
Secretariat of the Commission for Environmental Cooperation**Article 15(1) Notification to Council that
Development of a Factual Record is Warranted**

Submitter: Ángel Lara García
Party: United Mexican States
Date of submission: 17 June 2003
Date of this notification: 23 August 2004
Submission number: SEM-03-004/ALCA-Iztapalapa II

I. EXECUTIVE SUMMARY

Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), the Secretariat of the Commission for Environmental Cooperation (CEC) of North America (the “Secretariat”) may consider submissions asserting that a Party to NAAEC is failing to effectively enforce its environmental law. If the Secretariat finds that the submission meets the requirements of Article 14(1), it shall then determine whether the submission warrants requesting a response from the Party named in the submission, in accordance with Article 14(2). The Secretariat may notify the Council that it considers that the submission warrants developing an Article 15 factual record, in light of any response from the Party. By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record. The final factual record, again by a vote of two-thirds of the members of the Council, may then be made public.

This Notification contains the Secretariat’s Article 15(1) analysis with respect to whether the submission filed 17 June 2003 warrants the development of a factual record.

This submission asserts that Mexico is failing to effectively enforce its environmental laws with respect to the operation of a footwear materials factory owned by the company ALCA, SA de CV (ALCA), located on a property neighboring the Submitter’s home in the Santa Isabel Industrial neighborhood of Iztapalapa Delegation in Mexico City.¹

On 9 September 2003, the Secretariat determined that the submission met the requirements of Article 14(1) of NAAEC. Furthermore, in light of the criteria set forth in NAAEC Article 14(2), the Secretariat considered that the submission warranted a request for a response from the Party. Mexico provided the Secretariat with a response to the submission on 4 December 2003.

¹ Submission at 1, 3 and 4.

Although the submission and Mexico's response provides some information regarding certain proceedings related to the assertions in the submission, central questions regarding those assertions remain. The proceedings discussed in the submission and Mexico's response were all concluded well before the filing of the Submitter's submissions in November 2002 and June 2003, in which the Submitter asserts that ALCA's alleged violations continue despite any action Mexico has taken, and the Secretariat has no information indicating that any action has been taken with respect to the assertions in the submission since the filing of the submissions. Accordingly, as described further in this notification, pursuant to Article 15(1) of NAAEC, the Secretariat hereby notifies the Council that the submission warrants the development of a factual record in accordance with the provisions of section IV below.

II. THE SUBMISSION

A. Background

On 25 November 2002, Ángel Lara García (the "Submitter") submitted to this Secretariat a submission (SEM-02-005/ALCA-Iztapalapa) under Articles 14 and 15 of NAAEC. The Secretariat determined on 17 December 2002 that the submission did not meet the requirements of sections (c) and (d) of Article 14(1) of NAAEC. Based on section 6.2 of the *Guidelines for Submissions on Enforcement Matters* (the "Guidelines"), upon giving notice of its determination, the Secretariat notified the Submitter that he had 30 days to present a submission meeting the NAAEC Article 14(1) requirements.

On 17 June 2003, after stating that a lack of resources prevented him from amending his original filing in the time provided, the Submitter submitted a new submission to the Secretariat (SEM-03-004/ALCA-Iztapalapa II).² On 3 July 2003, the Submitter confirmed in writing his intention for the Secretariat to consider the information contained in the original submission in its review of the new submission.

Under NAAEC, the Secretariat may examine submissions meeting the requirements of Article 14(1). If it considers that a submission meets those requirements, the Secretariat shall then determine whether the submission warrants requesting a response from the Party. To arrive at this determination, the Secretariat follows the provisions of Article 14(2). The Secretariat determined on 9 September that the submission met the requirements of Article 14(1) and, pursuant to Article 14(2), requested a response from the Mexico.

² Submission at 1 and 5.

