

Secretariat of the Commission for Environmental Cooperation

**Determination in accordance with Articles 14(1) and (2)
of the North American Agreement on Environmental Cooperation**

Submitters:	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.
Represented by:	Greenpeace México, A.C.
Party:	United Mexican States
Revised submission:	5 February 2009
Original submission:	28 January 2009
Date of the determination:	3 March 2010
Submission I.D.:	SEM-09-001 (<i>Transgenic maize in Chihuahua</i>)

I. BACKGROUND

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., and Greenpeace México, A.C. (the

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/>

“Submitters”),² filed a submission on enforcement matters with the CEC 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 law in connection with the control, inspection, investigation, and assessment of the risks posed by transgenic maize in Chihuahua, Mexico.

3. On 6 January 2010, the Secretariat found that the submission did not meet all the NAAEC Article 14(1) eligibility requirements and, with reference to section 6.2 of the Guidelines, notified the Submitters that they had 30 days – i.e., until 5 February 2010 – in which to file a submission meeting those requirements. In particular, the Secretariat found that the submission referred in certain instances to instruments that do not qualify as environmental law in the sense of the NAAEC;³ did not cite the provisions obligating the Office of the Attorney General of the Republic (*Procuraduría General de la República*—PGR) to inform a complainant of progress on an investigation;⁴ and did not fully meet the requirement of Article 14(1)(c), since it did not provide sufficient information to enable the Secretariat to review it. Furthermore, in its *prima facie* review of the submission with reference to the criteria in Article 14(2)⁵, the Secretariat found that the submission did not contain information on private remedies pursued in relation to the matter raised in the submission,⁶ and that it appeared to be based exclusively on mass media reports.⁷
4. On 5 February 2009, the Submitters filed a revised submission with the Secretariat in accordance with Articles 14 and 15 of the Agreement.
5. The Secretariat now finds that the submission satisfies the requirements of NAAEC Article 14(1) and, with reference to the criteria set out in Article 14(2), warrants a response from the government of Mexico. Bearing in mind the determination of 6 January 2010 with respect to the original submission, this determination focuses on matters that remained pending in the absence of a revised submission.

² Between the date of filing of submission SEM-09-001 and 27 March 2009, the Secretariat received 5728 e-mails from persons requesting to be considered as submitters. All the requests came from the same e-mail address: write-a-letter@smtp-gw.greenpeace.org.

³ SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §§13, 16-17. Cf. NAAEC Article 45(2).

⁴ *Ibid.*, §22.

⁵ With respect to this, the Guidelines section which relates to the initial consideration of a submission by the Secretariat, guideline 5.6 of the Guidelines reads the submission “should address the factors for consideration identified in Article 14(2) of the Agreement” The Secretariat informed that *prima facie* the submission appeared to be based exclusively in mass media reports. SEM-09-001 (*Transgenic Maize in Chihuahua*) Determination pursuant to Article 14(1) (6 January 2010) §24(c).

⁶ *Ibid.*, §24(c). Cf. NAAEC Article 14(2)(c).

⁷ *Ibid.*, §24(c). Cf. NAAEC Article 14(2)(d).

II. SUMMARY OF THE SUBMISSION

A. Original submission

6. The Submitters assert that the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat); the 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 Público*—SHCP), and the Interministerial Commission on Biosafety of Genetically Modified Organisms (*Comisión Intersecretarial de Bioseguridad de los Organismos Genéticamente Modificados*—Cibiogem), are failing to effectively enforce the environmental laws cited in the submission.⁸
7. The Submitters state that these 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 (the “**Cartagena Protocol**”); Articles 2 paragraphs I, II, VI, VII, XI, XII and XIII, 9 paragraphs I, II, III, IV, V, VIII, IX, X, XI, XIV, XV, XVI, XVII and XVIII, 12, 13, 17, 18, 28, 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 13.⁹
8. The Submitters note that the state of Chihuahua is allegedly classified by the National Institute of Ecology (*Instituto Nacional de Ecología*—INE) as a region of high maize diversity, and that there are records of the occurrence of 23 landraces of native maize and two of teosinte.¹⁰ 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.¹¹

⁸ Original submission, p. 2.

⁹ *Ibid.*, pp. 5, 7, 9–13.

¹⁰ *Ibid.*, p. 14.

¹¹ *Ibid.*, p. 1.

