

Secretariat of the Commission for Environmental Cooperation

**Secretariat Determination in accordance with Article 14(1)
of the North American Agreement on Environmental Cooperation**

Submitters: Asociación Interamericana para la Defensa del Ambiente
(AIDA)
Centro Mexicano para la Defensa del Ambiente
Natural Resources Defense Council
Red Ecologista por el Desarrollo de Escuinapa
Amigos para la Conservación de Cabo Pulmo
COSTASALVAJE
Sociedad de Historia Natural Niparajá
Greenpeace Mexico
Los Cabos Coastkeeper
Alianza para la Sustentabilidad del Noroeste Costero
SUMAR

Represented by: Sandra Moguel, AIDA;
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Party: United Mexican States

Date of receipt: 11 April 2013

Date of the determination: 24 May 2013

Submission no.: **SEM-13-001** (*Tourism Development in the Gulf of
California*)

I. INTRODUCTION

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

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC) signed by Canada, Mexico, and the United States (the “Parties”) and published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) on 21 December 1993 [NAAEC]. The bodies of which the CEC is composed are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).

Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission.²

2. On 11 April 2013, Asociación Interamericana para la Defensa del Ambiente (AIDA) and Earthjustice, representing the aforementioned non-governmental organizations (the “Submitters”), filed a citizen submission with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) in accordance with NAAEC Article 14. The Submitters assert that Mexico is failing to effectively enforce its environmental law in that it is “approving various projects to build and operate tourism properties in ecologically sensitive areas” of the Gulf of California.³
3. The Submitters assert that Mexico is failing to effectively enforce the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (the Ramsar Convention)⁴ as well as various provisions of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA);⁵ the Regulation to the LGEEPA respecting Environmental Impact Assessment (*Reglamento de la LGEEPA en materia de Evaluación de Impacto Ambiental*—REIA);⁶ the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS);⁷ Mexican Official Standard NOM-022-SEMARNAT-2003, *Establishing specifications for the preservation, sustainable use, and restoration of coastal wetlands in mangrove zones* (NOM-022),⁸ and Mexican Official Standard NOM-059-SEMARNAT-2010, *Environmental protection-Mexican native species of wild flora and fauna-Risk categories and specifications for their inclusion, exclusion or change-List of species at risk* (NOM-059).⁹
4. The Submitters assert that the development of tourism infrastructure projects in the Gulf of California is having a major impact on the Bay of La Paz, the El Mogote nesting area, the Cabo Pulmo coral reef, and the Marismas Nacionales wetland in Mexico, and that the appropriate environmental impact assessment and permit granting procedures were not followed, among other failures to enforce the environmental law.

² Full details regarding the various stages of the process as well as previous Secretariat determinations and factual records can be found on the CEC website at <<http://www.cec.org/submissions>>.

³ SEM-13-001 (*Tourism Development in the Gulf of California*) Article 14(1) Submission (11 April 2011) [Submission], at 1.

⁴ *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, published in the DOF on 29 August 1986 and amended by: (i) the *Protocol to Amend the Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, adopted in Paris, France on 3 December 1982, and (ii) the *Amendments to Articles 6 and 7 of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, adopted at Regina, Canada, 28 May 1987 [Ramsar Convention].

⁵ General Ecological Balance and Environmental Protection Act, published in the DOF on 28 January 1988 [LGEEPA].

⁶ Regulation to the LGEEPA respecting Environmental Impact Assessment, published in the DOF on 30 May 2000 [REIA].

⁷ General Wildlife Act, published in the DOF on 3 July 2000 [LGVS].

⁸ Mexican Official Standard NOM-022-SEMARNAT-2003, *Establishing specifications for the preservation, sustainable use, and restoration of coastal wetlands in mangrove zones*, published in the DOF on 10 April 2003 and amended by the *Decision adding specification 4.43 to Mexican Official Standard NOM-022-SEMARNAT-2003*, published in the DOF on 7 May 2004 [NOM-022].

⁹ Mexican Official Standard NOM-059-SEMARNAT-2010, *Environmental protection-Mexican native species of wild flora and fauna-Risk categories and specifications for their inclusion, exclusion or change-List of species at risk*, published in the DOF on 30 December 2010 [NOM-059].

5. Having reviewed submission SEM-13-001 (*Tourism Development in the Gulf of California*), the Secretariat finds that it does not meet all the eligibility requirements of Article 14(1) of the Agreement and so notifies the Submitters as per section 6.1 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”).¹⁰ If a revised version of the submission is not received before **16 August 2013**, the Secretariat will proceed no further with the processing of submission SEM-13-001. In conformity with paragraph 6.1 of the Guidelines,¹¹ the Secretariat hereby presents its reasons for this determination.

II. SUMMARY OF THE SUBMISSION

6. The Submitters assert that Mexico is failing to effectively enforce the Ramsar Convention;¹² LGEEPA Articles 34, 35 and 35 *bis*;¹³ REIA Articles 13, 24, 36, 44, 57, 58, and 59; LGVS Articles 5 paragraph II and 60 *ter*;¹⁴ NOM-022, respecting the protection of wetlands in mangrove zones,¹⁵ and NOM-059, respecting the protection of species at risk.¹⁶
7. The submission describes the characteristics of the Gulf of California, pointing out that it is “a fragile area important for biodiversity, harbouring vulnerable ecosystems such as coral reefs and mangrove wetlands,”¹⁷ and underscoring “the abundance and characteristics of its endemism, particularly for cactuses, reptiles, and mammals.”¹⁸ In addition, the submission discusses the characteristics of the Bay of La Paz, B.C. where

¹⁰ *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, <www.cec.org/guidelines>, (viewed 7 May 2012) [Guidelines], section 6.1:

Where the Secretariat determines that a submission does not meet the criteria set out in Article 14(1) of the Agreement or any other requirement set out in these guidelines, with the exception of minor errors of form contemplated in section 3.10 of these guidelines, the Secretariat will promptly notify the Submitter of the reason(s) why it has determined not to consider the submission.

On 11 July 2012, the Council of the CEC approved various amendments to the Guidelines; see Council Resolution 12-06 <www.cec.org/guidelines> (viewed 21 April 2013) [Guidelines].

¹¹ *Ibid.*, section 6.2:

After receipt of such notification from the Secretariat, the Submitter will have 60 working days to provide the Secretariat with a submission that conforms to the criteria of Article 14(1) of the Agreement and to the requirements set out in these guidelines.

¹² Submission, note 3 *supra*, at 14.

¹³ *Ibid.*, at 2, 8, 10.

¹⁴ *Ibid.*, at 2, 8-9, 12.

¹⁵ *Ibid.*, at 2, 12-13.

¹⁶ *Ibid.*, at 2, 13.

¹⁷ *Ibid.*, at 1.

¹⁸ *Ibid.*, at 2.

the El Mogote dune is located;¹⁹ the Cabo Pulmo protected natural area (PNA) and coral reef,²⁰ and the Marismas Nacionales wetland in Sinaloa and Nayarit.²¹

8. The Submitters assert that “out-of-control tourism-related activities” have led to the ecological deterioration of the Gulf of California²² and argue “that there is no certainty as to the impacts ... on biodiversity and human communities” caused by tourism infrastructure projects approved by the Government of Mexico.²³ In presenting their arguments, they discuss the status of the Paraíso del Mar, Entre Mares, Centro Integralmente Planeado Costa Pacífico, Cabo Cortés, and Los Pericúes projects located on the Bay of La Paz and Cabo Pulmo (Baja California Sur) and Marismas Nacionales (Sinaloa and Nayarit).²⁴
9. The Submitters assert that the company Desarrollos Punta La Paz is building the Paraíso del Mar tourism complex on El Mogote (the “Paraíso del Mar project”), which consists of 2,050 hotel rooms and 4,000 housing units, two 18-hole golf courses, and an outdoor marina with 535 berths.²⁵ The Submitters assert that the environmental impact statement (EIS) did not consider the cumulative impacts, nor did the assessment include the access road – an essential component of the project.²⁶ According to the Submitters, the Paraíso del Mar project has been under construction and operating for “more than two and a half years without authorization” and already includes buildings and houses that have severely damaged the mangrove ecosystem.²⁷ The Submitters contend that remedies have been pursued in relation to the matter raised in the submission and that the project is still operating despite its alleged illegality.²⁸

¹⁹ El Mogote, a sand bar bordered by mangroves that is an important bird nesting and resting site, separates Ensenada de La Paz (a coastal lagoon) from the Bay of La Paz. In addition, it is a wetland included on the Ramsar Convention list; Submission, note 3 *supra*, at 2. See also: National Protected Natural Areas Commission (Conanp), information sheet on Ramsar wetlands: Ensenada de La Paz (27 October 2007), available at <<http://goo.gl/YK0kk>> (viewed 23 April 2013).

²⁰ The Cabo Pulmo coral reef, the habitat of many protected species of fish, marine invertebrates, and mammals, was declared a protected natural area in 1995 and was designated a Ramsar wetland of international importance in 2008; Submission, note 3 *supra*, at 3. See also: Order declaring the area named Cabo Pulmo, off the coast of the municipality of Los Cabos, BCS, a protected natural area with the status of a National Marine Park; DOF, 6 June 1995, available at <<http://goo.gl/EfFiI>> (viewed 23 April 2013); Conanp, information sheet on Ramsar wetlands: Cabo Pulmo (8 August 2007), available at <<http://goo.gl/R5sBj>> (viewed 23 April 2013).

²¹ Marismas Nacionales shelters twenty percent of Mexico’s mangroves; vulnerable, endangered, and critically endangered mammal species, and high waterfowl diversity. The section of Marismas Nacionales in the state of Nayarit has been a protected area since 2010 and the federal government intends to make the section on the Sinaloa side of the border a biosphere reserve; Submission, note 3 *supra*, at 3. See also: Order declaring the region known as Marismas Nacionales Nayarit, located in the municipalities of Acaponeta, Rosamorada, Santiago Ixcuintla, Tecuala, and Tuxpan in the state of Nayarit as a protected natural area with the character of a biosphere reserve, DOF, 12 May 2010, available at <<http://goo.gl/iBPrt>> (viewed 23 April 2013).

²² Submission, note 3 *supra*, at 2.

²³ *Ibid.*, at 8.

²⁴ *Ibid.*, at 2-3.

²⁵ *Ibid.*, at 3.

²⁶ *Ibid.*

²⁷ *Ibid.*, at 3-4.

²⁸ *Ibid.*, at 4.

10. Adjacent to the Paraíso del Mar project, Fideicomiso F/934 Deutsche Bank Mexico intends to build the Entre Mares tourism complex (the “Entre Mares” project), which would consist of 6,840 rooms on an area of 390 hectares with the capacity for more than 10,000 people in high season.²⁹ According to the Submitters, the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat) approved the environmental impact of this project without considering that its construction on El Mogote would damage the endemic and at-risk fauna, and without observing the declared Closed Forestry Protection Zone (*Zona Protectora Forestal Vedada*) comprising it,³⁰ nor adhering to the provisions of the Ramsar Convention.³¹
11. Similarly, according to the Submitters, the National Tourism Fund (*Fondo Nacional de Turismo*—Fonatur) of the Government of Mexico is promoting the construction of the Centro Integralmente Planeado Costa Pacífico tourism complex (the “CIP Playa Espíritu project”)³² in the municipality of Escuinapa, Sinaloa.³³ According to the Submitters, this project is located within the Marismas Nacionales priority wetland of international importance. The CIP Playa Espíritu project includes the construction of 43,981 hotel rooms, three golf courses, two marinas, a wastewater treatment plant, surface drinking water tanks, a waterskiing facility, a sports area, and basic infrastructure and utilities.³⁴ The Submitters assert that the EIS did not consider soil hypersalinity and that it does not mention impacts such as alteration of the coastline caused by dredging for construction of the marinas.³⁵ The Submitters state that Semarnat approved Phase 1 of the CIP Playa Espíritu project, which calls for the construction of 10,000 rooms, notwithstanding the contrary observations of the Ramsar advisory mission.³⁶
12. Finally, the submission refers to the construction of the Cabo Cortés tourism complex (the “Cabo Cortés project”), adjacent to the Parque Nacional Cabo Pulmo PNA, developed by the company Hansa Baja Investments.³⁷ The project is divided into five phases and includes the construction of 30,692 hotel rooms, two 27-hole golf courses, a marina, a canal system and artificial lakes, a desalination plant and other amenities.³⁸ The Submitters state that on 17 June 2012, President Felipe Calderón announced the cancellation of environmental impact approval for the Cabo Cortés project. Further to

²⁹ *Ibid.* See also: Consultores en Gestión, Política y Planificación Ambiental, S.C., Regional Environmental Impact Statement for the Entre Mares Project, Mexico, 2008, available at <<http://goo.gl/baLIq>> (viewed 23 April 2013) [Entre Mares EIS].

