
Secretariat of the Commission for Environmental Cooperation

**Notification to the Submitters and to Council
regarding a proceeding notified by Mexico**

Submitters:	Asociación Interamericana para la Defensa del Ambiente (AIDA) Centro Mexicano para la Defensa del Medio Ambiente Natural Resources Defense Council Red Ecologista por el Desarrollo de Escuinapa Amigos para la Conservación de Cabo Pulmo COSTASALVAjE Sociedad de Historia Natural Niparáj Greenpeace Mexico Los Cabos Coastkeeper Alianza para la Sustentabilidad del Noroeste Costero SUMAR
Represented by:	Sandra Moguel, AIDA Sarah Burt, Earthjustice
Party:	United Mexican States
Original submission:	11 April 2013
Revised submission:	16 August 2013
Date of this notification:	16 May 2014
Submission no.	SEM-13-001 (<i>Tourism Development in the Gulf of California</i>)

I. INTRODUCTION

1. On 11 April 2013, Asociación Interamericana para la Defensa del Ambiente (AIDA) and Earthjustice, representing the aforementioned nongovernmental organizations (together, the “Submitters”), filed submission SEM-13-001 (*Tourism Development in the Gulf of California*) with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) in accordance with Article 14 of the North American Agreement on Environmental Cooperation (NAAEC or the “Agreement”).¹ In the submission, the Submitters assert that Mexico is failing to effectively enforce its environmental law by “approving various projects to build and operate tourism infrastructure in ecologically sensitive areas” of the Gulf of California.²
2. On 24 February 2014, Mexico filed a Response pursuant to NAAEC Article 14(3) that noted the existence of an “administrative proceeding under Article 45(3)(a) of the Agreement,” for which

¹ North American Agreement on Environmental Cooperation (NAAEC), signed 13 September 1993 by Canada, the United States, and Mexico (the “Parties”), reprinted in: 32 I.L.M. 1480 (1993) and published in the *Diario Oficial of the Federación* (DOF) on 21 December 1993 [NAAEC].

² SEM-13-001 (*Tourism Development in the Gulf of California*), Article 14(1) Submission (11 April 2013), p. 1, available at < <http://goo.gl/uQP54K> > (viewed 14 April 2014). On 16 August 2013, at the request of the CEC Secretariat, the Submitters filed a revised version of their submission [Revised Submission]. For developments in relation to this submission, see the registry on the CEC website at < <http://goo.gl/OdHTwq> > (viewed 14 May 2014).

reason the Party asserts that the Secretariat should proceed no further with its consideration of the submission.³

3. The Secretariat has reviewed Mexico's notice in relation to the existence of a pending administrative proceeding and finds that the proceeding does in fact meet the NAAEC Article 45(3) definition and is pending in the sense of NAAEC Article 14(3). The Secretariat thus terminates the submission with respect to the assertion that the construction and operation of works and facilities for the Paraíso del Mar project are being conducted without environmental impact approval.

II. SUMMARY OF MEXICO'S NOTIFICATION

4. In its Response, Mexico notifies the Secretariat of proceedings arising from the enforcement of its environmental law with respect to the Paraíso del Mar project and to components of the project that lack environmental impact approval. Mexico maintains that the Baja California Sur branch office of the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) took inspection measures between July and December 2013 in the locality of El Mogote, La Paz, Baja California Sur as well as on the Paraíso del Mar project site.⁴ In addition, the Party gives notice of the existence of a citizen complaint filed 22 February 2013 by Centro Mexicano de Derecho Ambiental (CEMDA) that relates to the assertion concerning the shutting down of construction work and operational activities being carried out on the Paraíso del Mar project.⁵
5. Mexico concludes that the measures being taken by Profepa constitute a pending administrative proceeding in accordance with NAAEC Article 14(3)(a) and requests the Secretariat, pursuant to paragraph 9.6 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the "Guidelines"),⁶ to proceed no further with its review of the Submitters' assertion concerning the unauthorized construction works on the Paraíso del Mar project.⁷

III. ANALYSIS

A. Introduction

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

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

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

³ SEM-13-001 (*Tourism Development in the Gulf of California*), Article 14(3) Response (24 February 2014), p. 91 [Response].