9. The Submitters refer to the alleged “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.¹² They further assert a lack of measures to control and supervise storage, distribution, and marketing centers, and they 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 consent as examples.¹³ The Submitters affirm that importation, distribution, and cultivation of transgenic maize is taking place in the state of Chihuahua in violation of the environmental law provisions cited in the submission. Finally, the Submitters assert that they were not notified of the status of a complaint filed with the PGR in connection with the alleged illegal growing of transgenic maize.¹⁴

B. Revised submission

10. In response to the Secretariat’s determination of 6 January 2010, on 5 February 2010 the Submitters filed a revised version of the submission. In addition to the provisions cited in the original submission,¹⁵ the Submitters assert in their revised version that Mexico is failing to effectively enforce LBOGM Articles 3 and 12, and LGEEPA Articles 161, 162, 163, 164, 167, 169, and 171.
11. The Submitters reiterate the central assertions in the original submission and include additional information. In particular, the submitters provide information relating to two complaints filed with the PGR in relation to alleged facts that may constitute offenses defined in the CPF;¹⁶ they include documents about a complaint filed with Sagarpa and referred to Profepa;¹⁷ they elaborate on their explanations as to how Mexico is allegedly failing to effectively enforce the Mexican Constitution, the LBOGM, the LGEEPA, and the CPF, and they present arguments as to why the Cartagena Protocol should be considered environmental law in the sense of the NAAEC.¹⁸
12. The Submitters cite information relating to a criminal investigation as evidence of the alleged lack of technical capacity on the part of PGR officers to gather information on the

¹² *Ibid.*, p. 8.

¹³ *Ibid.*

¹⁴ *Ibid.*, pp. 4–6.

¹⁵ The Secretariat notes that the revised submission, unlike the original submission, does not cite Article 17 of the Mexican Constitution; NAAEC Articles 5–7; LBOGM Articles 2 paragraphs I, II, VI, VII, XII and XIII, 12, 28, 29, 102, 110, and 111; and LGEEPA Articles 1 and 2 paragraph III. Likewise, the Submitters no longer refer to the recommendations of the report titled *Maize and Biodiversity: the Effects of Transgenic Maize in Mexico*, published by the CEC Secretariat under NAAEC Article 13, as environmental law.

¹⁶ Revised submission, pp. 3–6.

¹⁷ *Ibid.*, p. 4.

¹⁸ *Ibid.*, pp. 7–10.

sites where the Submitters assert that transgenic maize is being planted;¹⁹ they discuss an alleged lack of capacity of Profepa inspectors to obtain samples of genetic material;²⁰ they refer to an alleged delay in the proper performance of an investigation;²¹ they indicate that two years after complaints were filed with the criminal investigative authority, the Submitters are unaware of the status of these complaints;²² and they assert that because of an alleged lack of transparency, there is no certainty in regard to the mitigation actions and measures that the government of Mexico is implementing.²³

13. In the revised submission, the Submitters maintain that with the entry into force of the Cartagena Protocol, the authorities became obligated to implement the provisions of this international treaty, in this case by means of the LBOGM, which functions as the implementing instrument for the Protocol. The Submitters reiterate that Mexico “committed to take necessary and appropriate legal, administrative and other measures ... with a view to helping guarantee an *adequate level of protection*”²⁴ but that this has not occurred, since the authorities have not taken “administrative measures and others, such as penal measures... apparently causing the spread of cases of transgenic contamination.”²⁵

14. The Submitters assert that despite the alleged entry and planting of genetically modified maize in the Chihuahua region, no risk assessments have been done; nor has the principle of prior informed consent been applied; nor are there adequate measures in place to control and supervise storage, distribution, and marketing centers; nor is there any review, monitoring, or oversight of these matters on the part of the customs authorities.²⁶ The Submitters report that these facts are allegedly taking place in the municipalities of Cuauhtémoc, Namiquipa, Buenaventura, and Ascención in the state of Chihuahua.²⁷

III. ANALYSIS

15. 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, Article 14(1) is not intended to be an insurmountable screening device. This means that the Secretariat interprets each submission in accordance with the Guidelines and the Agreement, without making an unreasonably narrow interpretation

¹⁹ *Ibid.*, p. 4.

²⁰ *Ibid.*

²¹ *Ibid.* The Submitters add that fourteen months after the complaint was filed, the investigating agency issued a decision declaring that it has no jurisdiction over the matter and referring it to the PGR office in Chihuahua.

