseveraciones sobre la supuesta ausencia de medidas que garanticen un nivel adecuado de protección de las variedades convencionales de maíz; la supuesta falta de atención oportuna a las denuncias interpuestas por los Peticionarios; y la supuesta falta de capacidad para la investigación y persecución de infracciones relativas a la presencia ilegal de semillas, la determinación del Secretariado del 6 de enero de 2010, contiene el razonamiento para su ulterior análisis.⁴⁷

B. Los seis requisitos del artículo 14 (1) del ACAAN

26. El Secretariado evalúa ahora la petición a la luz de los seis requisitos enlistados en el artículo 14(1) del ACAAN. En su determinación del 6 de enero de 2010, el Secretariado determinó⁴⁸ que la petición satisfacía los requisitos de los incisos (a), (b), (d), (e) y (f) del artículo 14(1) del ACAAN.⁴⁹ Sin embargo, el Secretariado determinó que la petición no contenía información suficiente para ulterior consideración.⁵⁰

^{47.} SEM-09-001 (*Maíz transgénico en Chihuahua*), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 21-23.

^{48.} Ibid., § 24.

^{49. &}quot;El Secretariado podrá examinar peticiones [...] si el Secretariado juzga que la petición:

⁽a) se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado;

⁽b) identifica claramente a la persona u organización que presenta la petición; (c) [...]

⁽d) parece encaminada a promover la aplicación de la ley y no a hostigar a una industria;

⁽e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte;

⁽f) la presenta una persona u organización que reside o está establecida en territorio de una Parte."

^{50.} SEM-09-001 (*Maíz transgénico en Chihuahua*), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 24(c).

27. Con la petición revisada y la información complementaria que los Peticionarios han proveído, el Secretariado determina ahora que la petición cumple también con todos los requisitos enlistados en el inciso c) del artículo 14(1),⁵¹ pues efectivamente proporciona información suficiente, incluidas las pruebas documentales para sustentarla y que permiten al Secretariado revisarla.

28. Si bien algunos documentos no tienen relación directa con las aseveraciones hechas en la petición, pues se refieren a los efectos biológicos en el consumo del maíz transgénico;52 y a la biodiversidad y al conocimiento tradicional del maíz,53 en la petición revisada se incluyen documentos que sirven de información de contexto a las aseveraciones en ella contenidas y entre los que se incluyen las memorias de un seminario-taller sobre identificación y producción de centros de origen de maíz;54 un documento de consenso emitido por la Organización de Cooperación y el Desarrollo Económicos (OCDE);55 una compilación sobre el origen y diversificación del maíz en México;⁵⁶ un estudio sobre el contexto del maíz silvestre y cultivado en México elaborado en el marco de un informe publicado por el Secretariado conforme al artículo 13 del ACAAN;⁵⁷ un ejemplar de la revista *Ciencias*, publicada por la Facultad de Ciencias de la Universidad Nacional Autónoma de México, en la que se aborda el tema del maíz transgénico en México;58 y un ejem-

(c) proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla."

 ^{51. &}quot;El Secretariado podrá examinar peticiones [...] si el Secretariado juzga que la petición:
 (a) presentaria de presidencia de

^{52.} Petición revisada, anexo disco compacto: A. Velimirov y C. Binter, "Biological effects of transgenic maize NK603xMON810 fed in long term reproduction studies in mice", *Bundesministerium für Gesundheit, Familie und Jugend*, Sektion IV, 2008; Spiroux de Vendomôis, *et al.*, "A Comparison of the Effects of the Three GM Corn Varieties on Mammalian Health", (2009) 5 *Int. J. Biol. Sci.* 706-726.

^{53.} Petición revisada, anexo disco compacto: L. Concheiro y F. López (coords.), "Biodiversidad y conocimiento tradicional en la sociedad rural: entre el bien común y la propiedad privada", Centro de Estudios para el Desarrollo Sustentable y la Soberanía Alimentaria, 2007.

^{54.} Petición revisada, anexo disco compacto: "Memorias del Seminario Taller 'Identificación y Producción de Centros de Origen de Maíz'", Semarnat, INE, Conabio, 9 de diciembre de 2004.

^{55.} Petición revisada, anexo disco compacto: "Consensus Document on the Biology of *Zea Mays ssp.* (Maize)", OCDE, 2003.

Petición revisada, anexo disco compacto: T.A. Kato, C. Mapes, L.M. Mera, J.A. Serratos y R.A. Bye, "Origen y diversificación del maíz: una revisión analítica. Universidad Nacional Autónoma de México", Comisión Nacional para el Conocimiento y Uso de la Biodiversidad, 2009, p. 98.

^{57.} Petición revisada, anexo 21: A. Turrent y J.A. Serratos, "Chapter 1. Context and Background on Maize and its Wild Varieties in Mexico", Secretariado de la Comisión para la Cooperación Ambiental, 2004.

^{58.} Petición revisada, anexo 21: *Ciencias* 92-93, octubre 2008–marzo 2009, Facultad de Ciencias, UNAM.

plar dedicado al origen y diversidad del maíz en el continente americano, publicado por uno de los Peticionarios.⁵⁹

29. Los Peticionarios adjuntan documentos que se relacionan con las aseveraciones sobre la protección de variedades locales de maíz frente al maíz genéticamente modificado, incluidos artículos relativos a la domesticación de cultivos;60 y un artículo sobre polinización cruzada a larga distancia.⁶¹ Anexo a la petición revisada se encuentra también un documento emitido por la Conabio en el que se señala que, si bien "no se ha encontrado evidencia científica comprobada de daños a la diversidad biológica, al medio ambiente o a la salud humana por la liberación al ambiente [de organismos vivos modificados en la agricultura]", se reconoce que el caso del maíz transgénico tiene ciertas particularidades, pues "es de polinización abierta al tiempo que es la especie agrícola de mayor variedad genética conocida, lo cual permite que sea cultivado en un amplio rango de ambientes".62 En tales documentos se afirma, asimismo, que dadas las tasas elevadas en las que ocurre el flujo génico entre los maíces, en caso de liberación al ambiente de maíces genéticamente modificados (y si se permite su floración) "habrá flujo genético hacia los maíces nativos o criollos".63

30. En otros estudios anexos a la petición revisada relativos a la aseveración sobre la puesta en marcha de medidas para controlar la liberación de maíz transgénico,⁶⁴ se hace notar la dificultad de controlar la dispersión de transgenes hacia centros de origen —aún si se restringe la liberación comercial de transgénicos en ciertas zonas de agricultura

Serratos Hernández, "El origen y la diversidad del maíz en el continente americano", Greenpeace, 2009.

^{60.} Petición revisada, anexo disco compacto: Allaby, *et al.*, "The genetic expectations of a protracted model for the origins of domesticated crops", (2008) 37 *PNAS* 13,982.

^{61.} En las conclusiones del artículo se indica: "A pesar de que existen muchos factores que influencian la dispersión del polen, gran parte del polen se estabiliza a cortas distancias y probablemente no tendrá posibilidades de interactuar con la mayor parte de tales factores" y se recomienda: "Los eventos aislados de polinización cruzada pueden requerir estudios más detallados en casos donde ésta deba evitarse a toda costa". Petición revisada, anexo disco compacto: M. Bannert y P. Stamp, "Cross-pollination of maize at long distance", (2007) 27 Europ. J. Agronomy 50.

^{62.} Petición revisada, anexo disco compacto: "Elementos base para la determinación de centros de origen y centros de diversidad genética en general y el caso de liberación experimental de maíz transgénico al medio ambiente en México", documento base sobre centros de origen y diversidad en el caso de maíz en México, Conabio, julio de 2006, § 6.

^{63.} Ibid., § 25.

Cfr. SEM-09-001 (Maíz transgénico en Chihuahua), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 20-21.

industrializada—⁶⁵ y se enfatiza la dificultad para interpretar correctamente resultados sobre la presencia de proteína transgénica en maíz cultivado.⁶⁶

31. Sobre las medidas de seguridad para la liberación segura de transgénicos,⁶⁷ los Peticionarios adjuntan un informe de la Conabio en el que se recomienda, en el caso de la liberación de maíz genéticamente modificado, poner en marcha un protocolo de seguridad y permitir la participación de instituciones capacitadas en la materia.⁶⁸

32. Por otra parte, los Peticionarios adjuntan diversos documentos tendientes a sustentar sus aseveraciones sobre la supuesta falta de atención de denuncias y la supuesta falta de capacidad para investigar y perseguir infracciones relativas a la presencia ilegal de semillas genéticamente modificadas en los cultivos de maíz.⁶⁹ Tales documentos incluyen denuncias de hechos interpuestas ante la PGR⁷⁰ y comparecencias del denunciante ante el órgano investigador.⁷¹

33. El Secretariado considera que la versión revisada de la petición proporciona ahora información suficiente que permite considerarla, en conformidad con el requisito del inciso (c) del artículo 14(1) del ACAAN.

Petición revisada, anexo disco compacto: G.A. Dyer, J.A. Serratos Hernández, H.R. Perales, P. Gepts, A. Piñeyro-Nelson, *et al.*, "Dispersal of Transgenes through Maize Seed Systems in Mexico", (2009) 4(5) *PLoS ONE* e5734.

Petición revisada, anexo disco compacto: J.A. Serratos Hernández, *et al.*, "Transgenic Proteins in the Soil Conservation Area of Federal District, Mexico", (2007) *Front. Ecol. Environ.* 5(5). Piñeiro, *et al.*, "Transgenes in the Centre of Origin of Maize", (2008) *Molecular Ecology* 11.

^{67.} *Cfr.* SEM-09-001 (*Maíz transgénico en Chihuahua*), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 20-21.

^{68.} Petición revisada, anexo disco compacto: "Elementos base para la determinación de centros de origen y centros de diversidad genética en general y el caso de liberación experimental de maíz transgénico al medio ambiente en México", documento base sobre centros de origen y diversidad en el caso de maíz en México, Conabio, julio de 2006, § 54.

^{69.} *Cfr.* SEM-09-001 (*Maíz transgénico en Chihuahua*), Determinación conforme al artículo 14(1) (6 de enero de 2010), § 23.

^{70.} Petición original, anexo 6: Denuncia de hechos interpuesta ante la Unidad Especializada en Investigación de Delitos contra el Ambiente y Previstos en Leyes Especiales de la PGR, de fecha 2 de octubre de 2007; anexo 10: Denuncia de hechos interpuesta ante el delegado estatal de la PGR en Chihuahua el 29 de septiembre de 2008.

^{71.} Petición original, anexos 7, 8, 9 y 11: Comparecencia del denunciante ante la PGR, escrito aclaratorio, aportación de elementos de prueba y ampliación de denuncia de hechos ante la Unidad Especializada en Investigación de Delitos contra el Ambiente y Previstos en Leyes Especiales de la PGR.

34. Asimismo, abundando en su razonamiento del 6 de enero de 2010 respecto del requisito del artículo 14(1)(d), el Secretariado estima que si bien la petición señala las "posibles consecuencias socio-económicas para los agricultores de la región"⁷² y, aunque las organizaciones que forman el grupo de Peticionarios puedan participar en otras actividades públicas,⁷³ en la petición en efecto se expresa la preocupación de los Peticionarios en la aplicación efectiva de la legislación ambiental.⁷⁴

IV. ANÁLISIS DE LA PETICIÓN CONFORME AL ARTÍCULO 14(2) DEL ACAAN

35. Una vez que ha determinado que las aseveraciones de una petición satisfacen los requisitos del artículo 14(1), el Secretariado analiza la petición para determinar si ésta amerita solicitar una respuesta de la Parte. En este caso, el Secretariado determina que la petición amerita solicitar una respuesta al gobierno de México, en términos del artículo 14(2) del ACAAN y conforme a los siguientes considerandos:

(a) si la petición alega daño a la persona u organización que la presenta;

Con respecto a que si la Petición alega daño a la persona u organi-36. zación que la presenta, del análisis de la petición se observa el interés de los Peticionarios en la preservación de la diversidad biológica de las variedades convencionales de maíz en Chihuahua y que el supuesto daño se debe a la omisión en la aplicación efectiva de la legislación ambiental.⁷⁵ Los Peticionarios aseveran que la supuesta ausencia de medidas de seguridad en el manejo de maíz transgénico "pone en riesgo al medio ambiente, la diversidad biológica y la sanidad vegetal, [...]";⁷⁶ que se desconoce "que tan extendida está la contaminación [lo que] pone en riesgo las variedades locales de maíz";77 que debido a la supuesta falta de capacidad técnica y jurídica de las autoridades no se realizan actos de aplicación para el control de maíz transgénico para "proteger y conservar el medio ambiente, la diversidad biológica, la salud humana, animal o vegetal",78 y que el conjunto de omisiones en la aplicación efectiva de la legislación citada en la petición supuestamente "atentan contra

^{72.} Petición original, p. 2.

^{73.} Véase, por ejemplo, el sitio de Internet de El Barzón, A.C. que dedica parte de su contenido a cuestiones de índole social: http://www.elbarzon.org/quien/quees.shtml, 26 de febrero de 2010.

^{74.} Petición original, p. 1.

^{75.} Petición revisada, p. 1.

^{76.} Petición original, p. 1.

^{77.} *Ibid.*, p. 7.

^{78.} Ibid., p. 6.

el ambiente, la bioseguridad [y] la gestión ambiental en la entidad federativa de Chihuahua.^{"79} Asimismo, los Peticionarios señalan que debido a la omisión en la aplicación de las disposiciones citadas, se "pone en riesgo la diversidad de las especies de maíz nativas o híbridas que se cultivan en la zona".⁸⁰

37. En vista de lo anterior, y guiado por el inciso 7.4 de las Directrices,⁸¹ el Secretariado considera que la petición se refiere a supuestos daños debidos a la omisión en la aplicación efectiva de la legislación ambiental y se encuentra relacionada con la protección del medio ambiente.

 (b) si la petición, por sí sola o conjuntamente con otras, plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas de este Acuerdo;

38. El Secretariado estima que la Petición plantea asuntos cuyo ulterior estudio en este proceso contribuiría a la consecución de las metas del ACAAN, en específico de los incisos f), g) y h) del Artículo $1.^{82}$

(c) si se ha acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte;

39. Con respecto a que se haya acudido a los recursos al alcance de los particulares conforme a la legislación de la Parte, el Secretariado nota que ni la consideración en el artículo 14(2)(c) ni la Directriz 7.5 pretenden imponer un requisito de tener que agotar todas las acciones o recursos bajo la legislación de la Parte. Incluso, la propia Directriz 7.5 orienta al Secretariado a considerar: *si con anterioridad a la presentación de la petición se han tomado las acciones razonables para acudir a dichos recursos, considerando que en algunos casos podrían existir obstáculos para acudir a tales recursos.*

^{79.} *Ibid.*, p. 8.

^{80.} Ibid., p. 13.

^{81. &}quot;Para evaluar si la petición alega dalo a la persona u organización que la formula, el Secretariado considerará factores tales como los siguiente:
(a) si el daño alegado se debe a la omisión aseverada en la aplicación efectiva de la

⁽b) si el daño alegado está relacionado con la protección del medio ambiente, o con la

prevención de un peligro para la vida o la salud humana (pero no directamente relacionado con la seguridad e higiene del trabajador), como se define en el artículo 45(2) del Acuerdo."

^{82. &}quot;Los objetivos de este Acuerdo son:

 ⁽f) fortalecer la cooperación para elaborar y mejorar las leyes, reglamentos, procedimientos, políticas, y prácticas ambientales;

⁽g) mejorar la observancia y la aplicación de las leyes y reglamentos ambientales;

⁽h) promover la transparencia y la participación de la sociedad en la elaboración de leyes, reglamentos y políticas ambientales [...]."

SEM-09-001

40. Los Peticionarios señalan que presentaron ante la Subprocuraduría de Investigación Especializada en Delitos Federales, Unidad Especializada en Investigación de Delitos contra el Ambiente y previstos en Leyes Especiales de la PGR una denuncia de hechos en contra de quien resulte responsable por el posible cultivo ilegal de maíz transgénico en Chihuahua.⁸³ Asimismo, indican que se interpuso una denuncia ante la Sagarpa —y posteriormente turnada a la Profepa— en la que se solicitó su actuación para determinar si se está utilizando maíz transgénico en cultivos en el ejido de Benito Juárez, municipio de Namiquipa, Chihuahua.⁸⁴ En la versión revisada de la petición, se hace referencia a una denuncia de hechos en contra de quien resulte responsable por la posible importación, distribución y liberación con fines agrícolas y/o siembra ilegal de variedades de maíz genéticamente modificado en el estado de Chihuahua.⁸⁵

41. En conformidad con el inciso c) del artículo 14(2) y, considerando que pueden existir obstáculos procesales para intentar otras vías procesales,⁸⁶ el Secretariado estima que la presentación de denuncias ante las autoridades correspondientes, es suficiente para considerar que se han tomado acciones razonables para acudir a recursos al alcance de los particulares conforme a la legislación de la Parte.

(d) si la petición se basa exclusivamente en noticias de los medios de comunicación.

42. Por lo que se refiere al artículo 14(2)(d), el Secretariado estima que la versión revisada de la petición no se basa en noticias de los medios de comunicación, sino en el conocimiento directo de los hechos por los Peticionarios, lo que es evidente al consultar la información de carácter técnica y jurídica recabada por ellos y presentada en la petición revisada y sus anexos para dar sustento a sus aseveraciones.

43. En resumen, habiendo revisado la petición a la luz de los factores listados en el artículo 14(2) del ACAAN, el Secretariado estima que las

^{83.} Petición revisada, p. 3.

^{84.} Petición revisada, anexo 22: Carta dirigida al gobernador constitucional del estado de Chihuahua, al secretario de Desarrollo Rural del estado de Chihuahua y al delegado de la Sagarpa en Chihuahua, de fecha 21 de septiembre de 2007.

^{85.} Petición revisada, anexo 10: Denuncia de hechos interpuesta ante el delegado estatal de la PGR en Chihuahua, fechada el 29 de septiembre de 2008.

^{86.} En este sentido, el Secretariado ha notado que "acudir" a los recursos a su alcance no significa que éstos tengan que agotarse antes de presentar una petición en conformidad con el artículo 14. *Cfr.* SEM-97-007 (*Lago de Chapala*) Determinación conforme al artículo 15(1) (14 de julio de 2000); y SEM-05-002 (*Islas Coronado*) Determinación conforme al artículo 14(1)(2) (30 de septiembre de 2005).

aseveraciones sobre la supuesta ausencia de medidas que garanticen un nivel adecuado de protección de las variedades convencionales de maíz frente al uso de maíz genéticamente modificado en los cultivos en Chihuahua; la supuesta falta de atención oportuna a las denuncias interpuestas a ese respecto; y la supuesta falta de capacidad para investigar y perseguir las presuntas infracciones a la legislación ambiental citada en la petición, ameritan solicitar una respuesta del gobierno de los Estados Unidos Mexicanos.

V. DETERMINACIÓN

44. El Secretariado examinó la petición SEM-09-001 (Maíz transgénico en Chihuahua) en conformidad con el artículo 14(1) del ACAAN y determina que cumple con los requisitos allí establecidos según las razones expuestas. Asimismo, tomando en cuenta el conjunto de los criterios establecidos en el artículo 14(2) del ACAAN, el Secretariado determina que la petición amerita solicitar a la Parte en cuestión, en este caso los Estados Unidos Mexicanos, una respuesta a las aseveraciones de los Peticionarios relativas a la supuesta falta de aplicación efectiva de los artículos 4º de la Constitución Federal; 2 (incisos 1 y 2); 8 y 9 (a excepción del inciso 3), 10 (a excepción del inciso 7), 15 y 16 (a excepción de lo que pudiese comprender la adopción de medidas legislativas) del **Protocolo** de Cartagena; 9, 12: fracción I, 13, 17, 18: fracciones I, II, IV y V, 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, 49, 60, 61, 62, 63, 64, 65, 66, 86, 87, 88, 101, 112, 113, 114, 115, 117, 119 y 120 de la **LBOGM**; 15, 160, 161, 164, 165, 166, 170 y 170 *Bis*, 182, 189, 190, 191, 192, 193, 198, 201, 202, 203 y 204, de la LGEEPA; y 420 Ter del CPF. En la respuesta, México puede incluir información sobre las supuestas omisiones que están teniendo lugar en los municipios de Cuahutémoc, Namiquipa y Ascensión del estado de Chihuahua, respecto de:

a. La supuesta ausencia de "medidas para controlar y supervisar centros de almacenamiento, distribución y comercialización de semillas que surten a los productores de la región";⁸⁷ actos para impedir la entrada a territorio nacional de semillas de maíz genéticamente modificado, particularmente el destinado al estado de Chihuahua;⁸⁸ la operación de mecanismos de salvaguarda;⁸⁹ el establecimiento del régimen de protección especial del maíz,

Petición original, p. 8; *Cfr.* LBOGM, artículos 2: fracciones VII, VIII y IX, 9: fracción III, 18: fracción III y 36; CPF, artículo 420 *Ter*.

^{88.} Ibid., p. 8.

^{89.} Ibid., p. 10.

determinación de centros de origen y de diversidad genética;⁹⁰ la implementación de un régimen de permisos para la siembra experimental⁹¹ y el análisis y evaluación de riesgo correspondiente,⁹²

- b. La supuesta falta de atención oportuna a las denuncias presentadas por los Peticionarios en las que —aseveran— "se constata una dilación en la aplicación de la justicia",⁹³ lo que trae como consecuencia "la falta de aplicación de la legislación ambiental"⁹⁴ que supuestamente "está dando un patrón sistemático de siembras ilegales de semillas de maíz transgénicas"⁹⁵; y
- c. La supuesta falta de capacidad para inspeccionar y verificar la presencia de semillas genéticamente modificadas en los cultivos de maíz;⁹⁶ la supuesta "falta de capacidad para la realización de muestreos adecuados [y la] ausencia de coordinación entre las autoridades encargadas de la bioseguridad en México".⁹⁷

45. Conforme a lo establecido en el artículo 14(3) del ACAAN, la Parte podrá proporcionar una respuesta a la petición dentro de los 30 días siguientes a la recepción de esta determinación, es decir hasta el **2 de abril de 2010**. En circunstancias excepcionales, la Parte podrá solicitar la ampliación del plazo a 60 días.

46. Reconociendo que una respuesta del gobierno de México puede incluir información confidencial y dado que el Secretariado debe hacer pública las razones para recomendar o no un expediente de hechos conforme al artículo 15(1), se recuerda a la Parte que la directriz 17.3⁹⁸ le invita a proporcionar un resumen de la información confidencial para su divulgación al público.

^{90.} Ibid.

^{91.} Ibid.

^{92.} Ibid.

^{93.} Petición revisada, p. 6.

^{94.} Ibid.

^{95.} Ibid.

^{96.} Petición original, pp. 6 y 10-11.

^{97.} Petición revisada, p. 6.

^{98. &}quot;Tomando en consideración que la información confidencial o privada proporcionada por una Parte [...] puede contribuir de manera sustancial a la opinión del Secretariado en cuanto a si se amerita o no la elaboración de un expediente de hechos, los suministradores de esa información deberían esforzarse por proporcionar un resumen de esa información [...]."

47. Dado que ya se ha enviado a la Parte una copia de la petición y de sus anexos respectivos, éstos no se acompañan a la presente determinación.

48. Sometida respetuosamente a su consideración, el 3 de marzo de 2010.

Secretariado de la Comisión para la Cooperación Ambiental

por: Paolo Solano Oficial jurídico, Unidad sobre Peticiones Ciudadanas

у

Dane Ratliff Director, Unidad sobre Peticiones Ciudadanas

 ccp: Sr. Enrique Lendo, representante alterno de México Sr. David McGovern, representante alterno de Canadá Sra. Michelle DePass, representante alterna de Estados Unidos Sr. Evan Lloyd, director ejecutivo interino del Secretariado de la CCA Peticionarios

SEM-09-002

(Wetlands in Manzanillo)

- **SUBMITTERS:** BIOS IGUANA, A.C., ET AL.
- PARTY: MEXICO
- DATE: 4 February 2009
- **SUMMARY:** The Submitters assert that the Government of Mexico is failing to effectively enforce its environmental laws with regard to the protection of the Laguna de Cuyutlán, Manzanillo, which—according to the submitters—represents 90 percent of wetlands in the state of Colima, Mexico and is the fourth largest wetland in the country.

SECRETARIAT DETERMINATIONS:

ART. 14(1) (9 October 2009)	Determination that criteria under Article 14(1) have not been met.
ART. 14(1)&(2) (13 August 2010)	Determination that criteria under Article 14(1) have been met, and that the submission merits requesting a response from the Party.

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 14(1) of the North American Agreement for Environmental Cooperation

Submitters:	Bios Iguana, A.C. (represented by Gabriel Martínez Campos) Esperanza Salazar Zenil
Party:	United Mexican States
Date received:	2 February 2009
Date of this determination:	9 October 2009
Submission no.:	SEM-09-002 (Wetlands in Manzanillo)

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement") provide for a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "Guidelines"). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a Factual Record, providing its reasons for

such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission.¹

2. On 2 February 2009, Bios Iguana, A.C. and Esperanza Salazar Zenil (the "Submitters") filed with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") a submission pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement"). The Submitters assert that Mexico is failing to effectively enforce its environmental law with regard to the environmental impact assessment and authorization of the projects known as *Manzanillo Liquefied Petroleum Gas (LPG) Supply Plant* and *Manzanillo Liquefied Natural Gas (LNG) Terminal* (the "Projects"), which, they assert, will affect the hydrological flow, flora and fauna of Laguna Cuyutlán in the state of Colima. They further assert that the modification of ecological zoning and urban development programs of the region violated Mexican environmental law.

3. The Secretariat may examine a submission from any person or non-governmental organization meeting the requirements in Article 14(1) of the Agreement. **The Secretariat has determined that some assertions in submission SEM-09-002** (*Wetlands in Manzanillo*) **do not satisfy Article 14(1) of the Agreement** and notifies the Submitters that they have 30 days to file a revised version of the Submission, failing which the Secretariat will proceed no further with respect to assertions not meeting the requirements of Article 14(1). The Secretariat provides the reasons for its determination below.

II. SUMMARY OF THE SUBMISSION

4. The Submitters assert that the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat), the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), the Office of the Federal Attorney General (*Procuraduría General de la República*—PGR), the government of the state of Colima, the Secretariat of Urban Development and Ecology (*Secretaría de Desarrollo Urbano y Ecología*) of the state of Colima, the Office of the Attorney General of the state of Colima (*Procuraduría General del estado de Colima*) and the municipal governments of Manzanillo and Armería are failing to effectively

^{1.} Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records can be found on the CEC website at: http://www.cec.org/citizen/index.cfm?varlan=english>.

enforce the environmental laws applicable to the environmental management of the Laguna de Cuyutlán. The Submitters further assert that the *Universidad de Colima*, the Mineral Resource Council (currently the Mexican Geological Service (*Servicio Geológico Mexicano*)) and the Federal Electricity Commission (*Comisión Federal de Electricidad*—CFE) are responsible for the enforcement of the environmental laws at issue.²

5. The Submitters assert that said authorities are failing to effectively enforce Article 4 of the Political Constitution of the United Mexican States (the "Mexican Constitution");3 Articles 1, 2, 3 and 4 of the Convention on Wetlands of International Importance, especially as Waterfowl Habitat⁴ (the "Ramsar Convention"); Articles 30, 35 and 35 Bis of the General Ecological Balance and Environmental Protection Act (Ley General de Equilibrio Ecológico y Protección al Ambiente-LGEEPA);⁵ Article 60 Ter of the General Wildlife Act (Ley General de Vida Silvestre-LGVS);6 the Federal Public Administration Organic Act (Ley Orgánica de la Administración Pública Federal-LOAPF);7 Article 60 of the Federal Administrative Procedure Act (Ley Federal de Procedimiento Administrativo-LFPA);8 Articles 4-IV, 13-III, 22 and 46 of the LGEEPA Environmental Impact Assessment Regulations;9 Articles 6, 7, 13, 14, 36, 48, 49 and 50 of the LGEEPA Ecological Zoning Regulations;¹⁰ Mexican Official Standard NOM-022-SEMARNAT-2003, establishing the specifications for the preservation, conservation, sustainable use and restoration of coastal wetlands in mangrove zones ("NOM-022");11 NOM-059-SEMARNAT-2001, environmental protection-native Mexican species of wild fauna and flora—risk categories and specifications for inclusion, exclusion or change-list of species at risk ("NOM-059");12 Articles 1

- 2. Submission, p. 2.
- 3. *Ibid.*, p. 1, 14.
- 4. *Ibid*.
- 5. *Ibid.*, pp. 1, 8, 10, 12, 13.
- 6. *Ibid.*, pp. 1, 11.
- 7. Ibid., p. 1.
- 8. *Ibid.*, pp. 1, 13.
- 9. *Ibid.*, pp. 1, 10, 11, 12, 13.
- 10. Ibid., p. 1, 6.
- 11. Ibid., pp. 1, 10, 11, 12.
- 12. *Ibid.*, pp. 1, 3, 4, 10. A Mexican Official Standard ("NOM") is defined in Article 3, Section XI of the Federal Law of Metrology and Normalization (*Ley Federal sobre Metrología y Normalización*) as "the technical regulation of a mandatory nature issued by the relevant authorities, according to the purposes established in Article 40 and which establishes rules, specifications, attributes, directives, characteristics or prescriptions applicable to a product, facility, system, activity, service or production and operation method, as well as those related to terminology, symbols, packaging, marking or labeling and those referred to its compliance and enforcement." The NOMs in this submission operating in conjunction with the LGEEPA can broadly be considered environmental law in the sense of Article 45(2) of NAAEC.

and 40 of the Colima State Environment and Sustainable Development Act (*Ley Ambiental para el Desarrollo Sustentable del Estado de Colima*— LADSEC);¹³ Articles 48 and 66 of the Colima State Human Settlements Act (*Ley de Asentamientos Humanos del Estado de Colima*—LAHEC);¹⁴ the Regional Ecological Zoning Program for the Laguna Cuyutlán Sub-Basin (the "Ecological Zoning Program");¹⁵ the Manzanillo Urban Development Program,¹⁶ and the Coordination Agreement for the Drafting, Issuance and Execution of the Regional Ecological Zoning Program for Laguna Cuyutlán (the "Coordination Agreement").¹⁷

6. The Submitters note that Laguna Cuyutlán is the country's fourth largest coastal wetland with 1,500 hectares of mangrove, and is deemed a priority mangrove conservation region by the National Commission for the Knowledge and Use of Biodiversity (*Comisión Nacional de Uso y Aprovechamiento de la Biodiversidad*—Conabio). They further state that the zone has 327 bird species, two of which are listed as endangered by NOM-059, with another 15 listed in the special protection category.¹⁸

7. The Submitters assert the existence of alleged irregularities in the procedures to issue authorizations for the construction and operation of two infrastructure projects at Laguna Cuyutlán: the *Western Zone LPG Receiving, Storage and Distribution Port Terminal* (the "Manzanillo LPG Project") and the *Manzanillo LNG Terminal* (the "Manzanillo LNG Project"). The information enclosed with the submission indicates that the Manzanillo LPG Project, carried on by the company Zeta Gas del Pacífico, S.A. de C.V. ("Zeta Gas"), consists of the construction and operation of a port terminal for LPG and propane gas storage and distribution. The project includes 16 LPG and four propane gas storage spheres, of 43,380 barrels each. The plant is designed to receive a total flow of 45,000 tons (559,325.89 barrels) of LPG per month and distribute a flow of 10,000 barrels per day, sufficient to supply the LPG demand for the area of influence of Manzanillo and surrounding towns.¹⁹

8. As regards to the Manzanillo LNG Project, the submission and its exhibits indicate that it is being undertaken by the CFE and involves the installation of an LNG receiving, storage and regasification terminal.

^{13.} Ibid., pp. 1, 5, 6, 7, 9.

^{14.} Ibid., p. 9.

^{15.} Ibid., pp. 2, 5, 6, 11.

^{16.} *Ibid.*, pp. 2, 6, 8.

^{17.} *Ibid.*, pp. 1, 4, 6.

^{18.} Ibid., p. 1.

^{19.} Submission, pp. 7-8 and Exhibit 7: Executive Summary of the Regional Environmental Impact Statement, Manzanillo LPG Project.

The Manzanillo LNG Project calls for the construction and operation of three LNG storage tanks of 165,000 cubic meters each, with a regasification capacity of 1,000 million cubic feet of natural gas per day. The Manzanillo LNG Project will supply natural gas to the Manzanillo Thermoelectric Complex and the thermoelectric stations in the country's Central-Western zone.²⁰

9. The Submitters assert that during the environmental impact assessment for both projects, the Semarnat General Environmental Impact and Risk Bureau (Dirección General de Impacto y Riesgo *Ambiental*—DGIRA) failed to conduct an analysis pursuant to the applicable environmental laws, and improperly-they assert-granted the environmental impact authorizations for both projects. In particular, they note that the absence of environmental impact statements (EIS) in the LPG and LNG projects in Manzanillo has not been penalized; that the Manzanillo LPG Project's adherence to the regional ecological zoning program was not evaluated; that both projects' conformity to the laws and Mexican official standards were not met in respect of observance of the levels of wetland and wild bird protection levels at Laguna Cuyutlán; and that the failure of the Manzanillo LNG Project to meet deadlines in the environmental impact assessment project was not penalized.21

10. According to the Submitters, Mexico has not penalized the violation for non-compliance of conditions established in the environmental impact authorization of the Manzanillo LNG Project.²²

11. The Submitters further assert that, before the Manzanillo LPG Project was authorized, local authorities amended the Manzanillo Urban Development Program to change the Project site zoning from "tourism-ecological" to "heavy industry", which—they claim—constitutes a violation of the ecological criteria of the regional ecological zoning program. Likewise, they assert that, before the Manzanillo LNG Project was authorized, the Colima state government illegally amended the regional ecological zoning program and did not establish an environmental log to record progress in the ecological zoning process.²³

^{20.} Submission, p. 9 and Exhibit 10: Executive Summary of the Regional Environmental Impact Statement, Manzanillo LNG Project.