³⁰ Submission, note 3 *supra*, final note 25: Order declaring as a Closed Forest Zone the land surrounding the city of La Paz, B.C., DOF, 24 August 1938, available at <<http://goo.gl/XVI91>> (viewed 28 April 2013) [Closed Forest Zone Order].

³¹ *Ibid.*, at 5; Ramsar Convention, note 4 *supra*.

³² Reference is made throughout the submission to the CIP Playa Espíritu project without clarifying its relationship to the CIP Costa Pacifico project to which the corresponding environmental impact statement and approval refer.

³³ Submission, note 3 *supra*, at 5.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*, at 6.

³⁸ *Ibid.*

the decision to cancel the Cabo Cortés project,³⁹ the company Riviera Desarrollos BCS filed an EIS to obtain environmental impact approval for a tourism complex on the projected Cabo Cortés construction site.⁴⁰ Called Los Pericúes (the “Los Pericúes project”), the project consists of 23,400 rooms, two 18-hole golf courses, a marina with 300 berths, a desalination plant, a landing strip, four wastewater treatment plants, and a commercial area.⁴¹

13. According to the submission, the developer of the Los Pericúes project withdrew from the environmental impact assessment process on 31 August 2012 in order to “await better conditions” for the filing thereof.⁴² Concerning the Cabo Cortés project, the Submitters state that the developer filed an action in nullity (*juicio de nulidad*) in Federal Tax and Administrative Court (*Tribunal Federal de Justicia Fiscal y Administrativa*—TFJFA) seeking to quash the Semarnat decision canceling environmental impact approval.⁴³
14. The Submitters maintain that the environmental impact approval for the Cabo Cortés and CIP Playa Espíritu projects in the Gulf of California violated provisions requiring the preparation of an EIS incorporating the best commonly used techniques and methodologies along with any additional information available and proposing prevention and mitigation measures for any predicted environmental impacts.⁴⁴ They further maintain that none of the aforementioned projects complies with legal provisions requiring the consideration of preventive measures in the design, construction, operation, and maintenance of such projects, and that such projects are frequently approved conditional on *ex post facto* environmental impact assessment.⁴⁵ The Submitters assert that for neither the Paraíso del Mar project nor the Cabo Cortés project did Semarnat take account of applicable urban development and ecological zoning plans as required by law.⁴⁶
15. The Submitters further maintain that Semarnat approved the CIP Playa Espíritu project without assessing the ecosystem fragmentation that will inevitably be caused by road, lighting, and telephone line installation,⁴⁷ and that in addition the project was subjected to piecemeal assessment, with an environmental impact study produced for 10,000 rooms instead of the nearly 44,000 included in the project.⁴⁸ In the case of the Cabo Cortés project, the Submitters maintain that Semarnat approved it pending the filing of an EIS for one of the essential components thereof – the desalination plant – thus breaking up the impact study and avoiding an assessment of cumulative impacts as

³⁹ *Ibid.*

⁴⁰ “Furthermore, on 7 July 2012 Minister of the Environment Juan Elvira Quesada visited Cabo Pulmo to inform the residents that a new project would be presented for the Cabo Cortés site”: *Ibid.*, at 7.

⁴¹ Cf. No author, Environmental Impact Statement, Regional Modality, Los Pericúes Project, Mexico (no date), available at <<http://goo.gl/1gjGb>> (viewed 3 May 2013) [Los Pericúes EIS].

⁴² Submission, note 3 *supra*, at 7.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, at 8.

⁴⁵ *Ibid.*, at 9-10.

⁴⁶ *Ibid.*, at 10-11.

⁴⁷ *Ibid.*, at 11.

⁴⁸ *Ibid.*

required by law.⁴⁹ They argue that the Paraíso del Mar and Entre Mares projects will create a new settlement on El Mogote but that the impacts of that situation were not considered by Semarnat when it granted approval.⁵⁰

16. On the protection of mangrove ecosystems, the Submitters maintain that the Entre Mares project is located in an area of mangrove abundance which, in the opinion of the National Biodiversity Commission (*Comisión Nacional para el Conocimiento y Uso de la Biodiversidad*—Conabio), would be negatively impacted; nevertheless, Semarnat granted approval, finding that there was no evidence of possible damage to this ecosystem during construction.⁵¹ In the case of the Paraíso del Mar project, the Submitters assert that Semarnat granted environmental impact approval for the project – subsequently canceled by a decision of the TFJFA – because the project would not be located adjacent to or bordering this ecosystem but rather within the mangrove ecosystem.⁵²
17. In regard to the enforcement of provisions for the protection of species at risk in the case of the Paraíso del Mar project, the Submitters state that the aquatic timber resources (i.e., mangroves) are regulated by the LGVS in conformity with NOM-059 and not by the General Sustainable Forestry Development Act (*Ley General de Desarrollo Forestal Sustentable*—LGDFS). However, Semarnat applied the LGDFS in order to obtain a land use change instead of the applicable statute – the LGVS – which does not allow for such a change.⁵³ The Submitters maintain that the EIS for the Entre Mares project does not assess the impacts of boats on dolphins, as noted by the government itself in a technical opinion, yet the project obtained approval.⁵⁴ In relation to the Cabo Cortés project, the Submitters maintain that the EIS for the project was approved despite impacts on listed endangered species and the fact that sea turtles beach and nest on a site adjacent to the project.⁵⁵

III. ANALYSIS

18. NAAEC Article 14 authorizes the Secretariat to consider any submissions of any nongovernmental organization or person asserting that an NAAEC Party is failing to effectively enforce its environmental law. To discharge its functions effectively, the Secretariat may interpret the meaning of the provisions relevant to the submission procedure towards achieving the goals and purposes of the NAAEC. As the Secretariat has noted in previous Article 14(1) determinations, Article 14(1) is not intended to be an insurmountable procedural screening device.⁵⁶ The Secretariat reviewed the submission with that perspective in mind.

⁴⁹ *Ibid.*, at 11-12.

⁵⁰ *Ibid.*, at 12.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*, at 13.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ See SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); SEM-98-003 (*Great Lakes*), Article 14(1)(2) Determination (8 September 1999).

A Opening paragraph of Article 14(1)

19. The opening paragraph of Article 14(1) allows the Secretariat to consider submissions “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law.” The submission includes a list of eleven organizations presenting themselves as nongovernmental organizations, and there is no information in the submission or on the websites of any of these organizations to suggest that any of them is linked to a government or under its direction.⁵⁷
20. As to the requirement of Article 14(1) that submissions must concern matters that are ongoing,⁵⁸ the Secretariat finds that the assertions in the submission meet this requirement. The alleged failures of enforcement to which the Submitters refer are still occurring in regard to the assessment and approval of tourism complexes in the Gulf of California, as explained below.
21. Concerning the Paraíso del Mar project, the Submitters assert that while the access road for the project was closed by the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente—Profepa*), the company continues to operate and, as of 2012, had built houses and buildings that caused severe damage to the mangrove ecosystem in the area.⁵⁹ In addition, a 14 January 2013 District Court decision upheld a TFJFA decision voiding the environmental impact approval (AIA) necessary for the project, which – allegedly – continues to operate.⁶⁰
22. In relation to the Entre Mares project, a TFJFA decision of September 2012 canceled the AIA for the project, finding that the project was in fact located within the protection area determined by the Closed Forestry Protection Zone and had failed to consider species at risk.⁶¹ The Submitters state that the developers “filed a new motion for review of the decision, which has not yet been ruled on.”⁶² Irrespective of any consideration which the Secretariat may, in due course, carry out under section 7.4 of the Guidelines, the assertion can be considered to relate to an ongoing situation.
23. Concerning the CIP Playa Espíritu project, the Submitters assert that on 9 February 2011, Semarnat approved Phase 1 of the project for the construction of 10,000 rooms and that the project is under construction (despite the filing of a motion for judicial review against the AIA), which, they assert, will make it impossible to repair the environmental damage to Marismas Nacionales.⁶³
24. As to the Cabo Cortés project, while Semarnat canceled the AIA for the project, the developer filed an action in nullity to quash the decision. In addition, the approvals

⁵⁷ NAAEC, note 1 *supra*, Article 45(1). See in this regard SEM-99-001 (*Methanex*), Article 14(1) Determination (30 March 2000).

⁵⁸ NAAEC, note 1 *supra*, Article 14(1):

The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party *is failing* to effectively enforce its environmental law.... (emphasis added).

⁵⁹ Submission, note 3 *supra*, at 3.

⁶⁰ *Ibid.*, at 3-4.

⁶¹ *Ibid.*, at 5.

⁶² *Ibid.*

⁶³ *Ibid.*

relating to forested land use changes and one relating to national waters remain in effect.⁶⁴

25. As to the Los Pericúes project, it is clearly not ongoing. While the Submitters assert that it is merely dormant and that the developers intend for it to be approved, it is not possible to identify the failure of enforcement that is now taking place, since the application was withdrawn by the developer.⁶⁵ The Submitters may present additional information on this issue in a revised version of their submission.

1) Environmental law in question

26. The Secretariat proceeds to consider whether the legal provisions cited in the submission fit the NAAEC Article 45(2) definition of environmental law⁶⁶ and then to assess whether the assertions in submission SEM-13-001 qualify for review. The Secretariat finds that while the provisions cited in the submission fit the NAAEC definition of “environmental law,” the assertions concerning failure to effectively enforce them warrant clarification from the Submitters in some cases.

i. Ramsar Convention

27. The Submitters assert that Mexico is failing to effectively enforce the Ramsar Convention in relation to the protection of Marismas Nacionales, the Bay of La Paz, and Cabo Pulmo.⁶⁷ In this regard, the Secretariat requires, among other matters, additional information from the Submitters in order to determine whether the provisions of this instrument fit the NAAEC Article 45(2)(a) definition of environmental law.
28. The Secretariat begins by determining whether the Ramsar Convention is or is not environmental law in the sense of the Agreement, on the premise that it is an instrument

⁶⁴ *Ibid.*, at 7.

⁶⁵ *Ibid.*

⁶⁶ NAAEC, note 1 *supra.*, Article 45(2) defines the term “environmental law” as follows:

“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.”

⁶⁷ Submission, note 3 *supra.*, at 14.

of international law that might not be entirely enforceable in the Mexican domestic legal framework.