²² *Ibid.*, p. 6

²³ *Ibid.*, p. 7

²⁴ *Ibid.*, p. 9 (emphasis in original).

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

and application of the Article 14(1) requirements.²⁸ The Secretariat reviewed the submission with that perspective in mind.

A. Opening paragraph of Article 14(1)

16. 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.” In its determination of 6 January 2010, the Secretariat found that the Submitters are persons or nongovernmental organizations²⁹ and that the submission meets the currency requirement in that the situation is ongoing. The Secretariat found that the following provisions qualify as environmental law in the sense of NAAEC Article 45(2):³⁰ Article 4 of the Mexican Constitution; LBOGM Articles 9, 12 paragraph I, 13, 17, 18 paragraphs I, II, IV and 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, and 120; LGEEPA Articles 15, 160, 161, 164, 165, 166, 170, 170 *Bis*, 182, 189, 190, 191, 192, 193, 198, 201, 202, 203, and 204; and CPF Article 420 *Ter*.
17. In its determination of 6 January 2010, the Secretariat found that the following provisions do not qualify as environmental law: Article 17 of the Mexican Constitution; NAAEC Articles 5, 6, and 7; LBOGM Articles 12 paragraphs II, III, IV, V, VI, and VII, 28, 29,

²⁸ 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.

²⁹ While the revised version of the submission clearly refers to the Submitters and authorizes third parties to join them, the source of all the letters of support for the submission is a single e-mail address, write-a-letter@smtp-gw.greenpeace.org, which does not provide the minimal data necessary to identify these third parties. At the time of receipt of the original submission, the Secretariat responded to some of the requests made through that e-mail address but did not obtain a response.

³⁰ 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, 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.”

102, 110, and 111; LGEEPA Articles 1 and 2.³¹ Based on the information in the revised submission, the Secretariat proceeded to determine whether Articles 1, 2, 8, 9, 10, 15, and 16 of the Cartagena Protocol, quoted in the original submission, and LBOGM Articles 3 and 12 paragraph I, added to the revised submission, qualify as environmental law.

1) Environmental law in question

18. In its determination of 6 January 2010, the Secretariat requested additional information from the Submitters in order to determine whether the Cartagena Protocol fits the definition of environmental law and, if so, the extent to which it is linked to the assertions concerning effective enforcement.³² Since the revised submission contains information relevant to this issue, the Secretariat proceeded to examine it. In the revised submission, the Submitters cite a document from the Mexican Congress (*Cámara de Diputados*) published in the Parliamentary Gazette in connection with the LBOGM legislative process. The document states:

[T]he Mexican government as a whole was bound before the international community, to comply with the obligations set forth in the Cartagena Protocol, and therefore the treaty forms a part of the Mexican legal system as from that date...³³

19. The document adds that:

[T]he entry into force of the Cartagena Protocol entails for Mexico that its authorities must implement the provisions of that international treaty without specific legal rules.³⁴

20. Likewise, the submission transcribes the text of a thesis (*tesis*) of the Plenary of the Mexican Supreme Court (*Suprema Corte de Justicia de la Nación*) reading as follows:

INTERNATIONAL TREATIES. THEY ARE AN INTEGRAL PART OF THE SUPREME LAW OF THE UNION AND ARE POSITIONED HIERARCHICALLY ABOVE GENERAL, FEDERAL, AND LOCAL LAWS. INTERPRETATION OF ARTICLE 133 OF THE CONSTITUTION.

A systematic interpretation of Article 133 of the Mexican Constitution points to the existence of a higher, national-scale juridical order made up of the Mexican Constitution, international treaties, and general laws. Thus, based on this interpretation, harmonized with the principles of international law found throughout the text of the Constitution as well as with the fundamental rules,

³¹ However, they serve to guide the Secretariat's review. Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §17.

³² SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §14.

³³ Revised submission, Appendix 20: Report of the Joint Environment and Natural Resources, Agriculture and Livestock, and Science and Biotechnology Commissions on the draft Executive Order enacting the Genetically Modified Organisms Biosafety Act.