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, available at < www.cec.org/Guidelines > (viewed 12 September 2013) [Guidelines].

⁷ Response, note 3 *supra*, p. 91.

7. For the purposes of Article 14(3), NAAEC Article 45(3)(a) defines the term “judicial or administrative proceeding” as:
- (a) a[n] ... administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: ... seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order;...
8. Similarly, the relevant part of paragraph 9.6 of the Guidelines states that:
- If, in its response under Article 14(3), the Party informs the Secretariat and explains in writing that the matter raised in the submission is the subject of a pending judicial or administrative proceeding, as defined in Article 45(3) of the Agreement, the Secretariat will proceed no further with the submission and will promptly notify the Submitter and the Council, in writing, that the submission process is terminated...⁸
9. That the Secretariat has the power to interpret the NAAEC⁹ and to review a notification from a Party as to the existence of pending judicial or administrative proceedings before terminating a submission under Article 14(3) is supported by the principle that a treaty cannot achieve its express goals and purpose if it is not effective.¹⁰ Thus, in practice, the Secretariat i) exercises its implied powers,¹¹ (ii) consistent with the concept of “institutional effectiveness.”¹² In applying these concepts to Mexico’s notification, the Secretariat takes into consideration that the Guidelines “describe the manner in which the submissions ... process is intended to be implemented”¹³ but should be interpreted “in a manner consistent with the Agreement,”¹⁴ and

⁸ Guidelines, note 6 *supra*, paragraph 9.6.

⁹ On this subject, see SEM-07-005 (*Drilling Waste in Cunduacán*) Article 14(3) Determination (8 April 2009) at para 23, available at < <http://goo.gl/Jkygrj> > (viewed 5 May 2014).

¹⁰ See, for example, A. M. Slaughter and A. Wiersema, *The Scope of the Secretariat’s Powers Regarding the Submissions Procedure of the North American Agreement on Environmental Cooperation under General Principles of International Law*, “North American Environmental Law and Policy” series, vol. 27, Commission for Environmental Cooperation, Montreal, 2010, available at < <http://goo.gl/4dRPwU> > (viewed 15 April 2014).

¹¹ In relation to implied powers, the International Court of Justice has stated:

[T]he necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as “implied” powers.

International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, 8 July 1996 (World Health Organization), *I.C.J. Reports 1996*, §25, available at < <http://goo.gl/zzwLPs> > (viewed 29 April 2014). On the same subject:

Applied to the CEC Secretariat, the existing law applicable to international organizations would suggest that the Secretariat has the specific powers assigned to it under the NAAEC, and additionally it has such powers as may reasonably be implied as necessary to carry out the specific functions assigned to it.

D. McRae, *Inclusion in a Factual Record of Information Developed by Independent Experts and the Autonomy of the Secretariat of the CEC in the Article 14 and 15 Process*, “North American Environmental Law and Policy” series, vol. 26, Commission for Environmental Cooperation, Montreal, 2008, pp. 20–1, available at < <http://goo.gl/Eg7hJX> > (viewed 15 April 2014).

¹² “[I]nternational organisations have regularly approached the interpretation of their constituent instruments [...] by way of the concept of institutional ‘effectiveness.’ Even though the governing text may not explicitly empower the organization to act in a particular manner, international law authorizes, indeed requires, the organization, should it find it necessary, if it is to discharge all its functions effectively, to interpret its procedures in a constructive manner directed towards achieving the objective the Parties are deemed to have in mind. The same is true of international judicial organs.” UN Security Council, Special Report of the Secretary General on Ethiopia and Eritrea, doc. no. S/2006/992 (15 December 2006) at 14 available at: < <http://goo.gl/GBLgaX> >.

