Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submitters:	Leoncio Pesqueira Senday Fernanda Pesqueira Senday Milagro Pesqueira Senday Arcadio Pesqueira Senday
Party:	United Mexican States
Date of receipt:	23 August 2002
Date of this notification:	17 May 2004
Submission no.:	**SEM-02-004/El Boludo Project**

I. INTRODUCTION

The Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may examine submissions from any person or nongovernmental organization asserting that a Party to the *North American Agreement on Environmental Cooperation* ("NAAEC" or "Agreement") is failing to effectively enforce its environmental law, if the Secretariat determines that the submission meets the requirements of Article 14(1) of the NAAEC. If the submission warrants a response, based on the factors listed in Article 14(2), the Secretariat may request a response from the concerned Party. In light of the response provided by the Party, the Secretariat may notify the Council that the submission warrants the preparation of a factual record, in accordance with Article 15(1). The Council may then instruct the Secretariat to prepare a factual record by a two-thirds vote of its members. The final factual record is made public upon a two-thirds vote of the Council.

This determination contains the Secretariat's analysis, in accordance with NAAEC Article 15(1), of submission SEM-02-004/El Boludo Project, filed on 23 August 2002, by Arcadio, Leoncio, Fernanda and Milagro Pesqueira Senday (the "Submitters"). The Submitters assert that Mexico is failing to effectively enforce its environmental law with respect to the "El Boludo" mining project in the lot called "El Tiro," which is owned by the Submitters and located in the municipality of Trincheras, Sonora, Mexico.

On 26 November 2002, the Secretariat determined that the submission meets the requirements of NAAEC Article 14(1) and warranted requesting a response from the Party pursuant to Article 14(2). On 8 January 2003, the Party filed its response with the Secretariat in accordance with

NAAEC Article 14(3) (the "Response"). Pursuant to Article 14(3)(a),[1] Mexico requested the Secretariat to proceed no further in reviewing the submission since, in October 2001, the Submitters filed a public complaint (*denuncia popular*) with the competent authority which, according to the Party, concerns the same matter as the submission and is the subject of a pending administrative proceeding.

Having reviewed the submission in the light of the Party's response and pursuant to NAAEC Articles 14(3)(a) and 15(1), the Secretariat hereby informs the Council that the submission warrants the development of a factual record as further explained below.. Based on the information it obtained, the Secretariat does not consider the administrative proceeding to which the Party refers in its response to be a pending administrative proceeding in terms of NAAEC Article 14(3)(a) and the NAAEC objectives. The rationale for this conclusion is set forth in section IV of this Notification.

II. SUMMARY OF THE SUBMISSION

The submission asserts that Mexico is failing to effectively enforce its environmental law with respect to the "El Boludo" mining project located on the "El Tiro" lot, which is owned by the Submitters and located in the municipality of Trincheras, Sonora, Mexico. The Submitters indicate that their land is used to run a livestock operation consisting of 526 adult head of cattle.

According to the Submitters, the "El Boludo" project involves mining and processing a low-grade placer gold deposit.[2] The Submitters assert that Minera Secotec, S.A. de C.V. ("Secotec") obtained an environmental impact authorization (*autorización de impacto ambiental*—AIA) for this project on 9 September 1997 (the "AIA"). The submission includes a transcription of the terms and conditions of the AIA.[3] The Submitters assert that Secotec violated provisions of the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) and its environmental impact and hazardous waste regulations by failing to comply with all the terms and conditions of the AIA.[4] The information provided to the Secretariat indicates that the Submitters are asserting that the environmental authority is failing to effectively enforce LGEEPA Articles 28 and 35, Article 20 of the Environmental Impact Regulation[5] and Articles 8 III, VI, VIII, X and XI, 15 III and IV, 23, and 25 of the LGEEPA Regulation Respecting Hazardous Waste by failing to sanction

[1] Article 14(3): "The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further…"
[2] Submission, p. 2.
[3] Submission, pp. 4–11.
[4] Submission, pp. 1–2.
[5] LGEEPA Articles 28 and 35 (published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) on 8 January 1988) and Article 20 of the version of the Regulation to the LGEEPA Respecting Environmental Impact (published in the DOF on 7 June 1988) that was in force at the time the AIA was issued establish that works or activities that may cause ecological imbalance shall adhere to the conditions imposed by the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat) through the environmental impact assessment procedure.

Secotec for violating these provisions and conditions 9, 11, 16, 19, 22, 26 and 31 of the AIA. They assert that Secotec destroyed an area of approximately 300 ha and damaged the region's ecosystem, eliminating flora and fauna classified as subject to special protection.