³⁴ *Ibid.*

standards, and premises of this domain of law, it is concluded that international treaties are positioned hierarchically below the Mexican Constitution and above general, federal, and local laws, insofar as the Mexican State, in entering into them, pursuant to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, and in accordance with the principle of *pacta sunt servanda*, which forms the basis of international treaty law, freely contracts obligations towards the international community that cannot be ignored by invoking domestic legal provisions; obligations whose non-fulfillment, moreover, becomes a matter of international liability.³⁵

21. By virtue of the above-cited incorporation mechanism, the Cartagena Protocol appears to constitute domestic law in Mexico.³⁶ In order to determine which provisions of the Cartagena Protocol cited in the submission focus on environmental protection in terms of “the protection of wild flora or fauna,”³⁷ the Secretariat read Article 1 of the Protocol, which states: “the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology *that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health* [emphasis added]...”³⁸
22. In view of the foregoing, the Secretariat finds that the provisions relating to measures that Mexico must take to implement its obligations;³⁹ the rules applicable to notification in connection with living modified organisms;⁴⁰ the decision procedure in connection with transboundary movement of living modified organisms,⁴¹ and risk assessment and risk management⁴² are in principle considered environmental law in the sense of NAAEC Article 45(2) and merit further study. As to the provisions limiting conflict with state sovereignty,⁴³ the absence of restrictions on the taking of additional action;⁴⁴ and the

³⁵ Revised submission, Appendix 19: Thesis. Location: ninth period, instance: full court; source: *Semanario Judicial de la Federación*, XXV; abril, 2007; thesis: IX-2007; isolated thesis; subject: constitutional.

³⁶ The Secretariat takes a cautious approach on this point, limiting its review to those of the Submitters’ assertions relating to the implementation of the Cartagena Protocol, without consideration of the status of that instrument in international law.

³⁷ Cf. NAAEC Article 45(2)(a)(iii).

³⁸ For greater clarity, the Secretariat did not review the effective enforcement of this article, which serves only to guide the Secretariat’s review.

³⁹ Cartagena Protocol, Article 2(1) and (2).

⁴⁰ *Ibid.*, Articles 8 and 9, with the exception of 9(3), since it establishes requirements concerning the adoption of the domestic legal framework, a matter which falls outside the scope of the submissions on enforcement matters procedure.

⁴¹ *Ibid.*, Article 10, with the exception of 10(7), which includes rules to be decided upon by the Conference of Parties.

⁴² *Ibid.*, Articles 15 and 16, with the exception of anything that may include the taking of legislative measures.

⁴³ *Ibid.*, Article 2(3).

⁴⁴ *Ibid.*, Article 2(4).

encouragement to take into account available instruments,⁴⁵ these are only being used to guide the Secretariat's analysis, with no review of their effective enforcement as such.

23. In this regard, Mexico may, as appropriate, provide in a response to the submission its considerations relating to the assertions concerning the implementation of the Cartagena Protocol in the Mexican legal system, as well as information on the assertions concerning the alleged failure to effectively enforce said instrument that are identified in this determination.
24. Concerning LBOGM Articles 3 and 12 paragraph I, which were added to the revised submission, the Secretariat finds that provisions establishing definitions,⁴⁶ although they may guide the Secretariat in studying matters of effective enforcement, do not qualify as environmental law in the sense of NAAEC Article 45. Concerning LBOGM Article 12, this provision gives Sagarpa the power to enforce the Act in connection with activities involving genetically modified plants, including seeds, considered agricultural species. It therefore qualifies for review, insofar as the exercise of such powers is geared toward the protection of the environment or human health.

2) Assertions concerning the failure to effectively enforce the environmental law

25. Concerning the assertions related to the alleged absence of measures ensuring adequate protection of conventional maize varieties; the alleged failure to timely process complaints filed by the Submitters, and the alleged lack of capacity to investigate and prosecute offenses related to the illegal presence of genetically modified seeds, the Secretariat's determination of 6 January 2010 contains the reasoning on which it bases its determination for further study.⁴⁷

B. The six requirements of NAAEC Article 14(1)

26. The Secretariat proceeded to evaluate the submission in light of the six requirements of NAAEC Article 14(1). In its determination of 6 January 2010, the Secretariat found⁴⁸ that the submission met the requirements of NAAEC Article 14(1)(a), (b), (d), (e), and (f).⁴⁹

⁴⁵ *Ibid.*, Article 2(5).

⁴⁶ LBOGM Article 3.

⁴⁷ SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §21–23.

⁴⁸ *Ibid.*, §24.