29. Pursuant to Article 133 of the Constitution,⁶⁸ the Mexican courts have found that international treaties ratified by Mexico are the supreme law of the Union⁶⁹ and are incorporated into the domestic legal framework by virtue of the mechanism enshrined in the Constitution.⁷⁰ The Government of Mexico ratified the Ramsar Convention in 1986⁷¹ and it has therefore been incorporated into Mexican law.⁷² The Government of Mexico has acknowledged that this Convention has been integrated into the domestic legal framework.⁷³
30. The Secretariat has previously found that certain provisions of the Ramsar Convention fit the NAAEC definition of environmental law.⁷⁴
31. The submission, however, does not mention the specific provisions of this Convention about which failures of effective enforcement are asserted. A revised version of submission SEM-13-001 may specify the provisions in question so that the Secretariat is in a position to determine whether they constitute environmental law.
32. Finally, the submission notes that a Ramsar advisory mission visited Marismas Nacionales in June 2010, and Cabo Pulmo in November 2011, for the purpose of producing “management recommendations.”⁷⁵ In this regard, the Secretariat requires

⁶⁸ Article 133 of the Political Constitution of the United Mexican States provides that “This Constitution, the laws of the Congress of the Unión emanating from it, and all the Treaties according with it, previously entered into and that are entered into by the President of the Republic, with approval of the Senate, shall be Supreme Law of the whole Union. The judges of each State shall adhere to this Constitution and these laws and treaties, despite any provisions to the contrary that may exist in State Constitutions or laws.”

⁶⁹ TRATADOS INTERNACIONALES. SON PARTE INTEGRANTE DE LA LEY SUPREMA DE LA UNIÓN Y SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES GENERALES, FEDERALES Y LOCALES. INTERPRETACIÓN DEL ARTÍCULO 133 CONSTITUCIONAL. Novena época. Body: Pleno. Source: *Semanario Judicial de la Federación y su Gaceta*, XXV, April 2007, at 6, tesis: P. IX/2007.

⁷⁰ TRATADOS INTERNACIONALES. INCORPORADOS AL DERECHO NACIONAL. SU ANÁLISIS DE INCONSTITUCIONALIDAD COMPRENDE EL DE LA NORMA INTERNA. Novena época. Body: Tribunales Colegiados de Circuito. Source: *Semanario Judicial de la Federación y su Gaceta*, XXVI, July 2007, at 2725, tesis: I.3°.C.79K.

⁷¹ On 4 July 1986, Mexico deposited its instrument of accession, and on 29 August 1986 the Order promulgating the Ramsar Convention, and the Protocol amending it, adopted in the cities of Ramsar on 2 February 1971, and Paris on 3 December 1982, respectively, was published in the DOF. Cf. SEM-09-002 (*Wetlands in Manzanillo*), Party Response (11 October 2010), at 30-1.

⁷² Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1)(2) Determination (3 March 2010), §21.

⁷³ The Government of Mexico has made the following statement:

The Government of Mexico acknowledges that the Ramsar Convention has been incorporated into the domestic legal framework by virtue of being signed, approved, and ratified in accordance with the provisions of the Political Constitution of the United Mexican States. For further reference, the Order promulgating the Convention on Wetlands of International Importance Especially as Waterfowl Habitat and the Protocol amending it, adopted in the cities of Ramsar on 2 February 1971, and Paris on 3 December 1982, respectively, was published in the DOF on 29 August 1986. On 4 July 1986, Mexico deposited its instrument of accession....

See SEM-09-002 (*Wetlands in Manzanillo*), Article 14(3) Response (12 October 2010), at 30.

⁷⁴ SEM-09-002 (*Wetlands in Manzanillo*), Article 14(1) Determination (9 October 2009), §16.

⁷⁵ Submission, note 3 *supra*, at 5-6.

additional information in order to determine the nature of the “management recommendations” and whether, in any case, they flow from provisions considered environmental law in the sense of the NAAEC, which information the Submitters could include in a revised version of their submission.

ii. LGEEPA Articles 34, 35, and 35 bis

33. LGEEPA Articles 34, 35, and 35 *bis* qualify as environmental law for the purposes of the NAAEC; however, not all the cited provisions relate to an assertion regarding failures of effective enforcement.
34. LGEEPA Article 34 provides that the EIS shall be made publicly available,⁷⁶ that the information contained in this document may be declared confidential,⁷⁷ and that Semarnat may hold a public consultation process subject to the considerations listed in five subsections of this article.⁷⁸
35. The article in question qualifies as environmental law since the purpose of the provision is to prevent pollutant emissions into the environment;⁷⁹ to protect wild flora and fauna, including species in any protection category;⁸⁰ and to protect species habitat and protected natural areas, by means of the implementation of an assessment procedure for any impact that works or activities may have on the environment. Other provisions reviewed in this section form a part of the environmental impact assessment procedure and they are therefore referred to as appropriate.
36. Having said this, the Secretariat finds that the Submitters must clarify how the Government of Mexico is allegedly failing to enforce LGEEPA Article 34, since this is not evident from the submission.
37. LGEEPA Article 35 provides that the filing of an EIS initiates the assessment process and that the review of the EIS shall adhere to the provisions of the LGEEPA, the REIA, the applicable NOMs,⁸¹ and any applicable urban development and/or ecological zoning plans, declarations of protected natural areas, or other applicable provisions.⁸² It must assess the impacts of the works or activities on ecosystems⁸³ and, as applicable, must either issue a favorable decision as per the application,⁸⁴ issue a conditional decision,⁸⁵ or deny approval if the project violates the applicable provisions, if the proposed work or activity could affect any species in any protection category, or if any of the information provided is false.⁸⁶ The provision allows for the posting of bonds or

⁷⁶ LGEEPA, note 5 *supra*, Article 34, first paragraph.

⁷⁷ *Ibid.*, Article 34, second paragraph.

⁷⁸ *Ibid.*, Article 34, third paragraph.

⁷⁹ *Cf.* NAAEC, note 1 *supra*, Article 45(2)(a)(i).

⁸⁰ *Cf.* NAAEC, note 1 *supra*, Article 45(2)(a)(iii).

⁸¹ LGEEPA, note 5 *supra*, Article 35, first paragraph.

⁸² *Ibid.*, Article 35, second paragraph.

⁸³ *Ibid.*, Article 35, third paragraph.

⁸⁴ *Ibid.*, Article 35 paragraph I.

⁸⁵ *Ibid.*, Article 35 paragraph II.

⁸⁶ *Ibid.*, Article 35 paragraph III.

insurance with respect to the conditions set out in the approval⁸⁷ and specifies that approval is only permitted to refer to the environmental aspects of the project.⁸⁸

38. The Secretariat finds that the provision qualifies as environmental law as per paragraph 35 *supra*. However, the fifth and sixth paragraphs of Article 35 are excepted from this analysis since they do not relate to the facts asserted in the submission.
39. LGEEPA Article 35 *bis* establishes the time period in which Semarnat must issue the corresponding decision and its power to request clarifications, and enumerates the valid justifications for postponement of approval.⁸⁹
40. This provision qualifies as environmental law since it provides for administrative control over the environmental impact assessment procedure designed to achieve the aims set out in paragraph 35 *supra*. However, the Submitters must clarify the relationship of this provision to the assertions made in the submission.

iii. LGEEPA Article 28

41. The Submitters mention LGEEPA Article 28 in the section of the submission titled “Applicable Laws”; however, the Submitters do not assert a failure to effectively enforce it nor do they relate it to the projects.
42. LGEEPA Article 28 establishes the environmental impact assessment procedure applicable to works and activities “that may cause ecological imbalance or exceed the limits or conditions set out in provisions applicable to environmental protection and to ecosystem preservation and restoration...”⁹⁰ The purpose of this mechanism is to “avert or minimize negative impacts on the environment”⁹¹ and for this purpose prior filing of an EIS is required.⁹² Paragraphs IX and X of Article 28 cited in note 45 of the submission provide that an EIS must be filed in the case of “real estate development affecting coastal ecosystems” as well as works and activities in “wetlands, mangrove ecosystems, lagoons, rivers, lakes, and estuaries connected to the ocean, as well as in its littoral or federal coastal zones.”⁹³
43. The provision establishes the environmental impact assessment procedure and indeed qualifies as environmental law in the sense of the NAAEC;⁹⁴ however, the Submitters must clarify whether they are asserting a failure to enforce this provision and, if so, in what respect.

iv. REIA Articles 13, 24, 36, 44, 57, 58, and 59

44. The Secretariat finds that REIA Articles 13, 24, 36, 44, 57, 58, and 59 qualify as environmental law in the sense of the NAAEC, in that their purpose is environmental protection as per paragraph 35 *supra*. These articles regulate the content of an EIS, the information and criteria which the authority may or must consider in its assessment of

⁸⁷ *Ibid.*, Article 35, fifth paragraph.

⁸⁸ *Ibid.*, Article 35, sixth paragraph.

⁸⁹ *Ibid.*, Article 35 *bis*.

⁹⁰ *Ibid.*, Article 28.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*, Article 28 paragraph X.

⁹⁴ See paragraph 35 *supra*.

an EIS, and the measures it may order in the case of works or activities improperly lacking an AIA, with a view to better ascertaining the environmental impacts engendered and applying effective measures for the prevention of the emission of environmental contaminants and the protection of natural features, as per Article 45(2)(a)(i) and (iii).⁹⁵ However, in some cases, it was not clear how some of the cited provisions relate to an assertion regarding effective enforcement.

45. REIA Article 13 includes a list of what the regional modality of an EIS must contain, including – *inter alia* – information on the relationship with planning instruments,⁹⁶ a description of the regional environmental system,⁹⁷ identification of the cumulative environmental impacts,⁹⁸ strategies for prevention and mitigation of environmental impacts,⁹⁹ regional environmental prognoses,¹⁰⁰ and identification of methodological instruments used.¹⁰¹
46. REIA Article 24 provides that Semarnat may solicit the technical opinion of any agency or entity,¹⁰² consult expert groups,¹⁰³ and keep the information confidential.¹⁰⁴ Concerning this provision, the Secretariat finds it necessary for the Submitters to indicate which of their assertions are related to the effective enforcement of this article.
47. REIA Article 36 provides that anyone producing an environmental impact assessment shall observe the applicable legal framework and make a sworn statement that the results were obtained with “the best techniques and methodologies commonly used by the scientific community of the country and the best available information,” and that the suggested prevention and mitigation measures are the most effective for mitigating the environmental impacts.¹⁰⁵ The second paragraph of this article provides that in the event the information is found to be false, the perpetrator may be punished.¹⁰⁶
48. REIA Article 44 provides that when assessing an EIS, Semarnat shall consider the possible impacts of the works or activities on ecosystems, taking account of the sum total of the elements of which they are composed,¹⁰⁷ as well as the use of natural resources in a manner that preserves the functional integrity and carrying capacity of the ecosystems.¹⁰⁸ The authority may also consider any preventive measures proposed by the applicant.¹⁰⁹
49. REIA Article 57 provides that where works or activities subject to the environmental impact assessment process are carried out without the applicable approval, Semarnat

⁹⁵ NAAEC, note 1 *supra*, Article 45(2)(a)(i) and (iii).

⁹⁶ REIA, note 6 *supra*, Article 13 paragraph III.

⁹⁷ *Ibid.*, Article 13 paragraph IV.

⁹⁸ *Ibid.*, Article 13 paragraph V.

⁹⁹ *Ibid.*, Article 13 paragraph VI.

¹⁰⁰ *Ibid.*, Article 13 paragraph VII.

¹⁰¹ *Ibid.*, Article 13 paragraph VIII.

¹⁰² *Ibid.*, Article 24, first paragraph.

¹⁰³ *Ibid.*, Article 24, second paragraph.

¹⁰⁴ *Ibid.*, Article 24, third paragraph.

¹⁰⁵ *Ibid.*, Article 36, first paragraph.

¹⁰⁶ *Ibid.*, Article 36, second paragraph.

¹⁰⁷ *Ibid.*, Article 44 paragraph I.

¹⁰⁸ *Ibid.*, Article 44 paragraph II.