According to the Submitters, serious irregularities were observed during an inspection carried out on 15 April 2002, by representatives of the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), leading to orders for temporary partial closure and corrective measures issued on 11 June 2002. The submission asserts that although "the company did not comply with the orders issued in response to the irregularities detected, the mining company suddenly entered into an agreement with the Sonora State Branch of the Profepa that rescinded the temporary partial suspension without giving us any opportunity to comment."[6]

The Submitters assert that although Secotec did not comply with the authority's conditions for the "El Boludo" project, it applied for the creation of rights of way and licenses of temporary occupation relating to mining lots located within the Submitters' property, and they indicate that the Mining Branch (*Dirección General de Minas*) approved the applications.

On 26 November 2002, the Secretariat determined that the allegations in the submission meet the requirements of NAAEC Article 14(1) except as regards the creation of rights of way and licenses of temporary occupation. These latter assertions do not meet the threshold requirement of NAAEC Article 14(1) since they do not allege a failure of environmental law enforcement.[7] Pursuant to Article 14(2), the Secretariat requested a response from Mexico in regard to the remaining assertions in the submission.

III. SUMMARY OF THE RESPONSE

The Secretariat received Mexico's response to the submission on 9 January 2003. Mexico summarizes the Secretariat's processing of the submission as of the date it was first filed in August 2002. Mexico asserts as follows:

> In light of the foregoing and as justified by NAAEC Article 14(3)(a), this Party hereby requests the Secretariat of the CEC to proceed no further in reviewing the submission since, on 8 October 2002 [*sic* 3 October 2001], Leoncio, Fernanda and Milagro Pesqueira Senday filed a *denuncia popular* with the Office of the Federal Attorney for Environmental Protection (Profepa) against the mining company "SECOTEC, S.A. de C.V." that concerns the same matter as submission SEM-02-004/El Boludo Project.
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> It should be noted that the *denuncia popular* filed with Profepa is the subject of a pending administrative proceeding bearing file number 37/2002.[8]

[6] Submission, pp. 3 and 11.
[7] SEM-02-004 (El Boludo Project), Determination under Articles 14 (1) and 14(2) (26 November 2002), p. 5.
[8] The Secretariat notes as well that file 37/2002, to which the Party refers in its response in support of its argument that the *denuncia popular* filed with Profepa is the subject of a pending judicial or administrative proceeding, does not correspond to a *denuncia popular* filed by the Submitters on 8 October 2002, but rather to a *denuncia popular* filed on 8 October 2001.

IV. ANALYSIS

This Notification corresponds to the stages of the process delineated in NAAEC Articles 14(3) and 15(1). The Secretariat determined previously that the submission met the requirements of Article 14(1) and warranted a response from the party in view of the criteria of Article 14(2). A response was received from the Party on 9 January 2003.

The Secretariat is obligated to include in this Notification its reasons for determining that the development of a factual record is warranted. First, however, the Secretariat discusses Mexico's assertion that the Secretariat should proceed no further because the matter set out in the submission is subject to a pending administrative proceeding.

A. Pending Judicial or Administrative Proceedings under NAAEC 14(3)(a)

NAAEC Article 14(3)(a) establishes that the Party, when it is requested by the Secretariat to respond to a submission, "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 whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further."

In NAAEC Article 45(3)(a), "judicial or administrative proceeding" is defined 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..[9]

In previous determinations, the Secretariat has read Article 14(3)(a) as indicating the Parties' intent "to foreclose a review of enforcement matters actively being pursued by any Party."[10] Moreover, it determined that "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."[11] Accordingly, the Secretariat established that "to apply this exceptional condition for terminating a submission, the Secretariat must ascertain that there is a 'pending judicial or administrative proceeding' and that the matter raised in the submission is the subject matter involved in such

[9] NAAEC Article 45(3)(a).
[10] See SEM-97-001 (BC Hydro), Recommendation of the Secretariat to the Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation (27 April 1998).
[11] SEM-01-001 (Cytrar II) Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (13 June 2001).

proceeding. Also, there must be a reasonable expectation that the 'pending judicial or administrative proceeding' invoked by the Party will address and potentially resolve the matters raised in the submission."[12]

In submission Oldman River I (SEM-96-003), the Secretariat determined that the interpretation of the concepts "judicial or administrative proceeding" and "pursued by the Party" contained in NAAEC Article 45(3)(a) should be construed as meaning those judicial or administrative proceedings initiated by a Party to the Agreement.

> In other words, where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination of the allegations of non-enforcement. The examples listed in Article 45(3)(a) support this approach, since the kinds of actions enumerated are taken almost exclusively by the official government bodies charged with enforcing or implementing the law.[13]

In sum, for an action to constitute a judicial or administrative proceeding, it must be pursued: (i) by a Party; (ii) in a timely fashion; (iii) in accordance with the Party's law and must (iv) belong to one of the categories set forth in Article 45(3). As regards the requirement of proceeding in a timely fashion, it is relevant to consider whether the action is pursued in accordance with time limits established by law and without undue delay.