⁴⁹ “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) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.”

However, the Secretariat found that the submission did not contain sufficient information to allow for further consideration.⁵⁰

27. With the revised submission and the complementary information provided by the Submitters, the Secretariat now finds that the submission also meets the requirements of Article 14(1)(c),⁵¹ since it indeed provides sufficient information, including documentary evidence to support it and to enable the Secretariat to review it.
28. While some of the documents have no direct bearing on the assertions in the submission, since they refer to the biological effects of consuming transgenic maize,⁵² and to biodiversity and traditional knowledge of maize,⁵³ the revised submission also includes documents serving as background information to its assertions, including the proceedings of a workshop on identification and production of maize centers of origin;⁵⁴ a consensus document issued by the Organization for Economic Cooperation and Development (OECD);⁵⁵ a compilation on the origin and diversification of maize in Mexico;⁵⁶ a study on the context of wild and cultivated maize in Mexico produced as part of a report published by the Secretariat under NAAEC Article 13;⁵⁷ a copy of an issue of *Ciencias*, a publication of the Faculty of Science of the Universidad Nacional Autónoma de Mexico, on the topic of transgenic maize in Mexico;⁵⁸ and a copy of a paper on the origin and diversity of maize in the Americas published by one of the Submitters.⁵⁹

⁵⁰ SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §24(c).

⁵¹ “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;”

⁵² Revised submission, compact disc appendix: A. Velimirov and 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; Joël Spirooux de Vendomôis et al., “A Comparison of the Effects of Three GM Corn Varieties on Mammalian Health,” *Int. J. Biol. Sci.* 5 (2009): 706–26.

⁵³ Revised submission, compact disc appendix: Luciano Concheiro and Francisco López, eds., *Biodiversidad y conocimiento tradicional en la sociedad rural: Entre el bien común y la propiedad privada* (Mexico City: Centro de Estudios para el Desarrollo Rural Sustentable y la Soberanía Alimentaria, 2007).

⁵⁴ Revised submission, compact disc appendix: *Memorias del Seminario Taller “Identificación y Producción de Centros de Origen de Maíz,”* Semarnat, INE, Conabio, 9 December 2004.

⁵⁵ Revised submission, compact disc appendix: *Consensus Document on the Biology of Zea mays subsp. mays (Maize)*, OECD, 2003.

⁵⁶ Revised submission, compact disc appendix: Takeo Angel Kato et al., *Origen y diversificación del maíz: una revisión analítica* (Mexico City: Universidad Nacional Autónoma de Mexico, Comisión Nacional para el Conocimiento y Uso de la Biodiversidad, 2009), 98.

⁵⁷ Revised submission, Appendix 21: Antonio Turrent and José Antonio Serratos, *Chapter 1: Context and Background on Maize and its Wild Relatives in Mexico* (Montreal: Secretariat of the Commission for Environmental Cooperation, 2004).

⁵⁸ Revised submission, Appendix 21: *Ciencias* 92–93 (Mexico City: Faculty of Science, UNAM, October 2008–March 2009).

⁵⁹ José Antonio Serratos Hernández, *El origen y la diversidad del maíz en el continente americano* (Mexico City: Greenpeace, 2009).

29. The Submitters attach documents relating to the assertions on protection of local maize varieties from genetically modified maize, including papers on crop domestication⁶⁰ and a paper on long-distance cross-pollination.⁶¹ Also attached to the revised submission is a document by Conabio which states that “there is no scientific evidence of harm to biological diversity, the environment, or human health caused by the environmental release [of living modified organisms in agriculture]” but acknowledges that transgenic maize has certain particularities, since “it is open-pollinated yet is the agricultural species with the greatest known genetic diversity, allowing it to be grown in a wide range of environments.”⁶² This document also states that given the high rates of gene flow between varieties of maize, if genetically modified varieties are released into the environment and allowed to flower, “there will be gene flow into native or *criollo* landraces.”⁶³
30. Other studies attached to the revised submission relating to the assertion concerning the taking of measures to control the release of transgenic maize⁶⁴ note the difficulty of controlling the spread of transgenes towards centers of origin, even if the commercial release of transgenes is restricted to certain zones of industrialized agriculture,⁶⁵ and emphasize the difficulty in correctly interpreting results about the presence of transgenic protein in cultivated maize.⁶⁶
31. On measures providing for the safe release of transgenic maize,⁶⁷ the Submitters attach a Conabio report recommending, that a biosafety protocol be put in place and that the competent institutions be allowed to participate.⁶⁸

⁶⁰ Revised submission, compact disc appendix: Robin G. Allaby et al., “The Genetic Expectations of a Protracted Model for the Origins of Domesticated Crops,” *Proceedings of the National Academy of Sciences* 105(37): 13982–6 (2008).