¹⁰⁹ *Ibid.*, Article 44 paragraph III.

may order any relevant corrective measures,¹¹⁰ and provides that for the application of safety measures, the authority shall determine the degree of environmental impact caused.¹¹¹

50. REIA Article 58 establishes the order of precedence of any corrective or urgent measures that may be applied by the authority;¹¹² the opportunity for the developer of a project to present alternative measures to those ordered by the authority,¹¹³ and the conditions under which time periods for the implementation of measures may be suspended. The Submitters must clarify how this provision relates to the assertions made in the submission.
51. REIA Article 59 authorizes Profepa to impose any relevant safety measures, independent of any corrective measures and sanctions,¹¹⁴ without prejudice to any civil or criminal actions that may apply.¹¹⁵

v. Articles 5 paragraph II and 60 *ter* of the General Wildlife Act

52. LGVS Article 5 sets out the objective of national wildlife policy¹¹⁶ and provides that in formulating the policy the authorities shall observe the principles prescribed by LGEEPA Article 15,¹¹⁷ and shall in addition provide for those preventive measures necessary for the maintenance of conditions conducive to the evolution, viability, and continuity of ecosystems, habitats, and populations; in addition, it expressly provides that in no case may “the lack of legal certainty be used as a justification for postponing the adoption of effective measures for the conservation and comprehensive management of wildlife and its habitat.”¹¹⁸ For its part, LGVS Article 60 *ter* prohibits the performance of works or activities that affect the integrity of water flow in mangroves, the ecosystem and its area of influence, their natural productivity and, specifically, the natural carrying capacity of the ecosystem for tourism projects, among other activities.
53. The provisions in question fit the NAAEC definition of environmental law since their primary purpose is the protection of wild flora and fauna and their habitat.¹¹⁹

¹¹⁰ *Ibid.*, Article 57, first paragraph.

¹¹¹ *Ibid.*, Article 57, second paragraph.

¹¹² *Ibid.*, Article 58, first paragraph.

¹¹³ *Ibid.*, Article 58, second paragraph.

¹¹⁴ *Ibid.*, Article 59, first paragraph.

¹¹⁵ *Ibid.*, Article 59, second paragraph.

¹¹⁶ LGVS, note 7 *supra*, Article 5, first paragraph.

¹¹⁷ *Ibid.*, Article 5, second paragraph.

¹¹⁸ *Ibid.*, Article 5 paragraph II.

¹¹⁹ *Cf.* NAAEC, note 1 *supra*, Article 45(2)(a)(iii).

vi. Mexican Official Standard NOM-022-SEMARNAT-2003, *Establishing specifications for the preservation, sustainable use, and restoration of coastal wetlands in mangrove zones*

54. NOM-022 contains mandatory provisions for anyone intending to carry out works or activities in coastal wetlands¹²⁰ and its object is to establish specifications regulating sustainable use in this type of ecosystems in order to prevent their deterioration.¹²¹ Paragraph 4.16 of NOM-022 provides that infrastructure “close or adjacent to the vegetation of a coastal wetland shall leave a minimum distance of 100 metres from the boundary of the vegetation”;¹²² paragraph 4.0 additionally provides that mangroves must be “protected as a plant community,” and the integrity of the water flow in the coastal wetland must also be protected.¹²³ It is specifically stated in paragraph 4.42 that environmental impact studies must consider a comprehensive study of the hydrological unit in which the coastal wetlands are situated.
55. The sections of NOM-022 cited in the submission fit the definition of environmental law since their primary purpose is to protect mangroves, which are an element of the environment.¹²⁴

vii. Mexican Official Standard NOM-059-SEMARNAT-2001, *Environmental protection-Mexican native species of wild flora and fauna-Risk categories and specifications for their inclusion, exclusion or change-List of species at risk*

56. The object of NOM-059 is to identify species or populations of wild flora and fauna at risk by means of the preparation of the relevant lists, and the establishment of risk categories and specifications for their inclusion or exclusion on the list of species at risk.¹²⁵
57. The Secretariat has previously determined that NOM-059 is environmental law,¹²⁶ since its primary purpose is the protection of Mexican native species of wild flora and fauna, which fully coincides with the meaning of Article 45(2)(a)(iii). In fact, the enforcement of this standard, by means of the harmonious use of other legal instruments, was previously addressed in a factual record.¹²⁷

2) Assertions concerning failures to effectively enforce the environmental law

58. The Secretariat proceeds to consider whether the submission asserts failures to effectively enforce the environmental law and not deficiencies therein. In this regard, the Secretariat finds that the submission as a whole does not in fact contain assertions concerning deficiencies in the environmental law.

¹²⁰ NOM-022, note 8 *supra*, paragraph 1.2.

¹²¹ *Ibid.*, paragraph 1.1.

¹²² *Ibid.*, paragraph 4.16.

¹²³ *Ibid.*, paragraph 4.0.

¹²⁴ Cf. SEM-09-002 (*Wetlands in Manzanillo*) Article 14(1) Determination (9 October 2002), §22.

¹²⁵ NOM-059, note 9 *supra*, paragraph 1.

¹²⁶ See SEM-98-006 (*Aquanova*) Article 15(1) Notification (4 August 2000), at 5-6; SEM-09-002 (*Wetlands in Manzanillo*), Article 14(1)(2) Determination (13 October 2010), §23.

¹²⁷ SEM-98-006 (*Aquanova*) Factual record in accordance with NAAEC Article 15 (5 April 2003).

i. Failures to effectively enforce the environmental law in respect of the environmental impact assessment procedure

59. The Submitters assert deficiencies in the environmental impact assessment of the projects submitted to the consideration of Semarnat, maintaining that the EISs do not present the best and most complete information; give piecemeal consideration to the projects; do not assess cumulative impacts; fail to implement mandatory mitigation and preventive measures, and do not incorporate land use planning instruments, as explained below.

a. Consideration of the best and most complete information in the preparation of an EIS

60. The Submitters assert that Mexico “is failing to enforce LGEEPA Article 36 [*sic*]¹²⁸ in the environmental impact assessment of projects” since the consultants in charge of preparing the EISs failed to consider the best and most complete information available.¹²⁹ According to the Submitters, the EISs for the Cabo Cortés and CIP Playa Espíritu projects “are based on false premises and erroneous information” and fail to consider relevant scientific information.¹³⁰ For example, the Submitters maintain that the EIS for the Cabo Cortés project ignores recent literature and is based on false premises concerning marine currents in the area, and in particular that it ignores scientific information published by the Scripps Institute and by the Centro de Investigación Científica y de Educación Superior de Ensenada (CICESE), which information is decisive in assessing the impact of this project on the reefs.¹³¹ On the Cabo Cortés project EIS, the National Protected Natural Areas Commission (*Comisión Nacional de Áreas Naturales Protegidas*—Conanp) found that:

...the current and tide studies, and the model used to predict the direction of currents is not the ideal scientific method for the site.... the studies conducted are not significant or representative of the hydrodynamics of the area. The assertion that the currents run only northward is rather weak and lacking in robust measurements.... [the model] does not reflect prevailing conditions in a particular area, and it is therefore not recommended to rely on the results presented in the additional information.... The impact of the marina on Cabo Pulmo ... is assumed using a numeric model that only considers tidal and wave currents, and no study verifying the impact on the contiguous protected natural area is presented.¹³²

61. In the case of the CIP Playa Espíritu project, the Submitters assert that the consultants did not consider scientific information published by the Institute of Geography of the Universidad Nacional Autónoma de Mexico (UNAM), which specifically mentions the

¹²⁸ The Submitters mention LGEEPA Article 36 but they quote the text of Article 36 of the *REIA*, the provision correctly mentioned on page 1 of the submission.

¹²⁹ Submission, note 3 *supra*, at 8-9.

¹³⁰ *Ibid.*, at 8.

¹³¹ *Ibid.*

¹³² Conanp, Technical Opinion, file no. F00DRPBCPN 0556/08 (25 August 2008), at 6, in Submission, note 3 *supra*, at 9; final note 50: Conanp, file no. F00DRPBCPN 316/2009 (13 July 2008), delivering public information, available at <<http://goo.gl/wlkHC>> (viewed 3 May 2013) [Conanp Technical Opinion].

project and discusses the risk of saltwater intrusion and hurricane damage if the sand bar aquifer is affected.¹³³

b. The alleged piecemeal consideration of the projects and assessment of cumulative impacts

62. The Submitters maintain that in addition, Semarnat “is not only allowing but promoting the piecemeal consideration of projects”¹³⁴ subject to the environmental impact assessment procedure, since it is submitting essential components of projects to piecemeal review, approving them piece by piece as projects are developed, in violation of LGEEPA Article 35 and REIA Article 44.¹³⁵
63. In the case of the CIP Playa Espíritu project, the Submitters assert that Semarnat approved one of the ten project phases – involving 10,000 rooms – yet the Government of Mexico publicly announces that the project will include 44,000 rooms.¹³⁶ In the appendices to the submission, the CIP Playa Espíritu EIS states that there will be construction of “43,981 tourist dwellings (rooms), construction of golf courses, infrastructure and basic services such as roads, bridges, drinking water supply....”¹³⁷ The EIS includes a table presenting the ten project phases as well as a general description of the components of each.¹³⁸ The AIA, for its part, approves Phase 1 of the project which comprises, among other aspects, 10,000 rooms or the equivalent, 261 ha of roads, 44 ha of recreational waterfront, 118 ha of the first phase of the golf course, 71 ha for a marina, among others, which in summary make up “the approved phase of the project.”¹³⁹
64. In the case of the Cabo Cortés project, the Submitters assert that Semarnat approved the project conditional on the performance of studies of currents and sedimentation patterns as well as the preparation of an EIS for the hotel, the marina, and the desalination plant, these being essential aspects of the project.¹⁴⁰ The EIS for the Cabo Cortés project includes a marina with 490 berths, beach clubs, a desalination plant, hotels, condominiums, and villas, etc.,¹⁴¹ and shows plans of the four project phases.¹⁴² The Cabo Cortés AIA approves the construction of a marina with 490 berths, and makes commencement of construction of the marina conditional on the filing of the study

¹³³ Submission, note 3 *supra*, at 9.

¹³⁴ *Ibid.*, at 2.

¹³⁵ *Ibid.*, at 11.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*, final note 28: Consultores en Gestión, Política y Planificación Ambiental, S.C., Environmental Impact Statement for the Centro Integralmente Planeado Costa del Pacífico Project, Mexico, 2010, available at <<http://goo.gl/Sz4iT>> (viewed 29 April 2013), ch. 1, at 2 [CIP Costa Pacífico EIS].

¹³⁸ *Ibid.*, ch. 2, at 49-57, 59.

¹³⁹ Submission, note 3 *supra*, final note 31: Environmental Impact and Risk Branch, Semarnat, file S.G.P.A. DGIRA/DG/1167/11 (9 February 2011), containing the environmental impact approval for the Centro Integralmente Planeado Costa del Pacífico project, available at <<http://goo.gl/Rbr6F>> (viewed 29 April 2013), pp. 57-59 [CIP Costa Pacífico AIA]. Emphasis in original.

¹⁴⁰ Submission, note 3 *supra.*, at 11.

¹⁴¹ *Ibid.*, final note 33: Corporativo Acuicultura Profesional, S.A. de C.V., Environmental Impact Statement for the Cabo Cortés Project, Mexico, 2008, ch. 1, at 1 [Cabo Cortés EIS].