B. Summary of the submission

The Submitter asserts that Mexico is failing to effectively enforce its environmental laws with respect to the operation of a footwear materials factory owned by the company ALCA, SA de CV (ALCA), located on a property neighboring the Submitter's home in the Santa Isabel Industrial neighborhood of Mexico City.³ The Submitter asserts that the factory's air pollution and ALCA employees' handling of hazardous substances and wastes violate Article 150 of the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) and Articles 414, first paragraph and 415, Section I of the Federal Penal Code (*Código Penal Federal*—CPF).⁴ In particular, the Submitter asserts that the company is illegally carrying on the storage, disposal and unloading of environmentally harmful hazardous substances without applying prevention and safety measures.⁵ The Submitter also claims that ALCA does not apply prevention or safety measures to prevent the atmospheric release or discharge of environmentally harmful gas, smoke, dust or pollutants.⁶ The Submitter asserts that the company is failing to manage hazardous materials and wastes in accordance with LGEEPA and the Mexican Official Standards (*Normas Oficiales Mexicanas*—NOMs) issued by the Secretariat of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat).⁷ The Submitter asserts that these alleged violations are causing pollution harming his and his family's health.⁸ He further asserts that the Office of the Federal Attorney General for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), despite having found violations during a factory inspection, terminated a citizen complaint filed by the Submitter without taking the actions necessary to stop the alleged violations.⁹

III. SUMMARY OF THE PARTY'S RESPONSE

In its response, Mexico focuses its arguments on what it claims to be the three principal aspects of the Submission: “a) violation of LGEEPA Article 150 by the company ALCA, SA de CV, as raised in a citizen complaint; b) violation of CPF Article 415, Section I as raised in a criminal complaint; and c) lack of resolution of a proceeding filed with the

³ Submission at 1, 3 and 4.

⁴ Submission at 3 and 4.

⁵ Submission at 3, bolded.

⁶ Ibid.

⁷ Submission at 4, bolded.

⁸ Submission at 2.

⁹ Submission at 1 and 2, and exhibit: Administrative report of the Undersecretariat for Public Affairs and Rules (*Subsecretaría de Atención Ciudadana and Normatividad*), General Bureau of Public Affairs (*Dirección General de Atención Ciudadana*), Adjunct General Bureau of Public Affairs (*Dirección General Adjunta de Atención Ciudadana*), Assistant Bureau of Direct Attention and Immediate Processing (*Subdirección de Atención Directa and Gestión Inmediata*) of the Secretariat of the Comptroller and Administrative Development (*Secretaría de Contraloría and Desarrollo Administrativo*), dated 23 October 2002.

Semarnat's Internal Control Agency, claiming 'collusion between inspectors and the company ALCA, to cover up liabilities and thereby avoid involvement of the judicial authority.'¹⁰

As regards the alleged failure to enforce LGEEPA Article 150, Mexico refers to the citizen complaint that the Submitter filed on 10 November 1995, but provides no further information because, it claims, the file was lost in a flood in the file room. However, Mexico asserts the process was concluded pursuant to law without initiation of a criminal investigation.¹¹ In addition, Mexico states that other proceedings were initiated against ALCA, including: 1) a filing dated 10 November 1998 submitted to the Iztapalapa Delegation by the coordinator of the Public Affairs Center (*Casa de Atención Ciudadana*), Omar A. Velasco, who noted the concern of neighbors residing near the company ALCA, SA de CV, which releases toxic gases such as hexane, heptane, styrene, toluene, xidenol, etc.; 2) a citizen complaint dated 19 November 1998 and filed by the same Omar A. Velasco against ALCA, due to toxic gas releases; and 3) a second citizen complaint filed by Ángel Lara García on 14 September 2000.¹² Mexico states that collectively, these proceedings led to an inspection of ALCA on 27 July 2001, during which facts and omissions constituting offenses under LGEEPA, as well as the air pollution, hazardous waste and environmental impact regulations thereunder, were observed. Based on inspection, on 7 September 2001, ALCA was fined 2,421.00 pesos, equivalent to 60 days' minimum salary for the Federal District.¹³ Mexico states that on 8 October 2002, after the fine was imposed, all of the citizen complaints were deemed concluded.¹⁴

As regards the violation of Article 415, paragraph I of the CPF, Mexico refers to a criminal investigation dated 14 March 1999, referenced by the Submitter under folio 4099/FEDEC/97. Mexico explains that this complaint was filed against Roberto Guillermo Álvarez Cabañas, Guillermo Antonio Álvarez Zarraga, Alejandra Verónica Álvarez Zarraga, Eduardo Álvarez Cabañas, and the company ALCA, SA de CV. Mexico states that, based on a technical opinion, it was decided 22 August 2000 not to undertake a criminal action, as the investigations "did not clearly establish a crime as set forth and penalized under Article 415, Section I of the CPF nor the probable liability of the suspects, as we deduce from the acts that although the asserted facts may constitute a crime, it is impossible to determine whether the crime exists due to irreparable material hindrance, because the proof provided is insufficient to evidence the crime."¹⁵

With respect to the lack of resolution of a proceeding filed with the Semarnat Internal Control Agency, Mexico states that the proceedings begun by the Submitter against Profepa officials were concluded without the imposition of penalty because sufficient

¹⁰ Party's response at 1.