B. Proceedings Referred to in the Submission and the Parties' Response

As noted above, proceedings not initiated by a Party to the Agreement do not fall within the meaning of judicial or administrative proceeding under Article 45 (3)(a). Because a *denuncia popular* is not initiated by the Party, it is not a "judicial or administrative proceeding" within the meaning of Article 45(3)(a), although a *denuncia popular* may under certain circumstances lead to inspection and surveillance (*inspección y vigilancia*) proceedings, brought by the Party, that could meet the Article 45(3)(a) definition.

In addition, whereas the Party asserts in its response that the *denuncia popular* relates to the same matter as the submission, the information provided to the Secretariat indicates that the submission not only encompasses the alleged failures to enforce mentioned in the *denuncia popular* of October 2001 but also refers to additional failures to enforce such as those relating to hazardous waste noted during an inspection of Secotec by Profepa on 15 April 2002.[14]

The *denuncia popular* to which the Party refers was filed in October 2001. Profepa conducted inspections giving rise to the issuance, on 11 June 2002, of an order for temporary partial closure

[12] See SEM-01-001 (Cytrar II) Article 15(1) Notification to Council that Development of a Factual Record is Warranted (29 July 2002).
[13] See SEM-96-003 (Oldman River I), Determination pursuant to Articles 14 & 15 (2 April 1997).
[14] A list of these alleged failures to enforce is given below.

and a corrective measures order.[15] In notifying Secotec of these orders, Profepa informed Secotec that as of the effective date of the notice of these orders, it was initiating a proceeding of an administrative nature against the company. It thus informed the company of its right to submit a written defense and evidence within 15 working days and that "once the aforementioned period has elapsed, an Administrative Decision on the merits will be issued as prescribed by Article 167 of the General Law on Ecological Balance and Environmental Protection."[16] Unlike the *denuncia popular*, the proceeding initiated on 11 June 2002 against Secotec was initiated by the Party and is the kind of proceeding that is explicitly included in Article 45(3)(a), although it did not include all of the matters that are included in the submission.

Secotec filed comments in the days following the orders, with the result that on 21 June 2002, it obtained a decision from Profepa permitting it to sign an agreement with that authority to rescind the order for temporary partial closure. Such an agreement was signed on 24 June 2002.[17]

The agreement signed by Profepa with Secotec in June 2002 referred to some of the problems detected during the inspection of the company. However, the agreement did not refer to all the discrepancies noted in the notice of 11 June 2002, with which the administrative proceeding commenced. Evidence of this is provided by the fact that Profepa reminded the company, on 24 June 2002, that

> […] all points not contemplated in [photocopy illegible] this decision shall remain covered by the decision issued [illegible] under *oficio* no. PFPA-DS-SJ-0654/2002 [notice of 11 June 2002] or, failing that, the provisions [illegible] General Law on Ecological Balance and Environmental Protection, its [illegible] Environmental Impact Assessment regulation, as well as the Forestry Law and its Regulation and [illegible] legal [illegible] applicable to the case.[18]

The party in its response to the submission did not provide information related to matters not referred to in the aforementioned agreement and in consequence there is no evidence as to any follow-up to verify Secotec's compliance with those issues. At the same time, no evidence was provided to the Secretariat with respect to whether the company addressed the issues that were included within the agreement between Secotec and Profepa.

C. Timeliness with which Administrative Proceedings Must Be Resolved in Mexico

In Mexican administrative law there exists a concept known as the lapsing or running (*caducidad*) of administrative proceedings. According to Mexican courts, the purpose of this concept is to "give certainty to and enhance the efficiency of a proceeding in terms of time, not leaving to the authorities' own discretion the possibility of their acting or failing to do so but, rather, ensuring that they observe and punctually adhere to the rules establishing when a power

[15] Submission, Appendix 43(e): *oficio* no. PFPA-DS-SJ-0654/2002 from Profepa, Sonora State Office, Legal Affairs Section, 11 June 2002, in re "Notice of summons, temporary partial closing order, corrective measures order and deadline for comment"; no. 037/2002.
[16] *Ibidem.*
[17] Submission, Appendix 43(c): *oficio* no. PFPA-DS-SJ-1017/2002 from Profepa, Sonora State Office, Legal Affairs Section, 21 June 2002, in re "Agreement", administrative file no. 037/2002 I.A.
[18] Profepa, *oficio* no. PFPA-DS-SJ-1017/2002, in re "Agreement," administrative file no. 37/2002 I.A.