¹⁴² *Ibid.*, ch. 2, at 2.

described in condition 11 of the approval,¹⁴³ which consists of the implementation of continuous monitoring of temperature, salinity, pH, wind speed, current direction, and tides.¹⁴⁴ The AIA provides that this plan must be submitted to the DGIRA prior to its implementation.¹⁴⁵ In addition, the AIA does not authorize construction or operation of a desalination plant, a marine outfall diffuser for dumping of the brine, a wastewater treatment plant, or the operation of hydrological protection and control structures.¹⁴⁶

65. In regard to the Paraíso del Mar and Entre Mares projects, the Submitters assert that Semarnat did not assess the cumulative impacts on the ecosystems in the vicinity of the new settlement of El Mogote, and that the EIS did not include the access road in the case of the Paraíso del Mar project.¹⁴⁷ The Paraíso del Mar project includes construction of 2,120 rooms and 2,286 condominium units.¹⁴⁸ A search in the project EIS did not turn up any information concerning the floating population or information relating to a new settlement such as the one the Submitters indicate was not considered.¹⁴⁹ Concerning the EIS for the Entre Mares project, it includes the construction of 3,420 housing units, equivalent to 6,840 hotel rooms.¹⁵⁰
66. The Secretariat finds that it is permitted to consider the assertion regarding the alleged piecemeal consideration of projects and assessment of cumulative impacts in the environmental impact assessment procedure. However, in regard to the assertions concerning the CIP Playa Espíritu project, the Submitters must clarify its relationship to the project known as Centro Integralmente Planeado Costa Pacífico (the “CIP Costa Pacífico” project), which is referred to in the documents cited in the final notes of the submission, since it is not clear whether they are identical, whether one of them constitutes a phase of a larger project, or whether they are separate projects.¹⁵¹

c. Failure to implement precautionary, mitigation, and preventive measures

67. The Submitters further argue that there is a failure to mention and implement preventive, precautionary, and mitigation measures in the design, construction, operation, and maintenance of the Cabo Cortés, CIP Playa Espíritu, and Paraíso del Mar projects, in violation of LGVS Article 5 paragraph II.¹⁵²

¹⁴³ Submission, note 3 *supra*, final note 36: Environmental Impact and Risk Branch, Semarnat, file no. S.G.P.A (24 January 2011), containing the environmental impact approval for the Cabo Cortés project, available at <<http://goo.gl/xXSbx>> (viewed 23 May 2013), at 125. [Cabo Cortés AIA].

¹⁴⁴ *Ibid.*, at 134.

¹⁴⁵ *Ibid.*, at 135.

¹⁴⁶ *Ibid.*, at 126.

¹⁴⁷ Submission, note 3 *supra*, at 3, 12.

¹⁴⁸ *Ibid.*, final note 15: Centro de Investigaciones Biológicas del Noroeste, S.C., Environmental Impact Statement for the Paraíso del Mar Project, Mexico, 2003, ch. 2, at 7, 14 [Paraíso del Mar EIS].

¹⁴⁹ For example, in producing the regional environmental prognosis, the Paraíso del Mar EIS contemplates the scenarios 1-7 years and 8-15 years, focusing on the economic benefits but omitting information about the floating population; *cf.* Paraíso del Mar EIS, ch. 7, at 1-2.

¹⁵⁰ Entre Mares EIS, note 29 *supra*, ch. 2, at 44.

¹⁵¹ See, for example, CIP Costa Pacífico EIS, note 137 *supra*, and CIP Costa Pacífico AIA, note 139 *supra*, which use a different project name from the one used in the submission.

¹⁵² Submission, note 3 *supra*, at 9-10.

68. The Submitters maintain that in the case of the Cabo Cortés EIS, the impact of the desalination plant will be significant due to wastewater outflow.¹⁵³ The Cabo Cortés EIS states:

In the area, given the existing geohydrological characteristics, subsurface water is difficult to obtain, and the need was therefore considered to obtain it directly from the ocean, as well as to dispose of the discharge water – the wastewater resulting from desalination that exclusively contains higher salinity – in the ocean.¹⁵⁴

It further states:

One of the impacts associated with tourism development is the water demand it generates. In the case of Cabo Cortés, the low availability of potable water in the region is perhaps the main challenge for a new development in the municipality of Los Cabos....¹⁵⁵

...

Moreover, in the case of the project, final estimated demand is for a volume of 10,641,680 m³/year, so that an additional volume of 6,141,680 m³/year is required; to satisfy the additional demand, a desalination plant will be built....¹⁵⁶

And in regard to its impacts, it is noted that:

An adverse impact that may be attributed to the operation of the desalination plant is the alteration of the salt concentration by the brine resulting from the fresh water manufacturing process.¹⁵⁷

69. Along these lines, the Cabo Cortés EIS states that hydrodynamic simulations show that the impact of the discharge is adverse but local.¹⁵⁸ In this regard, Semarnat, in the Cabo Cortés AIA, states:

the developer does not have the certainty that at a depth of approximately 7.0 m and a distance of 230 m the brine will be completely diluted.... said works shall be subject to the environmental impact assessment procedure....¹⁵⁹

70. The Submitters assert the existence of scientific information proving that due to the pattern of currents in the area, the brine would be driven towards the Cabo Pulmo PNA.¹⁶⁰

During the summer season, when the wind is weak, tidal currents dominate most of the circulation in the water column, and only the first few meters on the surface show the influence of wind.... In contrast, the winter shows the effects of

¹⁵³ *Ibid.*, at 10.

¹⁵⁴ Cabo Cortés EIS, note 141 *supra*, ch. 2, at 67.

¹⁵⁵ *Ibid.*, ch. 5, at 8.

¹⁵⁶ *Ibid.*, ch. 5, at 9.

¹⁵⁷ *Ibid.*, ch. 5, at 23.

¹⁵⁸ *Ibid.*, ch. 5, at 24.

¹⁵⁹ Cabo Cortés AIA, note 143 *supra*, at 114.

¹⁶⁰ Submission, note 3 *supra*, at 10.

intense northwest winds. These winds last for days and can modify the circulation of the entire water column....¹⁶¹

71. The Submitters maintain that in view of the lack of certainty, the Cabo Cortés project was not viable, yet it was approved by Semarnat.
72. Concerning the CIP Playa Espíritu project, the Submitters assert that the developer did not perform the studies necessary to demonstrate that there would be no impact on the aquifer and that the coast would not be eroded by the construction of a marina, and they state that the CIP Costa Pacífico AIA made construction of this component conditional only on the preparation of studies.¹⁶² In this regard, the Submitters mention the existence of information produced by experts who recommend not to open access channels to the marinas “due to the imminent salinization of the aquifer and the risk that these channels will continue to widen.”¹⁶³
73. In relation to the Paraíso del Mar project, the Submitters assert that Semarnat did not consider the environmental impacts of the marina on El Mogote before approving the project.¹⁶⁴ The Paraíso del Mar AIA stipulates that the environmental performance monitoring program shall “anticipate the environmental impacts” in order to define the levels of impact of nautical activity on the biota in the marine area.¹⁶⁵ The Submitters maintain that the objective of the environmental impact assessment procedure is vitiated when the impacts are assessed after, instead of before, approval for the project is granted.¹⁶⁶
74. The Secretariat finds that the assertion regarding alleged failures to implement precautionary, mitigation, and preventive measures qualifies for review under NAAEC Articles 14 and 15.

d. Failure to incorporate land use planning instruments into the environmental impact assessment procedure

75. The Submitters assert that Semarnat “routinely” fails to subject the environmental impact assessment procedure to applicable urban development and ecological zoning plans in conformity with LGEEPA Article 35.¹⁶⁷
76. In the case of the Paraíso del Mar project, the Submitters assert that Semarnat did not take into consideration the Order declaring a Closed Forest Protection Zone for the lands surrounding the city of La Paz.¹⁶⁸ The order stipulates:

¹⁶¹ A. Trasviña-Castro, *Observaciones de corrientes en el Parque Nacional de Cabo Pulmo, Baja California Sur: mediciones Eulerianas en verano, otoño y inicios del invierno*, GEOS, vol. 32, no. 2, available at <<http://goo.gl/evALT>> (viewed 31 May 2013) [Trasviña-Castro].

¹⁶² Submission, note 3 *supra*, at 10; CIP Costa Pacífico AIA, note 139 *supra*, at 125, 134.

¹⁶³ Submission, note 3 *supra*, at 10.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ The Order was published in the DOF on 24 August 1938 and bans removal of vegetation on the El Mogote peninsula; the Submitters that it was violated in connection with the Paraíso del Mar project; Submission, note 3 *supra*, at 10 and footnote 58.

The use of forest resources within the zone established by the first article of this Order shall be limited to extraction of dead wood.¹⁶⁹

77. In addition, the information attached to the submission included a decision in which the TFJFA ruled on the validity of the order as follows:

it is clear that the Closed Forest Protection Zone comprising the lands surrounding the city and port of La Paz ... continues to exist under this legal classification; consequently, the Ministry of the Environment and Natural Resources was obligated to consider this factor when issuing environmental impact approval for the “Turístico Hotelero y Residencial Entremares” project¹⁷⁰

78. The Submitters assert that in the case of the Cabo Cortés project, Semarnat “did not enforce the ban on construction in dunes contained in the Local Ecological Zoning Plan of the Municipality of Los Cabos.”¹⁷¹ The Submitters maintain that Semarnat also failed to enforce the ban in regard to turtle nesting sites and that the EIS “does not contain specific actions or commitments” for their protection.¹⁷²

79. The Ecological Zoning Plan of the Municipality of Los Cabos (POEL)¹⁷³ provides that “no construction of any kind shall be permitted in the coastal dune area along the littoral”;¹⁷⁴ in addition, the POEL provides that “no development of any kind may be carried out in sea turtle nesting areas...”¹⁷⁵ The Cabo Cortés EIS envisages the construction of a marina “in an area where environmental impact on coastal dynamics, water quality, and habitat function are minimal.”¹⁷⁶ The Cabo Cortés EIS also states that no construction is planned in the active dune and beach area¹⁷⁷ “except for the navigation channel...”¹⁷⁸ Concerning the protection of turtle nesting sites, the Cabo Cortés EIS provides that the coastal dunes are a “sea turtle beaching area”¹⁷⁹ and lists certain turtle protection measures, including conservation of a 300-metre strip in the dune area, between the construction and infrastructure perimeter and the beach via walkways. In addition, it states that “there may be furniture or equipment that interfere with sea turtles.” The Cabo Cortés EIS proposes to design and implement a sea turtle protection plan.¹⁸⁰ Concerning this assertion, while there is information indicating that work is being done in coastal dunes, there also appears to exist information concerning

¹⁶⁹ Forestry Department of Hunting and Fishing (*Departamento Forestal de Caza y Pesca*), Order declaring the lands surrounding the city and port of La Paz, B.C. a Closed Forest Protection Zone, DOF, 24 August 1938, available at <<http://goo.gl/MTThU>> (viewed 30 April 2013).

¹⁷⁰ TFJFA, Quinta Sala Regional Metropolitana, decision in file no. 4083/11-17-05-7 (2 August 2012), available at <<http://goo.gl/wQZxS>> (viewed 1 May 2012), at 52 [TFJFA Entre Mares decision].

¹⁷¹ Submission, note 3 *supra*, at 10-11.

¹⁷² *Ibid.*

¹⁷³ Ecological Zoning Plan for the Municipality of Los Cabos, abbreviated version of the Official Bulletin of the Government of Baja California Sur, 31 August 1995, available at <<http://goo.gl/uhq76>> (viewed 1 May 2013).

¹⁷⁴ *Ibid.*, at 11.

¹⁷⁵ *Ibid.*, at 14.

¹⁷⁶ Cabo Cortés EIS, note 141 *supra*, ch. 2, at 30.

¹⁷⁷ *Ibid.*, ch. 2, at 41.

¹⁷⁸ *Ibid.*, ch. 2, at 81.

¹⁷⁹ *Ibid.*, ch. 2, at 30.