⁶¹ The conclusion to this paper states: “Although there are many factors that influence pollen dispersal, most pollen will settle down within short distances and will probably not get the chance to interact with most of these factors.” The paper makes the following recommendation: “The diffusely distributed cross-pollination events at longer distances still could require more detailed studies in cases where any cross-pollination has to be strictly avoided.” Revised submission, compact disc appendix: Michael Bannert and Peter Stamp, “Cross-Pollination of Maize at Long Distance,” *Europ. J. Agronomy* 27 (2007): 50.

⁶² Revised submission, compact disc appendix: *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*, background document on centers of origin and diversity in the case of maize in Mexico, Conabio, July 2006, §6.

⁶³ *Ibid.*, §25.

⁶⁴ Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §§20–21.

⁶⁵ Revised submission, compact disc appendix: George A. Dyer et al., “Dispersal of Transgenes through Maize Seed Systems in Mexico,” *PLoS ONE* 4(5): e5734 (2009).

⁶⁶ Revised submission, compact disc appendix: José-Antonio Serratos-Hernández et al., “Transgenic Proteins in Maize in the Soil Conservation Area of Federal District, Mexico,” *Frontiers in Ecology and the Environment* 5(5): (2007); Piñeyro-Nelson, et al., “Transgenes in Mexican Maize: Molecular Evidence and Methodological Considerations for GMO Detection in Landrace Populations,” p. 11 *Molecular Ecology* 18(4): 750–61 (February 2009).

⁶⁷ Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §§20–21.

32. Moreover, the Submitters attach various documents to support their assertions concerning the alleged lack of response to complaints and the alleged lack of capacity to investigate and prosecute offenses relating to the illegal presence of genetically modified seeds in maize crops.⁶⁹ These documents include complaints filed with the PGR⁷⁰ and appearances by the complainant before the investigating body.⁷¹
33. The Secretariat finds that the revised version of the submission provides sufficient information to allow the Secretariat to review it, pursuant to NAAEC Article 14(1)(c).
34. With respect to the Secretariat reasoning of 6 January 2010 regarding Article 14(1)(d) requirement, the Secretariat finds that while the submission mentions the “possible socioeconomic consequences for the region’s farmers,”⁷² and although the organizations making up the group of Submitters may participate in other public activities,⁷³ the submission itself expresses the Submitters’ concern for the effective enforcement of environmental law.⁷⁴

IV. NAAEC ARTICLE 14(2) REVIEW OF THE SUBMISSION

35. Once the Secretariat finds that the assertions in a submission meet the Article 14(1) requirements, it then analyzes the submission to determine whether it warrants a response from the Party. In this case, pursuant to NAAEC Article 14(2), the Secretariat finds that the submission warrants requesting a response from the government of Mexico in view of the following considerations; namely, whether

⁶⁸ Revised submission, compact disc appendix: *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 Mexico*, background document on centers of origin and diversity in the case of maize in Mexico, Conabio, July 2006, §54.

⁶⁹ Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §23.

⁷⁰ Original submission, Appendix 6: Complaint filed with the Specialized Unit for Investigation of Environmental Offenses and Offenses Defined in Special Laws, PGR, 2 October 2007; Appendix 10: Complaint filed with the state office of the PGR in Chihuahua, 29 September 2008.

⁷¹ Original submission, Appendices 7, 8, 9, and 11: Appearance of complainant before the PGR, clarifying motion, presentation of evidence and addition to complaint filed with the Specialized Unit for Investigation of Environmental Offenses and Offenses Defined in Special Laws of the PGR.

⁷² Original submission, p. 2.

⁷³ See, for example, the website of El Barzón, which devotes part of its content to social issues: <http://www.elbarzon.org/quien/quees.shtml>, viewed on 26 February 2010.

⁷⁴ Original submission, p. 1.