arises and is extinguished so as not to create uncertainty and arbitrariness."[19] Thus, the Federal Administrative Procedure Law (*Ley Federal de Procedimiento Administrativo*—LFPA), which is applied in supplemental fashion to laws such as the LGEEPA,[20] provides in Article 57 paragraph IV that one cause for terminating an administrative procedure is its being declared lapsed. The LFPA indicates two separate cases and periods in which lapsing operates. Article 60 provides that "in proceedings initiated by the interested party, where these are paralyzed for reasons attributable to the interested party…upon the expiry of a period of three months, the proceeding shall lapse…. In the case of proceedings initiated as of right, these shall be deemed to lapse, and shall be archived, at the request of the interested party or as of right, 30 days following the expiry of the period provided for issuance of a decision."

Profepa has asserted that *denuncia popular* proceedings and inspection and monitoring are independent of one another and that, specifically, inspection and monitoring proceedings are proceedings as of right.[21] The Secretariat infers that the time period elapsed with respect to the *denuncia popular* and the inspection and monitoring proceedings appear to correspond to the time periods contemplated in the LFPA for operation of lapsing in both cases. In order to resolve the issue of the time when an administrative proceeding may be formally considered to have lapsed, the Secretariat notes that the Tribunales Colegiados de Circuito (circuit courts) in Mexico have interpreted that in order for lapsing to operate fully, only two criteria must be met: "the elapsing of a given period of time and the inactivity that consists in the absence of acts relating to the proceeding."[22] By this principle, lapsing operates even without any explicit decision to that effect since, in the opinion of the same court, such a decision would have to be made by the authority in mandatory form or as of right.[23]

In view of the existing criteria and interpretations relating to the lapsing of administrative procedures, the Secretariat's view is that where an administrative proceeding lapses due to the expiry of the period in which the authority must issue a decision, it ceases to be pending and ceases to be an "administrative action pursued by the Party *in a timely fashion and in accordance*

[19] LAPSING OF ADMINISTRATIVE PROCEEDINGS INITIATED AS OF RIGHT. OPERATES WHERE THE CORRESPONDING DECISION IS NOT ISSUED WITHIN THE PERIOD OF FOUR MONTHS PRESCRIBED BY ARTICLE 92, LAST PARAGRAPH, PLUS THE THIRTY DAYS CONTEMPLATED IN ARTICLE 60 OF THE FEDERAL ADMINISTRATIVE PROCEDURE LAW. Novena Época, Tribunales Colegiados de Circuito, Semanario Judicial de la Federación and Gazette, Vol. XVII; January 2003, Tesis I.4.A.368, p. 1735.

[20] LFPA Article 2 provides that "This Law, except as regards title 3A, shall apply in suppletive fashion to the various administrative laws. The Federal Code of Civil Procedure shall apply, again suppletive to this Law, and as applicable."

[21] Submission, Appendix 43(a): PROFEPA, Sonora Office, Legal Affairs Section. Oficio PFPA-DS-SJ-1248/2002 of 19 July 2002 in re "Reasoned report issued in *amparo* case No. 506/2002".

[22] CADUCIDAD DE LA INSTANCIA. PROCEDE DECLARARLA EN LOS PROCEDIMIENTOS ADMINISTRATIVOS INICIADOS DE OFICIO, CUANDO PREVIAMENTE SE HA CONSUMADO EL PLAZO PARA QUE AQUÉLLA OPERE. Novena Época. Tribunales Colegiados de Circuito. Semanario Judicial de la Federación and Gazette, Vol. XVI, July 2002. Tesis: I.7o.A.173 A Page 1258 in re: Isolated Administrativa *Tesis*.

[23] CADUCIDAD DE LOS PROCEDIMIENTOS ADMINISTRATIVOS. PRESUPUESTOS O CONDICIONES PARA DECLARARLA DE OFICIO, CONFORME A LA LEY FEDERAL DE PROCEDIMIENTO ADMINISTRATIVO. Novena Época, Tribunales Colegiados de Circuito, Semanario Judicial de la Federación and Gazette, Vol. XVI, September 2002. Tesis: I.4o.A.369 A, Page 1340.

with its law" (emphasis added) for the purposes of the NAAEC. Accordingly, and consistent with the other factors discussed above, the Secretariat concludes that neither the *denuncia popular* filed on 8 October 2001 nor the proceeding initiated on 11 June 2002 are pending administrative proceedings requiring the Secretariat to proceed no further.

D. The Submission Warrants Development of a Factual Record

Pursuant to NAAEC Article 15(1) and in light of Mexico's response, the Secretariat considers the submission to warrant the development of a factual record for the reasons set out below.