¹⁸⁰ *Ibid.*, ch. 6, at 29.

measures proposed by the Cabo Cortés EIS. The Submitters may specify which actions or commitments they believe were not included in the Cabo Cortés EIS.

ii. Failures to effectively enforce NOM-022 and LGVS Article 60 *ter*

80. The Submitters assert failures to effectively enforce LGVS Article 60 *ter* by virtue of the approval of the Entre Mares project, in that the developer did not present evidence that “the [mangrove] ecosystem would not be affected by the construction [of the project],” and by virtue of the Conabio’s opinion that temporary alteration of the ecosystem may occur.¹⁸¹ In addition, they assert a failure to enforce paragraphs 4.0, 4.16, and 4.42 of NOM-022 by virtue of the granting of environmental impact approval for the Paraíso del Mar project, because it allows for construction of a drydock within the mangrove ecosystem.¹⁸²
81. A reading of the appendices to the submission to ascertain how the Submitters support this assertion turns up the following passage concerning the Paraíso del Mar project taken from testimony by the plaintiff before the TFJFA:

Notwithstanding the stipulation of the aforesaid paragraph 4.16 [of NOM-022], the DGIRA acknowledges in the approval that the project does not comply with the distances prescribed by paragraph 4.16, since construction of a drydock was approved right inside the mangrove ecosystem and, despite this blatant situation, indicates that the reason why the project is alleged to comply with this provision is that ‘... the proposed activity is not located adjacent to or bordering but within the ecosystem itself....’ This argument is, needless to say, highly illegal since it is clear that if it is not permitted to build within 100 m of a mangrove ecosystem, it is also impermissible to build within one.¹⁸³

And the plaintiff adds:

Therefore, it is abundantly clear that if the NOM in question, in the context of environmental impact assessment, orders the responsible authority to guarantee the integrity of the mangrove ecosystem in all cases, it is illogical and begs the question to suppose that paragraph 4.16, which does not allow destruction of this vegetation by activities adjacent to or bordering the mangrove ecosystem at a distance of less than 100 m, somehow does regulate and allow for construction not in the vicinity of the mangrove ecosystem but within it. Therefore, it must be concluded that both the DGIRA and the responsible authority acted fraudulently and with a patent lack of care, as we have shown....¹⁸⁴

¹⁸¹ Technical Report of Conabio, file DGWE/2134/12, at 6, in Submission, note 3 *supra*, at 12, and final note 61: DGIRA, file no. S.G.P.A./DGIRA/DG/6884/09 (25 November 2009), containing the environmental impact approval for the Entre Mares project, available at <<http://goo.gl/B9AWb>> (viewed 3 May 2013) [AIA Entre Mares].

¹⁸² Submission, note 3 *supra*, at 13.

¹⁸³ *Ibid.*, final note 19: TFJFA, Décimo Primera Sala Regional Metropolitana, decision in file no. 32183/06-17-11-3 (14 January 2013), available at <<http://goo.gl/JQL2r>> (viewed 1 May 2013) [TFJFA Paraíso del Mar Decision of 14 January 2013], at 6.

¹⁸⁴ *Ibid.*, at 7.

82. The Submitters also maintain that the environmental impacts of the Paraíso del Mar project affect the storage of water in natural wells on El Mogote.¹⁸⁵ The Paraíso del Mar EIS states:

As to the aquifer, Conabio states that it is being exhausted, becoming salinized, and being contaminated by solid waste and wastewater. In the conservation recommendations it recommends aquifer recharge, planning of urban growth, and proper urban sanitation.¹⁸⁶

83. According to the Submitters, the Paraíso del Mar AIA found that while the project would have severe environmental impacts on the El Mogote dune, the project is contrary to NOM-022.¹⁸⁷
84. The Secretariat finds that the assertion regarding the alleged failure to effectively enforce the environmental law in connection with mangrove protection qualifies for review under the NAAEC submission mechanism.

iii. Failures to effectively enforce NOM-059

85. The Submitters assert a failure to enforce NOM-059 by virtue of the approval of the Paraíso del Mar, Entre Mares, and Cabo Cortés projects.¹⁸⁸
86. The Submitters assert that in the case of the Paraíso del Mar project, the forested land use change applied to the mangrove ecosystem is illegal because the mangrove is a species listed in the standard in question and is governed by the LGVS.¹⁸⁹ In addition, they assert that the Entre Mares project could affect the whale shark and protected species of dolphins, and assert that the Cabo Cortés project was approved despite alleged impacts on endangered turtle species.¹⁹⁰
87. The object of NOM-059 is to identify species or populations of wild flora and fauna at risk through the preparation of lists presenting the relevant risk classification.
88. In regard to the Paraíso del Mar project, the submission is not entirely clear as to the manner in which Semarnat enforced the LGDFS, it being alleged that it should instead have enforced the LGVS when implementing the forested land use change to the mangrove ecosystem. Nor does the submission identify which mangrove species protected under NOM-059 would be affected by the Paraíso del Mar project. The Submitters may, in a revised version of their submission, provide clarity on this assertion.
89. On the Entre Mares project, the EIS devotes a section to “concerns about dolphins and whales” in which it cites an opinion (*punto de acuerdo*) issued by the Partido Verde Ecologista de México¹⁹¹ that includes photographs of the damage caused by boats to whale sharks¹⁹² and recommends that development plans in habitats such as that of El

¹⁸⁵ Submission, note 3 *supra*, at 13.

¹⁸⁶ Paraíso del Mar EIS, note 148 *supra*, ch. 1, at 106.

¹⁸⁷ Submission, note 3 *supra*, at 13.

¹⁸⁸ *Ibid.*, at 13-14.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Entre Mares EIS, note 29 *supra*, ch. 4, at 80-5.

¹⁹² *Ibid.*, ch. 4, at 85.

Mogote take account of negative impacts as well as increased primary productivity and boat traffic.¹⁹³ One of the principal characteristics of the Entre Mares project is transfer of residents and visitors from the city of La Paz.¹⁹⁴ The Submitters assert that while the Environmental Policy Branch (*Dirección General de Política Ambiental*) of Semarnat opined that the assessment of these impacts was deficient, the project was nonetheless approved.¹⁹⁵ In addition, a reading of the appendices to the submission indicates that one of the remedies filed in relation to the Entre Mares project states that Semarnat approved the use of natural resources in both extractive and non-extractive activities, in violation of NOM-059.¹⁹⁶ The TFJFA found in its decision that the Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*) of Semarnat “was wrong to make any pronouncement whatsoever” in regard to such assertions.¹⁹⁷

90. In relation to the Cabo Cortés project, the Submitters assert that Semarnat improperly approved the project, which will affect the loggerhead sea turtle, the leatherback sea turtle, the olive Ridley sea turtle, the hawksbill sea turtle, and the black sea turtle.¹⁹⁸ They indicate that the Cabo Cortés EIS acknowledges that the project site is a turtle beaching and nesting site yet does not consider impacts on sea turtles, stating that the only relevant impact is vegetation loss.¹⁹⁹ The Cabo Cortés EIS identifies the turtle nesting sites listed in NOM-059;²⁰⁰ maintains that the project does not plan to build tourist camps in this area;²⁰¹ and presents specific information about the leatherback sea turtle.²⁰² The Cabo Cortés EIS also presents the following information:

Loss of nesting beaches at the north end of Punta Arena. The construction of marina protection structures will cause a change in the coastline due to the alteration of sediment transportation patterns...²⁰³

91. The developer of the Cabo Cortés project states that, all things considered, “the portion of beach affected by the development is very small considering the total length of beach where nesting may occur.” The Submitters contend that given this circumstance, the Cabo Cortés project should not have been approved.²⁰⁴
92. The Secretariat finds that the assertion regarding failures to effectively enforce NOM-059 qualifies for review under the NAAEC Article 14 and 15 procedure.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*, ch. 6, at 118.

¹⁹⁵ Submission, note 3 *supra*, at 13.

¹⁹⁶ TFJFA Entre Mares decision, note 170 *supra*, at 44.

¹⁹⁷ *Ibid.*, at 45.

¹⁹⁸ Submission, note 3 *supra*, at 13.

¹⁹⁹ *Ibid.*, at 14.

²⁰⁰ Cabo Cortés EIS, note 141 *supra*, ch. 3, at 96-7, and ch. 4, at 108, 142.

²⁰¹ *Ibid.*, ch. 3, at 97.

²⁰² *Ibid.*, ch. 4, at 142.

²⁰³ *Ibid.*, ch. 5, at 32. Emphasis in original.

²⁰⁴ Submission, note 3 *supra*, at 14.

iv. Failure to exercise powers to suspend works or activities lacking environmental impact approval

93. The Submitters assert that Profepa “did not exercise its powers” to enforce the environmental law since, even though citizen complaints were filed against the Paraíso del Mar project because it lacked the necessary environmental impact approval,²⁰⁵ Profepa did not close the site.²⁰⁶ In this regard, the submission cites REIA Article 59.
94. The Submitters state that all legal avenues in relation to the Paraíso del Mar project have been exhausted, that other legal actions relating to the Entre Mares, CIP Playa Espíritu, and Cabo Cortés projects are ongoing, and that “a final decision was not awaited before filing this submission, considering that the time necessary to reach a conclusion will put the ecosystem in greater danger.”²⁰⁷
95. The Secretariat finds that the assertion concerning the failure to exercise Profepa’s powers to suspend works or activities lacking environmental impact approval qualifies for review.

v. Assertions concerning violation of the Ramsar Convention

96. The submission states that Marismas Nacionales, the Bay of La Paz, and Cabo Pulmo were recognized as priority wetlands of international importance under Ramsar in 1995, 2007 and 2008, respectively.²⁰⁸ They further assert that the Convention “calls on the government to take legislative and regulatory measures for the protection of wetlands, and to designate wetlands of international importance within its territory,” and that the Government of Mexico has not fulfilled its international obligation under Ramsar to protect Cabo Pulmo, Marismas Nacionales, and the Bay of La Paz.²⁰⁹
97. The submission notes that the Ramsar advisory mission that visited Marismas Nacionales stated that “a proposed project like CIP Playa Espíritu ‘was unviable in the proposed form.’”²¹⁰ Additionally, the Submitters assert that representatives of the Ramsar Convention have stated in private correspondence that the joint advisory mission of Ramsar, the International Union for the Conservation of Nature (IUCN), and UNESCO recommended to the Government of Mexico that the site be included in the Montreux Record of endangered wetlands of international importance.²¹¹ They argue that, despite the recommendation of the Ramsar advisory mission to Marismas

²⁰⁵ “In August 2010, this federal [Tax and Administrative] court ruled the AIA for the tourism complex illegal.” Submission, note 3 *supra*, at 4, and final note no. 18: Tribunal de Justicia Fiscal y Administrativa, Décima Primera Sala Regional Metropolitana, decision of 3 August 2010, file no. 32183/06-17-11-3.

²⁰⁶ Submission, note 3 *supra*, at 2, 4, 15.

²⁰⁷ *Ibid.*, at 15.

²⁰⁸ *Ibid.*, at 2-3; Conanp, information sheet on Ramsar wetlands: Marismas Nacionales (22 June 1995); Conanp, information sheet on Ensenada de La Paz wetlands (27 October 2007); Conanp, information sheet on Cabo Pulmo wetlands (8 August 2007).

²⁰⁹ Submission, note 3 *supra*, at 14.

²¹⁰ *Ibid.*, at 5.

²¹¹ *Ibid.*, at 6.

Nacionales,²¹² Semarnat approved Phase 1 of the CIP Playa Espiritu project on 9 February 2011.²¹³

98. The Submitters further assert that the construction of the Entre Mares project on a highly vulnerable site violates provisions of the Ramsar Convention.²¹⁴
99. The submission does not clarify which provisions of the Convention are violated nor the manner in which the Government of Mexico is failing to enforce them. In a revised version, the Submitters may make assertions specifying the manner in which Mexico is allegedly failing to effectively enforce provisions of the Ramsar Convention in relation to the protection of Marismas Nacionales, the Bay of La Paz, and Cabo Pulmo; or, failing that, they may indicate the extent to which the Ramsar Convention is related to the remaining assertions in the submission.

B The six requirements of NAAEC Article 14(1)

100. The Secretariat now proceeds to review the submission with reference to the six requirements of NAAEC Article 14(1) and finds that submission SEM-13-001 does not meet all these requirements. The Secretariat's reasoning follows.