¹¹ Party's response at 2.

¹² Party's response at 2 and 3.

¹³ Party's response at 3.

¹⁴ Ibid.

¹⁵ Party's response at 3, 4, 5 and 6.

evidence of the public servants' alleged liability was not found. Mexico provides no further comment or documentary evidence in this regard, arguing that this information was deemed confidential under Article 13, Section V of the Federal Law of Transparency and Access to Governmental Public Information (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental—LFTAIPG*)¹⁶ and Article 26 of the Regulation thereunder.¹⁷ The Internal Control Agency classified the information as confidential.

IV. ANALYSIS

A. Introduction

This notification corresponds to the process stages set forth in Articles 14(3) and 15(1) of NAAEC. Previously, on 9 September 2003, the Secretariat determined that the submission met all requirements under Article 14(1) (a)-(f) of NAAEC.¹⁸ The Secretariat then proceeded to evaluate the submission based on the NAAEC Article 14(2) criteria, concluding that the Submission warranted requesting a response from the Party, which was received on 21 November 2003 as noted above. Consistent with Article 15(1), the Secretariat presents below the reasons why it considers this submission to warrant the development of a factual record.

B. Analysis of the reasons why the development of a factual record is warranted

In its response, although Mexico explains certain proceedings undertaken with respect to the company ALCA, it does not provide a comprehensive set of information with respect to the assertions contained in the submission to the effect that ALCA's air pollution releases and handling of hazardous substances and wastes violate Article 150 of the LGEEPA¹⁹ and Articles 414, first paragraph and 415, Section I of the CPF.²⁰ In

¹⁶ Article 13. Information may be classified as reserved when it may: [...]

V. Cause serious harm to the activities to verify compliance with the law, the prevention or prosecution of crimes, the administration of justice, collections from taxpayers, immigration control operations, and procedural strategies in judicial or administrative proceedings while rulings are pending.

¹⁷ Article 26. The heads of the administrative units of agencies and entities shall classify information at the time that:

The information is generated, obtained, acquired or processed, or

An information access request is received, in the case of documents not previously classified.

The classification may refer to a file or to a document.

¹⁸ SEM-03-004 (ALCA-Iztapalapa II), Article 14(1) determination (9 September 2003).

¹⁹ LGEEPA Article 150. Hazardous materials and wastes must be handled in accordance with this law, the Regulations hereof and any Mexican Official Standards issued by the Secretariat, on prior opinion of the Secretariats of Trade and Industrial Development, of Health, of Energy, of Communications and Transportation, of the Navy, and of the Interior. The regulation of the handling of these materials and

particular, it does not discuss whether ALCA, without applying prevention and safety measures: i) carries on the storage, disposal and unloading of environmentally harmful hazardous substances; ii) releases or discharges environmentally harmful gas, smoke, dust or pollutants into the atmosphere; or iii) is failing to handle hazardous materials and waste in accordance with the LGEEPA and the environmental NOMs issued by Semarnat.

In its response, Mexico refers to the citizen complaint filed by the Submitter on 10 November 1995 (file number 512/1166/09). Mexico states that the file for this citizen

substances shall include, as applicable, the use, collection, storage, transport, reuse, recycling, treatment and disposal thereof.

The Regulations and Mexican Official Standards to which the preceding paragraph refers shall contain criteria and lists identifying and classifying hazardous materials and wastes by their degree of hazard, consider the characteristics and volumes thereof, and differentiating those of high and low hazard. The Secretariat is responsible for the regulation and control of hazardous materials and wastes.

Furthermore, in coordination with the secretariats to which this article refers, the Secretariat shall issue the Mexican Official Standards establishing the requirements for the labeling and containment of hazardous materials and wastes and for risk assessment and information on contingencies and accidents that may occur in the handling thereof, particularly in the case of chemical substances.