In the case of the "El Boludo" project, the Submitters assert that Secotec is failing to comply with the terms of the AIA as well as the LGEEPA and its regulations as regards the restoration of areas impacted by its mining activities and as regards hazardous waste management, in terms of waste documentation and shipping as well as spill clean-up. In inspecting Secotec's operations, Profepa noted these failures as well as a significant delay in the restoration of the mined areas, which was to have proceeded at the same pace as the mining operations. The company was failing to grade the land; moreover, it was failing to comply by not storing topsoil and native plants for subsequent reforestation of the lot. Additional instances of noncompliance involved the failure to protect plants classified as subject to special protection during vegetation removal operations.[24] A listing is presented below of the instances of noncompliance noted by Profepa during the inspection visit of 15 April 2002 and their relationship to the assertions in the submission.

Alleged noncompliance by Secotec with the terms and conditions of the AIA as noted in the inspection report

The alleged instances of noncompliance set out below are taken in their entirety from the inspection report of 15 April 2002. Some of these were alleged by the Submitters specifically, while others, though not mentioned explicitly in the Submission, are included by virtue of the fact that the Submitters make generic reference to all irregularities detected in the inspection report.[25]

Alleged environmental impact-related noncompliance

1. On the date of the inspection report, approximately 56 ha of the total area worked were observed to be outside the authorized concession area.[26]

[24] See Appendix 43(b) of the submission: Profepa, Sonora State Office, Inspection and Enforcement Section, inspection report, El Boludo project, 15 April 2002, and Appendix 7 of the submission: National Institute of Ecology, Environmental Land-use Planning and Impact Branch, no. D.O.O.DGOEIA.05647 (Environmental Impact Authorization for Secotec "El Boludo" Project), 9 September 1997.
[25] Submission, p. 11.
[26] See first term of AIA, in relation to inspection report, p. 13, and *oficio* PFPA-DS-DQPS-061/2002 of 30 April 2002.

2. Secotec failed to exhibit documentation attesting to compliance with its obligation to notify the workers of the legal provisions and sanctions relating to the protection of wild flora and fauna as well as of the actions taken to guarantee observance of these provisions by the workers.[27]

3. Secotec failed to exhibit documentation demonstrating compliance with the Mexican Official Standards on air and noise emissions from its equipment and machinery; nor did it exhibit its preventive maintenance program.[28]

4. The inspection visit found that there was no temporary greenhouse infrastructure and that the company was failing to spray water constantly during its mining activities in order to keep down dust.[29]

5. Secotec failed to exhibit the salvage program for flora and fauna subject to special protection, since seven desert ironwood plants (*Olneya tesota*, a species subject to protection under NOM-059-ECOL-1994) were observed at the edge of one of the worked areas, as were piles of specimens of this species that had been affected previously.[30]

6. Secotec failed to store material obtained by clearing and removal of vegetation.[31]

7. It was observed that no type of soil salvage was performed prior to the mining operations[32] and that while mining activities had taken place on 163 ha, Secotec had only carried out restoration work on 22.5 ha.[33]

8. Secotec failed to exhibit its General Site Restoration Plan.[34]

9. Secotec failed to exhibit its Participatory Conservation and Enforcement Program.[35]

Alleged hazardous waste-related noncompliance

1. Various soil areas were found to be contaminated by hydrocarbons.[36]

2. A piece of sheet metal with mercury was found on the ground, exposed to the elements. Mercury was also found on bare ground in the amalgamation area over a surface of approximately seven square meters.[37]

[27] See fifth condition of sixth term of AIA in relation to inspection report, p. 7.
[28] See tenth condition of sixth term of AIA, in relation to inspection report, p. 7
[29] See sixteenth condition of sixth term of AIA, in relation to inspection report, pp. 9–10.
[30] See nineteenth condition of sixth term of AIA, in relation to inspection report, p. 10
[31] See twenty-second condition of sixth term of AIA, in relation to inspection report, p. 10.
[32] See twenty-fourth condition of sixth term of AIA, in relation to inspection report, p. 12.
[33] See twenty-sixth condition of sixth term of AIA, in relation to *oficio* PFPA-DS-SJ-0654/2002, 11 June 2002, p. 4.
[34] See twenty-sixth condition of sixth term of AIA, in relation to inspection report, p. 12.
[35] See thirty-first condition of sixth term of AIA, in relation to inspection report, p. 12.
[36] See ninth condition of sixth term of AIA, in relation to inspection report, p. 7.

