

Secretariat of the Commission for Environmental Cooperation

Secretariat Determination in accordance with Articles 24.27(2) and (3) of the United States-Mexico-Canada Agreement

Submitters:	MOCE Yax Cuxtal, A.C. <i>et al.</i>
Party:	United Mexican States
Original submission:	21 July 2022
Revised submission:	21 October 2022
Date of determination:	1 December 2022
Submission No.:	SEM-22-002 (Tren Maya)

I. INTRODUCTION

1. On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA or “the Agreement”) and the Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada (ECA) entered into force. After this date, the Submissions on Enforcement Matters (SEM) process originally established by Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) is governed by USMCA Articles 24.27 and 24.28. The Secretariat of the Commission for Environmental Cooperation (“CEC Secretariat”)¹ remains responsible for implementing the SEM process, as stipulated in the ECA.²
2. The SEM mechanism allows any national of a Party or entity organized under the laws of a Party to file a submission asserting that a Party to the USMCA is failing to effectively enforce its environmental laws. The CEC Secretariat initially reviews submissions based on the requirements set out in USMCA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements, it then determines, in accordance with the criteria of Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party’s response, the Secretariat then determines whether the matter warrants the preparation of a factual record and, if so, so informs the CEC Council and the Environment Committee,³

¹ The Commission for Environmental Cooperation was created in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), signed by Canada, the United States, and Mexico (the “Parties”). Pursuant to ECA Article 2(3), the Commission for Environmental Cooperation (CEC) “will continue to operate under the modalities in place as of entry into force of [the ECA].” The constitutive bodies of the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).

² While the provisions governing the SEM process are now in Chapter 24 of the USMCA, some related procedures are also set out in the ECA, namely: the role of the Secretariat in the implementation of the submissions process; the role of the Council in exchanging information with the Environment Committee; the preparation and publication of factual records; and the Council’s cooperative activities arising from such records. ECA, Articles 2(3), 4(1)(l), 4(1)(m), 4(4) and 5(5).

³ The Environment Committee was established by USMCA Article 24.26(2) and its role is to supervise the implementation of Chapter 24 of the Agreement.

- providing its reasons as prescribed by USMCA Article 24.28(1); otherwise, it terminates the review of the submission.⁴
3. On 21 July 2022, a group consisting of the organizations Moce Yax Cuxtal, A.C., Grupo Gema del Mayab, A.C., Red de Formadores Socio Ambientales, Sélvame del Tren, Cenotes Urbanos, Jaguar Wild Center, A.C. and 18 individuals (collectively, “the Submitters”) filed a submission with the CEC Secretariat, in accordance with USMCA Article 24.27(1), asserting that Mexico is failing to effectively enforcement its environmental laws with respect to the construction of the section 5 south of the “Tren Maya” project, in the municipalities of Solidaridad and Tulum, Quintana Roo.⁵
 4. On 22 August 2022, the Secretariat determined that submission SEM-22-002 (*Tren Maya*) did not meet all the eligibility requirements and criteria set out in USMCA Article 24.27 and notified the Submitters in its determination under Articles 24.27(2) and (3).⁶
 5. The Secretariat found that the Submitters must provide information on the legal status of the organizations filing the submission; include data to identify the individual and organizational signatories; include technical and scientific documents referenced in the submission (either as annexes or via links for download), and they could submit any additional documents relevant to support their assertions if desired. The Secretariat also requested information on other citizen complaints or remedies attempted in connection with the matters raised in the submission, since—according to the Submitters—a number of complaints had been lodged.
 6. On 21 October 2022, the Secretariat received a revised submission containing the information requested by the Secretariat in its determination.⁷ In addition to proving the legal status of the organizations Moce Yax Cuxtal, A.C., Jaguar Wild Center, A.C. and Grupo Gema del Mayab, A.C., and identifying their representatives, the revised submission includes information that describes the activities carried out by the groups Red de Formadores Socio Ambientales, Sélvame del Tren and Cenotes Urbanos, as well as links to social networks that elaborate on their actions.
 7. The Submitters also added information on the identities of 18 natural persons who signed the submission.⁸ The Secretariat will protect the personal data identifying the individual Submitters and keep their names confidential, in accordance with Article 16(1)(a) of the ECA.
 8. In addition, the Submitters include references and information from technical and scientific documents cited in their submission,⁹ as well as electronic links for viewing videos and various posts published on social media in order to support their assertions regarding section 5 south of the Tren Maya.