(a) *the submission alleges harm to the person or organization making it;*

36. With respect to whether the submission alleges harm to the person or organization making it, it is evident from a review of the submission that the Submitters have an interest in the preservation of biological diversity of conventional maize varieties in Chihuahua and that the alleged harm is due to a failure to effectively enforce the environmental law.⁷⁵ The submitters assert that the alleged absence of biosafety measures for the management of transgenic maize “imperils the environment, biological diversity, and plant health...”;⁷⁶ that the “extent of the contamination” is unknown, thus “putting at risk local maize varieties”;⁷⁷ that due to the alleged lack of technical and legal capacity, the authorities have not carried out acts of enforcement to control transgenic maize with a view to “protecting and preserving the environment, biological diversity, and human, animal, and plant health”;⁷⁸ and that the sum total of the failures to effectively enforce the law cited in the submission are allegedly “jeopardizing the environment, biosafety, [and] environmental management in the federated entity [state] of Chihuahua.”⁷⁹ Likewise, the Submitters state that the failure to effectively enforce the cited provisions is “putting at risk the diversity of native maize species and hybrids cultivated in the region...”⁸⁰

37. In view of the foregoing, and guided by section 7.4 of the Guidelines,⁸¹ the Secretariat finds that the submission refers to alleged harm due to the failure to effectively enforce the environmental law and is related to environmental protection.

(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;*

38. 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).⁸²

⁷⁵ Revised submission, p. 1.

⁷⁶ Original submission, p. 1.

⁷⁷ *Ibid.*, p. 7.

⁷⁸ *Ibid.*, p. 6.

⁷⁹ *Ibid.*, p. 8.

⁸⁰ *Ibid.*, p. 13.

⁸¹ “In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether:

(a) the alleged harm is due to the asserted failure to effectively enforce environmental law; and

(b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement.”

⁸² “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;

(c) *private remedies available under the Party's law have been pursued,*

39. Concerning 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 is intended to impose a requirement to exhaust all remedies under the Party's law. Indeed, section 7.5 of the Guidelines instructs 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."

40. The Submitters state that they filed a complaint with the PGR's Office of the Deputy Attorney for Specialized Investigation of Federal Offenses (*Subprocuraduría de Investigación Especializada en Delitos Federales*), Investigation of Environmental Offenses and Offenses Defined by Special Laws Unit (*Unidad Especializada en Investigación de Delitos contra el Ambiente y Previstos en Leyes Especiales*), against anyone found to be responsible for the alleged illegal cultivation of transgenic maize in Chihuahua.⁸³ In addition, they indicate that a complaint was filed with Sagarpa (and subsequently referred to Profepa) requesting action to determine whether transgenic maize was being used in crops in the *ejido* of Benito Juárez, municipality of Namiquipa, Chihuahua.⁸⁴ The revised version of the submission refers to a complaint filed against anyone found to be responsible for the possible importation, distribution, and release for agricultural purposes and/or illegal planting of genetically modified maize varieties in the state of Chihuahua.⁸⁵

41. In accordance with Article 14(2)(c), and considering the possibility that obstacles to other procedural routes may exist,⁸⁶ the Secretariat finds that the filing of complaints with the competent authorities suffices to reach a finding that reasonable efforts were made to pursue private remedies available under the Party's law.

(d) *the submission is drawn exclusively from mass media reports*

42. As regards Article 14(2)(d), the Secretariat finds that the revised version of the submission is not based on mass media reports but on the Submitters' direct knowledge of the facts. This is evident from a perusal of the technical and legal information gathered

(h) promote transparency and public participation in the development of environmental laws, regulations and policies;..."

⁸³ Revised submission, p. 3.

⁸⁴ Revised submission, Appendix 22: Letter to the Constitutional Governor of the State of Chihuahua, the Secretary of Rural Development of the State of Chihuahua, and the Sagarpa Officer in Chihuahua, dated 21 September 2007.

⁸⁵ Revised submission, Appendix 10: Complaint filed with the PGR officer in the state of Chihuahua, dated 29 September 2008.

⁸⁶ In this regard, the Secretariat has noted that "pursue" available remedies does not mean that submitters must exhaust such remedies before filing an Article 14 submission. Cf. SEM-97-007 (*Lake Chapala*), Article 15(1) Determination (14 July 2000); SEM-05-002 (*Coronado Islands*), Article 14(1) and (2) Determination (30 September 2005).

by them and presented in the revised submission and its appendices in support of their assertions.