¹³ Guidelines, paragraph 18.1.

hence consistent with the system of international law of which it forms a part. Guideline 9.6 sets out the Party's obligation to explain in writing how the judicial or administrative proceeding fits the NAAEC Article 45(3) definition and makes provision for the Secretariat, as applicable, to terminate the processing of the submission. Guideline 9.6 provides that the Secretariat to do this "promptly" and "in writing" before proceeding with its review of whether, in light of the response, the submission warrants the preparation of a factual record.

10. Thus, upon receiving notice of the existence of a pending judicial or administrative proceeding, the Secretariat proceeds to assess whether the matter raised in the submission is indeed the subject of the proceeding in question.¹⁵ In addition, the Secretariat finds that transparency and credibility in the process require a review of the notification in light of Article 45(3)(a) of the Agreement.¹⁶ Accordingly, the Secretariat has maintained that the principle of transparency permeating the Agreement does not allow it to terminate a submission upon mere notice from a Party as to the existence of a pending proceeding.¹⁷

B. Consideration of the proceedings notified by Mexico

11. The Submitters assert that the Paraíso del Mar project had been under construction and/or in operation for over two years at the time of filing of the submission, and that although the jurisdictional authorities have confirmed the illegality of the environmental impact approval (EIA) for the project, Profepa has not taken the inspection, surveillance, and enforcement measures prescribed by Articles 57 and 58 of the Environmental Impact Regulation to the General Environmental Protection Act (*Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en materia de Evaluación del Impacto Ambiental—REIA*).¹⁸ The Submitters also maintain that Profepa has not complied with a ruling of a district court and the

¹⁴ *Ibid.*

¹⁵ When analyzing any notification as to the existence of a pending proceeding, the Secretariat takes into account factors such as whether it is a judicial or administrative proceeding in the sense of Article 45(3)(a) of the Agreement; whether the proceeding is being pursued by the Party and is being processed in a timely manner in accordance with the Party's law, whether the proceeding relates to the matter raised in the submission, and whether the proceeding invoked by the Party in its response has the potential to resolve the matter or matters raised in the submission. SEM-07-001 (*Minera San Xavier*), Article 15(1) Determination (15 July 2009), §33, available at < <http://goo.gl/Dhyue2> > (viewed 14 April 2014).

¹⁶ See, for example: SEM-96-003 (*Oldman River I*); SEM-97-001 (*BC Hydro*); SEM-99-001 (*Methanex*); SEM-00-002 (*Neste Canada*); SEM-98-004 (*BC Mining*); SEM-00-004 (*BC Logging*); SEM-00-006 (*Tarahumara*); SEM-01-001 (*Cytrar II*); SEM-02-003 (*Pulp and Paper*); SEM-03-003 (*Lake Chapala II*); SEM-04-002 (*Environmental Pollution in Hermosillo*); SEM-04-005 (*Coal-fired Power Plants*); SEM-05-002 (*Coronado Islands*); SEM-05-003 (*Environmental Pollution in Hermosillo II*); SEM-06-003 and SEM-06-004, consolidated (*Ex Hacienda El Hospital II* and *Ex Hacienda El Hospital III*); SEM-06-005 (*Species at Risk*); SEM-06-006 (*Los Remedios National Park*); SEM-07-005 (*Drilling Waste in Cunduacán*); SEM-07-001 (*Minera San Xavier*); SEM-08-001 (*La Ciudadela Project*); SEM-09-003 (*Los Remedios National Park II*); SEM-09-002 (*Wetlands in Manzanillo*); SEM-10-004 (*Bicentennial Bridge*); and more recently, SEM-11-002 (*Sumidero Canyon II*); SEM-10-002 (*Alberta Tailings Ponds*); and SEM-12-001 (*BC Salmon Farms*).