⁴ More details on the various stages of the Submissions on Enforcement Matters process, the public registry of submissions, and previous Secretariat determinations and factual records can be found on the CEC website at <<http://www.cec.org/submissions-on-enforcement>>.

⁵ SEM-22-002 (*Tren Maya*), Submission pursuant to USMCA Article 24.27(1) (July 21, 2022), at: <<http://bit.ly/3TJvV6z>>.

⁶ SEM-22-002 (*Tren Maya*), Determination pursuant to Articles 24.27(2) and (3) (22 August 2022), at: <<http://bit.ly/3V1zK8Z>> [Determination].

⁷ SEM-22-002 (*Tren Maya*), revised Submission under USMCA Article 24.27(1) (21 October 2022), p. 2, at: <<http://bit.ly/3TGwKwZ>> [revised Submission].

⁸ Revised submission, p. 2.

⁹ See Determination, § 60 (referring to sources cited in the submission).

9. Finally, the revised submission provides additional information about the citizen complaints filed with the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente—Profepa*), dated 7 March and 16 August 2022, regarding the environmental impact assessment procedure for the Tren Maya project and the alleged breach of the preventive nature of this process. In addition, the Submitters point to omissions in the effective enforcement of Article 418: sections I and III of the Federal Penal Code (*Código Penal Federal—CPF*).
10. After examining the submission and the accompanying documents, the Secretariat determines that they meet all the eligibility criteria set out in paragraphs (1) and (2) of USMCA Article 24.27 and determines that it merits a response from the Government of Mexico under paragraph (3). The Secretariat supplements its reasoning in its determination from 22 August 2020 as follows.

II. ANALYSIS

11. The CEC Secretariat may consider any submission asserting that a Party to the USMCA is failing to effectively enforce its environmental laws. The Secretariat reiterates that the requirements of USMCA Articles 24.27(1), (2), and (3) are not intended to be an insurmountable procedural screening device¹⁰ and must therefore be given a broad interpretation consistent with the objectives of Chapter 24 of the Agreement.¹¹ The Secretariat reviewed the submission with that perspective in mind.

a. Article 24.27(1)

12. In its determination from 22 August 2022, the Secretariat stated that while the submission is signed by various organizations and individuals, the legal status of the organizations signing it was not entirely clear.¹²
13. Article 1.5 of the USMCA¹³ defines the term *person of a Party* as “a national of a Party or an enterprise of a Party.” In turn, *national* means “a natural person who has the nationality of a Party...or a permanent resident of a Party,” and an *enterprise* is defined as “an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization.”
14. The Submitters include documentary information about three organizations organized in accordance with the laws of Mexico: Moce Yax Cuxtal, A.C., Grupo Gema del Mayab, A.C. and Jaguar Wild Center, A.C. Also, they provide data to identify each of their representatives. The Secretariat finds that the information provided is sufficient to establish that such organizations constitute “persons of a Party” for the purposes of Article 24.27(1).

¹⁰ SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999); SEM-20-001 (*Loggerhead Turtle*), Article 24.27(2) and (3) Determination (8 February 2021).

¹¹ USMCA Article 24.2.

¹² Determination, § 21.

¹³ The Secretariat is mindful of the adoption of the Amending Protocol to the Agreement between the United Mexican States, the United States of America and Canada (“the Protocol”), by which provisions were added to chapters 1 and 24, and the numbering of some articles of the Protocol was therefore revised. This is the case with article 1.5, “General definitions”, initially article 1.4, but then renumbered in accordance with the Protocol. Thus, in the case of the Spanish version, it is necessary to consult the USMCA and its Protocol.