²⁰ CPF Article 414. A penalty of one to nine years of imprisonment and from 300 to 3,000 days' fine shall be imposed on anyone who illegally, or without applying the prevention or safety measures, undertakes the production, storage, traffic, importation or exportation, transport, abandonment, disposal, discharge, or any other activity with substances deemed hazardous due to their corrosive, reactive, explosive, toxic, flammable, radioactive or other similar characteristics, or so orders or authorizes, causing damage to natural resources, flora, fauna, the ecosystems, water quality, the soil, the subsoil, or the environment.

The same penalty shall apply to persons who illegally undertake the actions with the substances listed in the preceding paragraph, or with ozone-depleting substances, causing a risk of harm to natural resources, flora, fauna, the ecosystems, water quality or the environment.

In the case that the activities to which the preceding paragraphs refer are undertaken in a protected nature area, the penalty of imprisonment shall increase by up to three years and the economic penalty shall increase by up to 1,000 days' fine, except for activities undertaken with ozone-depleting substances.

When the actions referenced in the first and second paragraphs of this article are undertaken in urban zones with used oils or ozone-depleting substances in amounts not exceeding 200 liters, or with waste deemed hazardous by reason of its biological-infectious characteristics, half the penalty set forth in this article shall apply, except in the case of repeat offenses with amounts lower than those provided when they exceed such amount.

Article 415. A penalty of from one to nine years' imprisonment and from three hundred to three thousand days' fine shall be imposed on anyone who, without applying the prevention or safety measures:

I. Emits, releases or discharges into the atmosphere, or who so authorizes or orders, gases, smokes, dusts or pollutants that cause harm to the natural resources, the fauna, the flora, the ecosystems or the environment, provided that such emissions derive from fixed sources under federal jurisdiction, in accordance with the provisions of the General Law of Ecological Equilibrium and Environmental Protection, or

II. Generates emissions of noise, vibrations, thermal energy or light from sources under federal jurisdiction, in accordance with the law set forth in the preceding section, causing harm to the natural resources, the flora, the fauna, the ecosystems or the environment.

The same penalties shall apply to anyone who illegally undertakes the activities described in the foregoing sections causing a risk to the natural resources, the flora, the fauna, the ecosystems or the environment.

In the case that the activities to which this article refers are undertaken in a protected nature area, the penalty of imprisonment shall increase by up to three years and the economic penalty shall increase by up to 1,000 days' fine.

complaint was lost in a file room flooding and then refers to other proceedings filed by Omar Velasco on 10 and 19 November 1998, which were joined with a second complaint filed by Ángel Lara García on 14 September 2000. These three proceedings led to a fine against ALCA of 2,421.00 pesos on 7 September 2001. Lastly, the Party refers to criminal investigation 4099/FEDEC/97, presented by the Submitter on 14 March 1997, which resulted in no criminal action pursuant to ruling number 1039/2000 dated 22 August 2000.

Although the information Mexico provides in its response and the attachments to it present some information regarding certain proceedings related to the assertions in the submission concerning Article 150 of LGEEPA and Articles 414, first paragraph and 415, Section I of the CPF, central questions regarding those assertions remain. First, the proceedings discussed in Mexico's response were all concluded well before the filing of the Submitter's submissions in November 2002 and June 2003, in which the Submitter asserts that ALCA's alleged violations continue despite any action Mexico has taken. Mexico provides no information regarding any action it has taken with respect to possible environmental violations since the filing of the submissions.

Further, the Secretariat notes that the documents attached to the Submission include a document issued on 14 February 2002 by the Profepa General Bureau of Environmental Complaints and Public Participation (*Dirección General de Denuncias Ambientales, Quejas y Participación Social*),²¹ which cites certain actions undertaken by the authority with respect to ALCA:

- It refers to a citizen complaint filed 5 October 1994 by Ángel Soto Medina, resulting in an inspection visit on 7 December 1994, in which various infractions of federal environmental rules were found. As a result of the inspection, the temporary partial closing of pollution sources was imposed as a safety measure, lifted on 14 August 1996.
- By reason of a citizen complaint filed by Ángel Lara García on 13 January 1997, an inspection visit was performed on 10 March 1997, and given the company's observed noncompliance, on 5 September 1997 an administrative ruling was entered, imposing a fine of 21,160.00 pesos and ordering the undertaking of various corrective measures.
- An inspection visit was carried out on 17 February 2000, finding irregularities regarding hazardous waste generation.
- An inspection visit on 27 July 2001 found possible offenses regarded hazardous waste, risk and air pollution.