^{21.} Submission, pp. 8-10.

^{22.} Ibid., p. 14.

^{23.} Ibid., pp. 5-7.

III. ANALYSIS

12. NAAEC Article 14 authorizes the Secretariat to consider any submissions of any nongovernmental organization or person asserting that an NAAEC Party is failing to effectively enforce its environmental law. To discharge its functions effectively, the Secretariat may interpret the meaning of the provisions relevant to the submission procedure towards achieving the goals and purposes of the NAAEC.²⁴ As the Secretariat has noted in previous Article 14(1) determinations,²⁵ Article 14(1) is not intended to be an insurmountable procedural screening device.

A. Opening paragraph of Article 14(1)

13. The first sentence of Article 14(1) allows the Secretariat to consider submissions from "any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law." The Submitters are in fact persons or nongovernmental organizations filing a submission. Having met this requirement, the Secretariat believes that while some of the asserted failures to which the Submitters refer occurred in the past, these appear to be matters that continue to exist and thus meet the temporal requirement of an ongoing situation in Article 14(1). Lastly, the Secretariat determines whether each provision cited in the submission falls under the definition of environmental law pursuant to NAAEC Article 45(2), and whether the Submitters' assertions may be considered further by the Secretariat:

1. Environmental law in question

14. The Secretariat examined the provisions cited in the submission and finds that some of them cannot be addressed in the procedure provided in NAAEC Articles 14 and 15, because they do not fall under the definition set forth in section (a) of Article 45(2).²⁶ Appendix I contains the text of the provisions subject to further analysis.

SEM-07-005 (Drilling Waste in Cunduacán), Determination pursuant to Article 14(3) (8 April 2009).

^{25.} See *e.g.* SEM-97-005 (*Biodiversity*), Determination pursuant to Article 14(1) (26 May 2008), and SEM-98-003 (*Great Lakes*), Determination pursuant to Article 14(1)(2) (8 September 1999).

^{26.} NAAEC Article 45 defines "environmental law" as follows:
2. For purposes of Article 14(1) and Part Five:
(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:
(i) the prevention of a batement or another of a chapter of a chapte

⁽i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,

i) Article 4 of the Mexican Constitution

15. The Secretariat has previously determined²⁷ that the fourth paragraph of Article 4 of the Mexican Constitution falls under the definition of environmental law, as its primary purpose is the protection of the environment or the prevention of a risk to life or human health, and that such provision may be included in its analysis provided that it is complemented by the analysis of the environmental laws in question.²⁸

ii) Articles 1, 2, 3 and 4 of the Ramsar Convention

16. The Ramsar Convention is an international treaty adopted and ratified by Mexico.²⁹ The Mexican courts have found that, pursuant to Article 133 of the Mexican Constitution, international treaties are the supreme law of the land³⁰ and are incorporated into the domestic legal regime through the Mexican constitutional mechanism.³¹ The cited

⁽ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or

⁽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.
(b) For greater certainty, the term "environmental law" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

⁽c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) 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."

^{27.} SEM-06-006 (Los Remedios National Park), Determination under Article 14(1) (19 January 2007), pp. 4-5.

See also: ADEQUATE ENVIRONMENT FOR DEVELOPMENT AND WELFARE. CONCEPT, REGULATION AND DEFINITION OF THIS INDIVIDUAL RIGHT. Ninth Period. Instance: Collegiate Circuit Courts. Source: Semanario Judicial de la Federación y su Gaceta, XXI; January 2005, Thesis I.4o.A.447 A.

^{29.} Article 133 of the Mexican Constitution establishes that "This Constitution, the laws issued by the Congress of the Union and all the Treaties issued in conformity, celebrated and that are celebrated by the President of the Republic, will be the Law Supreme of the Union. Judges from each State will adhere to this Constitution, laws and treaties, notwithstanding the provisions in their contradiction that may exist in the Constitutions and State laws."

^{30.} INTERNATIONAL TREATIES. INTEGRAL PART OF THE SUPREME LAW OF THE LAND AND HIERARCHICALLY ABOVE GENERAL, FEDERAL AND LOCAL LAWS. INTERPRETA-TION OF CONSTITUTIONAL ARTICLE 133. Ninth Period. Instance: Supreme Court. Source: Semanario Judicial de la Federación y su Gaceta, XXV, April 2007, p. 6. Thesis: P. IX/2007.

^{31.} INTERNATIONAL TREATIES. INCORPORATED TO THE NATIONAL LAW. ITS ANALYSIS OF INCONSTITUTIONALITY ALSO INCLUDES THE DOMESTIC LAW. Ninth Period. Instance: Collegiate Circuit Courts. Source: *Semanario Judicial de la Federación y su Gaceta*, XXVI; July 2007, Thesis I.3o.C.79 K.

provisions of the Ramsar Convention define wetlands and waterfowl;³² establish the parties' obligation to designate wetlands for inclusion on a list³³ and to formulate and implement their planning so as to promote the conservation of the wetlands;³⁴ and, require the parties to create natural reserves for wetlands and waterfowl.³⁵ To the extent these provisions of the Ramsar Convention have been implemented in Mexican law, these provisions would meet the definition of environmental law in NAAEC Article 45(2).

iii) LOAPF

17. The submission does not cite any particular article of the LOAPF, though its reference appears to be related to a complaint filed with the Colima State Attorney General with respect to the Manzanillo LNG Project.³⁶ Taking the LOAPF as a whole, it does not appear to fall under the definition of environmental law since it is not drafted with environmental protection as its primary purpose and does not meet the NAAEC Article 45(2) definition of environmental law.

iv) LGEEPA Articles 30, 35 and 35 Bis; Articles 4 section IV, 13 section III, 22 and 46 of the Environmental Impact Assessment Regulations; and LFPA Article 60

18. The cited provisions of the LGEEPA and the Environmental Impact Assessment Regulations are considered for analysis because their primary purpose is the protection of the environment, and they establish requirements to be met by the persons responsible for a project or infrastructure works to obtain an environmental impact authorization,³⁷ determine the criteria for Semarnat to consider during the environmental impact assessment and authorization procedure,³⁸ provide the possibility of holding a public consultation during the procedure,³⁹ and establish the deadlines for the environmental impact procedure.⁴⁰ As regards the cited LFPA provision, establishing the revocation of

^{32.} Ramsar Convention, Article 1.

^{33.} Ibid., Article 2.

^{34.} *Ibid.*, Article 3.

^{35.} Ibid., Article 4.

Submission, Complementary Exhibit: Complaint filed by Esperanza Salazar Zenil and Gabriel Martínez Campos with the Colima State Attorney General on 4 June 2007.
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^{37.} LGEEPA, Article 30.

^{38.} LGEEPA, Article 35; Environmental Impact Assessment Regulations, Article 13.

^{39.} Environmental Impact Assessment Regulations, Article 4 section IV.

^{40.} LGEEPA, Article 35 *Bis*; Environmental Impact Assessment Regulations, Articles 22 and 46.

procedures for causes attributable to the interested party,⁴¹ the Secretariat considers it for analysis insofar as it relates to the effective enforcement of the terms and deadlines provided in the Environmental Impact Assessment Regulations.

v) LGVS Article 60 Ter

19. This provision entered into force on 12 February 2007, prior to when DGIRA issued the environmental impact authorization for the LNG Manzanillo Project on 11 February 2008 and falls under the environmental law definition because it prohibits activities affecting the ecosystem formed by mangrove zones, clearly intended to protect this aspect of the environment.

vi) Articles 6, 7, 13, 14, 36, 48, 49 and 50 of the Ecological Zoning Regulations

20. The cited provisions of the Ecological Zoning Regulations establish the ecological zoning objectives and outcomes,⁴² the function and contents of the environmental log,⁴³ and the conditions to amend the general ecological zoning program for the territory or regional ecological zoning programs,⁴⁴ and as such the provisions' primary purpose is of an environmental protection nature and accordingly conforms to the NAAEC Article 45(2) definition of environmental law. The Secretariat further considers that the primary purpose of ecological zoning in this particular context is the protection of the environment.⁴⁵

vii) LADSEC Articles 1 and 40

21. The Submission refers to a "section VIII of LADSEC Article 1", which does not exist. LADSEC Article 40 provides that works or activities carried on in the state of Colima are subject to the provisions of the corresponding ecological zoning programs. Since environmental protection is the primary purpose of ecological zoning, this provision falls under the definition of environmental law.

^{41.} LFPA, Article 60.

^{42.} Ecological Zoning Regulations, Articles 6 and 7.

^{43.} Ibid., Articles 13 and 14.

^{44.} *Ibid.*, Articles 36, 48, 49 and 50.

^{45.} *Cf.* SEM-06-006 (*Los Remedios National Park*), Determination under Article 15(1) (20 March 2008), p. 6.

viii) NOM-022 and NOM-059

22. The sections of NOM-022 cited by the Submitters establish conditions for the undertaking of works to ensure mangrove integrity, prohibit activities that may affect the ecosystems they form, and require that EIS include a comprehensive study of the hydrological unit where the coastal wetlands are located. These provisions of NOM-022 fall within the definition of environmental law, as their primary purpose is to regulate and protect these elements of the environment, namely mangrove zones.

23. NOM-059 also falls under the definition of environmental law, as its main objective is the protection of wild flora and fauna species native to Mexico through the establishment of risk categories and specifications for inclusion or exclusion on the list of at-risk species.

ix) LAHEC Articles 48 and 66, the Manzanillo Urban Development Program and the Ecological Zoning Program

24. The Secretariat consulted the LAHEC provisions applicable to urban development programs,⁴⁶ and determines that the provisions quoted by the Submitters are environmental law since, among the main purposes of the urban development programs—as defined by LAHEC—is the protection of the environment.

25. LAHEC Article 48 calls for consistency between municipal urban development programs and other planning instruments, establishing the required characteristics such as territorial jurisdiction, primary zoning, conservation actions, identification of population center limits, land use assignment, and enforcement guidelines. This provision provides a basis for understanding the enforcement of LAHEC with respect to the Manzanillo Urban Development Program and can be considered by the Secretariat.

26. LAHEC Article 66 describes the mechanism that allows for public participation during the formulation of urban development programs. This Article includes specific requirements such as scheduling public hearings, implement a consultation process and address comments from interested persons during the program preparation. The Secretariat does not view a requirement for public participation in an urban development program as characterized in the submission as environmental law in accordance with NAAEC Article 45(2).

^{46.} LAHEC, Articles 5 section XIII and 47.

27. While the Manzanillo Urban Development Program and the Ecological Zoning Program are administrative acts of the authorities which citizens must observe, the Secretariat does not consider them environmental laws. Mexican courts have determined on the scope of urban development programs, finding that although they provide rules

[T]hey do not constitute a law in a material sense nor do they share the hierarchy of a law, but rather their formation, application and enforcement are determined by the laws from which they originate.⁴⁷

28. For further clarification, the Mexican courts have held that urban development programs are, in any case, administrative acts that "while having general effects, [these are] not equal to a law".⁴⁸ The programs cited by the Submitters do not qualify as environmental law.⁴⁹

x) *Articles* 3, 5 and 6 of the Coordination Agreement

29. Published in the Federal Official Gazette (*Diario Oficial de la Federación*) on 27 October 2000, the Coordination Agreement was signed by the Ministry of the Environment, Natural Resources and Fisheries (currently Semarnat); the state of Colima and the cities of Armería and Manzanillo, among others. While its provisions contain obligations for the authorities at different levels (federal, state, municipal), it is considered solely to guide the Secretariat's analysis, since the extent to which the Coordination Agreement is an environmental law is unclear. However, the Submitters may present more information on this regard in a revised submission to clarify why they consider the Coordination Agreement an environmental law.

2. Assertions of a failure to effectively enforce environmental laws

30. Next, the Secretariat analyzes whether the submission "asserts" alleged failures in the "effective enforcement" of environmental laws,

^{47.} URBAN DEVELOPMENT PROGRAMS ISSUED UNDER THE PUEBLA STATE URBAN DEVELOPMENT ACT ARE GENERAL RULES SUBORDINATED TO THE LAW FROM WHICH THEY ORIGINATE (LAW IN EFFECT IN 2001). Administrative Collegiate Court for the Sixth Circuit. Ninth Period. Collegiate Circuit Courts. *Federal Judicial Weekly and Gazette*, XXI, May 2005, p. 1511.

^{48.} HUMAN SETTLEMENTS. DISTRICT URBAN DEVELOPMENT PROGRAM FOR CUAJIMALPA DE MORELOS, VERSION 1997, IS NOT A GENERAL, ABSTRACT AND PERSONAL RULE SIMI-LAR TO A LAW, BUT RATHER AN ADMINISTRATIVE ACT WITH GENERAL EFFECTS TO BE SATISFIED WITH THE GUARANTEE OF GROUNDS AND REASONING. Fourth Administrative Collegiate Court for the First Circuit. Ninth Period. Collegiate Circuit Courts. *Federal Judicial Weekly and Gazette*, XIX, February 2004, p. 985.

^{49.} Although these may be governed by environmental law.

and not alleged deficiency in the law. In this regard, the Secretariat determines that, in effect, the submission as a whole contains assertions on failures in effective enforcement rather than deficiencies in environmental laws. However, it found that some assertions cannot be analyzed according to the process provided in Articles 14 and 15. In this consideration, the Secretariat is guided by NAAEC Article 5, which enunciates some measures that the Parties may adopt for the effective enforcement of its environmental laws.⁵⁰

i) Assertions regarding amendments to the Manzanillo Urban Development Program

31. The Submitters state that the environmental impact statement (EIS) for the Manzanillo LPG Project was filed with Semarnat on 24 February 2004.⁵¹ On 12 June 2004, the municipality of Manzanillo agreed to amend the Manzanillo Urban Development Program, changing the classification of the site selected for the execution of the Manzanillo LPG Project from woodlands to a medium-term urban reserve, changing its zoning from "tourism-ecology" to "high-impact and high-risk heavy industry".⁵² The Submitters assert that the municipal authorities adjusted the Manzanillo Urban Development Program to accommodate the Projects,⁵³ and that the modifications to the Manzanillo Urban Development Program the environmental management units defined by the Ecological Zoning Program. They assert that doing so resulted in a lack of consistency between the Program and the state's obligations under the Coordination Agreement.

32. The Submitters assert that by amending the Manzanillo Urban Development Program, the municipality of Manzanillo failed to effectively enforce LAHEC Article 48 section I, which provides that the municipal urban development programs should be consistent with the respective ecological zoning program.

33. It is clear that the Manzanillo Urban Development Program is subject to the LAHEC and that according to Article 48 section I must include "consistency mechanisms". The Secretariat further notes that Article 5 section XIII of this law defines the term "urban development program", finding environmental protection among its elements, which confirms

^{50.} *Cfr.* SEM-98-003 (*Great Lakes*), Determination under Articles 14(1) and (2) (8 September 1999), pp. 8-9.

^{51.} Submission, p. 7.

^{52.} Ibid., pp. 8-9.

^{53.} *Ibid.*, p. 6. The environmental impact assessment authorization for the LNG Manzanillo Project was filed before Semarnat on 8 November 2006.

that the assertion regarding the amendments to the Manzanillo Urban Development Program may be analyzed, provided that the analysis refers to the environmental aspects of the program.

ii) Assertions regarding the amendments to the Ecological Zoning Program

34. The Submitters claim that the Ecological Zoning Program released on 5 July 2003 classified the sites of the infrastructure projects described in the submission as natural land areas in the framework of a regional conservation policy. The compatible use allowed in the zone was lowimpact tourism⁵⁴ and according to Submitters "establishes conservation and protection policies incompatible with 'human settlements, infrastructure and urban equipment".⁵⁵ On 8 November 2004, the CFE filed an EIS with Semarnat on the Manzanillo LNG Project to be located at Laguna Cuyutlán, subject to the provisions of the Ecological Zoning Program. The Submitters note that on 3 May 2007 the Colima state government amended the Ecological Zoning Program to allow human settlements, infrastructure and equipment at the designated Manzanillo LNG Project site.

35. The environmental authorization of the LPG Manzanillo Project states "there is a possibility for two maximum probable events and three maximum catastrophic events".⁵⁶ As for the LNG Manzanillo Project authorization, it documents eleven probable events in the areas subject to the ecological zoning program.⁵⁷ The Submitters claim that Mexico failed to effectively enforce the Ecological Zoning Regulations, stating that the ecological zoning programs may be modified only if the modification leads to a decrease in the adverse environmental impacts caused by productive activities.⁵⁸ The Submitters further note that, in the process to amend the Ecological Zoning Program, Mexico did not record the progress in the ecological zoning process in a publicly available log, thereby violating the applicable provisions of the Ecological Zoning Regulations.⁵⁹

36. The Secretariat notes that Article 1 of the Ecological Zoning Regulations provides a federal scope of application of the regulation. Though

^{54.} Submission, Exhibit 3: Ecological Zoning Program, p. 12.

^{55.} Submission, p. 5.

Submission, Exhibit 8: Environmental impact authorization of the Manzanillo LPG Project, dated 23 June 2004, p. 29.

^{57.} Submission, Exhibit 12: Environmental impact authorization of the Manzanillo LNG Project, dated 11 February 2008, pp. 105-108.

^{58.} Ecological Zoning Regulations, Articles 49 and 50.

^{59.} Ecological Zoning Regulations, Articles 7, 13 and 14.

the Submitters assert supplemental application, they fail to identify the issues within the state environmental law (i.e., the LADSEC) that warrant such supplemental application. The Submitters may provide a revised version of their submission addressing this.

iii) Assertions of a failure to effectively enforce LADSEC Article 40 and LGEEPA Article 35 and the failure to observe the Ecological Zoning Program with respect of the Manzanillo LPG Project

37. On 5 July 2003, the Colima state government released the Ecological Zoning Program. According to the Submitters, the Manzanillo LPG Project was to be located in the environmental management units regulated under the Ecological Zoning Program in effect at the time the project's environmental impact was evaluated.⁶⁰ The project site units were classified as highly or very highly fragile, the only compatible uses of which are low-impact tourism activities according to the Program. For both units, the land use compatibility tables of the Ecological Zoning Program provided that their use was incompatible with human settlements, infrastructure and equipment.⁶¹ On 24 June 2004, Semarnat issued the environmental impact authorization for the Manzanillo LPG Project.

38. The Submitters assert that, by authorizing a project not in compliance with the ecological guidelines of the Ecological Zoning Program, Mexico failed to effectively enforce LADSEC Article 40,6² which requires Colima state authorities to observe the zoning programs when issuing authorizations. In this regard, the Secretariat finds that said provision of the LADSEC, a state law that applies to Colima state authorities when issuing authorizations and not to the federal authorities that issued the environmental impact authorization. The Submitters may address this in a revised version of the submission.

39. According to the Submitters, Mexico did not effectively enforce Article 35 of the LGEEPA, which provides that in order to issue an environmental impact authorization for a given project, Semarnat must

^{60.} Environmental Management Units 39 and 40 under the Ecological Zoning Program. Unit 39, called "coastal dunes", consists of high dunes (10-25 m) with strong slopes of unconsolidated sand with sand coast halophiles fed by beach sand from the shoals abutting Laguna Cuyutlán to the south, corresponding to Unit 40.

^{61.} Submission, Exhibit 3: Ecological Zoning Program, Table 1: Land Use Compatibilities corresponding to each environmental management unit in the Laguna Cuyutlán Sub-Basin.

^{62.} Works or activities carried on in the State and the granting of land use or building permits and zoning certificates are subject to the provisions of the corresponding ecological zoning programs.

adhere to the provisions of the ecological zoning programs for the territory. In this respect, the assertion on the alleged failure to effectively enforce LGEEPA Article 35 in the issuance of the authorization of the Manzanillo LPG Project without observing the applicable Ecological Zoning Program may be reviewed in accordance with Article 14(1) of the Agreement.

40. The Submitters state that "starting 23 June 2004, the government of Colima improperly validated, within the scope of its jurisdiction, the construction, operation and functioning of the [Manzanillo LPG Project]". In this regard, while the provisions cited in the submission may be relevant, the Secretariat cannot ascertain which official act is being referenced by the Submitters, and this may also be addressed in a revised submission.

41. The Submitters claim that Mexico failed to effectively enforce the Coordination Agreement whereby Semarnat, the state of Colima and the municipalities of Armería and Manzanillo agree that their agencies and entities would be subject to the ecological provisions and criteria of the Ecological Zoning Program⁶³ and ensure that the authorizations issued in the state comply with the regulations in the Ecological Zoning Program. While the Coordination Agreement provides that Semarnat is to foster the application of the program, its application in the issuance of environmental impact authorizations is unclear. In this regard, the Submitters may provide a revised submission clarifying their assertion that the Coordination Agreement is binding upon Semarnat as the authority issuing the environmental impact authorization of the Manzanillo LPG Project and demonstrating how it relates to LGEEPA and the Ecological Zoning Regulations.

iv) Assertions of a failure to effectively enforce the applicable EIS requirements for the Manzanillo LPG and LNG Projects

42. The Submitters hold that the EIS for the Manzanillo LPG and LNG Projects do not contain sufficient information warranting their authorization, particularly because they did not comply with LGEEPA Article 30, and Article 13 of the Environmental Impact Assessment Regulations. As regards the Manzanillo LNG Project, the Submitters state that the construction and operation of the terminal will harm flora and fauna species listed as threatened, endangered or subject to special protection under NOM-059, asserting that there are no studies demonstrating that the LNG project will ensure the integrity of the mangrove ecosystem or

^{63.} Ecological Zoning Program, clause five, sections (b) and (c), and clause six, section (b).

how the fragmentation of the coastal wetland will be avoided. The Submitters further state that although Semarnat requested additional information on the Manzanillo LNG Project on 23 January 2007, it did not require and did not obtain the project's justification in the framework of the Ecological Zoning Program, which at that time had yet to be modified. They further assert that Mexico failed to effectively enforce LGEEPA Article 35, which provides the periods and situations in which the environmental impact authorization may be granted or denied.

43. These assertions refer to a failure to effectively enforce the requirements of the environmental impact assessment procedure and the conditions in which environmental impact authorizations were granted for the Manzanillo LPG and LNG Projects, and the Secretariat may consider them in any further assessment of the submission.

v) Assertions on the failure to effectively enforce NOM-059, NOM-022 and the LGVS

44. The Submitters hold that the environmental impact authorizations of the Manzanillo LPG and LNG Projects were not issued in accordance with NOM-059, listing and protecting flora and fauna species, or NOM-022, protecting wetlands. They further assert that, when authorized, the Manzanillo LNG Project contravened Article 60 *Ter* of the LGVS, in effect since 1 February 2007, which provides:

The removal, filling, transplanting, trimming or any work or activity affecting the integrity of the hydrological flow of the mangrove; the ecosystem and its zone of influence; its natural productivity; the natural load capacity of the ecosystem for tourism projects; nesting, mating, refuge, feeding and spawning areas; or interactions between the mangrove, rivers, dunes, the adjacent maritime zone and corals, or which cause changes to ecological characteristics and services, is prohibited.

45. The Secretariat finds that these assertions may be further considered under Article 14(1) of the Agreement, as they refer to a failure to effectively enforce the rules applicable to the protection of the environment, specifically wetlands, mangroves and wild birds.

vi) Assertions of a failure to enforce legal deadlines in the environmental impact assessment and authorization procedure of the Manzanillo LNG Project

46. The Submitters assert that there were irregularities in the environmental assessment procedure, since Semarnat allegedly did not revoke SEM-09-002

the assessment despite the fact that the deadline provided in Article 22 of the Environmental Impact Assessment Regulations had passed for additional information to be filed by the person responsible for the Manzanillo LNG Project, and the deadline for a ruling to be issued in LGEEPA Article 35 *Bis* and Article 46 of the Environmental Impact Assessment Regulations. On 5 September 2007, Submitters requested that DGIRA terminate the environmental impact assessment procedure, as the 120-day period prescribed by Article 46 of the Environmental Impact Regulations had been exceeded.⁶⁴

47. This assertion refers to the alleged failure to follow the deadlines applicable to environmental impact assessment procedures, and the Secretariat may consider this assertion under NAAEC Article 14.

vii) Assertions of a failure to penalize violation of the conditions established in the environmental impact authorization of the Manzanillo LNG Project

48. The Submitters state that the CFE, as the party undertaking the Manzanillo LNG Project, has yet to comply with the conditions established in the environmental impact authorization, which has resulted in environmental damage in the project area. They assert that despite the citizen complaint filed with Profepa on 10 July 2008, Mexico is failing to effectively enforce Article 47 of the Environmental Impact Assessment Regulations, which provides that the execution of a project must adhere to the provisions of the environmental impact ruling and applicable legal provisions.

49. Although the Secretariat finds that this assertion may be addressed under NAAEC Article 14, the Submitters have not identified which conditions of the environmental impact authorization were allegedly not met by CFE, and this may be addressed in a revised submission.

B. Requirements of NAAEC Article 14(1)

50. The Secretariat now evaluates the submission in light of the six requirements listed in Article 14(1) of the NAAEC and finds that while the submission as a whole satisfies the opening paragraph of Article 14(1), it does not comply with all requirements listed. The Secretariat's reasoning is explained below:

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^{64.} Submission, Complementary Exhibit: Revocation request filed by Esperanza Salazar Zenil with DGIRA on 4 September 2005.

- a. The submission meets the Article 14(1)(a)⁶⁵ requirement because it is filed in writing in a language designated by the Parties for the filing of submissions, in this case Spanish;⁶⁶
- b. The submission satisfies Article 14(1)(b)⁶⁷ because the information provided enables identification of the persons filing it. The statement of the name and address of the person or organization filing a submission is sufficient for the Secretariat to clearly identify the Submitters.⁶⁸
- c. The submission is not in full compliance with the requirements of Article 14(1)(c),⁶⁹ as it does not provide sufficient information on some of the assertions of the submission.

The enclosures filed with the submission include a copy of the executive summary of the EIS for the Manzanillo LPG Project⁷⁰ and the Manzanillo LNG Project,⁷¹ as well as a request for additional information on the latter issued by DGIRA, and the CFE's response;⁷² information on the deadline extension for the Manzanillo LNG Project authorization⁷³ and a copy of the environmental

67. "The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

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

69. "The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

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

^{65. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

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

^{66.} NAAEC Article 19 provides that the official languages of the CEC are Spanish, French and English, without distinction. Likewise, section 3.2 of the *Guidelines for Submissions* on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "Guidelines") provides: "Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions".

In this regard, see SEM-07-005 (*Drilling Waste in Cunduacán*), Determination under Article 14(3) (8 April 2009), § 25(a).

^{70.} Submission, Exhibit 7: Executive Summary of the Regional Environmental Impact Statement, Manzanillo LPG Project.

^{71.} Submission, Exhibit 10: Executive Summary of the Regional Environmental Impact Statement, Manzanillo LNG Project.

^{72.} Submission, Exhibit 14: CFE response to DGIRA request for additional information; Exhibit 15: Ruling S.G.P.A./DGIRA/DG/0175/07 issued by DGIRA on 23 January 2007, containing the request for additional information from CFE on the Manzanillo LNG Project.

^{73.} Submission, Exhibit 16: Ruling S.G.P.A./DGIRA/DESEI/0712/07 issued by DGIRA on 9 May 2007, containing the extension of the deadline for the Manzanillo LNG Project assessment.

impact authorizations for both projects, issued by DGIRA.⁷⁴ The submission includes copies of different recourses and filings on the Manzanillo LNG Project, including a citizen complaint on the construction activities and Profepa's response;⁷⁵ two recourses relating to the environmental impact authorization;⁷⁶ the request to revoke the environmental impact assessment procedure;⁷⁷ and a complaint filed with the Ministry of Public Function (*Secretaría de la Función Pública*) against the public officials responsible for issuing the environmental impact authorization of the Manzanillo LNG Project.⁷⁸

The Submitters also enclose information published in a scientific journal on the conservation and environmental value of Laguna Cuyutlán,⁷⁹ and a list of North American waterfowl at Laguna Cuyutlán identified in NOM-059.⁸⁰

The Secretariat may proceed further to consider the assertion as to the modification of the Ecological Zoning Program and the Submitter has provided sufficient information in accordance with NAAEC Article 14(1)(c).⁸¹

Now, guided by Section 5.6 of the Guidelines, the Secretariat ascertains *prima facie* during this phase of the process, whether the

^{74.} Submission, Exhibit 8: Environmental impact authorization of the Manzanillo LPG Project, dated 23 June 2004; Exhibit 12: Environmental impact authorization of the Manzanillo LNG Project, dated 11 February 2008.

^{75.} Submission, Complementary Exhibit: Complaint filed by Esperanza Salazar Zenil with Profepa on 10 July 2008, and Ruling PFPA/COL/DQ/79/02474/2008 issued by the Profepa delegate in Colima on 6 October 2008.

^{76.} Submission, Exhibit 20: Injunction suit, date illegible, and claim dated 11 July 2008, both filed by María Vanessa Gómez Pizano with the Federal Court for Tax and Administrative Justice (*Tribunal Federal de Justicia Fiscal y Administrativa*).

^{77.} Submission, Complementary Exhibit: Revocation request filed by Esperanza Salazar Zenil with DGIRA on 4 September 2005.

^{78.} Submission, Exhibit 18: Complaint filed by Esperanza Salazar Zenil with the Secretariat of Public Function (Secretaría de la Función Pública) on 28 April 2008.

^{79.} Submission, Exhibit 17: Erik Mellink and Mónica Riojas López, "Waterbirds and human-related threats to their conservation in Laguna Cuyutlán, Colima, México", *Rev. Biol. Trop.*, March 2009.

Submission, Complementary Exhibit: List of migratory Canadian, U.S. and Mexican migratory birds in Laguna Cuyutlán, listing those having special protection under NOM-059-SEMARNAT-2001 and the North American Waterfowl Management Plan.

^{81.} Submission, Exhibit 3: Decree approving the Ecological Zoning Program, published 5 July 2003; Exhibit 5: Ruling to amend the Manzanillo Urban Development Program, published 12 June 2004; Exhibit 6: Decree to amend the Ecological Zoning Program, published 3 May 2007; Exhibit 21: Nullification suit filed 24 May 2007 by Esperanza Salazar Zenil *et al.* before the Administrative Dispute Court of the State of Colima; Complementary Exhibit: Complaint filed by Esperanza Salazar Zenil and Gabriel Martínez Campos with the Colima State Attorney General on 4 June 2007.

submission addresses the criteria listed in NAAEC Article 14(2). Sections 5.6(a) and (c) of the Guidelines provide as follows:

The Submission should address the factors for consideration identified in Article 14(2) to assist the Secretariat in its review under this provision. Thus, the Submission should address:

(a) The issue of harm (Article 14(2)(a));

[...]

(c) The actions, including private remedies, available under the Party's law that have been pursued (Article 14(2)(c));

The Secretariat notes that the Submitters did not provide information on the status of the LNG and LPG projects referred to in their submission. More information regarding whether any of these projects have commenced—and whether any environmental impacts have been observed—may allow the Secretariat to consider, in a further phase of the process, whether the alleged harm is due to the asserted failure to evaluate the environmental impact of the gas projects in the Laguna de Cuyutlán.

The Secretariat also notes that the Submitters did not enclose a copy of the possible remedies against the environmental authorization of the Manzanillo LPG Project. This may be addressed in a revised version of the submission.

Finally, while the Submitters identified the environmental authorities charged with the effective enforcement of environmental law, they also included the *Universidad de Colima*, the Mexican Geological Service and the CFE. The Submitters may clarify how these organizations are charged with the authority to effectively enforce the environmental law in question in a revised version of their submission.

d. The submission satisfies Article 14(1)(d),⁸² as it appears to be aimed at promoting enforcement rather than at harassing industry.⁸³ While the submission refers to the environmental impact

^{82. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

⁽d) appears to be aimed at promoting enforcement rather than at harassing industry."
83. See also section 5.4 of the Guidelines, which provides that to determine whether the submission is aimed at promoting effective enforcement and not at harassing industry, the Secretariat will consider whether or not: (a) "the submission is focused on the

authorization granted to two infrastructure projects, the submission focuses essentially on the environmental impact assessment procedure applied by the environmental authorities. In addition, the Submitters do not appear to be competitors of Zeta Gas or the CFE. The submission does not appear to be frivolous, as it involves key issues in the effective enforcement of the environmental impact assessment procedure for infrastructure projects whose execution may affect areas and species protected under the laws cited in the submission.