15. The information provided by the Submitters also presents data to identify 17 individuals who signed in an individual capacity and to allow the Secretariat to determine that they qualify as “persons of a Party” for the purposes of Article 24.27(1).
16. Regarding Cenotes Urbanos, Red de Formadores Socio Ambientales, and Sélvame del Tren, the revised submission does not include information on their incorporation as legal entities in Mexico.¹⁴ Therefore those organizations do not fall within the definitions of *person of a Party*, *enterprise*, or *enterprise of a Party* in Article 1.5 of the USMCA. Thus, they cannot be considered Submitters for the purposes of submission SEM-22-002. It should be clarified, however, that an individual who claims to be a member of the Red de Formadores Socio Ambientales is properly identified, so the Secretariat considers that individual to qualify as a “person of a Party.”
17. The Secretariat determines that Moce Yax Cuxtal, A.C., Grupo Gema del Mayab, A.C. and Jaguar Wild Center, A.C., and a total of 18 individuals signing the submission in their personal capacity are indeed Submitters of the SEM-22-002 (*Tren Maya*) as they have proven their legal status in Mexico in compliance with Article 24.27(1).

b. Environmental laws in question

18. On 22 August 2022, the Secretariat determined that certain provisions cited in the submission qualify as environmental law in accordance with USMCA Article 24.1, namely:¹⁵
 - a. Article 4: fifth and sixth paragraphs of the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos* “Constitution”);
 - b. Articles 5: sections III, VIII and XI, 15: section XII, 28: sections I and VII, 34, 162, 170, 189, 192, 193 and 194 of the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*);
 - c. Articles 93, 97, 154 and 155: sections VII and XII of the General Law on Sustainable Forestry Development (*Ley General de Desarrollo Forestal Sustentable—LGDFS*);
 - d. Articles 5: I, 58: a) and 107 of the General Wildlife Law (*Ley General de Vida Silvestre—LGVS*); and
 - e. Articles 7a: sections I and 14 *bis* 5: sections I, IX and XX of the National Waters Law (*Ley de Aguas Nacionales—LAN*.)
19. The Submitters also cite Article 418, sections I and III, of the CPF,¹⁶ which provide that anyone who unlawfully removes or destroys natural vegetation (section I) or changes the use of forestry land (section III) could be sentenced to six months to nine years in prison and could be liable for a fine equivalent to 100 to 3,000 days of their net daily income (*días multa*). The Secretariat determines that the aforementioned provision qualifies as an environmental law according to Article 24.1 of the Agreement since it is aimed at protecting the environment through criminal sanctions to protect wild flora and fauna and their habitat.

¹⁴ Revised submission, p. 2.

¹⁵ Determination, § 24-54.

¹⁶ Revised submission, pp. 8-9.

c. USMCA Article 24.27(2) requirements

20. On 22 August 2022, the Secretariat determined that the submission meets the requirements of USMCA Article 24.27(2)(a), (d) and (e),¹⁷ but noted that the Submitters must file additional information to meet the requirements of subparagraphs (b) and (c):¹⁸

(b) clearly identifies the person making the submission

21. In its determination dated 22 August 2022, the Secretariat concluded that it was necessary to provide additional information to identify the entities and individuals filing the submission, as well as—in the case of organizations—the following elements to determine their legal status in Mexico: Federal Taxpayers Registry identification number (*Registro Federal de Contribuyentes*), registration of the use of its name or business name (*registro de uso de denominación o razón social*), Unique Registration Key with the Federal Registry of Civil Society Organizations (*Clave Única de Inscripción ante el Registro Federal de Organizaciones de la Sociedad Civil*) or the organization's articles of incorporation.¹⁹
22. After reviewing the information filed by the Submitters on 21 October 2022, the Secretariat considers that the submission meets Article 24.27(2)(b) of the USMCA as it includes documents and information that clearly identify the organizations Moce Yax Cuxtal, A.C., Grupo Gema del Mayab, A.C. and Jaguar Wild Center, A.C., as well as 18 individuals acting in their personal capacity.
23. At the request of the Submitters, the Secretariat will protect from disclosure any information that could identify the individual persons filing the submission, in accordance with Article 16(1)(a) of the ECA.

c) provides sufficient information to allow for the review of the submission including any documentary evidence on which the submission may be based and identification of the environmental law of which the failure to enforce is asserted

24. In its previous determination, the Secretariat stated that it was unable to identify the sources of technical and scientific documents relating to the geo-hydromorphological conditions of the Yucatan Peninsula cited in the submission.²⁰ The Submitters now include the texts of and links to the technical and scientific documents cited in their submission. They also attach various links to social media featuring videos and photographs related to the issues described.
25. Therefore, the Secretariat finds that the submission satisfies the requirement of subparagraph (c) of Article 24.27(2) of the USMCA.

d. USMCA Article 24.27(3) criteria

26. In its determination dated 22 August 2022, the Secretariat noted that submission SEM-22-002 meets all the criteria listed in USMCA Article 24.27(3).²¹ Regarding the requirement of subparagraph (c) of this article, the Secretariat advised the Submitters

¹⁷ Determination, § 55-67.