3. Secotec failed to install devices to prevent hydrocarbons from contaminating the ground occupied by the workshop.[38]

4. Hazardous waste was found uncovered outside the temporary warehouse and in a disused truck.[39]

5. An automotive battery was found on bare ground, exposed to the elements.[40]

6. The hazardous waste had no identification indicating its name and hazardousness characteristics.[41]

7. The recipient's signature was lacking on the delivery, shipping, and receipt manifests bearing numbers 3132, 3133, and 3070, as well as the unnumbered manifest bearing the shipping date 20 March 2002.[42]

8. The storage area lacked retaining walls, ditches, and gutters.[43]

9. Secotec failed to file semi-annual hazardous waste movement reports for both half-year periods of 2001.[44]

10. The entry and exit log for the hazardous waste warehouse did not indicate destinations and exit dates.[45]

The AIA provides that Profepa shall enforce compliance with the terms of the AIA as well as the applicable environmental provisions and that, for that purpose, it shall exercise, among others, the powers with which it is invested by Article 20 of the LGEEPA Regulation Respecting Environmental Impact.[46] According to the terms of the AIA, noncompliance with any of its terms

[37] See sixteenth condition of sixth term of AIA, in relation to inspection report, p. 9.
[38] See eleventh condition of sixth term of AIA, in relation to inspection report, p. 7.
[39] See twelfth condition of sixth term of AIA, in relation to inspection report, pp. 8–9.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] See fifteenth term of AIA.

Article 20.- (published in the DOF on 7 June 1988) Upon evaluation of the environmental impact statement for the work or activity in question, filed in the appropriate form, the Ministry shall formulate a decision and notify the interested parties thereof, in which decision it may:

I. Authorize the performance of the work or activity under the terms and conditions set out in the corresponding statement;

II. Authorize the performance of the projected work or activity conditional on modification or relocation of the project, or

invalidates the AIA without prejudice to the application of the sanctions provided by the LGEEPA and any other applicable provisions.[47] The AIA further provides that where the works, during their different stages, cause impacts that alter ecological balance, they may be required to be removed and compensation programs may be required to be implemented.[48] Moreover, where ecological balance is at risk or unforeseen environmental impacts occur, Semarnat may reassess the Environmental Impact Statement, General Form,[49] or request any other document it considers necessary, in accordance with Article 23 of the relevant LGEEPA regulation,[50] for the purpose of revalidating, amending, or suspending the AIA.[51]

The information obtained by the Secretariat shows that Profepa took some action in response to the Submitters' *denuncia popular* and that it acted in accordance with the LGEEPA in an attempt to compel Secotec to adhere to the requirements of the AIA and the LGEEPA. However, and in view of the fact that in its response Mexico did not respond to the submission's assertions, central questions remain outstanding for a consideration of whether, in the case of the "El Boludo" project, the Party is failing to effectively enforce its environmental law. The development of a factual record would enable the Secretariat to compile the information necessary for such a consideration.

For example, a factual record would make it possible to compile relevant information as to why Profepa, when ordering corrective measures and temporary partial closing on 11 June 2002, did not include in those orders all the irregularities detected during the inspection visit of 15 April 2002. Following is a list of these irregularities:

III. Deny such authorization.

In the cases of paragraphs I and II of this article, the Ministry shall specify the term of the corresponding authorizations. The performance of the work or activity in question shall adhere to the provisions of the corresponding decision. The Ministry may make use of its inspection and enforcement powers at any time to verify that the work or activity in question is or was carried out in accordance with the corresponding authorization and in a manner that meets the requirements of the applicable environmental technical provisions and standards.

[47] See fourteenth term of AIA.
[48] See tenth term of AIA.
[49] The Secretariat did not obtain a copy of this document.
[50] Article 23.- (published in the DOF on 7 June 1988) In those cases in which supervening causes of environmental impact not foreseen in the statements filed by the interested parties arise as a result of force majeure or acts of God subsequent to the issuance of the environmental impact authorization contemplated by Article 20 of the Regulation, the Ministry may, at any time, reassess the environmental impact statement in question. In such cases, the Ministry shall require the interested party to file any additional information necessary to assess the environmental impact of the work or activity in question.

The Ministry may revalidate the authorization and amend, suspend or revoke it where ecological balance is at risk or unforeseen harmful environmental impacts are caused.

Where the Ministry issues the decision contemplated in the preceding paragraph, it may, further to a hearing granted to the interested parties, order the temporary partial or total suspension of the work or activity in cases of imminent danger of ecological imbalance or contamination with dangerous consequences for ecosystems, their components, or public health.

[51] See twelfth term of AIA.