- e. The submission does not fully satisfy the requirement under section (e) of Article 14(1).⁸⁴ As regards the Manzanillo LNG Project, the Submitters include information indicating that this matter has been communicated in writing to the relevant Mexican authorities and the authorities responded to such communication.⁸⁵ In contrast, the submission does not refer to any communication with the Mexican authorities with respect to the concerns involving the Manzanillo LPG Project. A revised submission must show communication of the matter to the relevant Mexican authorities if the Secretariat is to proceed further with consideration of the submission in that connection.
- f. Lastly, the submission meets the Article 14(1)(f)⁸⁶ requirement, as it was filed by an organization and individuals residing or established in the territory of a Party, in this case Mexico.

IV. DETERMINATION

51. For the foregoing reasons, the Secretariat has determined that some of the assertions of submission SEM-09-002 (*Wetlands in Manzanillo*) do not meet the requirements of sections (c) and (e) of Article

acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission", and (b) "the submission appears frivolous".

^{84. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

⁽e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response."

^{85.} Submission, Exhibit 18: Complaint filed by Esperanza Salazar Zenil with the Secretariat of Public Function on 28 April 2008; Complementary Exhibit: Revocation request filed by Esperanza Salazar Zenil with DGIRA on 4 September 2005.

^{86. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

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

14(1). In accordance with sections 6.1 and 6.2 of the Guidelines, the Secretariat hereby notifies the Submitters that they have 30 days to file a submission in full compliance with Article 14(1). Such revised submission must be received no later than 9 November 2009, failing which the Secretariat shall proceed no further with respect to any assertions not meeting the requirements of Article 14(1) as described in this determination.

Secretariat of the Commission for Environmental Cooperation

By: Dane Ratliff Director, Submissions on Enforcement Matters Unit

> Paolo Solano Legal Officer, Submissions on Enforcement Matters Unit

c.c.: Mr. Enrique Lendo, Semarnat Mr. David McGovern, Environment Canada Mr. Scott Fulton, US-EPA Mr. Evan Lloyd, CEC Submitters [Note: Translation is not provided for this section]

APÉNDICE I

Legislación ambiental citada en la petición sujeta al procedimiento de los artículos 14 y 15 del ACAAN

Constitución Política de los Estados Unidos Mexicanos

Artículo 4 (reformado el 28 de junio de 1999)

[...]

Toda persona tiene derecho a un medio ambiente adecuado para su desarrollo y bienestar.

[...]

Convención relativa a los humedales de importancia internacional especialmente como hábitat de aves acuáticas (firmada en Ramsar, Irán; en vigor a partir del 2 de febrero de 1971; modificada según el Protocolo de París el 3 de diciembre de 1982 y según las Enmiendas de Regina el 28 de abril de 1987)

Artículo 1

1. A los efectos de la presente Convención son humedales las extensiones de marismas, pantanos y turberas, o superficies cubiertas de aguas, sean éstas de régimen natural o artificial, permanentes o temporales, estancadas o corrientes, dulces, salobres o saladas, incluidas las extensiones de agua marina cuya profundidad en marea baja no exceda de seis metros.

2. A los efectos de la presente Convención son aves acuáticas las que dependen ecológicamente de los humedales.

Artículo 2

1. Cada Parte Contratante designará humedales idóneos de su territorio para ser incluidos en la Lista de Humedales de Importancia Internacional, en adelante llamada "la Lista", que mantiene la Oficina establecida en virtud del artículo 8. Los límites de cada humedal deberán describirse de manera precisa y también trazarse en un mapa, y podrán comprender sus zonas ribereñas o costeras adyacentes, así como las islas o extensiones de agua marina de una profundidad superior a los seis metros en marea baja, cuando se encuentren dentro del humedal, y especialmente cuando tengan importancia como hábitat de aves acuáticas.

2. La selección de los humedales que se incluyan en la Lista deberá basarse en su importancia internacional en términos ecológicos, botánicos, zoológicos, limnológicos o hidrológicos. En primer lugar deberán incluirse los humedales que tengan importancia internacional para las aves acuáticas en cualquier estación del año.

3. La inclusión de un humedal en la Lista se realiza sin prejuicio de los derechos exclusivos de soberanía de la Parte Contratante en cuyo territorio se encuentra dicho humedal.

4. Cada Parte Contratante designará por lo menos un humedal para ser incluido en la Lista al firmar la Convención o depositar su instrumento de ratificación o de adhesión, de conformidad con las disposiciones del artículo 9.

5. Toda Parte Contratante tendrá derecho a añadir a la Lista otros humedales situados en su territorio, a ampliar los que ya están incluidos o, por motivos urgentes de interés nacional, a retirar de la Lista o a reducir los límites de los humedales ya incluidos, e informarán sobre estas modificaciones lo más rápidamente posible a la organización o al gobierno responsable de las funciones de la Oficina permanente especificado en el artículo 8.

6. Cada Parte Contratante deberá tener en cuenta sus responsabilidades de carácter internacional con respecto a la conservación, gestión y uso racional de las poblaciones migradoras de aves acuáticas, tanto al designar humedales de su territorio para su inclusión en la Lista, como al ejercer su derecho a modificar sus inscripciones previas.

Artículo 3

1. Las Partes Contratantes deberán elaborar y aplicar su planificación de forma que favorezca la conservación de los humedales incluidos en la Lista y, en la medida de lo posible, el uso racional de los humedales de su territorio.

2. Cada Parte Contratante tomará las medidas necesarias para informarse lo antes posible acerca de las modificaciones de las condiciones ecológicas de los humedales en su territorio e incluidos en la Lista, y que se hayan producido o puedan producirse como consecuencia del desarrollo tecnológico, de la contaminación o de cualquier otra intervención del hombre. Las informaciones sobre dichas modificaciones se transmitirán sin demora a la organización o al gobierno responsable de las funciones de la Oficina permanente especificado en el artículo 8.

Artículo 4

1. Cada Parte Contratante fomentará la conservación de los humedales y de las aves acuáticas creando reservas naturales en aquéllos, estén o no incluidos en la Lista, y tomará las medidas adecuadas para su custodia.

2. Cuando una Parte Contratante, por motivos urgentes de interés nacional, retire de la Lista o reduzca los límites de un humedal incluido en ella, deberá compensar en la medida de lo posible, la pérdida de recursos de humedales y, en particular, crear nuevas reservas naturales para las aves acuáticas y para la protección de una porción adecuada de su hábitat original, en la misma región o en otro lugar.

3. Las Partes Contratantes fomentarán la investigación y el intercambio de datos y de publicaciones relativos a los humedales y a su flora y fauna.

4. Las Partes Contratantes se esforzarán por aumentar las poblaciones de aves acuáticas mediante la gestión de los humedales idóneos.

5. Las Partes Contratantes fomentarán la formación de personal para el estudio, la gestión y la custodia de los humedales.

Ley General del Equilibrio Ecológico y la Protección al Ambiente (publicada en el DOF el 28 de enero de 1988 y modificada el 13 de diciembre de 1996)

Artículo 30

Para obtener la autorización a que se refiere el artículo 28 de esta Ley, los interesados deberán presentar a la Secretaría una manifestación de impacto ambiental, la cual deberá contener, por lo menos, una descripción de los posibles efectos en el o los ecosistemas que pudieran ser afectados por la obra o actividad de que se trate, considerando el conjunto de los elementos que conforman dichos ecosistemas, así como las medidas preventivas, de mitigación y las demás necesarias para evitar y reducir al mínimo los efectos negativos sobre el ambiente. Cuando se trate de actividades consideradas altamente riesgosas en los términos de la presente Ley, la manifestación deberá incluir el estudio de riesgo correspondiente.

Si después de la presentación de una manifestación de impacto ambiental se realizan modificaciones al proyecto de la obra o actividad respectiva, los interesados deberán hacerlas del conocimiento de la Secretaría, a fin de que ésta, en un plazo no mayor de 10 días les notifique si es necesaria la presentación de información adicional para evaluar los efectos al ambiente, que pudiesen ocasionar tales modificaciones, en términos de lo dispuesto en esta Ley.

Los contenidos del informe preventivo, así como las características y las modalidades de las manifestaciones de impacto ambiental y los estudios de riesgo serán establecidos por el Reglamento de la presente Ley.

Artículo 35

Una vez presentada la manifestación de impacto ambiental, la Secretaría iniciará el procedimiento de evaluación, para lo cual revisará que la solicitud se ajuste a las formalidades previstas en esta Ley, su Reglamento y las normas oficiales mexicanas aplicables, e integrará el expediente respectivo en un plazo no mayor de diez días.

Para la autorización de las obras y actividades a que se refiere el artículo 28, la Secretaría se sujetará a lo que establezcan los ordenamientos antes señalados, así como los programas de desarrollo urbano y de ordenamiento ecológico del territorio, las declaratorias de áreas naturales protegidas y las demás disposiciones jurídicas que resulten aplicables.

Asimismo, para la autorización a que se refiere este artículo, la Secretaría deberá evaluar los posibles efectos de dichas obras o actividades en el o los ecosistemas de que se trate, considerando el conjunto de elementos que los conforman y no únicamente los recursos que, en su caso, serían sujetos de aprovechamiento o afectación.

Una vez evaluada la manifestación de impacto ambiental, la Secretaría emitirá, debidamente fundada y motivada, la resolución correspondiente en la que podrá:

I. Autorizar la realización de la obra o actividad de que se trate, en los términos solicitados;

- II. Autorizar de manera condicionada la obra o actividad de que se trate, a la modificación del proyecto o al establecimiento de medidas adicionales de prevención y mitigación, a fin de que se eviten, atenúen o compensen los impactos ambientales adversos susceptibles de ser producidos en la construcción, operación normal y en caso de accidente. Cuando se trate de autorizaciones condicionadas, la Secretaría señalará los requerimientos que deban observarse en la realización de la obra o actividad prevista, o
- III. Negar la autorización solicitada, cuando:
 - a) Se contravenga lo establecido en esta Ley, sus reglamentos, las normas oficiales mexicanas y demás disposiciones aplicables;
 - b) La obra o actividad de que se trate pueda propiciar que una o más especies sean declaradas como amenazadas o en peligro de extinción o cuando se afecte a una de dichas especies, o
 - c) Exista falsedad en la información proporcionada por los promoventes, respecto de los impactos ambientales de la obra o actividad de que se trate.

La Secretaría podrá exigir el otorgamiento de seguros o garantías respecto del cumplimiento de las condiciones establecidas en la autorización, en aquellos casos expresamente señalados en el reglamento de la presente Ley, cuando durante la realización de las obras puedan producirse daños graves a los ecosistemas.

La resolución de la Secretaría sólo se referirá a los aspectos ambientales de las obras y actividades de que se trate.

Artículo 35 Bis

La Secretaría dentro del plazo de sesenta días contados a partir de la recepción de la manifestación de impacto ambiental deberá emitir la resolución correspondiente.

La Secretaría podrá solicitar aclaraciones, rectificaciones o ampliaciones al contenido de la manifestación de impacto ambiental que le sea presentada, suspendiéndose el término que restare para concluir el procedimiento. En ningún caso la suspensión podrá exceder el plazo de sesenta días, contados a partir de que ésta sea declarada por la Secretaría, y siempre y cuando le sea entregada la información requerida.

Excepcionalmente, cuando por la complejidad y las dimensiones de una obra o actividad la Secretaría requiera de un plazo mayor para su evaluación, éste se podrá ampliar hasta por sesenta días adicionales, siempre que se justifique conforme a lo dispuesto en el reglamento de la presente Ley.

Ley Federal de Procedimiento Administrativo

Artículo 60

En los procedimientos iniciados a instancia del interesado, cuando se produzca su paralización por causas imputables al mismo, la Administración Pública Federal le advertirá que, transcurridos tres meses, se producirá la caducidad del mismo. Expirado dicho plazo sin que el interesado requerido realice las actividades necesarias para reanudar la tramitación, la Administración Pública Federal acordará el archivo de las actuaciones, notificándoselo al interesado. Contra la resolución que declare la caducidad procederá el recurso previsto en la presente Ley.

La caducidad no producirá por sí misma la prescripción de las acciones del particular, de la Administración Pública Federal, pero los procedimientos caducados no interrumpen ni suspenden el plazo de prescripción.

Cuando se trate de procedimientos iniciados de oficio se entenderán caducados, y se procederá al archivo de las actuaciones, a solicitud de parte interesada o de oficio, en el plazo de 30 días contados a partir de la expiración del plazo para dictar resolución.

Ley de Asentamientos Humanos del Estado de Colima

Artículo 48

Los programas municipales de desarrollo urbano contendrán además de los elementos básicos a que se refiere el artículo 43 de esta Ley, lo siguiente:

I. La congruencia del Programa Municipal de Desarrollo Urbano, con los Planes Nacional, Estatal y Municipal de Desarrollo, el Programa Estatal de Desarrollo Urbano y el Programa de Ordenamiento Ecológico del Territorio;

- II. La circunscripción territorial que comprende el Municipio en cada caso, atendiendo a lo dispuesto en la Constitución Política del Estado y en la legislación aplicable;
- III. La zonificación primaria del territorio del Municipio, atendiendo a lo dispuesto en esta Ley y al Programa Estatal de Desarrollo Urbano;
- IV. La determinación general de las acciones de conservación, mejoramiento y crecimiento para los centros de población;
- V. La identificación de los límites de los centros de población ubicados en el territorio del Municipio;
- VI. La asignación general de los usos y destinos del suelo en el territorio municipal, y
- VII. Los lineamientos para la elaboración y ejecución de los programas operativos a realizarse en el territorio del Municipio.

Artículo 66

En la formulación de los proyectos de programas de desarrollo urbano, o su actualización establecidos en esta Ley, la autoridad competente promoverá la participación social, de acuerdo con las siguientes bases:

- I. La Secretaría o la Dependencia Municipal dará aviso del inicio del proceso de planeación, difundiéndolo en los dos periódicos de mayor circulación en el Estado o Municipio;
- II. Una vez formulado el proyecto de programa de desarrollo urbano, éste se difundirá de la misma manera;
- III. Se establecerá un plazo y un calendario de audiencias publicas, para que los ciudadanos presenten por escrito los planteamientos que consideren respecto del proyecto;
- IV. Las respuestas a los planteamientos improcedentes o las modificaciones a que den lugar, deberán fundamentarse y notificarse a los interesados en el domicilio señalado en su escrito, y estarán a consulta de ellos en las oficinas estatales o municipales correspondientes por lo menos quince días previos a la solicitud de aprobación; y

V. El proyecto de programa de desarrollo urbano, que deberá contener los elementos y características que se prevén en el mismo, será remitido por la dependencia coordinadora a la Comisión Estatal o a la Comisión Municipal respectiva para que así mismo emita su opinión. En el caso de los Programas Parciales de Urbanización, que se promueven a fin de llevar a cabo acciones de crecimiento o renovación urbana, se seguirá el procedimiento que establece el Título Octavo de esta Ley.

Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Evaluación del Impacto Ambiental (publicado en el DOF el 30 de mayo de 2000)

Artículo 4

Compete a la Secretaría:

[...]

- IV. Llevar a cabo el proceso de consulta pública que en su caso se requiera durante el procedimiento de evaluación de impacto ambiental;
- [...]

Artículo 13

La manifestación de impacto ambiental, en su modalidad regional, deberá contener la siguiente información:

[...]

III. Vinculación con los instrumentos de planeación y ordenamientos jurídicos aplicables;

[...]

Artículo 22

En los casos en que la manifestación de impacto ambiental presente insuficiencias que impidan la evaluación del proyecto, la Secretaría podrá solicitar al promovente, por única vez y dentro de los cuarenta días siguientes a la integración del expediente, aclaraciones, rectificaciones o ampliaciones al contenido de la misma y en tal caso, se suspenderá el término de sesenta días a que se refiere el artículo 35 *Bis* de la Ley.

La suspensión no podrá exceder de sesenta días computados a partir de que sea declarada. Transcurrido este plazo sin que la información sea entregada por el promovente, la Secretaría podrá declarar la caducidad del trámite en los términos del artículo 60 de la Ley Federal de Procedimiento Administrativo.

Artículo 46

El plazo para emitir la resolución de evaluación de la manifestación de impacto ambiental no podrá exceder de sesenta días. Cuando por las dimensiones y complejidad de la obra o actividad se justifique, la Secretaría podrá, excepcionalmente y de manera fundada y motivada, ampliar el plazo hasta por sesenta días más, debiendo notificar al promovente su determinación en la forma siguiente:

- I. Dentro de los cuarenta días posteriores a la recepción de la solicitud de autorización, cuando no se hubiere requerido información adicional, o
- II. En un plazo que no excederá de diez días contados a partir de que se presente la información adicional, en el caso de que ésta se hubiera requerido.

La facultad de prorrogar el plazo podrá ejercitarse una sola vez durante el proceso de evaluación.

Ley General de Vida Silvestre (publicada en el DOF el 3 de julio de 2000 y modificada el 14 de octubre de 2008)

Artículo 60 Ter

Queda prohibida la remoción, relleno, transplante, poda, o cualquier obra o actividad que afecte la integralidad del flujo hidrológico del manglar; del ecosistema y su zona de influencia; de su productividad natural; de la capacidad de carga natural del ecosistema para los proyectos turísticos; de las zonas de anidación, reproducción, refugio, alimentación y alevinaje; o bien de las interacciones entre el manglar, los ríos, la duna, la zona marítima adyacente y los corales, o que provoque cambios en las características y servicios ecológicos. Se exceptuarán de la prohibición a que se refiere el párrafo anterior las obras o actividades que tengan por objeto proteger, restaurar, investigar o conservar las áreas de manglar.

Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Ordenamiento Ecológico (publicado en el DOF el 8 de agosto de 2003)

Artículo 6

El ordenamiento ecológico deberá llevarse a cabo como un proceso de planeación que promueva:

- I. La creación e instrumentación de mecanismos de coordinación entre las dependencias y entidades de la Administración Pública Federal y los gobiernos estatales, municipales y del Distrito Federal y sus delegaciones;
- II. La participación social corresponsable de los grupos y sectores interesados;
- III. La transparencia del proceso mediante el acceso, publicación y difusión constante de la información generada, los métodos utilizados y resultados obtenidos;
- IV. El rigor metodológico de los procesos de obtención de información, análisis y generación de resultados;
- V. La instrumentación de procesos sistemáticos que permitan verificar los resultados generados en cada etapa del proceso de ordenamiento ecológico;
- VI. La generación de indicadores ambientales que permitan la evaluación continua del proceso de ordenamiento ecológico para determinar la permanencia de los programas, su ajuste o la corrección de desviaciones en su ejecución;
- VII. La asignación de lineamientos y estrategias ecológicas con base en la información disponible;
- VIII. El establecimiento de un sistema de monitoreo del programa de ordenamiento ecológico; y

IX. La permanencia o modificación de lineamientos y estrategias ecológicas a partir del análisis de los resultados del monitoreo.

El proceso de ordenamiento ecológico deberá prever mecanismos para determinar con una periodicidad bienal, el cumplimiento de las metas previstas en los programas, así como la evaluación de los resultados respecto de las expectativas de ordenación del territorio planteadas.

La Secretaría promoverá que la modificación de los programas de ordenamiento ecológico de su competencia, siga el mismo procedimiento para su formulación.

Artículo 7

El ordenamiento ecológico de competencia federal se llevará a cabo mediante el proceso de ordenamiento ecológico y deberá tener como resultado los siguientes productos:

- I. Convenios de coordinación que podrán suscribirse con:
 - a) Las dependencias y entidades de la Administración Pública Federal competentes para realizar acciones que incidan en el área de estudio; y
 - b) Las entidades federativas, sus municipios, el Distrito Federal y sus delegaciones del área de estudio.
- II. Programas de ordenamiento ecológico, que deberán contener:
 - a) El modelo de ordenamiento ecológico que contenga la regionalización o la determinación de las zonas ecológicas, según corresponda, y los lineamientos ecológicos aplicables al área de estudio, y en su caso, su decreto de expedición; y
 - b) Las estrategias ecológicas aplicables al modelo de ordenamiento ecológico; y
- III. La bitácora ambiental

La Secretaría podrá promover el inicio del proceso de ordenamiento ecológico en cualquiera de sus etapas, según se requiera.

Artículo 13

Para efectos del artículo 7 de este Reglamento, el registro de los avances del proceso de ordenamiento ecológico se llevará a cabo en la bitácora ambiental y tendrá por objeto:

- I. Proporcionar e integrar información actualizada sobre el proceso de ordenamiento ecológico;
- II. Ser un instrumento para la evaluación de:
 - a) El cumplimiento de los acuerdos asumidos en el proceso de ordenamiento ecológico; y
 - b) El cumplimiento y la efectividad de los lineamientos y estrategias ecológicas;
- III. Fomentar el acceso de cualquier persona a la información relativa al proceso de ordenamiento ecológico; y
- IV. Promover la participación social corresponsable en la vigilancia de los procesos de ordenamiento ecológico.

Artículo 14

La bitácora ambiental deberá incluir:

- I. El convenio de coordinación, sus anexos y, en su caso, las modificaciones que se realicen a los mismos;
- II. El programa de ordenamiento ecológico;
- III. Los indicadores ambientales para la evaluación de:
 - a) El cumplimento de los lineamientos y estrategias ecológicas;
 y
 - b) La efectividad de los lineamientos y estrategias ecológicas en la solución de los conflictos ambientales; y
- IV. Los resultados de la evaluación del cumplimiento y de la efectividad del proceso de ordenamiento ecológico.

Artículo 36

La Secretaría podrá promover la modificación del programa de ordenamiento ecológico general del territorio, entre otros supuestos, cuando surjan nuevas áreas de atención prioritaria, siguiendo las mismas formalidades observadas para su formulación.

Artículo 48

La Secretaría promoverá la modificación de los programas de ordenamiento ecológico a que hace referencia el presente Capítulo cuando se dé, entre otros, alguno de los siguientes supuestos, que:

- I. Los lineamientos y estrategias ecológicas ya no resulten necesarios o adecuados para la disminución de los conflictos ambientales y el logro de los indicadores ambientales respectivos; y
- II. Las perturbaciones en los ecosistemas causadas por fenómenos físicos o meteorológicos que se traduzcan en contingencias ambientales que sean significativas y pongan en riesgo el aprovechamiento sustentable de los recursos naturales, el mantenimiento de los bienes y servicios ambientales y la conservación de los ecosistemas y la biodiversidad.

Artículo 49

La modificación de los lineamientos y estrategias ecológicas a que hace referencia la fracción I del artículo anterior se podrá realizar, entre otros supuestos, cuando conduzca a la disminución de los impactos ambientales adversos ocasionados por las actividades productivas, los asentamientos humanos y el aprovechamiento de los recursos naturales.

Artículo 50

Las modificaciones a un programa de ordenamiento ecológico seguirán las mismas reglas y formalidades establecidas para su expedición.

Ley Ambiental para el Desarrollo Sustentable del Estado de Colima (publicada en el Periódico Oficial *El Estado de Colima* el 15 de junio del 2002 y modificada el 31 de marzo de 2006)

Artículo 40

Las obras o actividades que se realicen en el Estado, así como el otorgamiento de los permisos de uso del suelo o de construcción y las constancias de zonificación, se sujetarán a lo dispuesto por los programas de ordenamiento ecológico y territorial correspondientes.

Norma Oficial Mexicana NOM-022-SEMARNAT-2003, que establece las especificaciones para la preservación, conservación, aprovechamiento sustentable y restauración de los humedales costeros en zonas de manglar (publicada en el DOF el 10 de abril de 2003)

4.0 Especificaciones

El manglar deberá preservarse como comunidad vegetal. En la evaluación de las solicitudes en materia de cambio de uso de suelo, autorización de aprovechamiento de la vida silvestre e impacto ambiental se deberá garantizar en todos los casos la integralidad del mismo, para ello se contemplarán los siguientes puntos:

- La integridad del flujo hidrológico del humedal costero;
- La integridad del ecosistema y su zona de influencia en la plataforma continental;
- Su productividad natural;
- La capacidad de carga natural del ecosistema para turistas;
- Integridad de las zonas de anidación, reproducción, refugio, alimentación y alevinaje;
- La integridad de las interacciones funcionales entre los humedales costeros, los ríos (de superficie y subterráneos), la duna, la zona marina adyacente y los corales;
- Cambio de las características ecológicas;
- Servicios ecológicos;
- Ecológicos y eco fisiológicos (estructurales del ecosistema como el agotamiento de los procesos primarios, estrés fisiológico, toxicidad, altos índices de migración y mortalidad, así como la reducción de las poblaciones principalmente de aquellas especies en status, entre otros).

4.1 Toda obra de canalización, interrupción de flujo o desvío de agua que ponga en riesgo la dinámica e integridad ecológica de los humedales costeros, quedará prohibida, excepto en los casos en los que las obras descritas sean diseñadas para restaurar la circulación y así promover la regeneración del humedal costero.

4.3 Los promoventes de un proyecto que requieran de la existencia de canales, deberán hacer una prospección con la intención de detectar los canales ya existentes que puedan ser aprovechados a fin de evitar la fragmentación del ecosistema, intrusión salina, asolvamiento y modificación del balance hidrológico.

4.12 Se deberá considerar en los estudios de impacto ambiental, así como en los ordenamientos ecológicos el balance entre el aporte hídrico proveniente de la cuenca continental y el de las mareas, mismas que determinan la mezcla de aguas dulce y salada recreando las condiciones estuarinas, determinantes en los humedales costeros y las comunidades vegetales que soportan.

4.23 En los casos de autorización de canalización, el área de manglar a deforestar deberá ser exclusivamente la aprobada tanto en la resolución de impacto ambiental y la autorización de cambio de utilización de terrenos forestales. No se permite la desviación o rectificación de canales naturales o de cualquier porción de una unidad hidrológica que contenga o no vegetación de manglar.

4.28 La infraestructura turística ubicada dentro de un humedal costero debe ser de bajo impacto, con materiales locales, de preferencia en palafitos que no alteren el flujo superficial del agua, cuya conexión sea a través de veredas flotantes, en áreas lejanas de sitios de anidación y percha de aves acuáticas, y requiere de zonificación, monitoreo y el informe preventivo.

4.29 Las actividades de turismo náutico en los humedales costeros en zonas de manglar deben llevarse a acabo de tal forma que se evite cualquier daño al entorno ecológico, así como a las especies de fauna silvestre que en ellos se encuentran. Para ello, se establecerán zonas de embarque y desembarque, áreas específicas de restricción y áreas donde se reporte la presencia de especies en riesgo.

4.33 La construcción de canales deberá garantizar que no se fragmentará el ecosistema y que los canales permitirán su continuidad, se dará preferencia a las obras o el desarrollo de infraestructura que tienda a reducir el número de canales en los manglares.

4.37 Se deberá favorecer y propiciar la regeneración natural de la unidad hidrológica, comunidad vegetales y animales mediante el restablecimiento de la dinámica hidrológica y flujos hídricos continentales (ríos de superficie y subterráneos, arroyos permanentes y temporales, escurrimientos terrestres laminares, aportes del manto freático), la eliminación de vertimientos de aguas residuales y sin tratamiento protegiendo las áreas que presenten potencial para ello.

4.38 Los programas proyectos de restauración de manglares deberán estar fundamentados científica y técnicamente y aprobados en la resolución de impacto ambiental, previa consulta a un grupo colegiado. Dicho proyecto deberá contar con un protocolo que sirva de línea de base para determinar las acciones a realizar.

4.40 Queda estrictamente prohibido introducir especies exóticas para las actividades de restauración de los humedales cos teros.

4.42 Los estudios de impacto ambiental y ordenamiento deberán considerar un estudio integral de la unidad hidrológica donde se ubican los humedales costeros.

Secretariat of the Commission for Environmental Cooperation

Secretariat's Determination in accordance with Articles 14(1) and (2) of the North American Agreement on Environmental Cooperation

Submitters:	Bios Iguana, A.C. (represented by Gabriel Martínez Campos) Esperanza Salazar Zenil
Party:	United Mexican States
Revised submission:	2 November 2009
Original submission:	4 February 2009
Date of the determination:	13 August 2010
Submission no.:	SEM-09-002 (Wetlands in Manzanillo)

I. EXECUTIVE SUMMARY

Articles 14 and 15 of the North American Agreement on Environ-1. mental Cooperation (the "NAAEC" or the "Agreement") provide for a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "Guidelines"). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a Factual Record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission.¹

2. On 4 February 2009, Bios Iguana, A.C., represented by Gabriel Martínez Campos and Esperanza Salazar Zenil (the "Submitters"), filed submission SEM-09-002 (*Wetlands in Manzanillo*) with the Secretariat in accordance with Article 14 of the Agreement.

3. The Submitters assert that Mexico is failing to effectively enforce its environmental law in connection with the environmental impact assessment and authorization of the projects known as *Western Zone Liquid Petroleum Gas Receiving, Storage, and Distribution Terminal* (the "Manzanillo LPG Project") and *Manzanillo Liquid Natural Gas Terminal* (the "Manzanillo LNG Project"—collectively, the "Projects"), which —they assert—will affect the water balance, flora, and fauna in the area of Laguna de Cuyutlán, in the state of Colima. They further assert that changes were made to the ecological zoning and urban development programs for the region in violation of Mexico's environmental law.

4. On 9 October 2009, the Secretariat found that some of the assertions in the submission did not meet the requirements of Article 14(1)(c) and (e). Pursuant to section 6.2 of the Guidelines, the Secretariat notified the Submitters that they had 30 days—i.e., until 9 November 2009—to file a submission that met all the requirements of NAAEC Article 14(1).

5. In particular, the Secretariat found that in certain cases, the submission did not indicate which provisions of environmental law were at issue,² it did not establish how Article 1 of LGEEPA Regulations on Ecological Zoning (*Reglamento de la LGEEPA en materia de Ordenamiento Ecológico del Territorio*—ROE) applied to the alleged illegal modification of the Ecological Zoning Program for the Laguna de Cuyutlán Sub-

^{1.} Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records can be found on the CEC's Citizen Submissions on Enforcement Matters website at: http://www.cec.org/citizen.

^{2.} SEM-09-002 (Wetlands in Manzanillo), Article 14(1) Determination (October 9th, 2009), §§ 17, 21, 26, 27, 28, 29. Cf. The Secretariat did not consider the following to constitute environmental law: the Federal Public Administration Act (LOAPF, taken as a whole); Article 1 paragraph VIII of the of the Colima State Environmental and Sustainable Development Act (LADSEC); Article 66 of the Colima State Human Settlements Act (LAHEC); the Manzanillo Urban Development Program (PDUM); and the Ecological Zoning Program for the Laguna de Cuyutlán Sub-Basin.

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Basin;³ it did not specify the applicability of Article 40 of the Colima State Environmental and Sustainable Development Act;⁴ it did not explain how the Coordination Agreement for the Drafting, Issuance, and Execution of the Regional Ecological Zoning Program for Laguna de Cuyutlán was applicable to the issuance of the environmental impact authorization for the Manzanillo LPG Project;⁵ it did not identify the conditions of the environmental impact authorization for the Manzanillo LNG Project that were allegedly not effectively enforced by the environmental authority vis-à-vis the Federal Electricity Commission (Comisión Federal de Electricidad—CFE)⁶—the project sponsor; it did not clarify the alleged authority's act from the government of Colima in order to "validate" the Manzanillo LPG Project;⁷ it did not present information about the status of the Projects;8 it did not include information related to the possible remedies pursued against the environmental impact authorization for the Manzanillo LPG Project;9 it did not clarify why the Colima University, the Mexican Geological Service (formerly the Mineral Resources Council) and the CFE, should be considered as authorities in charge of the enforcement of the environmental law in question,¹⁰ and it did not provide information on the communication of the matter to the relevant authorities in connection with the Manzanillo LPG Project.¹¹

6. On 2 November 2009, the Submitters filed a revised submission with the Secretariat pursuant to Articles 14 and 15 of the Agreement.

7. The Secretariat has found that some of the assertions in the submission now meet the requirements of NAAEC Article 14(1) and that, with reference to the criteria set out in Article 14(2), those assertions warrant requesting a response from the government of Mexico. Bearing in mind the determination of 9 October 2009 on the original submission, this determination focuses on a review of the issues that remained pending in anticipation of a revised submission.

^{3.} SEM-09-002 (*Wetlands in Manzanillo*), Determination in accordance with Article 14(1) (9 October 2009), § 36.

^{4.} Ibid., § 38.

^{5.} *Ibid.*, § 41.

^{6.} Ibid., § 49.

^{7.} Ibid., § 40.

^{8.} *Ibid.*, § 50(c).

^{9.} *Ibid.*

^{10.} Ibid.

^{11.} Ibid., § 50(e).