¹⁷ SEM-01-001 (*Cytrar II*), Article 14(3) Determination (13 June 2001), p. 5, available at < <http://goo.gl/I5v8TA> > (viewed 6 January 2012).

¹⁸ Revised Submission, note 2 *supra*, p. 2.

Federal Tax and Administrative Court (*Tribunal Federal de Justicia Fiscal y Administrativa—TFJFA*) by stopping the development of the project.¹⁹

12. REIA Articles 57 and 58 provide as follows:

Article 57. Where works or activities subject to the environmental impact assessment procedure pursuant to the Act and this Regulation are carried out without the applicable approval, the Ministry, on the basis of Title Six of the Act, shall order any corrective or urgent enforcement measures that may apply, without prejudice to any administrative sanctions or civil or criminal actions that may be applicable, as well as to the application of any safety measures that may apply pursuant to the preceding article.

For the application of the safety measures and sanctions to which the preceding paragraph refers, the Ministry shall determine the degree of environmental impact caused, or that may have been caused, by the execution of the works or activities in question. In addition, it shall subject to the environmental impact assessment procedure any works or activities that have not yet been initiated.

Article 58. For the purposes of this chapter, the object of the corrective or urgent enforcement measures shall be to prevent impacts on the environment, ecosystems, or their components from continuing to occur; to restore any natural resources that may have been affected by works or activities to their natural condition, and to generate a positive impact that is alternative and equivalent to any adverse impacts on the environment, ecosystems, or their components that may have been identified in the course of the inspection procedures. In the determination of such measures, the authority shall consider the order of precedence to which this provision refers.

Within the five days following notice of the decision ordering corrective measures, the interested party may submit to the competent authority a proposal to take alternative measures to those ordered, provided that such proposal is duly justified and is designed to achieve the same ends as the measures ordered by the Ministry. Where the authority fails to issue a decision on such a proposal within the ten days following its receipt, the proposal is deemed to have been approved.

The time allotted for taking the corrective measures contemplated in the preceding paragraph shall be suspended until such time as the authority rules on the relevance of the proposed alternative measures. Such suspension shall apply where the applicant expressly requests it and where it does not cause harm or prejudice to third parties, unless the latter are saved harmless in the event that a favorable resolution is not obtained.²⁰

13. Mexico states that from 11 to 13 November 2008, the Environmental Impact and Federal Coastal Zone Branch (*Dirección General de Impacto Ambiental y Zona Federal Marítimo Terrestre—DGIAZ*) of Profepa, in the state of Baja California Sur, in conjunction with the Environmental Complaints and Social Participation Branch (*Dirección General de Denuncias Ambientales, Quejas y Participación Social*), made an inspection visit during which it identified violations relating to the environmental impact approval issued for the Paraíso del Mar project in doc. no.

¹⁹ *Ibid.*, p. 4.

²⁰ Environmental Impact Assessment Regulation to the General Environmental Protection Act (*Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Evaluación del Impacto Ambiental*), DOF, 30 May 2000.

SGPA/DGIRA.-DEI.-0397/04 of 9 March 2004 (the “Paraíso del Mar 2004 EIA”).²¹ During the inspection visit, Profepa identified violations of the first and third conditions of the Paraíso del Mar 2004 EIA.²² Further to these findings, on 1 April 2011 the DGIAZ issued an administrative decision ordering a series of corrective measures including removal of a concrete premixing and supply plant; the restoration of the affected site, and the relocation – within the approved project site – of the drydock (and its pier), a portion of the golf course, the “Marina Paraíso” marina, and required roads, as well as the materials handling yard and a seedling nursery. Finally, the project developer was ordered to file a compliance report for the leachate drainage and collection system of the golf course treatment plant, develop a contingency plan in the event of spills, and conduct water quality monitoring.²³