²¹ Ruling No. DG/094/DI/167/2002, FOLIO 027/4/98/2, dated 14 February 2002, issued by the General Bureau of Environmental Complaints and Public Participation, signed by General Director Edgar del Villar Alvelais.

In its response, Mexico provided information only with respect to the last proceeding listed in the Profepa document.

The information provided in the Submission and Mexico's response give some idea as to the history of penalties imposed on ALCA and the complaint and inspection processes carried out with respect to ALCA's operations since 1994. The penalties against ALCA range from the imposition of safety measures, such as the temporary partial closing of its pollution sources, to monetary sanctions.

However, while the information provided by the Submitter shows signs of pollution and health and environmental risks derived from ALCA operations, the respective information provided by Mexico is incomplete. For example, Exhibit 11 to Mexico's response, consisting of a "technical opinion with respect to the advice not to exercise criminal action made by agents of the Public Prosecutor (*Ministerio Público*) assigned to the General Bureau of Criminal Proceeding Control (*Dirección General de Control de Procedimientos Penales*)" is not a complete copy of that document, which purports to disprove the existence of environmental crimes committed by ALCA.

Article 161 of the LGEEPA provides: "The Secretariat shall carry on acts of inspection and oversight of compliance with the provisions contained in this law, and of all provisions hereunder."²² Although Mexico has undertaken some inspection and oversight activities, the fact that the Submitter asserts that alleged environmental violations continue despite those activities, compounded with the history of complaints and inspections against ALCA and the penalties thereon since 1994, persuade the Secretariat that a factual record is warranted. Development of a factual record would provide an opportunity to present a detailed and up-to-date set of facts regarding ALCA's alleged environmental violations, the various citizen complaints and proceedings that have arisen in connection with those alleged violations, the actual conduct of inspections and investigations undertaken, and the alleged failure of those proceedings to prevent ALCA's alleged violations from continuing. More specifically, a factual record would contribute not only to allowing for a determination of whether ALCA's air pollution releases and handling of hazardous substances and wastes violated the legal provisions set forth in the Submission,²³ but also to analyzing how and whether follow-up actions and measures intended to prevent repeat offenses were implemented.

A factual record on this submission would enable an analysis of Mexico's actions in undertaking important inspection and oversight proceedings, following through on each proceeding and determining measures to prevent repeat offenses. This focus would

²² LGEEPA Article 161.

²³ LGEEPA Article 150 and CPF Articles 414, first paragraph and 415, Section I, particularly regarding the application of prevention and safety measures, to prevent: (i) the storage, disposal and unloading of environmentally harmful hazardous substances; (ii) the atmospheric release or discharge of environmentally harmful gas, smoke, dust or pollutants, or (iii) whether hazardous materials and wastes are being handled in accordance with LGEEPA and the environmental NOMs issued by Semarnat.

contribute to the furtherance of the NAAEC objectives, by potentially encouraging the strengthening of environmental procedures and practices, enhancing compliance and enforcement of environmental laws and regulations, promoting effective environmental measures and promoting pollution prevention policies and practices.²⁴

V. RECOMMENDATION

Based on the reasons set forth herein, the Secretariat hereby notifies the Council that, in light of Mexico's response with respect to the operation of the company ALCA in the Iztapalapa Delegation of Mexico City, it considers that the assertions of submission SEM-03-004—with respect to Article 150 of LGEEPA and Articles 414 and 415 of the CPF—warrant developing a factual record. The submission raised questions left unanswered by the response on the effective enforcement of environmental laws with respect to the company ALCA, regarding the application of prevention and safety measures in the storage, disposal and unloading of environmentally harmful hazardous substances; the release or discharge of environmentally harmful gas, smoke, dust or pollutants; and the failure to handle hazardous materials and wastes in accordance with LGEEPA and the environmental NOMs issued by Semarnat. The factual record would enable a clarification of the unanswered questions and the collection of further information on ALCA's effective compliance with such provisions, as well as an illustration of whether and how the inspection and oversight proceedings served to prevent polluting industries' repeat offenses against environmental laws in Mexico, and contribute to effective enforcement in furtherance of the goals of NAAEC.

Respectfully submitted for your consideration on this 23rd day of August, 2004.

Secretariat of the Commission for Environmental Cooperation

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

²⁴ NAAEC Article 1: Objectives

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 [...]

(i) promote economically efficient and effective environmental measures;

(j) promote pollution prevention policies and practices.