II. SUMMARY OF THE SUBMISSION

A. Original submission

The Submitters assert that the Ministry of the Environment and 8. Natural Resources (Secretaría de Medio Ambiente y Recursos Naturales-Semarnat), the Office of the Federal Attorney for Environmental Protection (Procuraduría Federal de Protección al Ambiente-Profepa), the Office of the Attorney General of the Republic (Procuraduría General de la República—PGR), the government of the state of Colima, the Ministry of Urban Development and Environment (Secretaría de Desarrollo Urbano y Ecología) of the state of Colima, the Office of the Attorney General (Procuraduría General de Justicia) of the state of Colima, and the municipalities of Manzanillo and Armería are failing to effectively enforce the environmental law applicable to the environmental management of Laguna de Cuyutlán. The Submitters further assert that the University of Colima, the Mineral Resources Council (Consejo de Recursos Minerales), now the Mexican Geological Service (Servicio Geológico Mexicano), and the CFE are responsible for application of the environmental law in question.12

9. The Submitters assert that these authorities are failing to effectively enforce Article 4 of the Federal Constitution (Constitución Política de los Estados Unidos Mexicanos);13 Articles 1, 2, 3, and 4 of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (the "Ramsar Convention");14 Articles 30, 35, and 35 Bis of the Law of Ecological Equilibrium and Environmental Protection (Ley General de Equilibrio Ecológico y Protección al Ambiente—LGEEPA);¹⁵ Article 60 Ter of the General Wildlife Act (Ley General de Vida Silvestre-LGVS);¹⁶ the Federal Public Administration Act (Ley Orgánica de la Administración Pública Federal-LOAPF);17 Article 60 of the Federal Administrative Procedure Act (Ley Federal de Procedimiento Administrativo-LFPA);¹⁸ Articles 4 paragraph IV, 13 paragraph III, 22, and 46 of the LGEEPA Environmental Impact Assessment Regulation (Reglamento de la LGEEPA en materia de Evaluación del Impacto Ambiental—REIA);¹⁹ Articles 6, 7, 13, 14, 36, 48, 49, and 50 of the LGEEPA Ecological Zoning Regu-

^{12.} Submission, p. 2.

^{13.} Ibid., pp. 1, 14.

^{14.} Ibid.

^{15.} Ibid., pp. 1, 8, 10, 12-13.

^{16.} *Ibid.*, pp. 1, 11.

^{17.} Ibid., p. 1.

^{18.} Ibid., pp. 1, 13.

^{19.} Ibid., pp. 1, 10-13.

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lation (Reglamento de la LGEEPA en materia de Ordenamiento Ecológico-**ROE**);²⁰ Articles 1 and 40 of the Colima State Environmental and Sustainable Development Act (Ley Ambiental para el Desarrollo Sustentable del Estado de Colima—LADSEC);²¹ Articles 48 and 66 of the Colima State Human Settlements Act (Ley de Asentamientos Humanos del Estado de Colima-LAHEC);²² Mexican Official Standard NOM-022-SEMARNAT-2003, establishing the specifications for the preservation, conservation, sustainable use, and restoration of coastal wetlands in mangrove zones (the "NOM-022");²³ NOM-059-SEMARNAT-2001, Environmental protection-Native Mexican species of wild fauna and flora-Risk categories and specifications for inclusion, exclusion, or change—List of species at risk (the "NOM-059");²⁴ the Ecological Zoning Program for the Laguna de Cuyutlán Sub-Basin (the "Ecological Zoning Program");²⁵ the Manzanillo Urban Development Program (Programa de Desarrollo Urbano de Manzanillo-PDUM);²⁶ and the Coordination Agreement for the Drafting, Issuance, and Execution of the Regional Ecological Zoning Program for Laguna de Cuyutlán (the "Coordination Agreement").27

10. The Submitters note that Laguna de Cuyutlán is the country's fourth-largest coastal wetland, with 1500 ha of mangrove swamp, and is considered by the National Commission for the Use and Exploitation of Biodiversity (*Comisión Nacional de Uso y Aprovechamiento de la Biodiversidad*—Conabio) as a priority region for mangrove conservation. They further note that this area harbors 327 species of birds, two of which are listed in NOM-059 as endangered and 15 of which are subject to special protection.²⁸

11. The Submitters assert the existence of alleged irregularities in the procedures that gave rise to the approval of two projects involving the construction and operation of infrastructure in Laguna de Cuyutlán: the Manzanillo LPG Project and the Manzanillo LNG Project. The information attached to the submission indicates that the Manzanillo LPG Pro-

^{20.} Ibid., pp. 1, 6.

^{21.} Ibid., pp. 1, 5-7, 9.

^{22.} Ibid., p. 9.

^{23.} Ibid., pp. 1, 10-12.

^{24.} *Ibid.*, pp. 1, 3-4, 10. The NOM cited in the submission may be considered environmental law as defined by NAAEC Article 45(2), as it includes legal provisions that implement a law or a statute.

^{25.} Submission, pp. 2, 5-6, 11.

^{26.} Ibid., pp. 2, 6, 8.

^{27.} Ibid., pp. 1, 4, 6.

^{28.} *Ibid.*, p. 3-4.

ject, developed by Zeta Gas del Pacífico, S.A. de C.V., consists of the construction and operation of a port terminal for storage and distribution of liquid petroleum gas (LPG) and propane gas. This project includes 16 LPG spherical storage tanks and four propane gas tanks holding 43,380 barrels each. The plant is designed to receive a total flow of 45,000 tons/month (559,325.89 barrels/month) of LPG and to distribute 10,000 barrels/day, sufficient to supply the demand for LPG in greater Manzanillo and neighboring municipalities.²⁹

12. As to the Manzanillo LNG Project, the submission and its appendices indicate that it is being developed by the CFE and consists of the installation of a liquid natural gas (LNG) receiving, storage, and regasification terminal. The Manzanillo LNG Project includes construction and operation of three 165,000 m³ LNG storage tanks and a regasification capacity of 1 billion ft³ of natural gas per day. The Manzanillo LNG Project will supply natural gas to the Manzanillo Thermal Power Complex and to thermal power plants in the central/western part of the country.³⁰

The Submitters assert that during the environmental impact 13. assessment process for both projects, the Environmental Impact and Risk Branch (Dirección General de Impacto y Riesgo Ambiental—DGIRA) of Semarnat failed to conduct an analysis in accordance with the applicable environmental law and improperly granted—as they assert—environmental impact authorizations for both Projects. They note, in particular, that deficiencies in the environmental impact statements (EIS) for the Projects were not penalized, that compliance of the Manzanillo LPG Project with the Ecological Zoning Program was not assessed, that the compliance of the Projects with the laws and Mexican official standards as regards levels of protection established for wetlands and wild birds in Laguna de Cuyutlán was not assessed, that deadlines applicable to the environmental impact assessment of the Manzanillo LNG Project were not met,³¹ and that violation of the conditions set down in the environmental impact authorization for the Manzanillo LNG Project was not penalized.32

14. Likewise, the Submitters assert that prior to the approval of the Manzanillo LPG Project, the local authorities modified the PDUM,

^{29.} Original submission, pp. 7-8 and Appendix 7 (now 8): Executive Summary of the Environmental Impact Statement (Regional Form) for the Manzanillo LPG Project.

^{30.} Original submission, p. 9 and Appendix 10 (now 11): Executive Summary of the Environmental Impact Statement (Regional Form) for the Manzanillo LNG Project.

^{31.} Submission, pp. 8-10.

^{32.} Ibid., p. 14.

changing the zoning of the site from "tourism-ecology" to "heavy industry," which, the Submitters assert, constitutes a violation of the ecological criteria in the Ecological Zoning Program. Similarly, they assert that prior to approval of the Manzanillo LNG Project, the government of the state of Colima illegally modified the Ecological Zoning Program and did not establish an environmental log for recording of progress on the ecological zoning process.³³

B. Revised submission

15. In response to the Secretariat's determination of 9 October 2009, on 2 November 2009, the Submitters filed a revised version of the submission. The revised submission contains the same assertions as the original submission, to which the Submitters clarified facts and made a few precisions, which are summarized below.

16. Concerning the environmental law cited in the submission—and in addition to the provisions quoted in the original submission—the Submitters quote Articles 2 of the REIA and 1 paragraph VII of the LADSEC.³⁴ Likewise, they specify that the Coordination Agreement is an agreement signed pursuant to LGEEPA Article 20 *Bis* 2 and ROE Articles 7 paragraph I, 8, and 10.³⁵ The Submitters assert that pursuant to ROE Article 10, coordination agreements are matters of public law and are binding on the parties entering into them. Therefore, according to the Submitter, the Coordination Agreement is clearly binding on Semarnat, and DGIRA was obligated to verify compliance with it when considering the environmental admissibility of the Projects.³⁶

17. The Submitters specify that in 2008, Laguna de Cuyutlán was identified by Conabio as a mangrove woodland site of biological relevance designated for ecological rehabilitation, and that Semarnat, in a September 2008 document, ranked Laguna de Cuyutlán as the twelfth-highest priority wetland for coastal birds and winter counts.³⁷

18. Concerning the assertion as to the illegal amendment of the PDUM, the Submitters maintain that the government of Colima, in allowing the municipality of Manzanillo to amend the PDUM, the State

^{33.} Ibid., pp. 5-7.

^{34.} Revised submission, p. 6.

^{35.} Ibid., pp. 5-6.

^{36.} *Ibid.*, p. 6.

^{37.} Ibid., p. 3.

authority improperly validated the construction and operation of the Manzanillo LPG Project.³⁸

19. In relation to the Secretariat's observation that the LADSEC is applicable to the authorities of the state of Colima and not to the federal authorities, the Submitters argue that, being a law relating to natural resources and the environment, it is applicable to Semarnat, since LOAPF Article 32 *Bis* provides:³⁹

The Ministry of the Environment and Natural Resources is responsible for the following matters:

[...]

V.- To monitor and promote, in coordination with the federal, state, and municipal authorities, compliance with the laws, Mexican official standards, and programs relating to natural resources, environment, water, forests, terrestrial and aquatic wildlife, and fisheries, and other matters under the jurisdiction of the Ministry, and to apply any relevant penalties [...]⁴⁰

20. The Submitters further maintain that, in approving the Manzanillo LPG Project despite its failure to comply with the Ecological Zoning Program, Semarnat failed to enforce the Coordination Agreement, which they consider to be binding on Semarnat.⁴¹

21. Concerning the assertion of failure by Semarnat to enforce the requirements applicable to the EIS for the Manzanillo LNG Project, the Submitters relate that after initiating this procedure, Semarnat requested the CFE to provide information on the relationship between the Project and NOM-022, and also to provide a water balance impact study, which it requested again eight months later.⁴² The Submitters argue that Semarnat should have required this information to be filed as part of the EIS, because in order to assess the environmental impact of the Manzanillo LNG Project, it was necessary to ascertain the water balance, since the viability of a coastal wetland depends on it. The Submitters refer to NOM-022 in order to demonstrate the relationship between water balance and the conservation of coastal wetlands, as well as the

^{38.} Ibid., p. 4.

^{39.} Ibid., p. 8.

^{40.} The Secretariat notes that the revised submission does not textually quote Article 32 *Bis* of the LOAPF.

^{41.} Revised submission, p. 6.

^{42.} Ibid., pp. 9-10.

ways in which infrastructure construction can alter natural flows.⁴³ The Submitters reiterate that the University of Colima, the Mexican Geological Service and the CFE are responsible for the failure to effectively enforce the environmental laws, regulations, and standards since, they assert, those entities are responsible for producing the EIS for the Manzanillo LPG and LNG Projects, and therefore establish the relationship between the Projects and the applicable legal provisions.⁴⁴

22. Concerning the failure to consider Article 60 *Ter*, NOM-059, and NOM-022, the Submitters point out that Semarnat included a water balance study as a condition to its environmental impact authorization for the Manzanillo LNG Project, which indicates—they assert—that the water balance aspect was not taken into consideration *before* approving the Project.⁴⁵

23. Concerning the conditions contained in the environmental impact authorization for the Manzanillo LNG Project, the Submitters note that Semarnat did not enforce the condition on performance of a water balance study, nor did it enforce 16 other conditions identified by Semarnat in a memo of 28 May 2008. The Submitters specify that CFE began work on the Manzanillo LNG Project on 15 June 2008, without having complied with all the conditions governing the construction work, as attested by the CFE's first semiannual administrative report of 6 August 2008.⁴⁶

24. The revised submission refers to various administrative and judicial proceedings that were not identified in the original version and attaches copies of correspondence sent to the authorities regarding alleged failures to enforce relating to the Manzanillo LPG Project. Likewise, the Submitters present information concerning the current status of the Projects and the possible harm caused by them.

25. Concerning the status of the Manzanillo LPG Project, the Submitters relate that construction began in September 2004 and that while the operational phase is already underway, the construction phase has not yet concluded. In the appendices, they provide photos of the spherical storage tanks, which they assert to have affected the habitat of various species listed in NOM-059. The Submitters further assert that the Project comprises the installation of a 327-km gas pipeline that will pass

^{43.} Ibid., pp. 10-11.

^{44.} Ibid., p. 15.

^{45.} Ibid., p. 11.

^{46.} Ibid., p. 14.

through twenty-five communities of Colima and Jalisco. This, they assert, will affect two wetlands of great biological value.⁴⁷

26. Concerning the status of the Manzanillo LNG Project, the Submitters state that the construction phase of this project began in June 2008 with the clearing of vegetation and the filling of the lagoon over an area of approximately 4 ha starting from one edge of the mangrove in Laguna de Cuyutlán. They assert that this "has caused grave harm to species of fish, crustaceans, and mollusks, and to the benthos, considerably affecting the inshore fishery, in addition to the irreversible modification of the water balance, which will cause damage to the entire wetland."⁴⁸ The Submitters assert that the Project is considering opening the Tepalcates Canal and performing dredging in both the canal and the lagoon to a depth of 16 m. This, they assert, will further modify the water balance and salinity, thus affecting the mangrove ecosystem.⁴⁹

27. With respect to information on the remedies pursued in connection to the Manzanillo LPG Project, the Submitters report they filed an administrative appeal (*recurso de revisión*) before Semarnat against the environmental impact authorization which was resolved for the authority following an *amparo* appeal on 10 June 2009.⁵⁰

28. With respect to the assertion concerning the alleged failure to enforce environmental law by the University of Colima, the Mineral Resources Council (*Consejo de Recursos Minerales*)—now the Mexican Geological Service (*Servicio Geológico Mexicano*)—and CFE, the Submitters do not refer anymore to the Mexican Geological Services. They however maintain that the University of Colima and CFE are failing to effectively enforce environmental law, since these were in charge of the preparation of the EIA for the Projects.⁵¹

29. The Submitters also provide information from the relevant authorities response to a communication regarding the Projects.⁵²

51. Submission, pp. 2 and 16.

^{47.} Ibid., p. 14.

^{48.} Ibid., p. 16.

^{49.} Ibid., pp. 14-15.

^{50.} Ibid., p. 14.

^{52.} Revised submission, annex 20: Doc. S.G.P.A./DGIRA/DG/1495/05 issued by DGIRA, dated December 9, 2005, containing the response to a request from Mr. Gabriel Martínez Campos to the Ministry of Social Development (*Secretaría de Desarrollo Social*) to resolve environmental issues allegedly caused by the Projects.

III. ANALYSIS

30. NAAEC Article 14 authorizes the Secretariat to consider submissions from any person or nongovernmental organization asserting that an NAAEC party is failing to effectively enforce its environmental law. As the Secretariat has stated in previous Article 14(1) determinations, that provision is not intended to place an undue procedural burden on submitters. This means that the Secretariat interprets each submission in accordance with the Guidelines and the Agreement, without making an unreasonably narrow interpretation and application of the Article 14(1) requirements.⁵³ The Secretariat reviewed the submission with that perspective in mind.

C. Opening paragraph of Article 14(1)

31. The opening paragraph of Article 14(1) allows the Secretariat to consider submissions "from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law." In its determination of 9 October 2009, the Secretariat found that the Submitters are persons or nongovernmental organizations and that the submission meets the temporal criterion ("is failing"), since the situation appears to be ongoing. The Secretariat also found in 9 October 2009 determination that the following provisions qualify as environmental law in the sense of NAAEC Article 45(2):⁵⁴ Articles 4 of the Fed-

54. NAAEC Article 45 defines "environmental law" as follows:
"2. For purposes of Article 14(1) and Part Five:
(a) "environmental law" means any statute or regulation of a Party, or provision

Cf. SEM-97-005 (Biodiversity), Article 14(1) Determination (26 May 1998); SEM-98-003 (Great Lakes), Article 14(1) and (2) Determination (8 September 1999); and SEM-09-001 (Transgenic Maize in Chihuahua), Article 14(1) Determination (6 January 2010), § 8.

⁽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

⁽i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,

⁽ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or

⁽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.
(b) For greater certainty, the term **"environmental law"** does not include any statute

or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

⁽c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) 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."

eral Constitution; 1, 2, 3, and 4 of the Ramsar Convention;⁵⁵ 30, 35, and 35 *Bis* of the LGEEPA; 60 of the LFPA;⁵⁶ 48 of the LAHEC;⁵⁷ 4 paragraph IV, 13 paragraph III, 22, and 46 of the REIA; 60 *Ter* of the LGVS; 6, 7, 13, 14, 36, 48, 49 and 50 of the ROE;⁵⁸ 40 of the LADSEC;⁵⁹ and NOM-022 and NOM-059. However, the Secretariat found that LAHEC Article 66, the PDUM, and the Ecological Zoning Program are not environmental law, and has found no reason to change that determination after reviewing the revised submission.

32. With the information provided in the revised submission, the Secretariat now proceeds to determine whether the following provisions qualify as environmental law: LOAPF Article 32 *Bis*; LADSEC Article 1 paragraph VII; LGEEPA Article 20 *Bis* 2; REIA Article 2, ROE Articles 8 and 10, and the Coordination Agreement.⁶⁰

1. Environmental law at issue

33. LOAPF Article 32 *Bis* provides that Semarnat is responsible, in coordination with other authorities, for enforcing the laws related to natural resources and the environment. The Secretariat finds that, while environmental protection is not the main purpose of the LOAPF as a whole, it is the main purpose of Article 32 *Bis*, which therefore fits the definition of Environmental Law in NAAEC Article 45(2).⁶¹

34. Concerning LADSEC Article 1 paragraph VII,⁶² it establishes that the LADSEC is a matter of public order and common interest; that its

^{55.} It shall be clarified that Ramsar Convention definitions and procedures for listing wetlands of International Importance are only for guiding the Secretariat without an analysis of its effective enforcement.

^{56.} To the extent that it is related to the effective enforcement of the time periods and deadlines set out in the REIA.

^{57.} The Secretariat conducts an analysis only on matters related to zoning as related with protection and improvement of the environment as provided by LAHEC Article 3 sections I and VI. Likewise, the Secretariat only considers for its analysis section I of LAHEC Article 48 as this is the only provision that forms part of Submitters' central assertions.

^{58.} Provisions related to the planning process in ROE Article 6 and the list of purposes of the zoning process in ROE Article 7 are included only for guiding purposes, without conducting an analysis of its effective enforcement.

^{59.} As long as it meets the environmental goals of ecological zoning of the territory.

^{60.} Revised submission, pp. 5-6. *Cf.* LGEEPA Article 20 *Bis* 2, REIA Article 2, and ROE Articles 8 and 10.

^{61.} It shall be clarified that even if LOAPF Article 32 *Bis* qualifies as Environmental Law, it must be related to specific assertions in the Submission.

^{62.} The original submission referred to LADSEC Article 1 paragraph VIII.

purpose is environmental protection, promoting sustainable development, and laying the foundations for regulation of liability for environmental damage. The last paragraph of the article in question provides for the suppletive character of federal and state law where LADSEC is silent,⁶³ a provision which serves to guide the Secretariat's review of the LADSEC.

35. Concerning the Coordination Agreement, with the information in the revised submission, the Secretariat concluded that it does not constitute environmental law, since it does not establish obligations of a general nature, and is only applicable to the parties that have signed it. In any case, the Coordination Agreement can only be analyzed as an implementation device of LGEEPA Article 20 *Bis* and ROE Article 7, quoted in the submission and serves as a referent to commitments adopted by authorities charged with enforcement of environmental law in question.

36. As to LGEEPA Article 20 *Bis* 2, and ROE Articles 8, and 10, they qualify as environmental law since they refer to the drafting and issuance of coordination agreements for ecological zoning. The LGEEPA definition of ecological zoning comprises the objective of environmental protection.⁶⁴ Likewise, after consideration of these provisions it is clear that the purpose—among others—of preparing and implementing ecological zoning programs is to protect the environment, and thus these provisions qualify as environmental law.

37. As regards REIA Article 2,6⁵ which establishes that its application concern to the Executive branch through Semarnat in accordance with the applicable legal and regulatory provisions, the Secretariat determined that it qualifies as environmental law, as it establishes that the enforcement authority on environmental impact matters corresponds to Semarnat, and that its main purpose is the protection of the environment. Nevertheless, the Secretariat recognizes that its enforcement can not be made separately, but only with respect to the corresponding dispositions of the Regulation.

^{63.} Even if none of the original and revised submission explicitly refer to the last paragraph, the Submitters quote LADSEC Article 1 which is comprehensive to its last paragraph.

^{64. &}quot;Ecological Zoning Program: environmental policy instrument whose purpose is to regulate or induce land uses and economic activities with a view to achieving environmental protection as well as the preservation and sustainable enjoyment of natural resources, based on an analysis of the patterns of depletion and the potential for the use of those resources"; LGEEPA Article 3 paragraph XXIII.

^{65.} Revised submission, p. 6.

2. Assertions concerning failures to effectively enforce the environmental law

i) Assertions concerning the modification of the PDUM

38. In regard to the assertions concerning the alleged illegal modification of the PDUM, the Secretariat's determination of 9 October 2009 contains an explanation of the reasons for the further study of this assertion. The relevant section of Secretariat's determination is transcribed below:

It is clear that the Manzanillo Urban Development Program is subject to the LAHEC and that according to Article 48 section I must include "consistency mechanisms." The Secretariat further notes that Article 5 section XIII of this law defines the term "urban development program," finding environmental protection among its elements, which confirms that the assertion regarding the amendments to the Manzanillo Urban Development Program may be analyzed, provided that the analysis refers to the environmental aspects of the program.⁶⁶

ii) Assertions concerning the modification of the Ecological Zoning Program

39. In regard to the assertion concerning the alleged illegal modification of the Ecological Zoning Program, the Secretariat proceeds to conclude its analysis.⁶⁷

40. On 5 July 2003, the state of Colima issued the Ecological Zoning Program, whereby it classified the site of the Projects as a terrestrial natural area within the framework of a regional conservation policy. The Submitters assert that the compatible use in that zone was that of low-impact tourism, and therefore, in view of the conservation and protection policy, the proposed infrastructure was incompatible with the designated use. On 8 November 2004, CFE filed with Semarnat an EIS for the Manzanillo LNG Project, to be sited in Laguna de Cuyutlán, subject to the provisions and policies established by the Ecological Zoning Program. The Submitters state that on 3 May 2007, the government of Colima modified the Ecological Zoning Program to allow human settlements, infrastructure, and equipment on the site designated for the Manzanillo LNG Project.

^{66.} SEM-09-002 (*Wetlands in Manzanillo*), Article 14(1) Determination (9 October 2009), § 33.

^{67.} Ibid., §§ 34, 35, 36.

41. From a reading of the Ecological Zoning Program, it may be observed that Article 1 of the Executive Order published in the official gazette of Colima, on 5 July 2003, provides that:

[the] "Regional Ecological Zoning Program for the Laguna de Cuyutlán Sub-Basin" is the environmental policy instrument for the sustainable development of the area encompassed by the program, and its purpose is to assess and plan, from an environmental perspective, the permitted land uses, natural resource exploitation, productive activity and urban development with a view to making biodiversity conservation, environmental protection, and sustainable natural resource use compatible with urban and rural development as well as with the economic activities taking place, serving as a basis for the preparation of development programs and projects to be implemented, based on an analysis of environmental deterioration and the potential for use of natural resources, contained in the corresponding program.⁶⁸

42. The Submitters state that in modifying the Ecological Zoning Program, the state of Colima violated ROE Articles 6, 36, 48, 49, and 50, which, they assert, are applicable in view of the suppletive application authorized by LADSEC Article 1.

43. In this regard, the Secretariat notes that the ecological zoning system adopted by LADSEC has, as its purpose, the preservation and restoration of the ecological equilibrium and environmental protection.⁶⁹ From a reading of the submission, the state of Colima and its municipalities appear to be empowered by law to modify the Ecological Zoning Program,⁷⁰ provided that they do so for the purpose of reducing the environmental impacts caused by economic activity.⁷¹ Likewise, from the review of the revised submission, it is evident from ROE Articles 48, 49, and 50 that Semarnat has the power to modify the ecological zoning programs where "the environmental guidelines and strategies are no longer necessary or adequate to alleviate environmental conflicts and

- 69. LADSEC Article 3 paragraph LXII.
- 70. Cf. LADSEC Article 38.

^{68.} Revised submission, Appendix 4 (now 3): Executive Order Approving the Regional Ecological Zoning Program for the Laguna de Cuyutlán Sub-Basin.

^{71.} Cf. ROE Article 49. Mexican courts have pronounced judgment in connection with the supplementary mechanism which "[...] is generally observed in laws with specialized content in relation to laws with general content. The supplementary characteristic of the law results, in consequence, as an integration and referral of a specialized law to other general legislative texts establishing the applicable principles for the regulation of the substituted law [...]" APPLICATION OF A SUPPLEMENTAL LAW (SUPLETORIEDAD DE LEYES. CUANDO SE APLICA). Jurisprudence Thesis. Location: Ninth period, instance: Collegiate Circuit Courts; source: Semanario Judicial de la Federación and its Gazette; V; January 1997; thesis: I.3o.A. J/19; Jurisprudence; subject: common.

achieve the relevant environmental indicators,"⁷² and subject to such modification's "leading to a reduction in the adverse environmental impacts caused by the economic activities [...]"⁷³

44. The Secretariat accordingly finds that the assertion concerning the modification of the Ecological Zoning Program warrants further analysis.

iii) Assertions concerning the failure to enforce LGEEPA Article 20 Bis and ROE Article 7 in relation to the alleged violation of the Coordination Agreement

45. The Coordination Agreement was signed on 16 August 2000 by Semarnat, the state of Colima, the Mineral Resources Council,⁷⁴ and the municipalities of Manzanillo and Armería. Its purpose is to prepare and implement the Ecological Zoning Program.⁷⁵ By means of this instrument, Semarnat undertook to promote compliance of acts of the federal authorities with the Ecological Zoning Program.⁷⁶ As regards the municipality of Manzanillo, it undertook to "make adjustments" in order to render its planning instruments compatible with the Program.

46. The Submitters assert that DGIRA should have verified compliance by the parties that entered into the Coordination Agreement, in particular when it granted environmental impact authorization for the Manzanillo LPG Project. The Secretariat notes that not only does it seem to be DGIRA's responsibility to observe the Ecological Zoning Program pursuant to LGEEPA Article 35,⁷⁷ but also, pursuant to the Coordination Agreement. Similarly, Article 7 of ROE⁷⁸ lays the foundations for the exigibility of the obligation contracted by Semarnat in the Coordination Agreement, in particular that of furthering the effective enforcement of the Ecological Zoning Program.

74. Now the Mexican Geological Service.

^{72.} ROE Article 48, paragraph I.

^{73.} ROE Article 49.

^{75.} While the ROE had not yet been published, LGEEPA Article 20 *Bis* 2, cited in the submission, was not only in force but also expressly cited in the Coordination Agreement.

^{76.} Revised submission, Appendix 3 (before 2): Coordination Agreement to Support the Drafting, Issuance, and Implementation of the Regional Ecological Zoning Program for Laguna de Cuyutlán, located in the state of Colima, p. 3.

^{77.} *Cf.* SEM-09-002 (*Wetlands in Manzanillo*), Article 14(1) and (2) Determination (9 October 2009).

^{78.} Applied in accordance with the Second Transitory Article of the ROE.

47. The Submitters assert that the municipal authorities of Manzanillo also failed to observe the Coordination Agreement in amending the Manzanillo Urban Development Program, since they did not take into consideration the ecological criteria of the Ecological Zoning Program.⁷⁹

48. The Secretariat accordingly finds that the assertion of violation of the Coordination Agreement qualifies for review under NAAEC Articles 14 and 15.

iv) Assertions concerning the failure to effectively enforce LADSEC Article 40 and LGEEPA Article 35 as a result of failure to observe the Ecological Zoning Program in connection with the Manzanillo LPG Project

49. Concerning the Submitter's assertion of an alleged failure to effectively enforce LGEEPA Article 35 by issuing the environmental impact and risk authorization for the Manzanillo LPG Project without observing the Ecological Zoning Program in force, the Secretariat considers that it qualifies for review under Article 14(1) of the Agreement.⁸⁰

50. Concerning the assertion of Semarnat's alleged failure to effectively enforce LADSEC Article 40 in granting authorization for the Manzanillo LPG Project, the Secretariat finds that it does not warrant further study. LADSEC Article 40 provides that works and activities to be carried out in the state of Colima, and the issuance of land use, construction, and zoning authorizations, must adhere to the applicable ecological zoning programs. The Submitters argue that LADSEC, a state law, imposes obligations on Semarnat by virtue of LOAPF Article 32 *Bis*, which provides that it is Semarnat's responsibility, in coordination with the state authorities, to oversee the enforcement of laws related to natural resources and the environment.

51. The Secretariat finds that the obligations established by LADSEC Article 40 apply to the state authorities and to works and activities in the state of Colima, but not to Semarnat. As regards the reference to LOAPF Article 32 *Bis*, it is a provision granting authority to Semarnat within areas under federal jurisdiction; it does not give authority to Semarnat to

^{79.} This modification consisted of changing the land use from "forested area (AR-FOR) to medium-term urban reserve (RU-MP), as well as changing its zoning from tourism-ecology (TE) to high-impact and high-risk heavy industry." Submission, p. 5.

^{80.} Cf. SEM-09-002 (Wetlands in Manzanillo), Article 14(1) Determination (9 October 2009), § 39.

enforce State law, in this case LADSEC Article 40. Therefore, the Secretariat finds that this assertion does not qualify for study in this process.

The Submitters further state that "as of 12 June 2004, the govern-52. ment of Colima improperly, within the scope of its jurisdiction, validated the construction and operation of the [Manzanillo LPG Project]" since with the alleged "consent" from the State, the Municipality modified the Ecological Zoning Program in the conservation and protection zones UGA 39 and 40 in the Ejido of Campos.⁸¹ The Secretariat finds that this assertion qualifies for review, but only within the enforcement scope of LADSEC Article 40 and in light of ROE Articles 8 and 10 and the commitments adopted by the government of the State of Colima in the Coordination Agreement.⁸² The Secretariat notes that even if the revised submission does not further elaborate on arguments to determine how the State government "validated" the Manzanillo LPG Project, the Party in question may provide in a response the role of the government of the State of Colima in modifying the Ecological Zoning Program to allow the Manzanillo LPG Project in the Laguna de Cuyutlán, since such matter is relevant when considering effective enforcement of LADSEC Article 40.

v) Assertions concerning the alleged failure to effectively enforce: (1) the requirements applicable to the EIS for the Manzanillo LPG and LNG Projects; (2) NOM-059, NOM-022, and LGVS Article 60 Ter in connection with the environmental impact authorizations for the Manzanillo LPG and LNG Projects; (3) the prescribed time periods in the environmental impact assessment and authorization procedure for the Manzanillo LNG Project, and (4) the alleged violation of conditions set out in the environmental impact authorization for the Manzanillo LNG Project.

53. In its determination of 9 October 2009, the Secretariat found that the following assertions qualify for further analysis, providing reasons for their consideration:

(1) The alleged failure to effectively enforce the requirements applicable to the EIS for the Projects, pursuant to LGEEPA Articles 30 and 35 and REIA Article 13.⁸³ It is relevant to note that the Submitters

^{81.} Revised submission, pp. 4-5.

^{82.} *Cfr.* Fifth Clause (d) of the Coordination Agreement whereas the government of the State of Colima commit to "verify that the urban zoning plans and programs and other program devices are compatible with the provisions adopted in the Ecological Zoning Program for the Laguna de Cuyutlán", pp. 3-4.

indicate in the revised version of the submission that the University of Colima, and the CFE were in charge of preparing the EIS for the Projects and, in producing the EIS, were allegedly required to make the links between the Projects and the applicable legal provisions.⁸⁴ In this regard, the Secretariat finds that these entities cannot be considered to be responsible for the effective enforcement of the environmental law. Nevertheless, Mexico may respond to the assertion concerning the alleged deficiencies in the production of the EIS for the Projects.

- (2) The alleged failure to effectively enforce NOM-059 and NOM-022, as well as LGVS Article 60 *Ter*, which are applicable to works and activities performed where species with any protected status are found, as well as to protection of wetlands.⁸⁵
- (3) The alleged failure to effectively enforce REIA Articles 22 and 46 and LGEEPA Article 35 *Bis*, in relation to the expiry of the environmental impact assessment procedure.⁸⁶
- (4) The alleged failure to effectively enforce REIA Article 47, concerning the alleged violation of conditions set out in the environmental impact authorization for the Manzanillo LNG Project.⁸⁷ It should be noted that the Submitters complement their assertion concerning failure to comply with the terms of the environmental impact authorization for the Manzanillo LNG Project, specifying which conditions were allegedly not enforced vis-à-vis the company in charge of executing the project.⁸⁸

D. The six requirements of NAAEC Article 14(1)

54. The Secretariat finds that the revised submission meets the requirement of the opening sentence of Article 14(1) and proceeds to examine the revised submission with reference to the six requirements listed in NAAEC Article 14(1).

^{83.} Cf. SEM-09-002 (Wetlands in Manzanillo), Article 14(1) Determination (9 October 2009), §§ 42, 43.

^{84.} Revised submission, p. 15.

^{85.} Cf. SEM-09-002 (Wetlands in Manzanillo), Article 14(1) Determination (9 October 2009), §§ 44, 45.

^{86.} Ibid., §§ 46, 47.

^{87.} Ibid., §§ 48, 49.