14. Mexico notes that the company developing the Paraíso del Mar project filed a judicial review action (*recurso de revisión*), which was resolved by the director of Profepa in a decision voiding the DGIAZ decision of 1 April 2011. On 16 January 2012 the DGIAZ issued a new administrative decision, in compliance with that of the Profepa director, that basically reiterated the fines and corrective measures contained in the previous decision (of 1 April 2011).²⁴
15. According to information provided by the Party, the Paraíso del Mar 2004 EIA was the subject of an action in nullity (*juicio de nulidad*) that resulted in a 14 January 2013 decision by the 11th Regional Metropolitan Court declaring the nullity of said environmental impact approval, and ordering a new approval to be issued containing broader criteria.²⁵ On 13 May 2013, the Environmental Impact Branch (*Dirección General de Impacto Ambiental—DGIRA*) of the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales—Semarnat*) issued doc. no. SGPA/DGIRA/DG/3118 granting conditional approval for the Paraíso del Mar project (the “Paraíso del Mar 2013 EIA”).²⁶
16. In relation to the access road for the Paraíso del Mar project, Profepa inspected the site on 28 July 2011 and facts and omissions possibly constituting environmental offenses were detected.²⁷ Safety measures were ordered on 8 August 2011, including temporary total closure of the access road for the Paraíso del Mar project.²⁸ On 26 September 2011, a fine of 230,307 pesos was levied for lack of approval of the project access road, the worksite was completely shut down on a temporary basis, and restoration measures were ordered for the affected site.²⁹

²¹ Response, note 3 *supra*, p. 86.

²² *Ibid.* In relation to the Paraíso del Mar project, the first condition of file no. SGPA/DGIRA.-DEI.-0397/04 of 9 March 2004 [Paraíso del Mar 2004 EIA] approves the environmental impact of the project and presents a specific list of each of its components, including boundaries and coordinates, as well as uses: “single-family and multifamily residential,” “hotel and multifamily residential commercial area,” “recreational park,” “golf course,” “biological corridor,” “drydock,” “docks and roads,” etc. The third condition of the Paraíso del Mar 2004 EIA states that “the construction, operation, and/or expansion of any type of infrastructure works other than those listed are not approved.”

²³ Response, note 3 *supra*, p. 86.

²⁴ *Ibid.*, p. 87.

²⁵ *Ibid.*, Appendix H: DGIAZ (Profepa), doc. no. PFPA/4.1/8C.17.5/001/2014 (2 January 2014), p. 3 [DGIAZ document].

²⁶ *Ibid.*

²⁷ *Ibid.*, p. 4.

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 5.

17. Mexico further notes in its Response that on 22 February 2013, CEMDA filed a complaint concerning:
1. The execution of construction work covered by LGEEPA Article 28 without environmental impact approval.
 2. The operation of the golf facilities and courses built for the “Paraíso del Mar” residential tourism complex without environmental impact approval.³⁰
18. Mexico maintains that further to CEMDA’s complaint, the Profepa office in Baja California Sur took inspection-related measures from July to December 2013, and that no construction of buildings, houses, or cabins was noted during inspection visits to the Paraíso del Mar project site.³¹ In this regard, the inspection reports attached to the Response relate to inspection visits made to the site on 31 July and 24 December 2013, on which occasions no construction activities were found to be underway.³²
19. In addition, Mexico notes that after informing the complainant of acts of enforcement related to the facts complained of,³³ the Environmental Complaints and Social Participation Branch of Profepa requested, on 26 April 2013, that the file be transferred to it and asked the Profepa office in Baja California Sur – which had taken various measures relating to processing of the complaint – for the entirety of the CEMDA complaint file.³⁴ This Profepa branch informed the complainant of the enforcement of the TFJFA decision of 14 January 2013 voiding the Paraíso del Mar 2004 EIA and ordering a new decision to be issued in conformity with it. On 13 May 2013, the DGIRA issued the Paraíso del Mar 2013 EIA, granting conditional approval for the Paraíso del Mar project.³⁵
20. Article 189 of the General Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*) establishes the citizen complaint procedure, which any person may initiate.³⁶ When a complaint is filed, Profepa records it³⁷ and may then carry out the inspection and surveillance procedures set out in Title Six of the LGEEPA.³⁸ According to the information provided by the Party, the processing of the CEMDA complaint gave rise to various measures, including a request for the company in question to present evidence relating to the facts complained of; an opportunity for comment on the file by the complainant and the party complained of; an application to the DGIRA in relation to the issuance of the Paraíso del Mar 2013 EIA, and the submission of various arguments complementing the initial complaint document.³⁹