43. In summary, having reviewed the submission in light of the factors listed in NAAEC Article 14(2), the Secretariat finds that the assertions concerning the alleged absence of measures guaranteeing adequate protection of conventional maize varieties in the presence of genetically modified maize crops in Chihuahua; the alleged failure to process corresponding complaints in a timely manner, and the alleged lack of capacity to investigate and prosecute alleged offenses under the environmental law cited in the submission, warrant requesting a response from the government of the United Mexican States.

V. DETERMINATION

44. The Secretariat has reviewed submission SEM-09-001 (*Transgenic Maize in Chihuahua*) in accordance with NAAEC Article 14(1) and finds that it meets the requirements set out therein for the reasons discussed in this determination. Therefore, and taking into account the criteria of NAAEC Article 14(2), the Secretariat finds that the submission warrants requesting a response from the Party in question, in this case the United Mexican States, in relation to the Submitters' assertions concerning the alleged failure to effectively enforce Article 4 of the Mexican Constitution; Articles 2 (paragraphs 1–2), 8, 9 (with the exception of 9(3)), 10 (with the exception of 10(7)), 15, and 16 (with the exception of anything that may include taking legal measures) of the Cartagena Protocol; LBOGM Articles 9, 12 paragraph I, 13, 17, 18 paragraphs I, II, IV and 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, and 120; LGEEPA Articles 15, 160, 161, 164, 165, 166, 170 and 170 *Bis*, 182, 189, 190, 191, 192, 193, 198, 201, 202, 203, 204; and CPF Article 420 *Ter*. In its response, Mexico may include information on alleged failures to enforce that are taking place in the municipalities of Cuahutémoc, Namiquipa, and Ascensión of the state of Chihuahua in connection with:

- a. the alleged absence of “measures to control and supervise seed storage, distribution, and marketing centers supplying the region’s growers”;⁸⁷ acts to prevent the entry into the nation’s territory of genetically modified seeds, particularly those bound for the state of Chihuahua;⁸⁸ the operation of biosafety mechanisms;⁸⁹ the establishment of a special protection regime for maize, with determination of centers of origin and genetic diversity;⁹⁰ the implementation of a permitting system for experimental plantings,⁹¹ and the corresponding risk analysis and assessment;⁹²

⁸⁷ Original submission, p. 8; Cf. LBOGM Articles 2 paragraphs VII–IX, 9 paragraph III, 18 paragraph III, and 36; CPF Article 420 *Ter*.

⁸⁸ Original submission, p. 8.

⁸⁹ *Ibid.*, p. 10.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

- b. the alleged failure to process complaints filed by the Submitters in a timely manner, which, they assert, “is evidence of a delay in the operation of justice,”⁹³ the consequence being “the failure to enforce the environmental law”⁹⁴ in the face of a “systematic pattern of illegal planting of transgenic maize seeds,”⁹⁵ and
 - c. the alleged lack of capacity to inspect and verify the presence of genetically modified seeds in maize crops;⁹⁶ the alleged “lack of capacity to conduct adequate sampling [and the] absence of coordination among authorities responsible for biosafety in Mexico...”⁹⁷
45. 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 2 April 2010. In exceptional circumstances, the Party may notify an extension of the deadline to 60 days.
46. Since it is acknowledged that a response from the government of Mexico may include confidential information, and since the Secretariat must make public the reasons for recommending or not recommending a factual record pursuant to Article 15(1), the Party is reminded that section 17.3 of the Guidelines⁹⁸ encourages it to provide a summary of the confidential information for public disclosure.
47. Since a copy of the submission with appendices has already been sent to the Party, it is not attached to this determination.
48. Respectfully submitted for your consideration, 3 March 2010.

Secretariat of the Commission for Environmental Cooperation

(*signature in original*)
per: Paolo Solano
Legal Officer, Submissions on Enforcement Matters Unit

(*signature in original*)
per: Dane Ratliff
Director, Submissions on Enforcement Matters Unit

⁹³ Revised submission, p. 6.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Original submission, pp. 6, 10–11.

⁹⁷ Revised submission, p. 6.

⁹⁸ “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....”

cc: Mr. Enrique Lendo, Alternate Representative, Mexico
Mr. David McGovern, Alternate Representative, Canada
Ms. Michelle DePass, Alternate Representative, United States
Mr. Evan Lloyd, Acting Executive Director, CEC Secretariat
Submitters