¹⁸ Id. at § 58 and 61.

¹⁹ Id. at § 59.

²⁰ Id. at § 60.

²¹ Id. at §§ 68-82.

to include copies of other citizen complaints filed in connection with the issues raised, since—according to the Submitters—*several* complaints had been filed.²²

27. The Submitters include various official communications issued by Profepa in connection with the citizen complaint of 7 March 2022, which was appended to the file PFPA/5.3/2C.28.2/00011-20,²³ thus joining 36 other complaints filed by various persons in connection with the Tren Maya project.²⁴ The Submitters also enclose a digital copy of the citizen complaint submitted on 16 August 2022 related to the clearing work associated with section 5 south of the Tren Maya. The Secretariat notes that both complaints were sent to Profepa’s General Directorate of Environmental Claims, Complaints, and Public Participation (*Dirección General de Denuncias Ambientales, Quejas y Participación Social*), in Mexico City.²⁵ The Submitters assert that the complaints were filed because when project construction began, the applicable environmental impact and land use change authorizations had not been issued.²⁶
28. In the August 16th complaint, it is stated that on 28 February 2022, residents of Playa del Carmen, municipality of Solidaridad, Quintana Roo, noticed “the performance of clearing work with the use of heavy machinery.”²⁷ It is also argued that the Tren Maya project endangers more than 1,257 species of wild flora and fauna in the state of Quintana Roo, including 19 endemic species listed in the official Mexican standard NOM-059-SEMARNAT-2010, *Environmental protection - Native species of Mexico of wild flora and fauna - Risk categories and specifications for their inclusion, exclusion or change - List of species at risk*. The Submitters also allege that seven of those species are included in the IUCN Red List of Endangered Species.²⁸ In addition, the Submitters note that Quintana Roo has abundant underground rivers and pools, and the characteristics of the soil, biodiversity, and underground systems of the Yucatan Peninsula make the construction and operation of the project unviable.²⁹
29. Having confirmed that the additional information filed by the Submitters meets all the criteria of Article 24.27(3), the Secretariat concludes that the submission merits a response from the Party.

III. DETERMINATION

30. For the reasons stated above, the Secretariat determines that submission SEM-22-002 (*Tren Maya*) satisfies the eligibility criteria listed in Article 24.27(2) of the USMCA and warrants a response from the Government of Mexico, in accordance with Article 24.27(3), regarding the effective enforcement of the environmental laws listed below:
 - a. Article 4, fifth and sixth paragraphs of the Constitution;
 - b. LGEEPA Articles 5: Sections III, VIII and XI, 15: Part XII, 28: Section I and VII, 34, 162, 170, 189, 192, 193 and 194;

²² Id. at § 80. Emphasis added.

²³ Revised submission, p. 8.

²⁴ Profepa, Consolidation Agreement issued by the General Directorate of Environmental Complaints, Complaints and Social Participation of the Federal Office of Environmental Protection (Profepa), unnumbered document (March 17, 2022), p. 1.

²⁵ Revised submission, Annex: ‘Screenshot of T5N complaint TM mail’.

²⁶ Id. at p. 8.

²⁷ Id. at annex: “Citizen complaint submitted to the Federal Delegation in the State of Quintana Roo of the Federal Attorney for Environmental Protection” (16 August 2022), p. 2 [Complaint of 16 August].

²⁸ Complaint of 16 August, p. 4.

²⁹ Cf. Complaint of August 16, pp. 4-5.

- c. *Qo*
 - d. LGVS Articles 5: section I, 58: section (a) and 107;
 - e. LAN Articles 7a: subsections I and 14 *bis* 5: subsections I, IX and XX.
 - f. CPF Article 418: Sections I and III.
31. In accordance with Article 24.27(4) of the USMCA, the Party may provide a response to the submission within 60 days of receiving this determination, i.e. by **30 January 2023**.

Submitted respectfully for your consideration,

Secretariat of Commission for Environmental Cooperation

(original signed)

Per: Paolo Solano
Director of Legal Affairs and SEM Unit

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