³⁰ Response, note 3 *supra*, p. 91.

³¹ *Ibid.*

³² *Ibid.*, Appendix G (digital): Baja California Sur office, Enforcement Action Reports (31/7/2013 and 24/12/2013).

³³ The complainant was informed in doc. no. PFFPA/10.1/2C.28.2/481/2013, issued by the Baja California Sur office of Profepa. DGIAZ document, note 25 *supra*, p. 6.

³⁴ DGIAZ document, note 25 *supra*, p. 7.

³⁵ Response, Appendix G (digital): DGIRA (Semarnat), doc. no. SGPA/DGIRA/DG/3118 (13 May 2013).

³⁶ LGEEPA Articles 189–190 (published in the *Official Gazette of the Federation* [DOF], 28 January 1988).

³⁷ *Ibid.*, Article 191.

³⁸ *Ibid.*, Article 192.

³⁹ DGIAZ document, note 25 *supra*, p. 8.

21. Mexico notes that the Environmental Complaints and Social Participation Branch of Profepa is still processing the complaint filed by CEMDA on 22 February 2013.⁴⁰
22. In reviewing Mexico's notice as to the existence of pending proceedings, the Secretariat finds that the measures in question are related to the assertion that the construction and operation of works and facilities for the Paraíso del Mar project are being conducted without environmental impact approval. These proceedings are set out in LGEEPA Articles 189-192 relating to the citizen complaint procedure, and their implementation is related to the enforcement of REIA Articles 57–58. The Secretariat finds that the ongoing citizen complaint proceeding and the performance of acts of inspection and surveillance have the potential to resolve the matters relating to the unauthorized construction and operation of the Paraíso del Mar project.
23. In sum, the assertion concerning the construction and performance of activities not covered by environmental impact approval on the site of the Paraíso del Mar project is the subject of acts of authority related to the enforcement of REIA Articles 57–58, further to the citizen complaint filed 22 February 2013.

IV. NOTIFICATION

24. The Secretariat finds that the Response and its appendices contain sufficient information to conclude that the assertion regarding the construction and operation of works and facilities as part of the Paraíso del Mar project without possessing environmental impact approval is in fact a matter whose resolution is pending. Therefore, the Secretariat finds that the enforcement of REIA Articles 57 and 58 in relation to the unapproved works included in the Paraíso del Mar project is ongoing.
25. In accordance with paragraph 9.6 of the Guidelines, the Secretariat hereby notifies the Submitters and the Council that it is terminating the processing of the submission as it relates to the assertion of alleged failures to effectively enforce REIA Articles 57–58 in connection with the Paraíso del Mar project.
26. In accordance with Article 15(1), the Secretariat will proceed with its consideration of the rest of the assertions in the Revised Submission, to determine whether, in light of the response, recommending the development of a factual record is warranted.
27. This notice is issued without prejudice to the fact that a new submission may be filed in relation to the matter for which the Secretariat is terminating the processing of submission SEM-13-001.

Respectfully submitted on 16 May 2014.

Secretariat of the Commission for Environmental Cooperation



Per: Dr. Irasema Coronado
Executive Director

⁴⁰ “As of today, the complaint proceeding in question is pending”: DGIAZ document, note 25 *supra*, p. 9.