(a) *[Whether it] is in writing in a language designated by that Party in a notification to the Secretariat*

101. The submission meets the requirement of Article 14(1)(a)²¹⁵ because it is presented in writing in two of the languages designated by the Parties for the filing of submissions: Spanish and English.²¹⁶ Nothing prevents a submitter from filing a submission in more than one official language of the CEC; however, for the purposes of processing the submission, it was deemed appropriate to use the Spanish version of SEM-13-001.

(b) *[Whether it] clearly identifies the person or organization making the submission*

102. The submission satisfies Article 14(1)(b),²¹⁷ since the Submitters provide names, addresses, and other contact information for the organizations making the submission as well as the organizations representing them, which is sufficient for the Secretariat to clearly identify the Submitters and establish contact. In this regard, the Secretariat has

²¹² Ramsar Advisory Mission no. 67, Laguna Huizache-Caimanero (Ramsar site no. 1689) and Marismas Nacionales Ramsar site (Ramsar site no. 732), Report, 9 August 2010, available at <<http://goo.gl/i4jvd>> (viewed 3 May 2013) [Report of Ramsar Advisory Mission].

²¹³ Submission, note 3 *supra*, at 5.

²¹⁴ *Ibid.*

²¹⁵ NAAEC, note 1 *supra*, Article 14(1)(a):

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;

²¹⁶ Article 19 of the NAAEC provides that the official languages of the CEC are English, French, and Spanish. Likewise, section 3.2 of the Guidelines states: "Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions." *Cf.* Guidelines, note 10 *supra*.

²¹⁷ NAAEC, note 1 *supra*, Article 14(1)(b):

The Secretariat may consider a submission ... if the Secretariat finds that the submission:

(b) clearly identifies the person or organization making the submission;

previously found such information sufficient to satisfy the eligibility requirement of Article 14(1)(b).²¹⁸

(c) *[Whether it] provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based*

103. The submission does not fully satisfy the requirement of Article 14(1)(c).²¹⁹ In order for the Secretariat to consider some of the assertions in the submission, it is necessary for a revised version to present additional information, the nature of which is specified at the end of this section.

104. The Submitters attach a document with a general description of the Gulf of California indicating the geophysical and biophysical characteristics of the region.²²⁰ The document indicates, among other aspects, that the Gulf of California is divided into the Pacific Coastal Plain, the Sonora Desert Province, the Colorado Desert Province, and the Baja California Province. The information further indicates the abundance of coastal lagoons and similar bodies of water,²²¹ their high productivity, biological diversity, and beauty,²²² and the abundance of flora,²²³ marine invertebrates,²²⁴ fish,²²⁵ reptiles,²²⁶ seabirds,²²⁷ and marine mammals.²²⁸

105. The Submitters make reference to the inclusion of the Gulf of California islands, Loreto, and Cabo Pulmo in the UNESCO world network of World Heritage Biosphere Reserves.²²⁹ In addition, final note 3 of the submission includes the hyperlink for the registration of islands and protected areas of the Gulf of California in this network,²³⁰ as well as relevant information that includes the Cabo Pulmo PNA as part of the record proposed by the Government of Mexico.²³¹ While the information is relevant to the review of the submission in question and serves to support the assertion regarding the

²¹⁸ See, in this regard, SEM-07-005 (*Drilling Waste in Cunduacán*), Article 14(3) Determination (8 April 2009), § 25(a).

²¹⁹ NAAEC, note 1 *supra*, Article 14(1)(c):

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;

²²⁰ Submission, note 3 *supra*, final note 1: Semarnat, Marine Ecological Zoning Plan for the Gulf of California, General Description of the Gulf of California, available at <http://goo.gl/xb9nK> (viewed 25 April 2013).

²²¹ *Ibid.*, at 2.

²²² *Ibid.*, at 3.

²²³ *Ibid.*, at 6-7.

²²⁴ *Ibid.*, at 7-8.

²²⁵ *Ibid.*, at 8.

²²⁶ *Ibid.*

²²⁷ *Ibid.*, at 9-10.

²²⁸ *Ibid.*, at 10-11.

²²⁹ *Ibid.*, at 2.

²³⁰ World Heritage Council, decisions of the 29th session of the World Heritage Committee, Durban, 2005, available at <<http://goo.gl/IYo5b>> (viewed 2 May 2013), through <http://whc.unesco.org/en/list/1182>, cited in Submission, note 3 *supra*, final note 3.

²³¹ Semarnat, Conanp, Serial Nomination Format for the Islands and Protected Areas of the Gulf of California, Mexico, 2005, available at <<http://goo.gl/ZvrU6>> (viewed 3 May 2013), through <http://whc.unesco.org/en/list/1182>, cited in Submission, note 3 *supra*, final note 3.

region's natural value, it is not entirely clear to the Secretariat whether the Submitters are making any assertion regarding the effective enforcement of the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, which they may do in a revised version of their submission.

106. The Submitters attach the information sheet on the Mogote-Ensenada La Paz wetlands, which was recorded in accordance with the Ramsar Convention,²³² which information is provided in support of the assertion that the Bay of La Paz is a Ramsar wetland of international importance. In addition, the Submitters attach the Order declaring the Closed Forest Protection Zone encompassing the El Mogote site,²³³ with a view to supporting their assertions concerning the effective enforcement of the ecological zoning plan in the context of the environmental impact assessment procedure for the Entre Mares and Paraíso del Mar projects.
107. The Submitters provide the link to the order declaring the area named Cabo Pulmo, off the coast of the municipality of Los Cabos, BCS, a protected natural area with the status of a National Marine Park.²³⁴ In addition, the Submitters include the reference to a document underscoring the importance of the Cabo Pulmo PNA as a marine reserve having a role in the recovery of the coral reef,²³⁵ and they include the information sheet whereby the Cabo Pulmo PNA was recorded under the Ramsar Convention.²³⁶ The information in question serves to support the assertion regarding the importance, character, and function of Cabo Pulmo PNA.
108. The Submitters include the Ramsar Convention information sheet for the site known as "Marismas Nacionales," which states that the site is "of special value in the maintenance of genetic and ecological diversity in the region," affirms that it supports "an appreciable array of rare, vulnerable, and threatened wildlife species," and stresses that it "sustains a population of 20,000 water birds and is a winter refuge for more than 100,000 migratory water birds."²³⁷ Also attached to the submission are the order – or at any rate the hyperlink to the order – declaring the Marismas Nacionales PNA²³⁸ and the notice informing the public that the studies justifying the declaration of the Marismas

²³² Submission, note 3 *supra*, final note 6: Conanp, information sheet on Ramsar wetlands: El Mogote-Ensenada, La Paz (27 October 2007), available at <<http://goo.gl/YK0k>> (viewed 23 April 2013).

²³³ Closed Forest Zone Order, note 30 *supra*.

²³⁴ Submission, note 3 *supra*, final note 7: Order declaring the area named Cabo Pulmo, off the coast of the municipality of Los Cabos, BCS, a protected natural area with the status of a National Marine Park, with an area of 7,111-01-00 hectares (6 June 1995), Mexico, available at <<http://goo.gl/EfFiI>>, (viewed 3 May 2013).

²³⁵ Submission, note 3 *supra*, final note 8: O. Aburto Oropeza, et al., "Large Recovery of Fish Biomass in a No-Take Marine Reserve," Plos Online, 2011, available at <<http://goo.gl/2IP2w>> (viewed 3 May 2013).

²³⁶ Submission, note 3 *supra*, final note 9: Conanp, information sheet on Cabo Pulmo Nacional Park (8 August 2007), available at <<http://goo.gl/R5sBj>> (viewed 23 April 2013).

²³⁷ Submission, note 3 *supra*, final note 10: Conanp, information sheet on Ramsar wetlands: Marismas Nacionales, (8 August 2007), available at <<http://goo.gl/nvf0v>> (viewed 23 April 2013).

²³⁸ Submission, note 3 *supra*, final note 13: Order declaring the region known as Marismas Nacionales Nayarit, located in the municipalities of Acaponeta, Rosamorada, Santiago Ixcuintla, Tecuala, and Tuxpan in the state of Nayarit, as a protected natural area with the character of a biosphere reserve, DOF 12 May 2010, available at <<http://goo.gl/3vXa5>> (viewed 3 May 2013).

Nacionales PNA in the state of Sinaloa are available to the public.²³⁹ Finally, the Submitters attach the report of the Ramsar advisory mission of 9 August 2010.²⁴⁰ This information is related to the assertions concerning the environmental impact approvals being issued in the Marismas Nacionales region, a site characterized by the presence of mangroves.

109. The Submitters attach the Paraíso del Mar EIS,²⁴¹ the Entre Mares EIS,²⁴² the CIP Costa Pacífico EIS,²⁴³ the Cabo Cortés EIS,²⁴⁴ and the Los Pericúes EIS.²⁴⁵ Also attached is information containing the Entre Mares AIA,²⁴⁶ the CIP Costa Pacífico AIA,²⁴⁷ and the Cabo Cortés AIA.²⁴⁸ This information will assist the Secretariat in reviewing the alleged deficiencies in the environmental impact studies and approvals for tourism complexes, including: the alleged failure to include the best and most complete information available in the EISs;²⁴⁹ the alleged piecemeal consideration of the projects and assessment of cumulative impacts;²⁵⁰ the alleged failure to implement precautionary, mitigation, and preventive measures,²⁵¹ and the alleged failure to incorporate land use planning documents into the environmental impact procedure.²⁵² This information likewise serves, as applicable, to support the assertions concerning the enforcement of NOM-022 and NOM-059.²⁵³
110. The submission includes technical documents concerning marine current observation in Cabo Pulmo National Park,²⁵⁴ as well as the technical opinion issued by Conanp in relation to the Cabo Cortés project,²⁵⁵ these documents in support of the assertions concerning the failure to consider the best and most complete information in the environmental impact assessment.
111. The submission includes information concerning remedies pursued in relation to the matter raised in the submission, including the decision in file no. 32183/06-17-11-3 of the Eleventh Metropolitan Regional Court of the TFJFA of 14 January 2013, relating to the Paraíso del Mar project;²⁵⁶ the citizen complaint filed by a representative of Centro Mexicano de Derecho Ambiental with Profepa on 22 February 2013 due to the alleged

²³⁹ Submission, note 3 *supra*, final note 14: Notice informing the general public that the studies justifying the Order declaring the region known as Marismas Nacionales Sinaloa, with an area of 47,556-25-00 hectares, located in the municipalities of El Rosario and Escuinapa in the state of Sinaloa, are available to the public, DOF, 12 November 2010, available at <http://goo.gl/2BcKI> (viewed 3 May 2013).

²⁴⁰ Report of Ramsar Advisory Mission, note 212 *supra*.

²⁴¹ Paraíso del Mar EIS, note 148 *supra*.

²⁴² Entre Mares EIS, note 29 *supra*.

²⁴³ CIP Costa Pacífico EIS, note 137 *supra*.

²⁴⁴ Cabo Cortés EIS, note 141 *supra*.

²⁴⁵ Los Pericúes EIS, note 41 *supra*.

²⁴⁶ Entre Mares AIA, note 181 *supra*.

²⁴⁷ CIP Costa Pacífico AIA, note 139 *supra*.

²⁴⁸ Cabo Cortés AIA, note 143 *supra*.

²⁴⁹ See paragraphs 60 *et seq.*

²⁵⁰ See paragraphs 62 *et seq.*

²⁵¹ See paragraphs 67 *et seq.*

²⁵² See paragraphs 75 *et seq.*

²⁵³ See paragraphs 80 *et seq.*

²⁵⁴ Trasviña-Castro, note 161 *supra*.

²⁵⁵ Conanp Technical Opinion, note 132 *supra*.