^{88.} Revised submission, p. 14.

55. In its determination of 9 October 2009, the Secretariat found that the submission met the requirements of Article 14(1)(a), (b), (d), and (f).⁸⁹ However, the Secretariat found that some assertions in the submission did not meet the requirements of Article 14(c) and (e). With the revised submission, its appendices, and the complementary information provided by the Submitters, the Secretariat now finds that the submission meets all the Article 14(1) requirements.

56. The revised submission meets now the requirement of Article $14(1)(c)^{90}$ since it indeed provides sufficient information to enable the Secretariat to review it, including documentary evidence to support it.

57. In addition to the copies of documents already included in the appendices to the original submission, the Submitters attach copies of the following documents to the revised version: range map of mangroves showing the location of Laguna de Cuyutlán;⁹¹ request for additional information by DGIRA on the Manzanillo LNG Project;⁹² Semarnat decision on an administrative appeal (*recurso de revisión*) filed against the environmental impact authorization for the Manzanillo LPG Project;⁹³ DGIRA's response to a request for intervention in connection with the Manzanillo LNG Project and the environmental impact authorization for the Manzanillo LNG Project and the environmental impact authorization for the Manzanillo LNG Project and the environmental impact authorization for the Manzanillo LNG Project;⁹⁴ Semarnat decision on an

^{89. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

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

⁽b) clearly identifies the person or organization making the submission; (c) [...]

⁽d) appears to be aimed at promoting enforcement rather than at harassing industry; (e) [...]

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

^{90. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

^[...]

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

^{91.} Revised submission, Appendix 2: Mangrove distribution map, University of Guadalajara.

Revised submission, Appendix 16: Doc. S.G.P.A./DGIRA/DG/2343/07 issued by DGIRA, dated 4 October 2007, containing the request to the CFE for additional information on the Manzanillo LNG Project.

Revised submission, Appendix 19: Decision on administrative appeal 149/2006 issued by Semarnat, dated 10 June 2009.

^{94.} Revised submission, Appendix 20: Doc. S.G.P.A./DGIRA/DDT/1495/05 issued by DGIRA, dated 9 December 2005, containing the response to the request for intervention made by Gabriel Martínez Campos to the Ministry of Social Development to resolve the problems affecting the residents of Laguna de Cuyutlán.

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administrative appeal (*recurso de revisión*) filed against the environmental impact authorization for the Manzanillo LNG Project;⁹⁵ Semarnat correspondence analyzing the status of compliance with the conditions by the Manzanillo LNG Project and ordering full compliance;⁹⁶ first semiannual administrative report of the Manzanillo LNG Project, in which the Submitters claim to demonstrate that there is no evidence of effective enforcement of the environmental conditions of the project;⁹⁷ motion for nullity (*demanda de nulidad*) number 450/07, dated on 24 May 2007 submitted before the administrative tribunal in the state of Colima (*Tribunal Contencioso Administrativo del estado de Colima*) against the Decree approving the Reform of the Ecological Zoning Program,⁹⁸ and photos of the spherical storage tanks of the Manzanillo LPG Project, clearing of vegetation that allegedly occurred at the site of the Manzanillo LNG Project, and filling of an area allegedly comprising Laguna de Cuyutlán.⁹⁹

58. With respect to the requirement of Article $14(1)(e)^{100}$ the Secretariat finds that the submission now satisfies that requirement. In its determination of 9 October 2009, the Secretariat found that the Submitters had attached information indicating that the relevant authorities of Mexico had been notified in writing of the matter relating to the Manzanillo LNG Project, and indicated their response,¹⁰¹ but that the Submitters had not done so for the Manzanillo LPG Project. The Secretariat now

^{95.} Revised submission, Appendix 22: Decision on administrative appeal 108/2008 issued by Semarnat, dated 24 March 2009.

^{96.} Revised submission, Appendix 23: Doc. S.G.P.A./DGIRA/DESEI/0591/08 issued by DGIRA, dated 28 May 2008, notifying the CFE of the degree of compliance with the terms and conditions of the environmental impact authorization and informing the CFE that it was required to submit its first semiannual technical report; writ number 7B/2008/JMRA-00262 dated on 5 June 2008, issued by the CFE in response to the DGIRA request, and doc. S.G.P.A./DGIRA/DESEI/0732/08 issued by DGIRA, dated 24 June 2008, in terms of which DGIRA followed up the compliance with authorization conditionals by CFE.

^{97.} Revised submission, Appendix 23A: First Semiannual Administrative Report of the CFE number ROMZ-341/08 of the Manzanillo LNG Project dated 6 August 2008.

^{98.} Revised submission, Appendix 21: Motion for nullity (*demanda de nulidad*) of 24 May 2007, filed by Esperanza Salazar Zenil *et al.* in the Administrative Tribunal (*Tribunal de lo Contencioso Administrativo*) of the state of Colima (file no. 450/07).

^{99.} Revised submission, Appendix 24: Photographs.

^{100. &}quot;The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

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

^{101.} Original submission, Appendix 18 (now 26): Complaint filed by Esperanza Salazar Zenil with the Ministry of the Public Service, dated 28 April 2008, and Complementary appendix w/n: Request for declaration of invalidity of the environmental impact procedure filed by Esperanza Salazar Zenil with DGIRA, dated 4 September 2005 submitted on 5 September 2007.

finds that the revised submission states that the Mexican authorities were notified in writing of the matter relating to the Manzanillo LPG Project, by means of a request for intervention regarding the same matter from one of the Submitters to the Ministry of Social Development (*Secretaría de Desarrollo Social*), to which Semarnat responded; an administrative appeal (*recurso de revisión*) filed against the environmental impact authorization for the Manzanillo LPG Project,¹⁰² and a motion for nullity (*demanda de nulidad*) against the executive order revising the Ecological Zoning Program.¹⁰³

59. In summary, the Secretariat finds that the revised submission meets NAAEC Article 14(1) requirements.

E. NAAEC Article 14(2)

60. Having determined the assertions in the revised submission meet the requirements of NAAEC Article 14(1), the Secretariat now proceeds to review the revised submission in order to determine whether it warrants requesting a response from the Party based on the criteria set out in Article 14(2) of the Agreement.

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

61. Concerning whether the submission alleges harm to the person or organization making the submission, the Submitters state that Mexico allowed construction of the two natural and LP gas storage and transportation projects despite the negative impact that they would have on the wetland ecosystems and the mangrove. To substantiate their assertion of the alleged significant impacts on Laguna de Cuyutlán, the Submitters present information on the ecosystems and species found in the area of the Projects, the facilities already built (including photos), and provide explanations on the alleged negative consequences of such impacts.¹⁰⁴ In conformity with section 7.4 of the Guidelines, the Secretar-

^{102.} Revised submission, Appendix 19: Decision on administrative appeal 149/2006 issued by Semarnat, dated 10 June 2009; Appendix 20: Doc. S.G.P.A./DGIRA/ DDT/1495/05 issued by DGIRA, dated 9 December 2005, containing the response to the request for intervention made by Gabriel Martínez Campos to the Ministry of Social Development to resolve the problems affecting the residents of Laguna de Cuyutlán.

^{103.} Revised submission, Appendix 21: Motion for nullity (*demanda de nulidad*) of 24 May 2007, filed by Esperanza Salazar Zenil *et al.* in the Administrative Tribunal (*Tribunal de lo Contencioso Administrativo*) of the state of Colima (file no. 450/07)

^{104.} The Secretariat further observes that the submission mentions a citizen complaint relating to commission of environmental damage in the area of the Manzanillo LNG Project as a result of the violation of the conditions set out in the environmental

iat finds that the alleged harm is due to the alleged failure to effectively enforce the environmental law, and therefore meets the requirements of Article 14(2)(a).

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

62. The Secretariat finds that the submission raises matters whose further study in this process would advance the goals of the Agreement, specifically Article 1(f), (g), and (h).¹⁰⁵

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

63. In regard to whether private remedies available under the Party's law have been pursued, the Secretariat notes that neither Article 14(2)(c) nor section 7.5 of the Guidelines are intended to impose a requirement of having exhausted all available remedies under the Party's law. Indeed, section 7.5 directs the Secretariat to consider whether *reasonable actions have been taken to pursue such remedies prior to initiating a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.*

64. Concerning the alleged illegal modification of the Ecological Zoning Program, the Submitters state that on 24 May 2007, a motion for nullity (*demanda de nulidad*) was filed with an administrative tribunal in the state of Colima against the executive order revising the Program; the action was dismissed two years and four months later.¹⁰⁶ They also relate that on 4 June 2007, a criminal complaint in connection with the alleged illegal modification of the Program was filed before the Office of

impact authorization. Revised submission, p. 14; Original submission, Complementary appendix w/n: Citizen complaint filed by Esperanza Salazar Zenil with Profepa, dated 10 July 2008, and response no. PFPA/COL/DQ/79/02474/2008, dated 6 October 2008, issued by the Profepa official in Colima.

^{105. &}quot;The objectives of this Agreement are to:

^[...]

⁽f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;

⁽g) enhance compliance with, and enforcement of, environmental laws and regulations;

⁽h) promote transparency and public participation in the development of environmental laws, regulations and policies; [...]"

^{106.} Revised submission, pp. 7 and 13; and Appendix 21: Motion for nullity (*demanda de nulidad*) of 24 May 2007, filed by Esperanza Salazar Zenil *et al.* in the Administrative Tribunal (*Tribunal de lo Contencioso Administrativo*) of the state of Colima (case no. 450/07).

the Attorney General of the State of Colima. However, Submitters assert the criminal complaint was never addressed.¹⁰⁷

65. As to the alleged illegality of the environmental impact authorization for the Manzanillo LPG Project, in relation to NOM-022 and NOM-059, as well as the alleged incompatibility of the Project with the Ecological Zoning Program, the Submitters state that on 3 August 2006, an administrative appeal (*recurso de revisión*) was filed with Semarnat against the environmental impact authorization; the appeal was decided on 10 June 2009 in favor of the authority.¹⁰⁸ Likewise, the Submitters refer to a request made on 11 October 2005 for the intervention of the Ministry of Social Development, to which request Semarnat replied on 9 December 2005, stating that the relevant environmental and legal matters had been considered in the authorization of the Manzanillo LPG Project.¹⁰⁹

66. As to the alleged illegality of the environmental impact authorization for the Manzanillo LNG Project in relation to LGVS Article 60 *Ter*, NOM-022, and NOM-059, the Submitters relate that an administrative appeal (*recurso de revisión*) was filed on 26 March 2008, and resolved on 24 March 2009 upholding the environmental impact authorization.¹¹⁰ The appendices to the submission likewise make clear that on 16 April 2008, a motion for nullity (*demanda de nulidad*) was filed against the authorization for that project before the Federal Tax and Administrative Court (*Tribunal Federal de Justicia Fiscal y Administrativa*), a claim procedure (*recurso de reclamación*) against said Court and an *amparo* action.¹¹¹ The Submitters further relate that on 28 April 2008 they filed a complaint with the Ministry of the Public Service (*Secretaría de la Función Pública*)

^{107.} Revised submission, p. 7; Original submission: Complementary appendix: Complaint filed by Esperanza Salazar Zenil and Gabriel Martínez Campos with the Office of the Attorney General of the State of Colima, dated 4 June 2007.

Revised submission, p. 13; Appendix 19: Decision on administrative appeal 149/2006 issued by Semarnat, dated 10 June 2009.

^{109.} Revised submission, p. 13; Appendix 20: Doc. S.G.P.A./DGIRA/DDT/1495/05 issued by DGIRA, dated 9 December 2005, containing the response to the request for intervention made by Gabriel Martínez Campos to the Ministry of Social Development to resolve the problems affecting the residents of Laguna de Cuyutlán.

Revised submission, pp. 13-14; Appendix 22: Decision on administrative appeal 108/2008 issued by Semarnat, dated 24 March 2009.

^{111.} Revised submission: Appendix 28 (before 20); motion for nullity (demanda de nulidad) filed before the Federal Tax and Administrative Court (Tribunal Federal de Justicia Fiscal y Administrativa) dated 16 April 2008, claim procedure (recurso de reclamación) dated 13 June 2008, filed before the Federal Tax and Administrative Court (Tribunal Federal de Justicia Fiscal y Administrativa) (file no. 1874/08-07-01-7). Original submission: complementary appendix w/n: Amparo action filed by María Gómez Pizano in District Second Court of the State of Colima dated 6 August 2008.

against the alleged illegal authorization of that project;¹¹² they also filed a complaint of criminal activity with the Colima office of the PGR on 14 May 2008.¹¹³ Finally, they state that on 4 June 2008, an *amparo* action was filed in the District Court of the state of Colima against the alleged lack of action to process and investigate said criminal complaint. Although this latter case did prosper, it did not give rise to the PGR's characterizing the facts complained of as an offense.¹¹⁴

67. Concerning the alleged failure to enforce the legally prescribed periods in the environmental impact assessment and authorization procedure for the Manzanillo LNG Project, the Submitters state that on 5 September 2007, they filed with Semarnat for a declaration of expiry of the procedure, to which filing they claim to have received no response.¹¹⁵

68. With respect to the alleged failure to penalize violations of conditions set out in the environmental impact authorization for the Manzanillo LNG Project, the Submitters specify that on 10 July 2008, a citizen complaint was filed with Profepa, with the response that while the Project had been granted the relevant authorization, "the conditions [of such authorization] had not been reviewed".¹¹⁶

69. In view of the foregoing, the Secretariat finds that the Submitters have taken reasonable actions to pursue private remedies available under the Party's law, and have therefore met the criteria of Article 14(2)(c).

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

70. As regards Article 14(2)(d), the Secretariat finds that the submission is not based on mass media reports, but rather on the facts gathered

^{112.} Revised submission, p. 13; Original submission, Appendix 18; Revised submission, Appendix 26 (before 18): Complaint filed by Esperanza Salazar Zenil with the Ministry of the Public Service, dated 28 April 2008;

Revised submission, p. 13; Original submission: Appendix 19; (Revised submission: Appendix 27): Citizen complaint filed by Esperanza Salazar Zenil with Profepa, dated 14 May 2008.

^{114.} Revised submission, p. 14; Appendix w/n: *Amparo* action filed by Esperanza Salazar Zenil and Gabriel Martinez Campos in the District Court of the State of Colima, dated 4 June 2008.

^{115.} Revised submission, p. 13.

^{116.} Revised submission, p. 14; Original submission, Complementary appendix w/n: Citizen complaint filed by Esperanza Salazar Zenil with Profepa, dated 10 July 2008, and response number PFPA/COL/DQ/79/02474/2008, dated 6 October 2008, issued by the Profepa official in Colima.

by the Submitters, and on information derived from their correspondence with some of the authorities mentioned in the submission.

IV. DETERMINATION

71. The Secretariat has reviewed submission SEM-09-002 (*Wetlands in Manzanillo*) with reference to NAAEC Article 14(1) and finds, for the reasons discussed above, that it meets all the requirements set out therein. Likewise, with reference to the criteria set out in NAAEC Article 14(2), the Secretariat finds that the submission warrants requesting a response from the Party, in this case the United Mexican States, to the Submitters' assertions relating to the alleged failure to effectively enforce:

- a. LAHEC Article 48 paragraph I, in relation to the mechanisms for consistency with other ecological zoning programs that should have been considered in the modification of the PDUM;
- b. ROE Articles 6, 13, 14, 36, 48, 49, and 50 as regards the alleged illegal modification of the Ecological Zoning Program;
- c. LGEEPA Articles 20 *Bis* 2 and ROE Article 7 in relation to the alleged violation of the Coordination Agreement;
- d. LADSEC Article 40 and LGEEPA Article 35 as regards the alleged incompatibility of the Manzanillo LPG Project with the Ecological Zoning Program;
- e. LGEEPA Articles 30 and 35 and REIA Articles 2, 13 and 4 paragraph IV applicable to the EIS for the Manzanillo LPG and LNG Projects;
- f. LGVS Article 60 *Ter*, NOM-059, and NOM-022, concerning the environmental impact authorizations for the Manzanillo LPG and LNG Projects;
- g. REIA Articles 22 and 46 and LGEEPA Article 35 *Bis* in relation to the alleged expiration of the environmental impact assessment procedure, and
- h. REIA Article 47 in regard to the alleged violation of conditions set out in the environmental impact authorization for the Manzanillo LNG Project;

- i. Ramsar Convention, Articles 1, 2, 3 and 4, with respect to the alleged harm to the wetlands in the Laguna de Cuyutlán;
- j. ROE Articles 8 and 10, related to the alleged modifications made to the Ecological Zoning Program without respecting the Coordination Agreement.

72. The Party in its response—if any—may refer how such provisions are enforced in light of Article 4 of the Constitution which establishes the right to a healthy environment; LOAPF Article 32 *Bis* which establishes Semarnat's authority in enforcement and surveillance of the provisions quoted in the Submission; LADSEC Article 1 paragraph VII, in particular the application by extension of the federal and local legislation that is authorized in its last paragraph, and LFPA Article 60 related to the expiration of the environmental impact evaluation process of GNL Manzanillo Project.

73. As stipulated in NAAEC Article 14(3), the Party may provide a response to the submission within the 30 days following receipt of this determination; that is, by **14 September 2010**. In exceptional circumstances, the Party may notify an extension of the deadline to 60 days. Since a copy of the submission with appendices has already been sent to the Party, it is not attached to this determination.

74. Respectfully submitted for your consideration this 13 August 2010.

Secretariat of the Commission for Environmental Cooperation

- per: Paolo Solano Legal Officer, Submissions on Enforcement Matters Unit
- *per*: Dane Ratliff Director, Submissions on Enforcement Matters Unit
- ccp: Mr. Enrique Lendo, Alternate Representative, Mexico Mr. David McGovern, Alternate Representative, Canada Ms. Michelle DePass, Alternate Representative, United States Mr. Evan Lloyd, Executive Director, CEC Secretariat Submitters

SEM-09-004

(Quebec Mining)

- SUBMITTERS: THE QUEBEC ENVIRONMENTAL LAW CENTRE (CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT—CQDE) AND NATURE QUÉBEC
- PARTY: CANADA
- DATE: 3 September 2009

SUMMARY: The Submitters assert that Canada, and more specifically the province of Quebec, is failing to effectively enforce: *Quebec's Mining Act*: the *Regulation Respecting Mineral Substances other than Petroleum*, *Natural Gas and Brine*; and, the *Sustainable Development Act*, all in connection with the financing and environmental management of remediation and redevelopment of mining sites in Quebec.

SECRETARIAT DETERMINATION:

ART. 14(1)Determination that criteria under Article 14(1)(20 October 2009)have not been met.

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 14(1) of the North American Agreement for Environmental Cooperation

Submitters:	The Quebec Environmental Law Centre (<i>Centre québécois du droit de l'environnement</i> —CQDE) Nature Québec
Party:	Canada
Date received:	3 September 2009
Date of this determination:	20 October 2009
Submission no.:	SEM-09-004 (Quebec Mining)

I. INTRODUCTION

Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement") provide a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "Guidelines"). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with the NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a Factual Record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission. Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records can be found on the CEC's website.¹

This Determination contains a summary of the Secretariat's analysis in accordance with NAAEC Article 14(1) and the Guidelines, and a summary of submission SEM-09-004 (*Quebec Mining*) (hereinafter the "Submission"), filed with the Secretariat on 3 September 2009 by '*Nature Québec*' and the '*Centre québécois du droit de l'environnement*' (hereinafter, the "Submitters"). The Submitters assert that Canada, through the Province of Quebec, has failed to effectively enforce the Quebec *Mining Act* (the "Act") and *Regulation respecting mineral substances other than petroleum, natural gas and brine* (the "Regulation"), as well as the *Sustainable Development Act*.

The Submitters assert, *inter alia*, that the government's failure to enforce provisions relating to the rehabilitation and restoration of land affected by mining operations is creating a heavy financial burden on the people of Quebec while causing unwarranted environmental damage.

Pursuant to Guideline 3.10, the Secretariat notified the Submitter by letter of minor errors of form on 4 September 2009, noting that the submission failed to indicate whether the matter had been communicated in writing to the relevant authorities of the Party. On 21 September 2009, the Submitters filed supplemental information in response to the Secretariat's letter of 4 September 2009. Specifically, the Submitters asserted that their claims had been made known to the relevant authorities through a press release by a coalition (of which they are part), *Pour que le Québec ait meilleure mine!* The Submitters provided several media reports meant to support their statements.

Taking into account the submission and the Submitter's letter of 21 September 2009, for the reasons set out below, the Submitters are being notified in this Determination that submission SEM-09-004 (*Quebec Mining*) does not meet all the criteria for admissibility contained in Article 14(1), and in particular Article 14(1)(c) and (e), and that, in accordance with Guideline 6.2, they have thirty days from the date of this Determination to provide a submission which conforms to all of the

^{1.} CEC Online at: <http://www.cec.org/citizen/index.cfm?varlan=english>.

requirements of Article 14(1), failing which the Secretariat will terminate the process with respect to this submission.

II. SUMMARY OF THE SUBMISSION AND SUPPLEMENTAL INFORMATION

On 3 September 2009, the Submitters filed a submission with the Secretariat of the CEC asserting that Quebec is failing to effectively enforce sections 221, 222, 232.1 to 232.5 and 251 of the Quebec *Mining Act*, sections 108 to 115 of the *Regulation respecting mineral substances other than petroleum, natural gas and brine*, and section 6 of the *Sustainable Development Act*. In support of their assertions, the Submitters rely solely on the *Report of the Auditor General of Quebec to the National Assembly for 2008-2009, Volume II, Chapter 2: Government interventions in the mining sector* (the "AG Report"), the Governmental Strategy for Sustainable Development 2008-2013 (*Stratégie gouvernementale de développement durable 2008-2013*), and several media clippings.

The Submitters state that, under Annex 41 of the NAAEC,² the Government of Canada is bound in respect of any acts and omissions of the Province of Quebec as these relate to the application of the NAAEC. They further note that the Quebec National Assembly ratified the NAAEC in Article 2 of the *Act respecting the implementation of international trade agreements*, Article 8 of which specifies that NAAEC clauses concerning application of the Agreement apply to the Government of Quebec.³ They also note that the Government of Quebec signed the *Canadian Intergovernmental Agreement Regarding the NAAEC*, which specifies at Article 2 that signatories are bound by NAAEC Article 14 as it pertains to enforcement matters.⁴

The Submitters assert that "poor State management of the province's mining resources has had disastrous [environmental, economic, and social] consequences"⁵ and that the Quebec government's information management system for the mining sector is deficient.⁶ The Submitters note that pursuant to sections 221 and 222 of the Act, those engaged in mining operations are bound to submit annual reports to the Minister of Natural Resources and Wildlife (*Ministère des Ressources naturelles et de la Faune*, or "MRNF") regarding their activities during the preceding

^{2.} Submission, para. 13.

^{3.} *Ibid.*, para. 13(a).

^{4.} Ibid., para. 13(b).

^{5.} Ibid., para. 16.

^{6.} Ibid., paras. 19-24.

year as well as preliminary reports and forecasts for the upcoming year.⁷ The Submitters allege that these reports contain information that is "crucial for monitoring rehabilitation and restoration plans and the state of financial guarantees."⁸

The Submitters then recall section 251 of the Act, whereby inspectors may examine reports and plans for mining operations and request additional information respecting those operations.⁹ The Submitters cite the AG Report which notes that of 25 files analyzed, 56% did not include an inspection report, and which states that

the documentation of mining site files made by the MRNF had serious flaws such as a lack of justification and supporting documents for certain decisions, key pieces of evidence that were missing, or departmental actions not recorded in the documents.¹⁰

The Submitters further recall that the AG Report pointed out that "documentation of mining site files made by the MRNF had serious flaws,"¹¹ and that it stresses the importance of keeping mining files up to date in light of the "significant economic, social and environmental impact they have in certain regions."¹²

The Submitters maintain that section 232.1 of the Act requires a company operating a mining site to restore it based on an MRNF-approved plan, which must in turn be based on consultations with the Ministry of Sustainable Development, Environment and Parks (*Ministère du Développement durable, de l'Environnement et des Parcs* (hereafter the "MDDEP"), pursuant to section 232.5 of the Act.¹³ They note that section 232.2 of the Act indicates that the plan must be submitted to the MDDEP¹⁴ (*sic*) for approval before operations commence.¹⁵ Relying on the statement in para. 2.66 of the AG Report that the MRNF does not have an internal process permitting it to monitor the commencement of mining operations, the Submitters maintain that "the MRNF is not in a

^{7.} Ibid., para. 20.

^{8.} *Ibid*.

^{9.} Ibid., para. 21.

^{10.} Ibid., para. 23.

^{11.} *Ibid*.

^{12.} *Ibid.*, Appendix 4 at para. 2.99.

^{13.} Ibid., para. 25.

^{14.} It appears that there may be a typo in the Submission and that the reference is meant to be the "MRNF".

^{15.} Submission, para. 26.

position to coordinate the reception of plans within the time limits set out in the Act." $^{\rm 16}$

The Submitters continue to summarize the AG Report, noting that out of 25 files analyzed by the AG, there were 2 cases where companies commenced operations prior to having submitted plans, 9 cases where companies failed to take into account the time required to review their plan, 11 cases where companies failed to meet stipulated deadlines for tabling or reviewing their plans without being fined, and 10 cases where plans were approved despite MDDEP notices that were inconclusive, unfavourable, stipulated conditions or were altogether absent.¹⁷ The Submitters also express dissatisfaction with "unacceptably long" lengths of time taken to approve plans.¹⁸ The Submitters go on to describe the regime for operator-paid financial guarantees to restore mining sites (citing sections 232.1 and 232.4 of the Act), as well as the amounts of those guarantees (section 111 of the Regulation), and the payment schedules (sections 112 and 113 of the Regulation).¹⁹ The Submitters note that under Regulation section 112, "payments are to start only after approval."²⁰ The Submitters maintain that "unreasonable delays in approval, as well as failures to even table a plan [...] can lead to disastrous consequences in the financial management of these files."21 The Submitters proceed to assert that the MRNF is not complying with sections 112 and 113 of the Regulation, and, relying again on the AG Report, note that "poor enforcement of the Regulation resulted in the postponement of \$16 million in payments by the companies examined" (by the Auditor General).²²

The Submitters recall the AG Report's finding that the MRNF has stopped making information about the mining industry public, and they contend that this information is necessary for the people of Quebec to "understand the benefits and impacts of the sector," and that it is vital for regions economically dependent on the mining sector.²³ The Submitters draw attention to the AG Report's recommendations, and to section 6 of the *Sustainable Development Act*, regarding citizen participation and access to knowledge. They also note that section 3 of the *Sustainable Development Act* stipulates that it applies to the MRNF.²⁴

21. Ibid.

24. Ibid., para. 40.

^{16.} *Ibid.*, para. 27.

^{17.} Ibid., para. 28.

^{18.} *Ibid.*, para. 30.

^{19.} Ibid., paras. 31-33.

^{20.} Ibid., para. 33. Emphasis in original.

^{22.} Ibid., para. 36.

^{23.} Ibid., para. 38.

The Submitters conclude that Canada has failed to enforce its legislation concerning the effective management of mines operating in the Province of Quebec, and note that a factual record would "shed light on the government's practices and numerous failures in the mining sector," and would be in line with the objectives stated in NAAEC Article 1(a), (b), (g), (h), and (i).²⁵ Last, the Submitters note that the laws cited "do not stipulate any private remedy that would ensure their effective enforcement," and that "no other remedies are currently being sought."²⁶

III. ANALYSIS

The Secretariat will now treat each requirement of NAAEC Article 14(1) in turn.

Article 14(1)

The chapeau of NAAEC Article 14(1) provides: "[t]he Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law" if the submission meets with the criteria in Article 14(1)(a) to (f).

Although the submission purports to assert in its paragraph 14 that the Government of Quebec has failed to effectively enforce the laws there cited, the submission almost exclusively relies on recitation of the AG Report, often without formulating direct assertions.

The Submitters assert "poor State management of the province's mining resources"²⁷ and note a deficient information management system for the mining sector by the Government of Quebec.²⁸ However, the Submitters do not directly make an assertion on how the Party is allegedly failing to effectively enforce the Act, and in particular sections 221, 222, and 251 of the Act, nor do they "focus on any acts or omissions of the Party asserted to demonstrate such failure" in accordance with Guide-line 5.1. As noted in the previous paragraph, the Secretariat considers that recalling sections of the AG Report is not equal to positively asserting a failure to effectively enforce an environmental law in accordance with the chapeau of Article 14(1) and Guideline 5.1.

^{25.} Ibid., paras. 41-42.

^{26.} Ibid., para. 44.

^{27.} Ibid., para. 16.

^{28.} Ibid., paras. 19-24.

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With respect to the consideration of whether the laws cited in a submission qualify as "environmental law," the Secretariat notes that the primary purpose (in the sense of NAAEC Article 45(2)(a) and (c)) of sections 221 (except arguably 221.3) and 222, appears to concern reporting requirements for issues other than environmental protection, and that section 251 on its own merely establishes the powers of inspectors.²⁹ These provisions do not appear to be "environmental law" as defined by NAAEC Article 45(2)(a), although they may function within an overall regime which could broadly be described as focusing on environmental protection. NAAEC Article 45(2)(c) provides that "the primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) 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." Applying this important clarification in NAAEC Article 45(2)(c) to the meaning of NAAEC Article 45(2)(a) and the submission, the Secretariat concludes it cannot proceed further with respect to assertions on the foregoing sections of the Act.³⁰

Regarding the submission's contentions as to sections 232.1, 232.2, and 232.5 of the Act, although the cited provisions can be considered environmental law within the meaning of Article 45(2) of the NAAEC, the Submitters do not indicate clearly which time limits referred to in submission paragraph 27 are meant, and more importantly, the Submitters' assertion regarding the MRNF not being in a position to coordinate the reception of plans within time limits appears to be speculative about possible future events, but the Submitters do not in this connection, pursuant to NAAEC Article 14(1) and Guideline 5.1, assert a specific act or omission of the Party which would amount to an alleged failure to effectively enforce its environmental law. Furthermore, the Secretariat has repeatedly interpreted the words in the chapeau of Article 14(1) "is failing to effectively enforce its environmental law," to mean that an assertion of a failure to effectively enforce should concern an ongoing situation.³¹ A revised submission may clarify whether the submission

^{29.} Section 222 of the *Mining Act* may be considered, however, to guide the Secretariat's analysis in the event the Submission merits further consideration regarding the effective enforcement of the environmental law in question.

^{30.} In previous determinations, submissions asserting the lack of use of inspection requirements as a failure to effectively enforce environmental law were rejected. The Submitters in the instant submission pointed out that in some cases, inspections did not take place, and that the AG Report said they should in order to ensure "effective management." Effective management and effective enforcement of an environmental law are different matters. This is clear in SEM-00-004 *BC Logging*, "inspections [...] might, but do not necessarily, lead to further enforcement action within a specified timeframe." See NAAEC Article 45(1) on the use of regulatory discretion.

^{31.} Submissions where the Secretariat has on numerous occasions discussed the need for assertions regarding failures to effectively enforce to meet a temporal requirement

regarding the MRNF not being in a position to coordinate the reception of plans within time limits concerns an ongoing circumstance related to specific alleged failures to effectively enforce environmental law.

Regarding sections 108 to 115 of the Regulation, the Secretariat considers these provisions could broadly fall within the definition of environmental law in accordance with Article 45(2) as they operate in conjunction with Section 232.1 of the Act. However, the information provided by the Submitters describes punctuated instances of past conduct which do not appear to indicate an ongoing circumstance of an alleged failure to effectively enforce environmental law in accordance with the temporal requirement of the Article 14(1) chapeau.

Article 45(2) of the NAAEC, the Submitters do not indicate clearly which time limits referred to in submission paragraph 27 are meant, and more importantly, the Submitters' assertion regarding the MRNF not being in a position to coordinate the reception of plans within time limits appears to be speculative about possible future events, but the Submitters do not in this connection, pursuant to NAAEC Article 14(1) and Guideline 5.1. However, the Secretariat may consider the *Sustainable Development Act* section 6 as environmental law in accordance with NAAEC Article 45(2).

As noted above, the submission states that the AG Report pointed out that "documentation of mining site files made by the MRNF had serious flaws,"³² and that the AG Report stresses the importance of keeping mining files up to date in light of the "significant economic, social and environmental impact they have in certain regions."³³ Here as well, mere recollection or citation of a report is not a positive assertion of a failure to effectively enforce environmental law in accordance with Article 14(1) and Guideline 5.1.

Bearing the foregoing in mind, any revised submission should conform to the requirements of Article 14(1) chapeau, and Guideline 5.1.

of being an "ongoing" situation at the time of submission include: SEM-97-03 *Quebec Hog Farms*, "the submission meets the temporal requirement in Article 14(1) because [...] the submission asserts that many of the alleged violations are ongoing" [page 8]; SEM-99-02 *Migratory Birds*, [page 4] "the submission focuses on asserted failures to enforce that are ongoing. It thereby meets the jurisdictional requirement in the first sentence of Article 14(1)"; SEM-00-003 *Jamaica Bay* [page 3] "it appears that the submission focuses on a prospective rather than on an ongoing asserted failure to effectively enforce. It therefore fails to comply with Article 14(1)."

^{32.} Submission, para. 23.

^{33.} Ibid., Appendix 4 at para. 2.99.