Alleged environmental impact-related noncompliance

1. On the date of the inspection report, approximately 56 ha of the total area worked were observed to be outside the authorized concession area. [52]

2. Secotec failed to exhibit documentation attesting to compliance with its obligation to notify the workers of the legal provisions and sanctions relating to the protection of wild flora and fauna as well as of the actions taken to guarantee observance of these provisions by the workers.[53]

3. Secotec failed to exhibit documentation demonstrating compliance with the Mexican Official Standards on air and noise emissions from its equipment and machinery; neither did it exhibit its preventive maintenance program.[54]

4. The inspection visit found that there was no temporary greenhouse infrastructure and that the company was failing to spray water constantly during its mining activities to keep down dust.[55]

Alleged hazardous waste-related noncompliance

1. The recipient's signature was lacking on the delivery, shipping, and receipt manifests bearing numbers 3132, 3133, and 3070, as well as the unnumbered manifest bearing shipping date 20 March 2002.[56]

Among the documents provided to the Submitters by the Department of Environmental Petitions, Complaints, and Civic Participation (copies included as appendices to the submission), there is no copy of a technical report corresponding to the inspection of 15 April 2002, and mentioned in the notice of 11 June 2002, which might contain information relevant to this issue.[57] Regarding the technical report, the Secretariat has only the following information: a copy of a letter from the Sonora State Deputy Attorney for Natural Resources to the Director of the Profepa Department of Environmental Petitions, Complaints and Civic Participation, which was given to the Submitters as part of the *denuncia popular* proceeding and states as follows:

> On the 15th day of this month [15 April 2002], an inspection visit was made to the company Minera Secotec, S.A. de C.V. Inspection report 14042002-SIV-Q-008 was produced and referred to the decision-making unit under file no. 037/2002. This report indicated that the company had not in fact complied with all the terms and conditions under which the project was originally authorized. It was further observed that 34.3 percent (56-00-00 ha) of the total worked were located outside of the authorized concession area and that at the time of the visit, the company had worked on approximately 163-00-00 ha of the 300-00-00

[52] See first term of AIA, in relation to inspection report, p. 13, and *oficio* no. PFPA-DS-DQPS-061/2002, 30 April 2002.
[53] See fifth condition of sixth term of AIA, in relation to inspection report, p. 7.
[54] See tenth condition of sixth term of AIA, in relation to inspection report, p. 7
[55] See sixteenth condition of sixth term of AIA, in relation to inspection report, pp. 9–10.
[56] Ibid.
[57] See notice of 11 June 2002, Appendix 43(e) of the submission, p. 2.

> authorized. The reforestation carried out by the company was insufficient in terms of both the area reforested and the manner in which this was done, since it was low density and the rate of survival was minimal.[58]

Furthermore, the Secretariat has no information about Profepa's assessment of Secotec's comments after Secotec received a copy of the inspection report of 15 April 2002.[59] This information would be relevant for consideration in a factual record.

Also lacking is information concerning Profepa's decision to rescind the order for temporary partial closure. Profepa issued the order as a safety measure on 11 June 2002,[60] and, in doing so, stated as follows:

> …it was found that the Establishment has carried out mining activities on 163 ha and only carried out restoration activities on 22.5 ha, plus 8 additional ha indicated in the quarterly report filed with this office on 8 May 2002, the foregoing to the detriment of the site's flora and fauna with possibly irreversible negative consequences…[61]

In the development of a factual record, information would be gathered on the reasons why Profepa decided to rescind the order for temporary partial closure upon signing the agreement of 24 June 2002, with Secotec, despite the fact that it had stated in the notice of 11 June 2002, that the order for closure would be rescinded "when [Secotec] carries out the following actions and provides proof thereof to this office…", pursuant to LGEEPA Article 170 Bis.[62] The actions to which Profepa subjected the rescission of the order for temporary partial closure were as follows: 1) Secotec's grading of 40 ha previously mined, and 2) Secotec's filing with Profepa a study or expert opinion issued by a respected organization or professional indicating whether or not there is a loss of fertile soil in the graded and mined area. The conditions contained in the agreement were as follows: 1) grade a minimum of 10 ha of land per month in the mined areas; 2) by 31 December 2002, provide proof of having graded 80 percent of the areas mined to date, and maintain that proportion with respect to the areas where mining was ongoing; 3) carry out a

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[58] *Oficio* no. PFPA-DS-DQPS-061/2002 from the Deputy Attorney for Natural Resources, Dr. José Ramón Nuñez Soto, to the Director of the Department of Environmental Petitions, Complaints, and Civic Participation of Profepa, Lic. Beatriz Eugenia Carranza Meza, 19 April 2002 in re "Complaint."

[59] Appendix 43(e) of the submission; memo no. 14042002-SIV-Q-008 to the Profepa Attorney for the State of Sonora, Lic. Otto Guillermo Clausen Iberri, from Francisco Arturo Bayardo Tiznado, on behalf of Secotec, 24 April 2002, in re "Presenting Observations." On p. 2 of the notice of 11 June 2002, Appendix 43(e) of the submission, it is stated that these observations were noted, without further details.