²⁵⁶ TFJFA Paraíso del Mar Decision of 14 January 2013, note 183 *supra*.

performance of works without environmental impact approval as part of the Paraíso del Mar project,²⁵⁷ and a decision of the Semarnat Information Committee confirming that the decision canceling the Paraíso del Mar AIA remains in effect.²⁵⁸ With this information, the Submitters provide support for their assertions concerning the operation of the Paraíso del Mar project without the applicable environmental impact approval.

112. The submission includes information concerning the legal instruments mentioned in the submission, including NOM-022,²⁵⁹ NOM-059,²⁶⁰ the Semarnat Organization Manual,²⁶¹ the Internal Regulation of Semarnat,²⁶² and decisions issued by the Conference of the Parties of the Ramsar Convention.²⁶³
113. The Submitters do not attach physical or electronic copies or hyperlinks to the following information mentioned by the Submitters, which is necessary in some cases in order to complete the Secretariat's Article 14(1) review:
 - a. the decision in files PFPA/BCS/DQ/79/0018-05 and PFPA/BCS/DQ/79/0127 of 13 August 2001, mentioned in final note 16 of the submission;
 - b. the decision of the Eleventh Metropolitan Regional Court of the TFJFA in file 32183/06-17-11-3 of 3 August 2010, mentioned in final note 18 of the submission;
 - c. the document titled "Analysis of the salt marsh system associated with the terrestrial regional environmental system of the CIP Costa Pacífico project," mentioned in final notes 29 and 53 of the submission;
 - d. if possible, a copy of motion for judicial review 11/2012, file XV/2012/11, mentioned in final note 32 of the submission;
 - e. the land use change approval for the Cabo Cortés project of 4 August 2009, contained in file no. SEMARNAT-BCS.02.02.0905/09, mentioned in final note 35 of the submission;
 - f. file no. S.G.P.A./DGIRA/DG/1919 of 6 March 2012, mentioned in final note 37 of the submission;
 - g. if possible, motion for judicial review 403/2011, file XV/2011/403, mentioned in final note 40 of the submission;

²⁵⁷ Cemda, Citizen Complaint (22 February 2013), available at <<http://goo.gl/qb3cZ>> (viewed 3 May 2013).

²⁵⁸ Semarnat Information Committee, resolution no. 180/2012 arising from request for information no. 0001600159012.

²⁵⁹ Submission, note 3 *supra*, final note 48: NOM-022.

²⁶⁰ Submission, note 3 *supra*, final note 49: NOM-059.

²⁶¹ Submission, note 3 *supra*, final note 46: Semarnat Organization Manual, DOF, 13 August 2003.

²⁶² Submission, note 3 *supra*, final note 47: Internal Regulation of Semarnat, DOF, 21 January 2003.

²⁶³ Submission, note 3 *supra*, final note 66: Conference of the Parties to the Ramsar Convention, Resolution VII.7: Guidelines for reviewing laws and institutions to promote the conservation and wise use of wetlands, 7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971), San José, Costa Rica, 10-18 May 1999.

- h. if possible, the electronic communication of 9 July 2012 from spokespeople of the community of Cabo Pulmo to Coalición Cabo Pulmo Vivo, mentioned in final note 41 of the submission;
- i. the AIA for the Paraíso del Mar project, mentioned on page 3 of the submission.

(d) *[Whether it] appears to be aimed at promoting enforcement rather than at harassing industry*

114. The submission satisfies Article 14(1)(d)²⁶⁴ since it appears to be aimed at promoting enforcement rather than at harassing industry. Section 5.4 of the Guidelines provides that when making a determination that a submission appears to be aimed at promoting enforcement rather than at harassing industry, the Secretariat shall consider whether: i) “the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission,” and ii) “the submission appears frivolous.”²⁶⁵
115. In a previous determination, the Secretariat considered how in certain cases a submission does not satisfy the requirement of Article 14(1)(d):
- 37. ...The Submitter does not elaborate on why the Quebec Government has purportedly failed to effectively enforce the law at issue by not responding to the CRA report [a report by a consultant commissioned by the submitter], or why section 24 EQA [Environment Quality Act] would legally entitle the Submitter to expect a response to it from the Government of Quebec....
 - 38. Given the nature of the asserted failure to effectively enforce the law at issue, and the purported evidence of such failure, it is then highly relevant, under Guideline 5.4(a), that the Submission is focused exclusively on compliance by a particular company – Horizon – with section 24 of the EQA, and that the Submitter is Horizon’s direct competitor that, in certain circumstances, may stand to benefit economically from the Submission.²⁶⁶
116. In the case at issue, although the submission mentions five specific projects (Paraíso del Mar, Entre Mares, CIP Playa Espíritu, Cabo Cortés, and Los Pericúes), it is clear that it does so for the purpose of supporting the assertion of “Mexico’s systematic failure to enforce the environmental law” in the assessment and approval of tourism complexes in the Gulf of California.²⁶⁷
117. It is also evident – considering the information about the Submitters that is presented on their websites, for those that have websites, and further to an Internet search on those that do not have websites – that none of the submitters are competitors of the developers, nor do they have any apparent commercial ties to competitors of the

²⁶⁴ NAAEC, note 1 *supra*, Article 14(1)(d):

The Secretariat may consider a submission ... if the Secretariat finds that the submission:
(d) appears to be aimed at promoting enforcement rather than at harassing industry;

²⁶⁵ Cf. Guidelines, note 10 *supra*, section 5.4.

²⁶⁶ SEM-11-001 (*PCB Treatment in Grandes-Piles Quebec*), Article 14(1) Determination (12 April 2012), §37-8.

²⁶⁷ Submission, note 3 *supra*, at 1.

companies Desarrollos Punta La Paz, Fideicomiso F/934 Deutsche Bank México, Hansa Baja Investments, Riviera Desarrollos BCS, and Fonatur. The Submitters are organizations established in Mexico and the United States without any apparent profit motive, whose mission includes the sustainable development and conservation of the coastal ecosystem of the Gulf of California. These organizations engage in legal action, community action, education, and other types of action aiming to influence public policy in this area. Finally, the Natural Resources Defense Council works with companies to help them increase their environmental impact and share their best practices with other players in their sector;²⁶⁸ the Secretariat has found no indication that it may have a direct interest in the economic success of the companies with which it collaborates nor that such success bears any relationship to SEM-13-001. In view of the foregoing, the Secretariat concludes that this submission is not intended for the economic benefit of the Submitters.

(e) *[Whether it] indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any*

118. The Submitters do not attach copies of correspondence with various authorities, nor any response that may have been received. The submission states:

This matter has been communicated to the Mexican authorities. As described above, the Submitters and others have communicated regularly with Semarnat and Profepa and filed various administrative and legal actions concerning Mexico's failure to enforce the environmental law by virtue of its approval of mega-resorts on the Gulf of California.²⁶⁹

119. The Submitters state that in fact i) they have communicated the matter to Semarnat and Profepa, and ii) they have filed various administrative and legal actions.

120. Paragraph 5.5 of the Guidelines states:

The submission must indicate that the matter has been communicated in writing to the relevant authorities of the Party in question and indicate the Party's response, if any. The Submitter must include, with the submission, copies of *any relevant correspondence* with the relevant authorities. The relevant authorities are the agencies of the government responsible under the law of the Party for the enforcement of the environmental law in question.²⁷⁰

121. The submission makes reference, for example, to a letter of 5 December 2011 requesting that approval be rescinded due to violation of the conditions of the Cabo Cortés AIA, but this letter is not attached.²⁷¹

122. While the submission includes a good part of the various remedies pursued in relation to the matter raised in the submission, these actions are not equivalent to communication of the matter in question as prescribed by NAAEC Article 14(1)(e) and section 5.5 of the Guidelines. In any case, review of legal actions pursued in relation to

²⁶⁸ NRDC, "Smarter Business," available at <<http://goo.gl/8uFQd>> (viewed 23 May 2013).

²⁶⁹ Submission, note 3 *supra*, at 14.

²⁷⁰ Cf. Guidelines, note 10 *supra*, section 5.5. Emphasis added.

²⁷¹ Submission, note 3 *supra*, at 6.

the matter raised by the Submitters will take place once it is determined whether the submission warrants a response from the Party.²⁷²

123. The Submitters may, in a revised version, present copies of any relevant correspondence with the authorities of the Parties, in accordance with the requirement of Article 14(1)(e).²⁷³

(f) *[Whether it] is filed by a person or organization residing or established in the territory of a Party*

124. The submission meets the requirement of Article 14(1)(f)²⁷⁴ since it was filed by nongovernmental organizations established in the territory of two NAAEC Parties: the United Mexican States and the United States of America.

IV. DETERMINATION

125. For the reasons set out herein, the Secretariat finds that submission SEM-13-001 (*Tourism Development in the Gulf of California*) does not fully satisfy the eligibility requirements of NAAEC Article 14(1), and that the Submitters may therefore present a revised submission in which they address the following matters:

- i) the status of the Los Pericúes project, so that the Secretariat can determine whether it is an enforcement situation that is ongoing (paragraph 25 *supra*);
- ii) clarify the failure to effectively enforce LGEEPA Article 34 (paragraphs 34-35 *supra*);
- iii) identify the specific provisions of the Ramsar Convention which the Submitters believe are not being enforced along with additional information to ascertain whether the “management recommendations” can be considered environmental law in the sense of the NAAEC (paragraphs 31, 32, and 99 *supra*);
- iv) clarify which of their assertions are related to the enforcement of LGEEPA Article 35 *bis* (paragraph 40 *supra*);
- v) clarify whether they assert a failure to enforce LGEEPA Article 28 (paragraph 41 *supra*);
- vi) clarify which of their assertions are related to the enforcement of REIA Articles 24 and 58 (paragraphs 46 and 50 *supra*);

²⁷² Cf. NAAEC, note 1 *supra*, Article 14(2)(c).

²⁷³ *Ibid.*, Article 14(1)(e):

The Secretariat may consider a submission ... if the Secretariat finds that the submission: (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party’s response, if any;

²⁷⁴ *Ibid.*, Article 14(1)(a):

The Secretariat may consider a submission ... if the Secretariat finds that the submission: (f) is filed by a person or organization residing or established in the territory of a Party.

- vii) clarify the relationship of the CIP Playa Espíritu project to the CIP Costa Pacífico project to which the final notes to the submission refer (paragraph 66 *supra*);²⁷⁵
- viii) present information concerning measures to protect sea turtles that were not considered in the Cabo Cortés EIS (paragraph 79 *supra*);
- ix) present information concerning the non-applicability of the LGDFS as asserted (paragraph 88 *supra*);
- x) present information to satisfy, to the extent possible, NAAEC Article 14(1)(c) (paragraph 113 *supra*);
- xi) clarify whether they are asserting a failure to effectively enforce the *Convention Concerning the Protection of the World Cultural and Natural Heritage* mentioned in paragraph 105 *supra*, and
- xii) present information to satisfy the requirement of NAAEC Article 14(1)(e) (paragraphs 118 et seq.).

126. In conformity with sections 6.1 and 6.2 of the Guidelines, the Secretariat hereby notifies the Submitters that they have 60 working days in which to file a submission that meets all the requirements of Article 14(1). If such a revised submission is not received by **16 August 2013**, the Secretariat will terminate the process relating to submission SEM-13-001.

127. The Submitters are kindly requested to send a revised version of their submission along with any additional information in electronic format to the following address: sem@cec.org.

Secretariat of the Commission for Environmental Cooperation

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

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

²⁷⁵ See, for example, CIP Costa Pacífico EIS, note 137 *supra*, and CIP Costa Pacífico AIA, note 139 *supra*, which use a different name for the project from the one provided in the submission.

cc: Mr. Enrique Lendo, Mexico Alternate Representative
Mr. Dan McDougall, Canada Alternate Representative
Ms. Michelle DePass, United States Alternate Representative
Dr. Irasema Coronado, Executive Director, Secretariat of the CEC
Submitters