Article 14(1)(*a*)

Article 14(1)(a) requires that a submission be: "in writing in a language designated by that Party in a notification to the Secretariat [...]."

The Secretariat notes that the submission meets the criteria of Article 14(1)(a) as it is in French, an official language designated by the Parties for filing a submission.³⁴

Article 14(1)(b)

Article 14(1)(b) requires that a submission: "clearly identif[y] the person or organization making the submission [...]."

The Secretariat considers that the Submitters and their organizations are clearly identified and the submission meets the criteria of Article 14(1)(b).

Article 14(1)(*c*)

Article 14(1)(c) requires that a submission provide: "sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based [...]."

As to assertions on sections 232.1 and 232.4 of the Act, and sections 111, 112, and 113 of the Regulation, and in particular that the MRNF is not complying with said sections 112 and 113, because allegedly "poor enforcement of the Regulation resulted in the postponement of \$16 million in payments by the companies examined" by the AG,³⁵ the requirements of Article 14(1)(c) are not met, and the submission does not include in accordance with Guideline 5.3 "sufficient documentary evidence" to allow the Secretariat to review the submission with regard to this particular assertion.³⁶ For example, the AG Report mentions

^{34.} Cfr. Guideline 3.2.

^{35.} Submission, para. 36.

^{36.} The Secretariat, in previous determinations noted that, "Many submitters are nongovernmental environmental organizations with limited financial and human resources for monitoring compliance with environmental laws and gathering evidence of specific breaches. These constraints provide additional support for concluding that the Submitters have submitted sufficient information regarding the alleged widespread failure to enforce section 36(3) effectively to meet the threshold requirements of Article 14." SEM-98-004 *BC Mining*, Art. 15(1) Determination, at 13. In this case, however, the submission does not include documentary evidence sufficient to prove a causal link between the alleged "poor enforcement of the Regulation" and the

numerous dossiers, but these are not included either in the AG Report or supplied to the Secretariat by the Submitters. Moreover, there is a lack of information as to whether the assertions regarding all of the laws cited regard ongoing failures to effectively enforce or not. Regarding the assertion that "the MRNF is not in a position to coordinate the reception of plans within the time limits set out in the Act,"³⁷ the submission does not clarify which are those time limits set out in the Act and the AG Report alone does not support the Submitters' contention. Any revised submission should address this lack of sufficient information to document the Submitter's assertions.³⁸

Article 14(1)(d)

Article 14(1)(d) requires that a submission: "appears to be aimed at promoting enforcement rather than at harassing industry [...]."

The submission is in accordance with Article 14(1)(d) and Guideline 5.4 and appears to be aimed at promoting enforcement and not at harassing industry.

Article 14(1)(e)

Article 14(1)(e) requires that a submission: "indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any [...]."

The submission fails to meet the requirements of Article 14(1)(e) and is not in accordance with Guideline 5.5. The supplementary information provided to the Secretariat in the Submitter's letter of 21 September 2009 solely consists of press releases and clippings, which are not communications in writing to the relevant authorities for the purposes of Article 14(1)(e) and Guideline 5.5. A letter, e-mail, fax, or similar form of communication from the Submitters or others directly to the relevant authorities is meant here, and such must regard the matters which are the subject of the submission, and be dated prior to the submission's filing. Moreover, copies of any response of the Party must be included.³⁹

[&]quot;postponement of \$16 million in payments." Such an assertion must necessarily be accompanied by sufficient information to allow the Secretariat to closely examine it in any further steps of the process, and this information appears to be available despite possible resource constraints the Submitters may face.

^{37.} Submission, para. 27.

^{38.} Cfr. Guideline 1.1.

^{39.} Submissions wherein the Secretariat has previously discussed the requirement that the matter be communicated in writing to the relevant authorities of the Party

Article 14(1)(*f*)

Article 14(1)(f) requires that a submission: "is filed by a person or organization residing or established in the territory of a Party."

The submission indicates that it is filed by organizations and persons residing in and established in Montreal, Quebec, Canada, and thus meets the requirements of Article 14(1)(f).

IV. DETERMINATION

Submission SEM-09-004 (*Quebec Mining*) does not meet all the criteria for admissibility contained in Article 14(1), and in particular its chapeau, as well as Article 14(1)(c) and (e). In accordance with Guideline 6.2, the Submitters have thirty calendar days from the date of this Determination to provide a submission which conforms to the requirements of Article 14(1)(a) to (f), failing which the Secretariat will terminate the process with respect to this submission.

Secretariat of the Commission for Environmental Cooperation

Dane Ratliff Director, Submissions on Enforcement Matters Unit

Marcelle Marion Legal Officer, Submissions on Enforcement Matters Unit

c.c.: David McGovern, Environment Canada Michelle DePass, US EPA Enrique Lendo, Semarnat Evan Lloyd, CEC Submitters

concerned include: SEM-01-002 *AAA Packaging*, which states, "the only indication that the government of Canada is aware generally of issues related to matters raised in the submission is in a newspaper article [...] However, nothing in the submission indicates that the specific matter addressed in the submission [...] has been communicated in writing by the Submitters or others to the relevant Canadian authorities [...]". See also, A14/SEM/00-004/04/COM *BC Logging* [page 2] wherein potentially relevant correspondence with the relevant authorities was not included with the Submission and was subsequently requested by the Secretariat.

SEM-09-005

(Skeena River Fishery)

SUBMITTERS: NORTH COAST STEELHEAD ALLIANCE

PARTY: CANADA

DATE: 15 October 2009

SUMMARY: The Submitter asserts that Canada is failing to effectively enforce the federal *Fisheries Act*, the *Pacific Fishery Regulations*, and, in particular, ss. 22(1) and 22(2) of the *Fishery (General) Regulations* in connection with the alleged violation of fishing licenses and notices in the Skeena River, British Columbia, Canada.

SECRETARIAT DETERMINATION:

ART. 14(1)&(2)	Determination that criteria under Article 14(1)	
(18 May 2010)	have been met, and that the submission merits	
	requesting a response from the Party.	

Secretariat of the Commission for Environmental Cooperation

Determination in accordance with Article 14(1) and (2) of the North American Agreement on Environmental Cooperation

Submitter:	North Coast Steelhead Alliance
Represented by:	Richard Overstall and Christina Cook
Concerned Party:	Canada
Date received:	15 October 2009
Date of this determination:	18 May 2010
Submission no.:	SEM-09-005 (Skeena River Fishery)

I. INTRODUCTION

Articles 14 and 15 of the North American Agreement on Environ-1. mental Cooperation (the "NAAEC," or the "Agreement") provide for a process allowing any person, or non-governmental organization, to file a Submission asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") initially considers Submissions to determine whether they meet the criteria contained in NAAEC Article 14(1)¹ and the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (the "Guidelines"). When the Secretariat determines that a Submission meets the criteria set out in Article 14(1), it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the Submission merits a response from the NAAEC Party named in the Submission. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the

^{1.} The word "Article" throughout this Determination refers to an Article of the North American Agreement on Environmental Cooperation, unless otherwise stated.

matter warrants the development of a Factual Record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it proceeds no further with the Submission.²

2. On 15 October 2009, the North Coast Steelhead Alliance (the "Submitter") filed SEM-09-005 (*Skeena River Fishery*) (the "Submission") with the Secretariat, in accordance with NAAEC Article 14. The Submitter asserts that Canada is failing to effectively enforce its environmental law in relation to fishing licenses issued by the federal Department of Fisheries and Oceans ("DFO") to commercial fishers of salmon in the Skeena River, an inland marine fishery located on the north coast of British Columbia, Canada ("BC").

3. On analysis of SEM-09-005 (*Skeena River Fishery*), the Secretariat finds that the Submission meets all the admissibility requirements of Article 14(1), and, pursuant to the criteria set out in Article 14(2), the Secretariat finds that the Submission warrants requesting a response from the Government of Canada. The Secretariat presents its reasons for this Determination below.

II. SUMMARY OF THE SUBMISSION

4. The Submitter asserts that Canada is failing to effectively enforce its environmental law, as set out in the *Fisheries Act* (R.S.C. 1985, c. F-14), by "allowing marine commercial salmon fishers on the North Coast of British Columbia, Canada, to ignore license conditions aimed at protecting and conserving certain kinds of fish, mainly steelhead trout, that are caught as 'by-catch', that is, during fisheries aimed at catching other kinds of fish, mainly sockeye salmon."³ The Submitter notes the asserted failures primarily concern license conditions⁴ under the *Fishery (General) Regulations* (the "FGR"), i.e. those imposed by sections 22(1)(a), (h), (s) and 22(2) ("the laws at issue"). The Submitter also asserts that Canada failed to enforce the latter environmental laws "in violation of its obligations under Article 5(1)" of the NAAEC. In the following section, the Secretariat summarizes the details of the Submitter's assertions.

Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records can be found on the CEC website: http://www.cec.org/citizen/index.cfm?varlan=english>.

^{3.} Submission, p. 2.

^{4.} Submission, p. 7. In particular, the Submitter asserts that the gill-net and seine-net commercial fishing license conditions are being ignored.

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5. According to the Submitter, DFO is failing to effectively enforce the following commercial license conditions: s. 22(1)(a) FGR, the license condition that concerns the species of fish and quantities thereof that may be taken or transported, and which does not permit the taking of steelhead trout (non-salmon fish species) at all times, and certain salmon species (chum, coho, and chinook) at certain specified times; s. 22(1)(h) FGR, the license condition specifying the type, size, and quantity of fishing gear and equipment that may be used, and the manner in which it may be used; s. 22(1)(s) FGR, the license condition making mandatory the segregation of prohibited fish by species on board vessels; and s. 22(2) FGR, which allows the Minister to amend licenses for the purpose of conservation and protection of fish.

6. The Submitter also outlines DFO's power to issue "variation orders" which can "close specified areas to fishing for specified periods," but notes that these orders are not the subject of the submission, and that information on them is included only to provide context.⁵ The Submitter states that variation orders may be issued in order to close specified areas to fishing for specified periods.⁶ The Submitter also provides information on the legal context for its assertions, describing the function of the *Pacific Fishery Regulations*, 1993 (the "PFR") as to "give the Minister specific discretion to issue a commercial salmon fishing license on Canada's Pacific coast."⁷⁷

7. The Submitter states that there are five salmon species in the northeast Pacific Ocean: chinook, chum, coho, pink, and sockeye.⁸ The Submitter states that these species begin life in fresh water then migrate, after a rearing period, to the ocean. There the fish remain, before returning to spawn and die at the same freshwater site where they began; they do this once in their life-cycle. The Submitter states that ocean-going steelhead trout, in contrast, can repeatedly migrate from fresh water to the ocean and back again to spawn.⁹ The Submitter alleges that the license condition amendments specifying the prohibited salmon species fall under s. 22(2).¹⁰

^{5.} Submission, p. 6.

^{6.} Submission, pp. 6-8. Provisions for variation orders and notices are found in ss. 6 and 7 of the FGR, and ss. 53 and 54 of the *Pacific Fishery Regulations*, 1993. Provision for notices of amendments pursuant to FGR 22(2) is found in section 22(3) FGR.

^{7.} Submission, p. 5.

^{8.} Submission, p. 3.

^{9.} Submission, p. 3.

^{10.} Submission, p. 14.

8. The Submitter also notes that the Skeena River Fishery boasts the second-largest run of sockeye salmon in Canada.¹¹ The Submitter states that since the 1970s this fishery has been a mixed-stock marine fishery, with incidental capture of non-target and protected species known as "by-catch."¹² The Submitter opines that effective enforcement of fishing license conditions would protect and preserve steelhead through sorting of the fish by-catch, fish resuscitation in revival boxes aboard fishing vessels, and the immediate release of incidentally caught non-target fish (such as steelhead) back into the ocean. The Submitter notes that other fishing practices to ensure low amounts of fish by-catch could include adjusting the timing of the commercial fishing periods, specifying fishing locations, and methods such as adjusting net size, mesh size and type.¹³ The Submitter lists two types of fishing licenses that relate to their assertions: commercial gill-net licenses and seine-net licenses.¹⁴

9. According to the Submitter, the gill-net licenses at issue apply to the fishing of salmon species and to those species of fish permitted as by-catch. Such licenses specify that only sockeye, coho, pink, chum and chinook salmon may be taken, subject to closed periods.¹⁵ In addition, the Submitter asserts that the license specifies what fishing gear and equipment is permitted, and requires that each vessel be equipped with a fish-revival tank.¹⁶ The Submitter notes that a salmon seine-net fishing license requires in addition that fishers brail and sort their catch.¹⁷

10. The Submitter states that the Skeena River salmon fishery is governed by the *Fisheries Act*¹⁸ and two sets of regulations adopted under it: the FGR¹⁹ and the PFR.²⁰ The Submitter notes that "DFO has delegated responsibility for steelhead management in their freshwater environment to the BC government, although it remains accountable to Parliament for such management," and that DFO maintains "direct management responsibility for steelhead in the marine environment."²¹ The Submitter states that the *Fisheries Act* and the provisions in the regulations at issue have a dual purpose, namely, the proper management and control of sea coast and inland fisheries, and the conservation and

- 19. Fishery (General) Regulations, SOR/93-53.
- 20. Pacific Fishery Regulations, 1993, SOR/93-54.
- 21. Submission, p. 5.

^{11.} Submission, p. 3.

^{12.} Submission, p. 3.

^{13.} Submission, p. 4.

^{14.} Submission, p. 7.

^{15.} Submission, p. 7.

^{16.} Submission, p. 7.

^{17.} Submission, p. 7.

^{18.} Fisheries Act, R.S.C. 1985, c. F-14.

protection of fish.²² The Submitter thus considers the laws at issue "environmental laws" in accordance with NAAEC Article 45(2).²³

11. The Submitter notes that fishers are required to comply with license conditions or face summary conviction or indictment punishable under s. 78 of the Fisheries Act by fine, imprisonment, or both.²⁴ The Submitter also maintains that the "federal Department of Fisheries and Oceans is required to regulate salmon fishers so that by-catch mortality for steelhead is both minimized and kept below agreed levels," pursuant to a 1996 agreement (implemented in 1997 and in subsequent years) among the BC Ministry of Environment, the DFO, and stakeholder groups represented by the Skeena Watershed Committee.²⁵ The Submitter states that the Skeena River fishery is further guided by policy set out in annual Integrated Fisheries Management Plans ("IFMPs") and DFO's Conservation and Protection operations policy.²⁶ According to the Submitter, although there is no commercial steelhead fishery, a maximum steelhead exploitation rate of 24 percent has been incorporated into each IFMP since 1997.27

12. The Submitter cites the 2006 IFMP, and notes that the "objective for Skeena steelhead, as well as all North Coast steelhead, is to release to the water with the least possible harm all steelhead caught incidentally in fisheries targeting other species."²⁸ This objective, the Submitter notes, requires that fishers follow conditions set out in fishing licenses, such as using fishing techniques to reduce prohibited by-catch, and reviving and releasing steelhead which are incidentally caught.²⁹

13. The Submitter notes that in 2006, the sockeye return in the Skeena Fishery "exceeded all predictions with a run of approximately three million fish."³⁰ In that connection, according to the Submitter, there was, conversely, a "weak steelhead return."³¹ The Submission notes DFO decided at the time to allow commercial fishing to operate an extra eleven consecutive days, to take advantage of the abundant sockeye.³²

^{22.} Submission, pp. 13 & 14.

^{23.} Submission, p. 14.

^{24.} Submission, pp. 2 & 6.

^{25.} Submission, pp. 2 & 6.

^{26.} Submission, p. 9.

^{27.} Submission, p. 9.

^{28.} Submission, p. 9.

^{29.} Submission, p. 9.

^{30.} Submission, p. 4.

^{31.} Submission, p. 4.

^{32.} Submission, p. 4.

14. The Submitter asserts that during the summer of 2006, DFO failed to enforce license conditions and amendments issued to commercial fishers operating in the Pacific North Coast fishery and authorized by the Minister under s. 22(1) and (2) of the FGR. The license conditions at issue for the Submitter are:³³

- having operating revival tanks on board while fishing;
- sorting, reviving and releasing non-target species with the least possible harm;
- not taking steelhead prohibited at any time; [and]
- the taking and possession of chum, coho and chinook salmon only at certain specified times.

15. The Submitter asserts that during the summer of 2006 voluntary compliance for by-catch was minimal, the by-catch rules were systematically violated, and the license conditions mentioned above were ignored, all by commercial fishers. In that connection, the Submitter cites government correspondence indicating that licensed commercial fishers were simply throwing by-catch back as soon as it hit the boat, "dead or alive."³⁴ Thus, the Submitter asserts, "[DFO], in the face of the observed absence of voluntary compliance, did not enforce those license conditions or amendments."³⁵ The Submitter also states:

The low enforcement effort on the marine commercial fishery since 2006 does not reflect increased compliance by fishers. DFO continues to record in 2008 that it has a significant problem with gill-net vessels failing to have operational revival boxes operating during the gill-net fishery.³⁶

16. In a letter to the Minister of Fisheries and Oceans dated 25 January 2007, the Submitter notes that in 2007 "we are no closer to a satisfactory management plan that recognizes conservation requirements of Skeena salmon while providing a fair allocation of those same fish than we were in 1975."³⁷

^{33.} Submission, pp. 7, 9 and 14.

^{34.} Submission, p. 10.

^{35.} Submission, p. 10.

^{36.} Submission, p. 13. See Appendix M at p. 77.

^{37.} Submission, p. 13. See Appendix N, Letter to the Minister of DFO, dated 25 January 2007.

17. The Submitter further alleges that in 2006 enforcement was overwhelmingly targeted at recreational and aboriginal fishers, and states that "[t]he failure to revive and release prohibited species by the marine commercial fleet affects returns of vulnerable salmon and steelhead populations by an order of magnitude more than do violations by recreational [and] aboriginal fishers."³⁸

18. The Submitter asserts that in the summer of 2006, the Prince Rupert DFO Detachment patrolled the marine commercial salmon fleet for a mere 167.5 hours, just over half as much as in 2005, and this without any warnings having been issued nor any charges having been laid under the environmental laws at issue.³⁹ The Submitter also asserts that effective enforcement of the commercial gill-net licenses and seine-net licenses is necessary, to protect the health and biodiversity of the species these environmental laws are intended to protect,⁴⁰ and draws the conclusion that reduced fish stocks are a result of non-enforcement of license conditions. The Submitter further asserts that this non-enforcement harms "the entire ecosystem, including people, other species of fish and their habitat."⁴¹ Moreover, the Submitter alleges that "the low enforcement effort [by DFO] on the marine commercial fishery since 2006 does not reflect increased compliance."⁴²

19. The Submitter also asserts that the matter has been communicated to the Government of Canada, in both written and oral form, by "individuals representing various environmental and recreational interests."⁴³ The Submitter asserts that "no realistic alternative private remedies [are] available," to redress the alleged failures to effectively enforce the laws at issue, citing its limited financial capacity. The Submitter also

^{38.} Submission, p. 13.

^{39.} Submission, p. 12.

^{40.} In that connection, the Submitter asserts: "The failure to revive and release prohibited species by the marine commercial fleet affects returns of vulnerable steelhead populations by an order of magnitude more than do violations by recreational and aboriginal fishers. To choose to direct limited enforcement hours to recreational and aboriginal fishers does not represent a reasonable exercise of discretion in allocation of resources." Submission, pp. 9 and 13.

^{41.} Submission, p. 14.

^{42.} Submission, p. 13.

^{43.} Submission, p. 13. The Secretariat has found in previous Determinations that the Article 14(1)(e) communication with relevant authorities does not have to emanate directly from the Submitter, but such communication must concern the matter raised in the Submission, along with the other requirements of Article 14(1)(e). See, for example, SEM-01-002 AAA Packaging, at p. 4, "nothing in the Submission indicates that the specific matter addressed in the Submission [...] has been communicated in writing by the Submitters or others to the relevant Canadian authorities" (emphasis added).

states that, "[w]hile Canadian citizens do have the right to commence private prosecutions of offences under the *Fisheries Act* and its regulations where the government refuses to enforce the law, such proceedings are usually stayed by the Attorney General and, in any event, do not address the systemic problem of persistent non-enforcement by the Canadian government."⁴⁴

III. ANALYSIS

20. NAAEC Article 14 authorizes the Secretariat to "consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]"⁴⁵ The Secretariat finds that the submission meets the criteria set out in Article 14(1)(a) to (f). As the Secretariat has found in previous Article 14(1) Determinations,⁴⁶ Article 14(1) is not intended to be an insurmountable screening device. This means that the Secretariat will interpret every Submission in accordance with NAAEC and the Guidelines, yet without an unreasonably narrow interpretation and application of those Article 14(1) criteria. The Secretariat analyzed Submission SEM-09-001 from this perspective.

A. Opening Paragraph of Article 14(1)

21. The Secretariat will now treat each component of NAAEC Article 14(1) in turn. Article 45(1) defines "non-governmental organization."⁴⁷ The Submitter, the North Coast Steelhead Alliance, represents itself as a non-profit organization: "The Submitter is a non-profit entity dedicated to working with all levels of government, industry, and community and stakeholder groups to preserve and enhance Skeena wild steelhead."⁴⁸ The Submitter also represents itself as a non-governmental organization.⁴⁹ The Submitter thus appears to meet the definition of "non-gov-

^{44.} Submission, p. 15.

^{45.} NAAEC, Article 14(1).

See, for example, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998), and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

^{47.} NAAEC, Article 45(1): "any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government."

^{48.} Submission, p. 2.

^{49.} Submission, pp. 13 & 14. The Submission includes a description of their organization: "The Submitter is a non-governmental organization whose members include individuals and other organizations that have a shared interest in the conservation and protection of the Skeena salmonids, especially Skeena steelhead. The members of the Submitter make use of these fisheries [...]."

ernmental" set out in Article 45(1) of NAAEC: its organization is a non-profit and a non-governmental organization and it does not appear to be affiliated with, nor is it under the direction of, any government.⁵⁰

22. Having held that this requirement is met, the Secretariat now considers whether the assertions relate to an "ongoing" alleged failure to effectively enforce environmental law.⁵¹ The Secretariat notes that the asserted failures to effectively enforce are best documented with regard to commercial gill-net and seine-net licenses issued in 2006,⁵² but these assertions of failures to effectively enforce the laws at issue also appear to extend from at least 2005 to the time of the Submission.⁵³ The Submitter also provides 2000-2007 commercial harvest data and the Party's own compliance and enforcement ("C&E") summaries for the latter years, as well as C&E sections of DFO's 2007 and 2008 post-season reviews.⁵⁴

23. It appears from the latter information, and from other information provided in the Appendices to the Submission, that the Party increased enforcement efforts in 2007 and 2008 as compared to 2006: it raised patrol hours and issued warnings and laid charges for violations of

^{50.} Submission, p. 14.

^{51.} The Secretariat has often discussed the need for assertions regarding failures to effectively enforce to meet the temporal requirement of concerning an apparently "ongoing" situation at the time of Submission. These occasions include: SEM-97-03 *Quebec Hog Farms*, p. 8, "the Submission meets the temporal requirement in Article 14(1) because [...] the Submission asserts that many of the alleged violations are ongoing"; and SEM-99-02 *Migratory Birds*, p. 4, "the Submission focuses on asserted failures to enforce that are ongoing. It thereby meets the jurisdictional requirement in the first sentence of Article 14(1)." See also *Quebec Mining*, SEM-09-004 Determination, at note 31.

^{52.} Submission, p. 7. The Submitter refers to the licenses relevant to this submission: "The fishing licences relevant to this submission are commercial gill-net and seine-net licences for North Coast Pacific ocean salmon fisheries issued by the Minister in 2006 under the Act and section 19 of the PFR to each fisher for a specified licenced vessel."

^{53.} Submission, pp. 13 & 15 and Appendix M at p. 77. The Submitter refers to private prosecution proceedings, but states that these "do not address the systemic problem of persistent non-enforcement by the Canadian government," and the Submitter characterizes the problem as ongoing: "Private prosecutions [...] are not a viable option for effective enforcement where there are numerous ongoing violations of federal law." The Submitter includes an email exchange of August 8, 2006 about the alleged failure to effectively enforce the laws at issue: "[S]ince the fishing season [2006] was over for that year, lack of enforcement could be addressed the following year," at Submission, p. 12. Further in the Submission, the Submitter claims that "the low enforcement effort on the marine commercial fishery since 2006 does not reflect increased compliance by fishers." The Submitter further notes that "DFO continues to record in 2008 that it 'has a significant problem with gill-net vessels failing to have operational revival boxes operating during the salmon gill-net fishery": Submission, p. 13.

^{54.} See Submission, p. 2, Appendix E (Counterpoint Consulting Data for 2004-2007 Table 11) and Appendix J (DFO Compliance and Enforcement Summaries 2000-2007).

license conditions.55 C&E data for 2009 were not included in the Submission and does not appear to have been available at the time of the Submission. However, it is not entirely clear from the data provided how this evidence of increased enforcement efforts directly concerns the area in which the Submitter asserts that the laws at issue are not being effectively enforced.⁵⁶ It also appears that the assertions alleging violations of license conditions with regard to vessels having operating revival boxes on board, and non-target fish being released with the least harm, cover a period prior to 2006 as well, and such assertions also appear to concern an ongoing situation in 2008,57 despite the increased enforcement efforts.⁵⁸ Moreover, assertions of harmful effects of enforcement efforts which disproportionately target aboriginal and recreational fishers, rather than commercial fishers, concern an ongoing situation at the time of the Submission.⁵⁹ For these reasons, the Secretariat considers that the assertions in the Submission meet the temporal requirement in the opening paragraph of Article 14(1).

24. The opening paragraph of NAAEC Article 14(1) allows the Secretariat to consider a Submission from any non-governmental organization or person "asserting that a Party is failing to effectively enforce its environmental law."⁶⁰ The Secretariat now examines whether, first, the laws at issue in the Submission constitute "environmental law" and, secondly, whether the assertions allege a failure to "effectively enforce" such environmental law.

^{55.} See Submission, Appendices J-N, and in particular with regard to 2007 and 2008, Appendices L & M.

^{56.} The enforcement and compliance data provided concern a large area including, but extending beyond, the Skeena Fishery.

^{57.} See Submission, Appendix A at p. 83, which alleges that as of 2005 there were apparent compliance problems with revival boxes and release of by-catch in a manner that causes the fish the least harm.

^{58.} See Submission, Appendix M, where the "North Coast C&P Compliance and Enforcement Mid-season Summary April 1st to November 1st 2008" states at p. 68: "This season saw a focused effort by Prince Rupert C&P staff on assessing and reacting to early concerns in the Area 3-4 commercial gill-net fisheries where early non-compliance with revival box use was very high. As a result of this unacceptable practice, DFO engaged industry in a firm manner to assist in raising compliance of this important management tool."

^{59.} Submission, pp. 12-13, where the Submitter states: "Of this salmon fishery patrol time, only 10 percent (209 hours) was spent on the commercial fleet[*j*] the remaining 90 percent was spent on the recreational and aboriginal fisheries. The proportions of this effort have not significantly changed in subsequent years. [...] The failure to revive and release prohibited species by the marine commercial fleet affects returns of vulnerable salmon and steelhead populations by an order of magnitude more than do violations by recreational or aboriginal fishers."

^{60.} NAAEC, Article 14(1).

The environmental laws at issue

25. The Submitter alleges that the Party has failed to effectively enforce three subsections in section 22(1) as well as 22(2) FGR. The Secretariat examined assertions regarding license conditions found in s. 22(1) (a), (h) and (s) FGR and amendments to license conditions in section 22(2) FGR, to determine whether these are environmental laws in accordance with NAAEC Articles 14 and 45(2). The Submitter also asserts that "the Party is in violation of its obligations under Article 5(1) of the [NAAEC]."⁶¹ NAAEC Article 45(2)(a) states in relevant part that, for the purposes of Article 14(1) and Part Five,

"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: [...] (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.⁶²

26. Section 22(1) FGR provides for the authority of the Minister to set conditions on fishing licenses for the purpose of the conservation and protection of fish:

22. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition that is not inconsistent with these Regulations or any of the Regulations listed in subsection 3(4) and in particular, but not restricting the generality of the foregoing, may specify conditions respecting any of the following matters:

(a) the species of fish and quantities thereof that are permitted to be taken or transported;

[...]

(h) the type, size and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is permitted to be used;

[...]

(s) the segregation of fish by species on board the vessel[.]

^{61.} Submission, p. 2.

^{62.} NAAEC, Article 45(2)(a)(iii).

27. Section 22(2) FGR provides for the authority of the Minister to amend a license for the purposes of conservation and protection of fish:

The Minister may, for the purposes of the conservation and protection of fish, amend the conditions of a licence.

The Secretariat considers that, pursuant to Article 45(2), FGR sec-28. tions 22(1)(a), (h), and (s), and 22(2), cited in the Submission, are environmental laws the objects and purposes of which are the protection of the environment through the protection of species of fish, i.e., "wild [...] fauna," in the Party's territory.63 The laws at issue may in some enforcement circumstances englobe the purpose of managing the commercial harvest or exploitation, or of subsistence fishing, or of aboriginal harvesting of natural resources, but these do not appear to be the respective primary purposes of the laws at issue. Moreover, the assertions in the Submission relate directly to the effective enforcement of license conditions "aimed at protecting and conserving certain kinds of fish [...]"64 The Secretariat does not, however, consider further any assertions relating to alleged failures to effectively enforce the conditions of fishing licenses held by aboriginal fishers, as these appear to be covered by laws other than the laws at issue, and the Submitter has not adequately demonstrated how the laws that are at issue apply to those assertions.65

^{63.} The Secretariat recalls SEM-97-001, *BC Hydro*, concerning the federal-state nature of fisheries management in the Province of British Columbia, and notes that the effective enforcement of the laws that are the subject of the Submission appears to be a matter for the federal government, as was the case in *BC Hydro*, albeit this Submission involves a different part of the *Fisheries Act*:

[&]quot;Canada highlights the importance of a cooperative relationship between provincial and federal authorities in protecting fish habitat and promoting compliance with relevant legal requirements, stating: 'In B.C., anadromous and marine species and their habitats are managed by Canada, while B.C. exercises responsibility for managing freshwater species. B.C. also undertakes certain activities with respect to management of freshwater habitats, although Canada retains responsibility for administering the habitat protection provisions of the *Fisheries Act*. The result is a complex administrative environment where cooperation, common goals, and good faith are essential.' (Canada's July 1997 Response, p. 7). Canada indicates that while there is a partnership between the Province and the federal government, Canada remains ultimately responsible for administering the habitat protection provisions of the *Fisheries Act*." (BC Hydro Factual Record, p. 34, 2000).

Further, DFO states on its website that: "The management and protection of fish stocks in the Skeena River system is shared by Fisheries and Oceans Canada (DFO) and the Province of British Columbia (B.C.) DFO is responsible for the conservation of salmon populations in the river, and for managing the fisheries that target these stocks. B.C. is responsible for the conservation of the river's steelhead populations, and for managing the recreational fisheries that target them." See http://www.dfo-mpo.gc.ca/media/back-fiche/2008/pr08-eng.htm (last visited 3/05/2010).

^{64.} Submission, p. 2.

^{65.} The Pacific Region IFMP for Salmon in 2006-2007, Submission Appendix A, p. 59, states that: "First Nations access to salmon for FSC purposes is managed through

29. The Secretariat also does not consider further the Submitter's assertion that the Party is "in violation of its obligations under Article 5(1) of the [NAAEC]" because, as the Secretariat has noted in previous determinations, the NAAEC is not considered an "environmental law" in accordance with Article 45(2) and for the purposes of Articles 14 and 15—save to the extent that a Party has incorporated NAAEC or provisions thereof into its domestic legal regime.⁶⁶ The latter is not the case in Canada.

Assertions on the failure to effectively enforce

30. The Secretariat now analyzes whether the assertions in Submission SEM-09-005 concern alleged failures of the "effective enforcement" of environmental laws, in accordance with the opening paragraph of NAAEC Article 14(1). The Secretariat has consistently interpreted Article 14(1) to exclude any assertions alleging a deficiency in the law itself. The Secretariat considers that the Submission as a whole does assert failures of effective enforcement of the Party's environmental laws, rather than deficiencies in the laws themselves.

31. The Secretariat will now treat each requirement of NAAEC Article 14(1)(a) to (f) in turn.

communal licences. These licences set out the specifics and target harvest levels by First Nations groups."

^{66.} See SEM 98-001-03, *Guadalajara*, Article 14(1) Determination (2003), which states in relevant part:

[&]quot;The Submitters also cite Articles 5(1)(j)(l), 6 and 7 of the NAAEC, related respectively to government action for the enforcement of environmental laws and regulations, private access to remedies, and procedural guarantees. The Secretariat's view is that, as a general matter, to the extent that these Articles create obligations on the part of the Parties (Canada, Mexico and the United States) the remedy provided under the Agreement for a Party's purported failure to fulfill its obligations lies with the other Parties. Article 14 of the NAAEC provides the exclusive process for non-governmental organizations and individuals relating to allegations that a Party is not effectively enforcing its environmental laws. Only if an individual or non-governmental organization could seek enforcement of Articles 5(1)(j)(l), 6 and 7 of the NAAEC under the domestic legal regime of a Party would these provisions be potentially susceptible to a submission under Article 14 of the Agreement. Because the Submitters do not indicate that they have sought enforcement of Articles 5(1)(j)(l), 6 and 7 of the NAAEC under the domestic legal regime of the Party or communicated that matter to the Party, we cannot conclude that the allegations that those provisions are not being enforced effectively satisfy the criteria under Article 14(1) of the Agreement. In short, the Secretariat considers that the allegations that Articles 5(1)(j)(l), 6 and 7 of the NAAEC have not been enforced effectively do not satisfy the criteria under Article 14(1) of the Agreement."