[60] Pursuant to LGEEPA Article 170: Where there exists an imminent risk of ecological imbalance or damage to or severe degradation of natural resources, or cases of contamination with dangerous consequences for ecosystems, their components, or public health, the Ministry may, with due justification, order any of the following safety measures: I. Temporary partial or total closing of pollution sources, as well as facilities managing or storing specimens, products or subproducts of wild flora or fauna species, forest resources, [… II. …] as well as property, vehicles, tools and instruments directly related to the conduct giving rise to the imposition of the safety measure, or…

[61] Appendix 43(e) of the submission, p. 5.

[62] LGEEPA Article 170 Bis: Where the Ministry orders any of the safety measures contemplated by this Law, it shall indicate to the interested party, as applicable, the actions that the latter shall take to correct the irregularities justifying the application of said measures, as well as the deadlines for carrying them out, in order for the safety measures order to be rescinded once these actions are completed.

reforestation program; 4) post a performance bond with Profepa in an amount of P$400,000.00 to guarantee compliance with the corrective measures stipulated in the agreement.

The only information obtained by the Secretariat as to why the order for temporary partial closure was rescinded two weeks after it was issued is found in a report issued by Profepa on 19 July 2002, in the context of a judicial review proceeding in which the Submitters challenged the validity of the agreement.[63] Profepa stated that this type of agreement is contemplated by LGEEPA Article 168, that it "specifically defines the actions to be taken by the company in performance of the corrective measures necessary to comply with the terms and conditions imposed by means of the decision rendered in file no. D.O.O.O.DGNA.-005647 [the AIA] of 9 September 1997," and that "the Office of the Federal Attorney for Environmental Protection reserves the right to exercise any of its powers in case of noncompliance with the aforementioned terms of the agreement in question …"[64]

Likewise, a factual record would make it possible to gather information on whether the Party has taken the actions necessary to ensure and, as applicable, require compliance by Secotec with the agreement of 24 June 2002,with any stipulations in the notice of 11 June 2002 not covered by that agreement, and with any remaining instances of non-compliance noted in the inspection report of 15 April 2002. If none of said instances of noncompliance were remedied, the Secretariat would gather information regarding follow-up by Profepa in order to determine, among other things, whether Profepa ever found it necessary to terminate the agreement of 24 June 2002 and execute the bond posted by the company in order to carry out restoration of the affected site itself.

The Secotec AIA issued in September 1997 specifies that its period of validity is two years and that the company may apply for renewal within the 30 calendar days prior to expiry. The application must include the validation of the company's last report of compliance with the conditions imposed by Profepa as well as the following: a) a report of the results of the restoration program, including maps with geographical coordinates; b) current status of the lot; c) area and location on maps with geographical coordinates of the sites to be exploited in the next two years; d) video and photographic record indicating the progress achieved.[65] The authorization was renewed for the first time in October 2000.[66] For the development of a factual record, information would be gathered to determine how the Party granted to Secotec the renewal of these authorizations and whether it gave the appropriate follow-up to these applications and decisions.

[63] Appendix 43 of the submission: *oficio* PFPA-DS-SJ-1248/2002 from the Profepa Attorney for the State of Sonora, Lic. Otto Guillermo Clausen Iberri, to the First District Judge of the State of Sonora, 19 July 2002, in re "Reasoned Report Filed," amparo proceeding no. 506/2002; Complainants: Leoncio, Fernanda and Milagro Pesqueira Senday; File: Principal.
Mexico does not mention this proceeding in its response.
[64] Ibid, p. 16.
[65] See second term and condition 3 of sixth term of AIA.
[66] Appendix 32 of the submission; *oficio* no. D.O.O.DGOEIA.-006278 to Secotec from National Institute of Ecology, Environmental Land Use Planning and Impact Branch, 17 October 2000.

V. SECRETARIAT'S DETERMINATION

In the case of submission SEM-02-004/El Boludo Project, the Secretariat reviewed the Party's response in accordance with Article 14(3)(a) in light of Article 45(3)(a) and the relevant provisions of the Party's law, in this case, the LGEEPA. The Secretariat finds, based on the information received by the Secretariat, that for the purposes of the NAAEC, the matter addressed by the submission is not the subject of a pending administrative proceeding. The Secretariat reviewed the submission for the purposes of Article 15(1) and finds that it raises central issues relating to whether the Party is failing to effectively enforce its environmental law in the case of the "El Boludo" project, issues that remain outstanding as the Party did not respond to the assertions in the submission. Therefore, the Secretariat hereby notifies the Council, pursuant to NAAEC Article 15(1), that it considers the submission to warrant the development of a factual record.

Respectfully submitted for your consideration on 17 May 2004.

Secretariat of the Commission for Environmental Cooperation

(original signed)
per: William V. Kennedy
Executive Director