(a) the Submission must be: "in writing in a language designated by that Party in a notification to the Secretariat [...]"

32. The Secretariat finds the Submission meets the criterion of NAAEC Article 14(1)(a) as the Submission is in English, an official language designated by the Parties for the filing of a Submission.⁶⁷

(b) the Submission "clearly identifies the person or organization making the Submission [...]"

33. The Submission provided the name and mailing address of the Submitter and the person filing it. The statement of the name and address of the person or organization filing the Submission is sufficient for the Secretariat clearly to identify the Submitter, the North Coast Steelhead Alliance. The Secretariat considers that the Submitter and the organization are clearly identified and thus the Submission meets the criterion of Article 14(1)(b).⁶⁸

(c) the Submission "provides sufficient information to allow the Secretariat to review the Submission, including any documentary evidence on which the Submission may be based [...]"

34. The Submitter provides several reports, documents and communications with DFO, some of which were obtained through the Party's information-access legislation.⁶⁹ The Submission's supporting documentation is from varied sources, such as DFO notices,⁷⁰ fishing licenses,⁷¹ and consultants' reports,⁷² all related to the assertions in the

^{67.} NAAEC Article 19 provides that the official languages of the CEC are Spanish, French, and English. Likewise, section 3.2 of the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of NAAEC (the "Guidelines") provides: "Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for Submissions."

In this regard, see SEM-07-005 (*Drilling Waste in Cunduacán*), Determination under Article 14(3) (8 April 2009), § 25(a).

Submission, Appendix C. The Access to Information documents include 38 emails by Fisheries and Oceans officials on Skeena River Fishery to various provincial officials and DFO authorities, from 25 August 2006 to 7 September 2006.

^{70.} Submission, Appendices G and H. Fishery Notice for a Variation was dated 19 August 2006, for Area C; Gillnet and Fishery Notice was dated 29 August 2006, for Management Areas 4 and 5.

^{71.} Submission, Appendix F: sample Salmon Gillnet License for period 2 June 2006 to 31 March 2007.

^{72.} Submission, Appendices D and E: Report of C.J. Walters, J.A. Lichatowich, R.M. Peterman and J.D. Reynalds, *Report of the Skeena Independent Science Review Panel*, submitted to the Department of Fisheries and Oceans and the British Columbia Ministry of the Environment, 15 May 2008, 140 pages; and Counterpoint Consulting, *Economic Dimensions of Skeena Watershed Salmonid Fisheries*, October 2006, 111 pages.

Submission.⁷³ In particular, the reports and documents in the Appendices relate to the Skeena River Fishery and the North Pacific Coast Fishery Region, and cover the relevant time-periods set out in the assertions.⁷⁴ The Secretariat, in light of the foregoing, finds that the Submission provides sufficient information to allow the Secretariat to review it, and therefore meets the requirement of Article 14(1)(c).

(*d*) *the Submission: "appears to be aimed at promoting enforcement rather than at harassing industry* [...]"

The Secretariat, on the basis of the information currently before 35. it, considers that the Submission satisfies the requirements of Article 14(1)(d), as the Submission appears to be aimed at promoting enforcement of the laws at issue rather than at harassing industry.⁷⁵ In making this determination, the Secretariat notes that the Submission is in part concerned with what the Submitter alleges is a disproportionate enforcement effort targeting recreational fishers. However, the Submitter also analyzes comparative data on enforcement efforts by DFO officials concerning commercial, recreational and aboriginal fishing licenses alike for 2006, 2007 and 2008.76 The Submitter asserts that these data show DFO's enforcement priorities negatively impact returns of "vulnerable salmon and steelhead populations." It is not evident from the information before the Secretariat that the Submitter is in a competitive relationship with commercial licensees mentioned in the Submission, or that the Submitter is a competitor who could stand to benefit economically from the Submission.

36. The Secretariat also considers that the submission appears to be focussed on the alleged acts and omissions of the Party in accordance with Guideline 5.1, rather than on compliance by a particular company or business operating in the Skeena River Fishery. For the foregoing reasons, the Secretariat finds the Submission meets the requirement of NAAEC Article 14(1)(d).

^{73.} The Submission contains several website sources in Appendix A, Department of Fisheries and Oceans, *Pacific Region, Integrated Fisheries Management Plan, IFMP, Salmon Northern B.C. 1 June 2006 to 31 May 2007*, 86 pages. Pages 3-8 note several websites.

^{74.} Submission, Appendix A, IFMP 1 June 2006 to 31 May 2007.

^{75.} The Secretariat was guided by Section 5.4 of the Guidelines, which provides that to determine whether the Submission is aimed at promoting effective enforcement and not at harassing industry, the Secretariat will consider whether: "(a) the Submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the Submission," and "(b) the Submission appears frivolous."

^{76.} Submission, p. 12.

(e) the Submission: "indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response [...]"

37. The Submitter states that issues raised in the Submission have been communicated to the Party, in writing and orally, by individuals representing various environmental and recreational interests.⁷⁷ The Submitter provides information indicating that their concerns about the enforcement of license conditions have been communicated in writing in 2006, 2007 and 2008 to the relevant Fisheries and Oceans Ministry and its authorities responsible for enforcing the laws at issue.⁷⁸ The Submitter included copies of emails that were sent in 2008 to DFO Prince Rupert Detachment for enforcement,⁷⁹ and the Submitter's letters to the relevant authority.⁸⁰ The Submitter included Appendices with additional communications between B.C. government officials and the relevant authority concerning enforcement issues on the Skeena Fishery.⁸¹ For all these reasons, the Secretariat considers that the Submission satisfies the requirements of NAAEC Article 14(1)(e).

(f) the Submission: "[...] is filed by a person or organization residing or established in the territory of a Party."

38. Finally, the Secretariat considers whether the Submission was filed by a person or organization residing in or established in the territory of a Party. The Submitter reports its address as being in Hazelton, British Columbia, Canada. The Secretariat accordingly finds that the Submission meets the requirement of Article 14(1)(f).

B. Article 14(2) Factors

39. The Secretariat reviews a Submission under Article 14(2) when it finds that the Submission meets the criteria in NAAEC Article 14(1).

^{77.} Submission, p. 13. See Appendix N, Letter to the Minister of DFO dated 25 January 2007.

^{78.} Some communications were media reports, describing protests led by the Mayor of Prince Rupert in 2006.

^{79.} Submission, Exhibit K: Copies of 3 emails from the Chairperson of North Coast Steelhead Alliance on Compliance and Enforcement Summaries to C & P Detachment Supervisor, dated 16 January 2008, 11 February 2008 and 22 & 23 July 2008.

^{80.} Submission, p. 13. See Appendix N, Letters to the Minister of Fisheries and Oceans Canada, including one of 25 January 2007. Other letters in Appendix N were to US Scientific Certification Systems (5 February 2007) and to the Minister of the Environment, Government of British Columbia (4 February 2007). These last two letters were copied to the Minister of Fisheries and Oceans, which is the relevant authority.

Submission, Appendix B: Emails from DFO officials to the B.C. Ministry of the Environment, pp. 23-26.

Having determined in the preceding section that the Submission indeed meets the requirements of NAAEC Article 14(1), the Secretariat will now review the Submission under NAAEC Article 14(2), in order to determine whether the Secretariat should request a response to the Submission from the Party.

40. NAAEC Article 14(2) provides that:

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the Submission alleges harm to the person or organization making the Submission;
- (b) the Submission, alone or in combination with other Submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the Submission is drawn exclusively from mass media reports.⁸²
- *(a) "the Submission alleges harm to the person or organization making the Submission"*

41. First, the Secretariat examines whether the Submission alleges harm to the person or organization making the Submission under Article 14(2)(a). Following Guideline 7.4(a) and (b), the Secretariat further considers whether the alleged harm, according to the Submitter, is due to the asserted failure to effectively enforce the law, and whether the alleged harm relates to the protection of the environment.⁸³ The Submitter states that it is "a non-governmental environmental organization whose members include individuals and other organizations that have a shared interest in the conservation and protection of Skeena salmonids, especially Skeena steelhead."⁸⁴ The Submitter claims that its members make use of these fisheries, and it alleges that any "reduced viability of fish stocks harms (Article 14.2(a)) the entire ecosystem, including people, other species of fish and their habitat."⁸⁵ The Submitter also asserts that Canada is failing to effectively enforce the *Fisheries Act* "by allowing marine commercial salmon fishers on the

^{82.} NAAEC, Article 14(2).

^{83.} NAAEC, Article 14(2)(a), and NAAEC Guideline, 7.4(a) and (b).

^{84.} Submission, p. 14.

^{85.} Submission, p. 14.

North Coast of British Columbia, Canada, to ignore licence conditions aimed at protecting and conserving certain kinds of fish, mainly steelhead trout, that are caught as 'by-catch.'"⁸⁶ The Secretariat concludes that the Submission alleges harm to the organization making the Submission in accordance with Article 14(2)(a), and that this allegation relates to the protection of the environment.

(b) "the Submission, alone or in combination with other Submissions, raises matters whose further study in this process would advance the goals of this Agreement"

42. The Secretariat considered Article 14(2)(b) and whether the Submission raises matters whose further study in this process would advance the goals of the Agreement. In this connection, the Submission includes detailed information on fish preservation and conservation best practises, as well as information on fisheries law-enforcement practises. Further study of the matters raised in the Submission could thus advance NAAEC objectives found in Article 1(a), (f), (g), and (h).⁸⁷

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

43. In accordance with Article 14(2)(c), the Secretariat has examined whether private remedies available under the Party's law have been pursued. The Secretariat was also guided in this connection by Guide-line 7.5(b).⁸⁸ The Submitter claims that "there are no realistic alternative private remedies available (Article 14(2)(c))."⁸⁹ According to the Submission, "[t]he Submitter either does not have status for civil remedies or would find them impractical to pursue."⁹⁰ Moreover, the Submitter states, "[w]hile Canadian citizens do have the right to commence private

^{86.} Submission, p. 2.

^{87.} NAAEC Article 1 objectives (a), (f), (g), and (h) are for the Agreement to:
"(a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations; [...]
(f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
(g) enhance compliance with, and enforcement of, environmental laws and regulations;
(h) promote transparency and public participation in the development of environment

<sup>mental laws, regulations and policies[.]"
88. Guideline 7.5 requires that "[i]n considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether:
[...] (b) reasonable actions have been taken to pursue such remedies prior to making a Submission, bearing in mind that the barriers to the pursuit of such remedies may exist in some cases."</sup>

^{89.} Submission, p. 15.

^{90.} Submission, p. 15.

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prosecutions of offences under the *Fisheries Act* and its regulations where the government refuses to enforce the law, such proceedings are usually stayed by the Attorney General and [...] do not address the systemic problem of persistent non-enforcement by the Canadian government."⁹¹ The Submitter alleges that "[p]rivate prosecutions are [...] not a viable option for effective enforcement where there are numerous ongoing violations of federal law."⁹²

In light of the foregoing, the Secretariat finds that the Submitter 44. apparently does have access to private remedies under the Party's law, although the Submitter may not, by its own admission, be in a financial position to pursue them. The Secretariat notes that Article 14(2)(c) does not define what the term "private remedies" means, although it assumes that the words are to be interpreted in the context of the domestic court system of the Party concerned. In this case, the Submitter obtained independent legal advice.93 The Secretariat considers that obtaining legal advice regarding the pursuit of private remedies may be considered an "action" in accordance with Guideline 5.6. The Secretariat also notes that the words "including private remedies" in Guideline 5.6 appear subsequent to the word "action." In that connection, the Submitter has stated that it did not consider, after obtaining legal advice, that private remedies would be practical to pursue. Guideline 7.5(b) can be read as contemplating this situation. It does appear that the Submitter has not pursued private remedies in the sense of going to the courts with its assertions. But the Submitter has engaged in other "actions," including participating in discussions on the government's integrated fisherymanagement plans,94 undertaking efforts to obtain government information through access-to-information legislation, and communicating about the matters at issue with the Party.95 Further, the Submitter attaches a witness-complaint report made by a private citizen to the DFO Area Chief Regional Resource Management office in Prince Rupert, providing an eye-witness account and the Area Chief's email response.⁹⁶ In accordance with Guideline 7.5(a) the Secretariat considers that it does not appear there would be duplication or interference if a Factual Record were prepared, and in accordance with Guideline 7.5(b), the Submitter appears to have taken reasonable actions to pursue private remedies,

^{91.} Submission, p. 15.

^{92.} Submission, p. 15.

^{93.} Submission, p. 15, paragraph 2.

^{94.} Submission, p. 2. The Skeena Watershed Committee and the 2006 Integrated Fisheries Management Plan are referred to in footnotes 2 and 4 by the Submitter.

^{95.} Submission, p. 2.

^{96.} Submission, pp. 10-11. Citizen complaint and report to DFO at Appendix I. Email from DFO dated 8 August 2006 at Appendix C at p. 19.

and as noted above it alleges that it faces barriers to the pursuit of such remedies. In light of the foregoing, the Secretariat finds that the Submission meets the requirements of Article 14(2)(c).

(d) "the Submission is drawn exclusively from mass media reports"

45. With respect to Article 14(2)(d) and guided by Guideline 7.6,⁹⁷ the Secretariat examines whether the the Submission is based exclusively on mass media reports. In reviewing the Submission along with its Appendices, the Submitter notes that the Submission is based primarily on information obtained from the federal and provincial governments, industry, and research resources⁹⁸, as well as the Submitter's direct involvement with the Skeena River Fishery and the North Coast Fishery of British Columbia.

46. The Secretariat considers that the Submission is not based solely on mass media reports. Guided by Guideline 7.6, other sources of information (predominantly government documents) were reasonably available, and the Submitter does rely on these in making its assertions.

IV. DETERMINATION

47. For the above reasons, the Secretariat, guided by the Guidelines, determines that Submission SEM-09-005 (*Skeena River Fishery*) meets the requirements of Article 14(1) of the Agreement. The Secretariat, having also considered the criteria in Article 14(2) and its corresponding Guidelines, further determines that the Submission warrants requesting a response from the Government of Canada.

48. In any response, the Party may wish to include information regarding the Submitter's assertions that Canada is failing to effectively enforce FGR sections 22(1)(a), (h), and (s), and 22(2). In so doing, the Government of Canada may, as far as practicable, wish to include information on its efforts to effectively enforce the environmental laws at issue from the year 2000 to date.⁹⁹ In particular, the Party may in any

^{97.} NAAEC Guideline 7.6 reads:

[&]quot;In considering whether a response from the Party concerned should be requested when the submission is drawn exclusively from mass media reports, the Secretariat will determine if other sources of information relevant to the assertion in the submission were reasonably available to the Submitter."

^{98.} Submission, p. 15.

^{99.} The year 2000 was chosen as a possible reference year because apparently it was when selective fishing using the current ceiling cap of 24% began. Using this date as a reference year could shed light on the matters raised in the Submission. See Submission, Appendix B, p. 29.

response wish to provide information on two points. These are: (1) enforcement efforts relating to the area concerned in the Submission, and the effectiveness of such efforts in conserving and protecting fish in accordance with the laws at issue; and (2) information concerning allocation of enforcement resources, and the Submitter's assertions of disproportionate targeting of non-commercial fishers, allegedly causing negative impacts on the conservation and protection of fish.¹⁰⁰

49. The Secretariat requests a response from the Government of Canada to the Submission in accordance with Article 14(3) of the Agreement, and notes that any response should normally be received within 30 days of this Determination. A copy of the Submission and its Appendices has been forwarded to the Party under separate cover.

50. Recognizing that a response from the Government of Canada may contain confidential information and that the Secretariat will make public its reasons for deciding whether to recommend a Factual Record, the Secretariat recalls that paragraph 17.3 of the NAAEC Guidelines encourages the Party to provide its own summary, for public disclosure, of confidential information.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

- *per:* Marcelle Marion Legal Officer, Submissions on Enforcement Matters Unit
- *per:* Dane Ratliff Director, Submissions on Enforcement Matters Unit
- c.c.: Mr. David McGovern, Canada Alternate Representative, Environment Canada
 Ms. Michelle DePass, US Alternate Representative, EPA
 Mr. Enrique Lendo, Mexico Alternate Representative, Semarnat
 Mr. Evan Lloyd, Executive Director, CEC
 Submitters

^{100.} The Secretariat notes in that connection that any response may also wish to include information on "reasonable exercises of discretion" and "*bona fide* decisions to allocate resources to enforcement" in accordance with NAAEC Article 45(1).

SEM-10-001

(Sumidero Canyon)

- SUBMITTERS: COMITÉ PRO-MEJORAS DE LA RIBERA CAHUARÉ
- PARTY: MEXICO
- DATE: 25 February 2010
- SUMMARY: The Submitter asserts that since 1963 a limestone open-pit mine has been operating adjacent to the National Park of Sumidero Canyon (the "Canyon"). The Submitter further assert that in recent years the east face of the Canyon has been "severely damaged with cracks," allegedly due to the quarry operations. The Submitter moreover asserts that several environmental and health impacts can be associated with the open-pit mining operations, including noise and air emissions beyond maximum permissible levels, harm to flora and fauna, and damage to the respiratory health of the nearby community of Ribera de Cahuaré.

SECRETARIAT DETERMINATION:

ART. 14(1)	Determination that criteria under Article 14(1)	
(14 June 2010)	have not been met.	

Secretariado de la Comisión para la Cooperación Ambiental

Determinación del Secretariado en conformidad con el artículo 14(1) del Acuerdo de Cooperación Ambiental de América del Norte

Peticionario:	Comité Pro-Mejoras de la Ribera Cahuaré
Representados por:	Fernando Velázquez Pérez Raúl Guerrero Borraz Ma. Alejandra Aldama Pérez Sandra López Martínez
Parte:	Estados Unidos Mexicanos
Fecha de recepción:	25 de febrero de 2010
Fecha de la determinación:	14 de junio de 2010
Núm. de petición:	SEM-10-001 (Cañón del Sumidero)

INTRODUCCIÓN

1. Los artículos 14 y 15 del Acuerdo de Cooperación Ambiental de América del Norte ("ACAAN" o el "Acuerdo") establecen un proceso que permite a cualquier persona u organismo sin vinculación gubernamental presentar una petición en la que asevere que una Parte del ACAAN está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental. El Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado" de la "CCA") examina inicialmente las peticiones con base en los requisitos establecidos en el artículo 14(1) del ACAAN y las *Directrices para la presentación de peticiones relativas a la aplicación efectiva de la legislación ambiental conforme a los artículos 14 y 15 del ACAAN* (las "Directrices"). Cuando el Secretariado considera que una petición cumple con tales requisitos, entonces determina, conforme a lo señalado en el artículo 14(2), si la petición amerita una respuesta de la Parte en cuestión. A la luz de cualquier respuesta de la Parte —si la hubiere— y en conformidad con el ACAAN y las Directrices, el Secretariado determina si el asunto amerita la elaboración de un expediente de hechos y, de ser así, lo notifica al Consejo, exponiendo sus razones en apego al artículo 15(1); en caso contrario —o bien, ante la existencia de ciertas circunstancias— no prosigue con el trámite de la petición.¹

2. El 25 de febrero de 2010, el Comité Pro-Mejoras de la Ribera Cahuaré (el "Peticionario") presentó ante el Secretariado de la Comisión para la Cooperación Ambiental (el "Secretariado") una petición en conformidad con el artículo 14 del *Acuerdo de Cooperación Ambiental de América del Norte* (ACAAN o el "Acuerdo"). El Peticionario asevera que México está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental respecto de una mina a cielo abierto para la explotación de piedra caliza, ubicada adyacente al Parque Nacional Cañón del Sumidero en el estado de Chiapas, México. El Peticionario afirma que las operaciones de dicha cantera están ocasionando cuarteaduras en la cara oriente de la pared del cañón y está dañando la flora y fauna de dicho Parque Nacional, así como la salud de la población de la comunidad vecina.

3. Tras haber analizado la petición SEM-10-001 (*Cañón del Sumidero*), el Secretariado ha determinado que ésta no cumple con todos los requisitos de admisibilidad del artículo 14(1) del Acuerdo y notifica al Peticionario que cuenta con 30 días para presentar una versión revisada de la petición. Asimismo, le notifica al Peticionario que de no recibirse, el Secretariado no continuará con el trámite de SEM-10-001. En conformidad con el inciso 6.1 de las Directrices, el Secretariado expone las razones de su determinación.

II. RESUMEN DE LA PETICIÓN

4. El Peticionario asevera que México está omitiendo la aplicación efectiva de la legislación ambiental respecto de la supuesta operación irregular de una mina a cielo abierto que supuestamente está ocasionando daños al área natural protegida Parque Nacional Cañón del Sumidero (el "Parque" o el "Cañón del Sumidero").² El Peticionario asevera que México está omitiendo la aplicación efectiva del Reglamento de la LGEEPA en materia de Evaluación de Impacto Ambiental (REIA).³ La

^{1.} Para conocer más detalles relativos a las diversas fases del proceso, así como las determinaciones y expedientes de hechos del Secretariado, se puede consultar el sitio de la CCA en: ">http://www.cec.org/citizen/?varlan=es>.

^{2.} Petición, pp. 1, 2, 3, 5 y 6.

^{3.} *Ibid.*, pp. 4 y 5.

petición refiere a disposiciones tales como la Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA) "en materia de emisión de partículas contaminantes a la atmósfera como polvo, humos y vapores"⁴ (*sic*) y a la LGEEPA "en materia de Audición Ambiental"⁵ (*sic*), así como al decreto publicado en el *Diario Oficial de la Federación* (DOF) el 8 de diciembre de 1980 que creó la área natural protegida del Parque Nacional Cañón del Sumidero.⁶

5. El Peticionario apunta que desde 1963 la empresa denominada Cales y Morteros del Grijalva S.A. de C.V. (la "empresa") ha estado operando una mina a cielo abierto (la "mina" o la "cantera") adyacente al Cañón del Sumidero. El Peticionario afirma que la empresa se dedica a la extracción de piedra caliza y material pétreo proveniente de la cantera, el cual se procesa para obtener calhidra, caliche, grava, gravilla, granzón y otros materiales destinados a la construcción.⁷

6. Asevera que en años recientes la cara oriente de la pared del cañón, así como las casas de los habitantes del municipio vecino de Chiapa de Corzo, han estado dañadas con cuarteaduras debido —supuestamente— a las vibraciones causadas por la utilización de dinamita como detonador para la extracción del material.⁸

7. El Peticionario señala además que la operación de la mina a cielo abierto, está ocasionando efectos negativos a la flora y fauna del Parque,⁹ así como a "la salud de la población y sus viviendas".¹⁰ Asevera que la cantera emite ruido que rebasa los límites permitidos por la normatividad,¹¹ así como partículas contaminantes a la atmósfera generados durante la operación de la maquinaria de la cantera.¹² Señala que la maquinaria genera emisiones fugitivas; que las operaciones de la empresa que opera la cantera son inadecuadas pues se están descargando aguas residuales sin previo tratamiento al río Grijalva,¹³ y que presentó una denuncia por la supuesta tala de árboles como consecuencia de la extracción de material de la cantera.¹⁴ El Peticionario afirma que

^{4.} Ibid., p. 2.

^{5.} *Ibid.*, p. 4.

^{6.} *Ibid.*, p. 5.

^{7.} *Ibid.*, p. 1.

^{8.} Ibid., pp. 1 y 4.

^{9.} *Ibid.*, p. 5.

^{10.} *Ibid.*

^{11.} *Ibid.*, p. 2.

^{12.} *Ibid.*

^{13.} *Ibid.*, p. 5.

^{14.} *Ibid*.

la vegetación en esta región presenta un blanqueamiento permanente en sus tallos y hojas, pereciendo éstas generalmente antes de completar su ciclo natural de vida¹⁵ y que la población de Chiapa de Corzo padece constantemente irritación de ojos y piel, además de afectaciones en las vías respiratorias.¹⁶ El Peticionario asevera que hay habitantes que presentan síntomas asociados a enfermedades tales como rinitis, asma, tuberculosis, neumonía y la supuesta incidencia de cáncer en la comunidad a causa de las operaciones de la mina.¹⁷ El Peticionario asevera que tres de cada diez niños en edad escolar se han visto afectados por rinitis alérgica y espasmo bronquial.¹⁸

8. El Peticionario asevera que ha presentado denuncias por la supuesta existencia de irregularidades en los procedimientos para emitir la autorización de cambio de uso de suelo y para otorgar o extender la licencia de funcionamiento de la mina.¹⁹ El Peticionario señala que la mina no cuenta con un estudio de impacto y riesgo ambiental.²⁰

9. El Peticionario asevera además que la empresa que opera la mina ha sido sancionada y aún así, continúa emitiendo ruidos y emisiones a la atmósfera; contaminando las aguas del río Grijalva con desechos domésticos e industriales; e invadiendo el perímetro del Parque Nacional Cañón del Sumidero.²¹

III. ANÁLISIS

10. El artículo 14 del ACAAN autoriza al Secretariado a considerar peticiones de cualquier persona u organismo sin vinculación gubernamental en las que se asevere que una Parte del ACAAN está omitiendo la aplicación efectiva de su legislación ambiental. Tal y como el Secretariado lo ha expresado en anteriores determinaciones elaboradas con base en el artículo 14(1) del ACAAN, éste no se erige como un instrumento de examen procesal que imponga una gran carga a los peticionarios. Ello quiere decir que el Secretariado interpreta cada petición en conformidad con el Acuerdo y las Directrices, sin caer en una interpretación y aplicación de los requisitos del artículo 14(1) irrazonablemente estrecha. El Secretariado revisó la petición en cuestión con tal perspectiva en mente.

21. *Ibid.*, pp. 2, 3, 4 y 5.

^{15.} Ibid., p. 4.

^{16.} Ibid.

^{17.} Ibid.

^{18.} Ibid.

^{19.} Ibid., p. 6.

^{20.} *Ibid.*

A. Párrafo inicial del artículo 14(1)

11. La oración inicial del artículo 14(1) permite al Secretariado considerar peticiones "de cualquier persona u organización sin vinculación gubernamental que asevere que una Parte está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental." El Peticionario se ostenta como una organización sin vinculación gubernamental y no hay información en la petición que haga concluir que se trata de una organización sea parte del gobierno o que esté bajo su dirección.²² Cumplido este requisito, el Secretariado estima que las omisiones a las que el Peticionario se refiere siguen ocurriendo, lo cual cumple con el requisito temporal de una situación actual del artículo 14(1). Finalmente, el Secretariado analiza si las disposiciones legales que se citan en la petición encajan dentro del concepto de legislación ambiental del artículo 45(2) del ACAAN²³ y evalúa si las aseveraciones de SEM-10-001 pueden considerarse por el Secretariado.

1. Legislación ambiental en cuestión

12. El Secretariado examinó la legislación citada y/o referida en la petición y encontró que el Peticionario no hace cita de disposiciones que puedan revisarse conforme al procedimiento establecido en el artículo 14 del ACAAN o bien cita leyes que no se identifican en la legislación mexicana.

^{22.} *Cfr.* ACAAN, artículo 45(1). Véase en este sentido SEM-99-001 (*Methanex*), Determinación conforme al artículo 14(1) (30 de marzo de 2000).

^{23.} El artículo 45(2) del ACAAN define el término "legislación ambiental" como: "Para los efectos del artículo 14(1) y la Quinta Parte: (a) 'legislación ambiental' significa cualquier ley o reglamento de una Parte, o sus disposiciones, cuyo propósito principal sea la protección del medio ambiente, o la prevención de un peligro contra la vida o la salud humana, a través de: (i) la prevención, el abatimiento o el control de una fuga, descarga, o emisión de contaminantes ambientales, (ii) el control de químicos, sustancias, materiales o desechos peligrosos o tóxicos, y la diseminación de información relacionada con ello; o (iii) la protección de la flora y fauna silvestres, incluso especies en peligro de extinción, su hábitat, y las áreas naturales protegidas en territorio de la Parte, pero no incluye cualquier ley o reglamento, ni sus disposiciones, directamente relacionados con la seguridad e higiene del trabajador.

⁽b) Para mayor certidumbre, el término 'legislación ambiental' no incluye ninguna ley ni reglamento, ni sus disposiciones, cuyo propósito principal sea la administración de la recolección, extracción o explotación de recursos naturales con fines comerciales, ni la recolección o extracción de recursos naturales con propósitos de subsistencia o por poblaciones indígenas.

⁽c) El propósito principal de una disposición legislativa o reglamentaria en particular, para efectos de los incisos (a) y (b) se determinará por su propósito principal y no por el de la ley o del reglamento del que forma parte."

i. Disposiciones emanadas de la Ley General del Equilibrio Ecológico y la Protección al Ambiente

13. La petición SEM-10-001 hace referencia a la LGEEPA "en materia de emisión de partículas contaminantes a la atmósfera como polvo, humo y vapores"²⁴ y a la LGEEPA "en materia de Audición Ambiental". Al respecto, el Secretariado no pudo identificar ambos cuerpos legales. En caso de que el Peticionario se refiera a un reglamento de la LGEEPA o a un capítulo de esa Ley, debe aclararlo en una versión revisada de su petición. El inciso 5.2 de las Directrices concretamente señala:

El Peticionario deberá identificar la ley o el reglamento aplicable, o su disposición, tal como se define en el artículo 45(2) del Acuerdo. En el caso de la Ley General del Equilibrio Ecológico y la Protección al Ambiente de México [LGEEPA], el Peticionario deberá identificar el capítulo o la disposición aplicable de la Ley.

14. El Peticionario podrá aclarar en una versión revisada de su petición, cuáles disposiciones de la LGEEPA (u de otra ley o reglamento) relativas a la emisión de contaminantes a la atmósfera y al ruido supuestamente no se están aplicando efectivamente por México. Asimismo, deberá cerciorarse de que esas disposiciones están relacionadas con las aseveraciones hechas en su petición.²⁵

ii. Reglamento de la LGEEPA materia de Evaluación de Impacto Ambiental (REIA)

15. El Peticionario hace cita del artículo 3: fracción IX del REIA el cual define el término de "impacto ambiental significativo o relevante". El Secretariado considera que, mientras el artículo 3: fracción IX sirve para interpretar el sentido de otras disposiciones de ese reglamento, dicha disposición no confiere a alguna autoridad una facultad, o bien, impone alguna obligación. Si bien el artículo citado puede servir de guía, el Secretariado no puede hacer un análisis de aplicación efectiva. El Peticionario puede, en una versión revisada de su petición, precisar las disposiciones de la LGEEPA o del REIA relativas al procedimiento de evaluación de impacto ambiental, para que el Secretariado pueda determinar si éstas se ajustan al concepto de "legislación ambiental" del artículo 45(2) del ACAAN y, en una fase ulterior, determinar si la petición amerita una respuesta de México. Asimismo, el Peticionario deberá

^{24.} Petición, p. 2.

^{25.} El inciso 5.1 de las Directrices establece "[...] Para efectos de determinar si la petición cumple con los requisitos estipulados en el artículo 14(1) del Acuerdo, el término 'legislación ambiental' se define en el artículo 45(2) del Acuerdo."

cerciorarse de que las disposiciones que haga cita, se relacionen con las aseveraciones hechas en su petición.

iii. El decreto que crea el área natural protegida Parque Nacional Cañón del Sumidero

16. Publicado en el *Diario Oficial de la Federación* el 8 de diciembre de 1980, este decreto expropia los terrenos ubicados dentro del área del Parque a favor de la federación; determina las coordenadas geográficas del Parque Nacional Cañón del Sumidero; y establece un procedimiento para el deslinde del área que ocupa el Parque. Aunque tiene como propósito principal el destino del área del Parque para su conservación, el Secretariado no puede hacer un análisis de aplicación efectiva, a menos que el Peticionario haga cita de una ley o reglamento que prevea la forma en que deba aplicarse el decreto de creación del Parque.

17. El Peticionario podrá aclarar en una petición revisada, cuáles son las disposiciones —si las hay— que México supuestamente está omitiendo aplicar en relación con el área natural protegida del Parque Nacional Cañón del Sumidero y verificar cómo se relacionan con las aseveraciones en su petición.

2. Aseveraciones sobre la omisión en la aplicación efectiva de la legislación ambiental

18. A continuación, el Secretariado hace un análisis sobre si la petición "asevera" presuntas omisiones en la aplicación efectiva de la legislación ambiental y no su deficiencia. Al respecto, el Secretariado determina que, en efecto, la petición en su conjunto no contiene aseveraciones sobre deficiencias en la legislación ambiental, pero nota que la petición hace aseveraciones indirectas que deben aclararse en una versión revisada de SEM-10-001.²⁶ El Secretariado también encuentra que una vez corregidas tales deficiencias, las aseveraciones de la petición sólo podrían analizarse en una etapa ulterior, en la medida en que una versión revisada haga cita de las disposiciones que les sean aplicables.

i. El estudio de impacto y riesgo ambiental para otorgar autorizaciones y licencias a la empresa que opera la mina

19. El Peticionario relata que la Secretaría de Medio Ambiente y Recursos Naturales (Semarnat) emitió la licencia de funcionamiento y la

^{26.} Véase SEM-98-003 (*Grandes Lagos*), Determinación conforme a los artículos 14(1) y (2) (8 de septiembre de 1999), p. 7.

autorización para el cambio de uso de suelo respecto de las actividades de la cantera sin contar con un estudio de impacto y riesgo ambiental, lo cual hizo del conocimiento de la autoridad mediante una denuncia.²⁷ El Peticionario asevera en particular que las autoridades emitieron un dictamen de evaluación de riesgos en el cual se constataron daños a los bienes de la población.²⁸ Señala que las actividades ocasionan lo que él denomina "movimientos telúricos" supuestamente ocasionados por el uso de explosivos,²⁹ y que tales actividades están ocasionando daños a la cara oriente de una de las paredes del Cañón del Sumidero.³⁰ Señala que las actividades de explotación de la cantera causan daño a la salud de la población por las emisiones de partículas contaminantes.³¹ Según el Peticionario, la supuesta destrucción del área está modificando "de manera irreversible el hábitat de la fauna y la flora".³²

20. Como se ha señalado, el Peticionario debe precisar en una versión revisada de su petición, las disposiciones jurídicas relativas a las supuestas omisiones que se aseveran en SEM-10-001. Específicamente, la petición no hace cita de disposiciones aplicables a la obtención y emisión de una autorización en materia de impacto y riesgo ambiental así como los requisitos para la obtención de una licencia de funcionamiento y autorización de cambio de uso de suelo. La petición tampoco hace una aseveración directa, pues más bien se refiere a quejas y denuncias presentadas con anterioridad, lo cual hace suponer que hay una cuestión de aplicación efectiva. Se hace notar que es requisito esencial del párrafo inicial del artículo 14(1) el que una petición asevere que una de las Partes del ACAAN "está incurriendo" en supuestas omisiones en la aplicación de su legislación ambiental. Al respecto, una petición es una "aseveración documentada de que una de las Partes [...] está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental".³³ La ausencia de una aseveración directa en una petición, obstaculiza en una etapa ulterior del procedimiento, analizar cuestiones de aplicación efectiva.

ii. Las supuestas violaciones a la LGEEPA por parte de la empresa que opera la mina

21. El Peticionario asevera que las autoridades ambientales sancionaron las violaciones a la LGEEPA cometidas por la empresa —específica-

^{27.} Petición, pp. 5-6.

^{28.} Ibid., p. 3.

^{29.} Ibid.

^{30.} Ibid., p. 4.

^{31.} *Ibid*.

^{32.} Ibid., p. 5.

^{33.} Inciso 1.1 de las Directrices.

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mente por la supuesta emisión de partículas contaminantes a la atmósfera—³⁴ el 19 de septiembre de 2002, pero que sin embargo, sigue la empresa operando a la fecha. La petición señala que la empresa rebasa los límites permitidos establecidos para las emisiones de ruido;³⁵ y que realiza el vertimiento de desechos al río Grijalva sin previo tratamiento.³⁶

22. Tal como lo ha hecho saber, el Secretariado nota que el Peticionario no hace cita de las disposiciones de la LGEEPA o de alguno de sus reglamentos que establezcan las obligaciones en materia de emisiones de partículas contaminantes a la atmósfera. El Peticionario tampoco refiere alguna disposición de la LGEEPA ni alguna norma oficial mexicana en la que se especifiquen los niveles de ruido al ambiente o vibraciones que supuestamente están siendo rebasados por las operaciones de la cantera³⁷. En cuanto al supuesto vertimiento de desechos domésticos e industriales al río Grijalva por la empresa, la petición no presenta suficiente información, pues no resulta claro si se están descargando aguas residuales por encima de los límites máximos permisibles. El Peticionario debe hacer tal aclaración en su petición y hacer cita de la disposición de la LGEEPA, reglamento o norma oficial mexicana en materia de aguas que supuestamente no se está aplicando efectivamente. Asimismo, la petición tampoco hace una aseveración directa sobre omisiones en que esté incurriendo la autoridad respecto de i) las irregularidades identificadas por la Profepa en septiembre de 2002; ii) las emisiones de ruido, y iii) el vertimiento de desechos al río Grijalva, pues una vez más la petición hace referencias indirectas. Por otro lado, aunque la petición alude al hecho de que en enero de 2003 la empresa no había actualizado su licencia de funcionamiento,³⁸ no se indica claramente si ello se debe a una omisión por parte de las autoridades en aplicar la legislación ambiental. El Peticionario puede proporcionar más información al respecto en una versión revisada de su petición, especificar sus aseveraciones haciéndolas directamente y, en todo caso, precisar las disposiciones legales aplicables.

^{34.} Petición, p. 2 y anexo sin número: oficio de la Profepa en el expediente DQ/113/2002 de fecha 19 de septiembre de 2002, relativa a la denuncia popular de fecha 2 de mayo de 2002, por el que se informa el Peticionario del resultado de una inspección realizada a la mina el 2 de septiembre de 2002.

^{35.} *Ibid.*, p. 4.

^{36.} Ibid., p. 5.

^{37.} Ibid., p. 4.

^{38.} Ibid., p. 3.

iii. La operación de la mina más allá de los límites de una área natural protegida

23. El Peticionario asevera que la cantera está invadiendo los terrenos correspondientes a la poligonal del Parque, lo que viola el decreto publicado en el DOF el 8 de diciembre de 1980 que creó el área natural protegida del Parque Nacional Cañón del Sumidero.³⁹ Si bien el decreto publicado en el DOF establece el Parque, el Peticionario debe aclarar la disposición jurídica relativa a la protección y conservación del área natural protegida en cuestión, pues el citado decreto no establece las obligaciones a cargo de alguna autoridad de hacerlo efectivo, lo cual puede hacer el Peticionario en una versión revisada de su petición.

24. Por último, si bien es claro que la intención del Peticionario de hacer una aseveración de que el gobierno de México está omitiendo la aplicación efectiva de su legislación ambiental con respecto a las cuestiones identificadas en la petición SEM-10-001, el Secretariado estima que una petición siempre debe contener una aseveración positiva de que una de las Partes del ACAAN "está incurriendo en omisiones en la aplicación efectiva de su legislación ambiental", lo cual hace falta en la petición en cuestión.

B. Los seis requisitos del artículo 14(1) del ACAAN

25. El Secretariado evalúa ahora la petición a la luz de los seis requisitos enlistados en el artículo 14(1) del ACAAN y determina que la petición SEM-10-001 no cumple con todos los requisitos ahí listados. El razonamiento del Secretariado se explica a continuación.

(a) [si] se presenta por escrito en un idioma designado por esa Parte en una notificación al Secretariado

26. La petición cumple con el requisito del artículo 14(1)(a) porque se presenta por escrito en un idioma designado por las Partes para la presentación de peticiones; en este caso, el español.⁴⁰

^{39.} Ibid., p. 5.

^{40.} El artículo 19 del ACAAN establece que los idiomas oficiales de la CCA son indistintamente el español, el francés y el inglés. En este mismo sentido, el punto 3.2 de las Directrices establece: "Las peticiones podrán presentarse en español, francés o inglés, que son los idiomas designados por las Partes para las peticiones".

(b) [si] identifica claramente a la persona u organización que presenta la petición

27. La petición satisface el artículo 14(1)(b),⁴¹ ya que la información proporcionada permite identificar a las personas que la presentan. Los Peticionarios aportan el nombre, dirección y otros medios de contacto de la organización que presenta una petición, así como las personas que la representan, lo cual es suficiente para que el Secretariado pueda identificar claramente al Peticionario y establecer contacto.⁴²

(c) [si] proporciona información suficiente que permita al Secretariado revisarla, e incluyendo las pruebas documentales que puedan sustentarla

28. La petición no cumple del todo con el requisito del artículo 14(1)(c),⁴³ ya que no proporciona información suficiente relativa a las aseveraciones de la petición.

29. Los anexos de la petición contienen copia de una denuncia popular que el Peticionario presentó en 2002 a la Procuraduría Federal de Protección al Ambiente en el estado de Chiapas (la "Profepa"), relativa a la supuesta contaminación ambiental causada por la mina⁴⁴ y de un oficio de la Profepa que presenta el resultado en seguimiento a dicha denuncia popular. En el oficio emitido por la Profepa en septiembre de 2002 se hace mención de las irregularidades detectadas durante la inspección a la empresa y de las medidas de seguridad impuestas:

[L]a empresa antes mencionada [...] no cuenta con lo siguiente:

- 1. Licencia de funcionamiento actualizada
- 2. Inventario de sus emisiones contaminantes
- 3. Canalización de dos fuentes de emisiones a la atmósfera

^{41. &}quot;El Secretariado podrá examinar peticiones [...] si el Secretariado juzga que la petición:

⁽b) identifica claramente a la persona u organización que presenta la petición;"

^{42.} Véase a este respecto SEM-07-005 (*Residuos de perforación en Cunduacán*), Determinación conforme al artículo 14(3) (8 de abril de 2009), § 25(a).

^{43. &}quot;El Secretariado podrá examinar peticiones [...] si el Secretariado juzga que la petición:
(c) proporciona información suficiente que permita al Secretariado revisarla, e inclu-

yendo las pruebas documentales que puedan sustentarla".

^{44.} Denuncia popular del Peticionario de fecha 2 de mayo de 2002 presentada ante la Profepa relativa a la emisión de ruido y de partículas a la atmósfera y al impacto de las detonaciones.

- 4. Monitoreo perimetral
- 5. Bitácoras de operación de sus equipos de control y proceso para dos fuentes de emisión
- 6. [S]e encontraron emisiones fugitivas [*sic*] Como medida de seguridad esta autoridad determinó la clausura de una de las dos líneas de proceso [...]

Se dictaron además seis medidas de urgente aplicación las cuales son las siguientes:

- 1.- Realizar las actividades de reingeniería necesaria para evitar que la perforadora genere polvos:
- 2.- Canalizar las emisiones a la atmósfera de la trituradora;
- Deberá eliminar las emisiones fugitivas detectadas en el área de proceso;
- 4.- Realizar las obras necesarias para evitar que los camiones generen gran cantidad de polvo al transitar;
- 5.- Presentar a esta procuraduría [*sic*] las características del material utilizado en sus explosivos, Y [*sic*];
- 6.- Se apercibe a la empresa que deberá respetar los límites máximos permisibles de emisión de ruido durante sus actividades.⁴⁵

30. La petición anexa un oficio emitido por la Semarnat que informa al Peticionario sobre el proyecto de desincorporación de superficies del Parque, en el cual se considera la determinación de áreas que supuestamente invade la cantera.⁴⁶ La petición adjunta un informe de resultados de monitoreo de la calidad del aire realizada por la Secretaría de Medio Ambiente y Vivienda del estado de Chiapas ("Semavi"), en los alrededores de la cantera. En el reporte —elaborado mediante cinco días de muestreo— se destaca "una calidad del aire predominantemente regular y solamente un día se encontró en Mala".⁴⁷ La petición adjunta también los resultados de un monitoreo de emisiones de ruido por las activida-

^{45.} Petición, anexo sin número: oficio de la Profepa en el expediente DQ/113/2002 de fecha 19 de septiembre de 2002, relativa a la denuncia popular de fecha 2 de mayo de 2002, por el que se informa el Peticionario del resultado de una inspección realizada a la mina el 2 de septiembre de 2002.

Petición, anexo sin número: oficio SDGPA/UGA/DMIC/003/03 de fecha 9 de enero de 2003 emitido por el Delegado Federal de la Semarnat en el estado de Chiapas.

^{47.} Petición, anexo sin número: oficio SEMAVI/SMA/DPA/390/09 de fecha 26 de junio de 2009 emitido por la Dirección de Protección Ambiental de la Secretaría de Medio Ambiente y Vivienda (Semavi).

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des de la mina en el que se observa que "se detectaron emisiones de ruido de hasta 80 y 89 decibeles, los cuales rebasan la Norma Oficial Mexicana NOM-081-ECOL-1994" y se hace constar que se inició un procedimiento administrativo;⁴⁸ copia de la minuta de una audiencia pública con el presidente municipal de Chiapa de Corzo; y de una minuta de acuerdo con la misma Presidencia municipal para atender los daños supuestamente ocasionados por las actividades de la empresa.⁴⁹ La petición anexa copia de una resolución administrativa emitida en 2007 por la Profepa en la que se da por concluido un procedimiento de denuncia popular.⁵⁰

31. Finalmente, se adjunta el Decreto por el que se declara como Parque Nacional, con el nombre de "Cañón del Sumidero", mapas del área dónde opera la mina y de los límites del Parque⁵¹, y artículos de prensa relatando la problemática.⁵²

32. Si bien se adjuntan los oficios de la Profepa que relatan el contenido de los procedimientos relacionados con la petición,⁵³ el Peticionario

Petición, anexo sin número: oficio IHNE/DPA/464/2002 de fecha 4 de diciembre de 2002 emitido por el Instituto de Historia Natural y Ecología (IHNE) del estado de Chiapas.

^{49.} Petición, anexo sin número: audiencia pública del ayuntamiento del municipio de Chiapa de Corzo del 26 de agosto de 2002; y minuta de Acuerdo entre la Presidencia municipal de Chiapa de Corzo y representantes de la Ribera Cahuaré, de fecha 13 de febrero de 2003.

^{50.} Petición, anexo sin número: oficio de la Profepa en el expediente DQ/113/2002 de fecha 18 de noviembre de 2007 que declara concluido el procedimiento de denuncia popular iniciado por el Peticionario el 2 de mayo de 2002.

^{51.} Petición, anexo sin número: mapa del área de operación de la mina y de la delimitación del Parque; y el plano denominado "Síntesis de la Problemática" elaborado por el gobierno del estado de Chiapas.

^{52.} Petición, anexo sin número: Óscar Gutiérrez, Calera daña salud de Chiapanecos. El Universal, 26 de marzo de 2007. Abril Martínez, Denuncian en Internet a empresa Chiapaneca-Calera destruye y contamina al Cañón del Sumidero. Negocios, 15 de enero de 2010. Óscar Gutiérrez, Denuncian contaminación en Cañón del Sumidero. El Universal, 6 de febrero de 2010.

^{53.} Petición, anexo sin número: oficio núm. PFPA/14.7/8C.17.5/0537-09 emitido por la Profepa de fecha 8 de junio de 2009, en el expediente PFPA/CHIS/DQ/79/0240-08 relativo a la denuncia popular presentada por el Peticionario el 31 de octubre de 2008, informándole que se realizó una visita de inspección a la empresa y que se instauró un procedimiento administrativo; oficio núm. PFPA/14.7/8C.17.5/0651/2009 emitido por la Profepa de fecha 12 de junio de 2009, en el expediente PFPA/CHIS/DQ/78/0031/08 relativo a la denuncia popular presentada el 31 de octubre de 2008 por el Peticionario, informándole que se realizó una visita de inspección a la empresa la cual reveló diversas irregularidades que contravienen a la legislación ambiental y que se instaurará un procedimiento administrativo; oficio núm. PFPA/14.7/8C.17.5/0935/2009 emitido por la Profepa de fecha 10 de agosto de 2009, en el expediente PFPA/14.7/2C.28.2/0161-09 relativo a la denuncia popular presentada el 20 de abril de 2008 por el gobierno del estado de Chiapas, informando al denunciante que se

puede aclarar en una petición revisada, el estado procesal que guardan tales procedimientos.⁵⁴ Por otro lado, si bien la petición no adjunta copias de las autorizaciones de cambio de uso de suelo y de las licencias de funcionamiento de la empresa que opera la mina, si acompaña los documentos que refieren a su ausencia o que demuestran que el Peticionario realizó las gestiones necesarias para intentar obtener tal información.⁵⁵

33. En virtud de lo anterior, el Secretariado concluye que el Peticionario —de contar con dicha información— debe indicar cuál es el estado de las denuncias populares u otros procedimientos que se refieren en SEM-10-001, en conformidad con el inciso (c) del artículo 14(1) del ACAAN y el inciso 5.3 de las Directrices.

(d) [si] parece encaminada a promover la aplicación de la ley y no a hostigar una industria

34. La petición satisface el artículo 14(1)(d),⁵⁶ ya que parece encaminada a promover la aplicación de la ley y no a hostigar a una industria.⁵⁷ Aunque la petición refiere a una empresa que opera la cantera, esencial-

realizó una visita de inspección a la empresa la cual reveló diversas irregularidades y que se instaurará un procedimiento administrativo; carta del Peticionario a la Profepa de fecha 24 de enero de 2010, solicitando copia de los expedientes de los dos procedimientos administrativos instaurados en contra de la empresa y citados por la Profepa, así como información sobre las medidas correctivas impuestas a la empresa.

^{54.} Si bien los anexos de la petición señalan en algunos casos que "el presente Procedimiento de Denuncia Popular se declara concluido [...]", conforme al inciso 7.5 de las Directrices, el Secretariado deberá considerar si un expediente de hechos puede ocasionar interferencia con los recursos promovidos por los peticionarios. *Cfr.* Petición, anexo sin número: acuerdo resolutivo del expediente DQ/113/02 de fecha 28 de noviembre de 2007 emitido por la delegación de la Profepa en el estado de Chiapas.

^{55.} Véase, por ejemplo, petición, anexo sin número: oficio emitido por la Subsecretaría de Gestión para la Protección Ambiental de la Semarnat, de fecha 9 de enero de 2003, que responde a una solicitud de información de parte del Peticionario indicando que la empresa no ha solicitado la extensión de la licencia de funcionamiento de la mina; oficio de la Seduvi, de fecha 29 de junio de 2009 que niega una solicitud de información del manifiesto del impacto ambiental de la mina y de los permisos otorgados a la empresa, explicando que la Semarnat es la autoridad competente.

^{56. &}quot;El Secretariado podrá examinar peticiones [...] si el Secretariado juzga que la petición:

⁽d) parece encaminada a promover la aplicación de la ley y no a hostigar a una industria;"

^{57.} Véase también el apartado 5.4 de las Directrices, que señala que al determinar si la petición está encaminada a promover la aplicación efectiva de la legislación ambiental y no a hostigar a una industria, el Secretariado tomará en cuenta: i) "si la petición se centra en los actos u omisiones de la Parte y no en el cumplimiento de una compañía o negocio en particular, especialmente cuando el Peticionario es un competidor que podría beneficiarse económicamente con la petición", y ii) "si la petición parece intrascendente".

mente se enfoca en la aplicación efectiva de la legislación ambiental relacionado con los supuestos daños al ambiente, la obtención de las autorizaciones para explotar la mina y las acciones de aplicación de la ley emprendidas por México. Asimismo, no se desprende que el Peticionario sea un competidor de la empresa que pueda beneficiarse económicamente de la petición.

(e) [si] señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte

35. La petición adjunta copia de denuncias populares interpuestas ante la Profepa por el Peticionario en noviembre de 2008,⁵⁸ y otra interpuesta por la directora del Parque en abril de 2009.⁵⁹ La petición adjunta copias de la correspondencia relativa a tales procedimientos de denuncia popular⁶⁰ y de los acuerdos administrativos emitidos por la Profepa

^{58.} Petición, anexo sin número: denuncia popular del Peticionario a la Profepa de fecha 31 de octubre de 2008 recibida el 5 de noviembre de 2008, solicitando la realización de una investigación a la empresa respecto a las emisiones de ruido, polvo y "movimientos telúricos".

^{59.} Petición, anexo sin número: denuncia popular de la Directora del Parque Nacional Cañón del Sumidero a la Profepa de fecha 16 de abril de 2009 recibida el 23 de abril de 2009 relativa al "ecosidio" por las actividades de la empresa y a su intrusión en el territorio del Parque.

^{60.} Petición, anexo sin número: cartas del Peticionario a la Profepa, de fecha 1 de abril de 2009, 21 de mayo de 2009, 12 de agosto de 2009, 27 de agosto de 2009 y 7 de febrero de 2010 en las que se adjuntan documentos a la denuncia popular presentada por el Peticionario el 31 de octubre de 2008; acuerdos emitidos por la Profepa de fecha 4 de febrero de 2009, 14 de agosto de 2009 y 4 de septiembre de 2009 en el expediente PFPA/CHIS/DQ/78/0031-08 respecto de la denuncia popular presentada por el Peticionario el 31 de octubre de 2008, por los que se acusan recibo de diversos escritos del Peticionario; acuerdos emitidos por la Profepa de fecha 11 de noviembre de 2008 y 11 de noviembre de 2008 en el expediente PFPA/CHIS/DQ/79/0240-08 respecto de la denuncia popular presentada por el Peticionario el 31 de octubre de 2008, por los que se acusan recibo de varios escritos del Peticionario; oficio núm. PFPA/14.7/ 2C.28.2/0035/2009 emitido por la Profepa de fecha 12 de enero de 2009, en el expediente PFPA/CHIS/DQ/78/0031-08 respecto de la denuncia popular presentada por el Peticionario el 31 de octubre de 2008, informándole que se realizó una inspección a la empresa en la que se revelaron diversas irregularidades que contravienen a la legislación ambiental; carta del Peticionario a la Profepa de fecha 18 de mayo de 2009, solicitando el resultado de una inspección realizada a la empresa derivada de la denuncia popular presentada por el Peticionario del 31 de octubre de 2008; oficio núm. PFPÅ/14.7/8C.17.5/0537-09 emitido por la Profepa de fecha 8 de junio de 2009, en el expediente PFPA/CHIS/DQ/79/0240-08 respecto de la denuncia popular presentada por el Peticionario el 31 de octubre de 2008, informándole que se realizó una visita de inspección a la empresa y que se instauró un procedimiento administrativo; oficio núm. PFPA/14.7/8C.17.5/0651/2009 emitido por la Profepa de fecha 12 de junio de 2009, en el expediente PFPA/CHIS/DQ/78/0031/08 relativo a la denuncia popular presentada por el Peticionario el 31 de octubre de 2008, informándole que se realizó una visita de inspección a la empresa la cual reveló diversas irregularidades que contravienen a la legislación ambiental y que se instaurará un procedimiento administrativo; oficio núm. PFPA/14.7/8C.17.5/0805/2009 emitido por la Profepa

que los declaran concluidos en 2009.⁶¹ Se adjuntan también copia de la correspondencia dirigida a otras autoridades, incluyendo su respuesta, cuando la hubo.⁶² La petición adjunta los resultados de una evaluación

de fecha 21 de julio de 2009, en el expediente PFPA/CHIS/DQ/79/0240/08 relativo a la denuncia popular presentada por el Peticionario el 31 de octubre de 2008, informándole que se realizó una inspección a la empresa en la que se revelaron diversas irregularidades; oficio núm. PFPA/14.7/8C.17.5/0935/2009 emitido por la Profepa de fecha 10 de agosto de 2009, en el expediente PFPA/14.7/2C.28.2/0161-09 respecto de la denuncia popular presentada por el Gobierno del estado de Chiapas el 20 de abril de 2008, informando el denunciante que se realizó una visita de inspección a la empresa la cual reveló diversas irregularidades y que se instaurará un procedimiento administrativo; carta del Peticionario a la Profepa de fecha 24 de enero de 2010, solicitando copia de los expedientes de los dos procedimientos administrativos instaurados en contra de la empresa y mencionados por la Profepa en sus comunicados, así como información sobre las medidas correctivas impuestas referidas por esa autoridad.

^{61.} Petición, anexo sin número: acuerdo resolutivo de la Profepa núm. PFPA/14.7/ 2C.28.2/0301/09 de fecha 27 de octubre de 2009 que declara concluido el procedimiento de denuncia popular iniciada por el Peticionario el 31 de octubre de 2008 bajo el expediente PFPA/CHIS/DQ/78/0031-08; acuerdo resolutivo de la Profepa núm. PFPA/14.7/2C.28.2/0391/09 de fecha 28 de octubre de 2009 que declara concluido el procedimiento de denuncia popular en el expediente PFPA/14.7/2C.28.2/0120-09 iniciado por la directora del Parque el 16 de abril de 2008. La petición también anexa también el acuerdo núm. PFPA/14.7/2C.28.2/0385/09 de fecha 30 de octubre de 2009 emitido por la Profepa en el que se declara concluido el procedimiento de denuncia popular iniciado por el Peticionario el 31 de octubre de 2008 bajo el expediente PFPA/CHIS/DQ/79/0240-08; y el acuerdo núm. PFPA/14.7/2C.28.2/0388/09 de fecha 28 de octubre de 2009 emitido por la Profepa por el que se declara concluido el procedimiento de denuncia popular iniciado por el Gobierno del estado de Chiapas el 20 de abril de 2008, bajo el expediente PFPA/14.7/2C.28.2/0161-09.

Petición, anexo sin número: acta de verificación del IHNE de fecha 29 de octubre de 62. 2002 y comunicado del IHNE al Peticionario de fecha 4 de diciembre de 2002 informando que como resultado de la verificación, se observaron irregularidades en las emisiones de ruido por la mina; oficio emitido por la Unidad de Gestión Ambiental de la Semarnat en Chiapas, de fecha 9 de enero de 2003, que responde a una solicitud de información de parte del Peticionario indicando que la empresa no ha solicitado la extensión de la licencia de funcionamiento de la mina; carta del Peticionario a la Secretaría de Salud de estado de Chiapas, de fecha 3 de marzo de 2009, solicitando la realización de un investigación sobre las medidas de seguridad de la empresa y de una valoración médica de los habitantes de la comunidad vecina; carta del Peticionario a la Semavi, de fecha 27 de enero de 2009, solicitando una respuesta a una comunicación previa; carta del Peticionario a la Semarnat, de fecha 2 de marzo de 2009, denunciando los diversos impactos ambientales de la mina y solicitando la aplicación de la legislación ambiental; Carta del Peticionario a la Comisión Nacional de Áreas Naturales Protegidas (Conanp), de fecha 1 de abril de 2009, denunciando los diversos impactos ambientales de la mina y solicitando la aplicación de la legislación ambiental; carta del Peticionario a la Comisión Nacional de Aguas Nacionales (Conagua) de fecha 1 de abril de 2009, solicitando una investigación de los recursos hídricos que la empresa utiliza; carta del Peticionario a la Semavi, de fecha 7 de abril de 2009, comunicando la denuncia del asunto; carta del Grupo Escala Montañismo y Exploración a la Semavi de fecha 16 de abril de 2009 denunciando un supuesto "ecosidio" (sic) practicado por la empresa; carta del Peticionario al Gobierno del estado de Chiapas de fecha 15 de abril de 2009, solicitando que se aplique la legislación ambiental y que la empresa sea reubicada; carta del Peticionario a la Semarnat, de fecha 11 de agosto de 2009, solicitando una respuesta a su denuncia recibida el 3 de abril de 2009.

de los riesgos asociados con las cuarteaduras en las viviendas de la población aledaña y de un monitoreo de la calidad del aire en el área de influencia de la mina.⁶³ Se adjunta además copia de la minuta de acuerdos de una reunión realizada entre el Peticionario y la Profepa.⁶⁴

36. La petición adjunta también comunicados a diversas autoridades que si bien no son las "autoridades pertinentes", muestran que el Peticionario ha acudido a diversas instancias a exponer su caso.⁶⁵

^{63.} Petición, anexo sin número: oficio de la Semavi de fecha 27 de febrero de 2009 que aclara al Peticionario el papel de las diferentes autoridades involucradas; oficio del gobierno del estado de Chiapas de fecha 20 de abril de 2009 informando el Peticionario que su solicitud de investigación se ha turnado a la Profepa; oficio de la Subsecretaría de Protección Civil del estado de Chiapas, de fecha 23 de abril de 2009, que presenta los resultados de la evaluación de riesgo realizada en conformidad con la solicitud del Peticionario del 23 de marzo de 2008; oficio de la Semavi de fecha 26 de junio de 2009, en respuesta a la carta del Peticionario de fecha 27 de mayo de 2009, indicando que se realizó un monitoreo de la calidad del aire en el área de influencia de la empresa y anexa los resultados; oficio de la Semavi de fecha 29 de junio de 2009 que niega una solicitud de comunicación del manifiesto del impacto ambiental de la mina, de los permisos otorgados a la empresa y de los resultados de un monitoreo ambiental realizado los 8-18 marzo, explicando que la Semarnat es la autoridad competente; oficio de la Semarnat de fecha 17 de julio de 2009, solicitando a la Conagua que emita una respuesta al Peticionario; oficio de la Conagua, de fecha 4 de agosto de 2009, informando el Peticionario que se tomarán las medidas necesarias para verificar el cumplimiento de la Ley de Águas Nacionales; oficio de la Semarnat, de fecha 13 de agosto de 2009, turnando a la Profepa la carta del Peticionario del 11 de agosto de 2009.

^{64.} Petición, anexo sin número: minuta de Acuerdos de una reunión entre el Peticionario y la Profepa de fecha 4 de diciembre de 2009 sobre el asunto de la mina, en que se prevé que se organizara una reunión con las diferentes autoridades involucradas, y que se verificará el cumplimiento de medidas impuestas en las resoluciones administrativas.

Petición, anexo sin número: oficio núm. 45630 de la Secretaría de la Defensa Nacional 65. (Sedena) de fecha 8 de octubre de 2002, emitido en respuesta a una comunicación del Peticionario; oficio de la Sedena de fecha 11 de marzo de 2003, en respuesta a la nota del Peticionario; carta del Peticionario a la Comisión Estatal de Derechos Humanos (CEDH), de fecha 13 de noviembre de 2008; carta del Peticionario a la Subsecretaría de Protección Civil del estado de Chiapas, de fecha 21 de noviembre de 2008; carta del Peticionario a la Subsecretaría de Protección Civil del estado de Chiapas, de fecha 23 de marzo de 2008; carta del Peticionario al Presidente municipal de Chiapa de Corzo, de fecha 20 de noviembre de 2008; carta del Peticionario a la Sedena de fecha 3 de marzo de 2009; carta del Peticionario a la Secretaría de Salud del estado de Chiapas, de fecha 13 de septiembre de 2002; carta del Peticionario a la Subsecretaría de Protección Civil del estado de Chiapas, de fecha 13 de septiembre de 2002; carta del Peticionario a la Sedena de fecha 13 de septiembre de 2002; carta del Peticionario a la CEDH de fecha 17 de diciembre de 2002; carta del Peticionario al IHNE del estado de Chiapas de fecha 30 de septiembre de 2002; carta del Peticionario a la CEDH de fecha 28 de noviembre de 2002; carta del Peticionario al gobernador del estado de Chiapas de fecha 7 de octubre de 2002; carta de la directora de una escuela primaria a la Subsecretaría de Protección Civil del estado de Chiapas, de fecha 2 de diciembre de 2002; carta del Peticionario al Instituto Nacional de Antropología e Historia (INAH) en Chiapas de fecha 8 de enero de 2003; y carta del Peticionario al gobierno del estado de Chiapas de fecha 21 de enero de 2003.

37. Por lo tanto, la petición satisface el requisito del inciso e) del artículo 14(1)⁶⁶ porque indica que el asunto ha sido comunicado por escrito a las autoridades pertinentes de México y señala, cuando la hubo, una respuesta por parte de dichas autoridades.⁶⁷

(f) [si] la presenta una persona u organización que reside o está establecida en territorio de una Parte

38. Por último, la petición cumple el requisito del artículo 14(1) inciso f),⁶⁸ ya que fue presentada por una organización sin vinculación gubernamental establecida en Chiapa de Corzo, Chiapas, México, territorio de una de las Partes del ACAAN, en este caso los Estados Unidos Mexicanos.⁶⁹

IV. DETERMINACIÓN

39. Por las razones expuestas, el Secretariado considera que las aseveraciones de la petición SEM-10-001 (*Cañón del Sumidero*) no satisfacen del todo los requisitos de admisibilidad establecidos en el artículo 14(1) del ACAAN. En conformidad con el apartado 6.1 y 6.2 de las Directrices, el Secretariado notifica al Peticionario que cuenta con 30 días para presentar una petición que cumpla con todos los requisitos del artículo 14(1). Si tal petición revisada no se recibe a más tardar el **14 de julio de 2010**, el Secretariado dará por terminado el proceso con respecto a la petición SEM-10-001.

^{66. &}quot;El Secretariado podrá examinar peticiones [...] si el Secretariado juzga que la petición:

⁽e) señala que el asunto ha sido comunicado por escrito a las autoridades pertinentes de la Parte y, si la hay, la respuesta de la Parte."

^{67.} El Secretariado refiere a las numerosas cartas del Peticionario dirigidas a varias autoridades ambientales de diferente niveles de gobierno, y que se mencionaron en la parte relativa al requisito del artículo 14(1)(c).

^{68. &}quot;El Secretariado podrá examinar peticiones [...] si el Secretariado juzga que la petición:

⁽f) la presenta una persona u organización que reside o está establecida en territorio de una Parte."

Véase a este respecto SEM-07-005 (*Residuos de perforación en Cunduacán*), Determinación conforme al artículo 14(3) (8 de abril de 2009), § 25(c).

Secretariado de la Comisión para la Cooperación Ambiental

Paolo Solano Oficial jurídico, Unidad sobre Peticiones Ciudadanas

- p.p.: Dane Ratliff Director, Unidad sobre Peticiones Ciudadanas
- ccp: Sr. Enrique Lendo, representante alterno de México Sr. David McGovern, representante alterno de Canadá Sra. Michelle DePass, representante alterna de Estados Unidos Sr. Evan Lloyd, director ejecutivo del Secretariado de la CCA Peticionario