
Secretariat of the Commission for Environmental Cooperation**Determination pursuant to Article 14(3)
of the North American Agreement on Environmental Cooperation**

Submitter(s): Academia Sonorense de Derechos Humanos, A.C.
Lic. Domingo Gutiérrez Mendivil

Concerned Party: United Mexican States

Date Received: 14 February 2001

**Date of this
Determination:** 13 June 2001

Submission I.D.: SEM-01-001/Cytrar II

I. INTRODUCTION

The Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) may consider submissions from any nongovernmental person or organization who asserts that a Party to the *North American Agreement on Environmental Cooperation* (the “NAAEC” or the “Agreement”) is failing to effectively enforce its environmental law, where the Secretariat deems that the submission meets the requirements of NAAEC 14(1). Where the submission so merits, and with consideration to the criteria of Article 14(2), the Secretariat may request that the Party provide a response to the submission. Within 30 days of delivery of the request or, in exceptional circumstances, within 60 days, the Party may notify the Secretariat whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and any other information that the Party wishes to submit. Where it considers that, in light of the response of the Party, the submission warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

On 14 February 2001, Academia Sonorense de Derechos Humanos, A.C. and Lic. Domingo Gutiérrez Mendivil (the “Submitters”) filed a submission with the Secretariat in accordance with Articles 14 and 15 of the NAAEC. On 24 April 2001, the Secretariat determined that this submission meets the criteria of NAAEC 14(1) and requested a response from the Mexican

government pursuant to Article 14(2).¹ On 4 June 2001, the Party notified the Secretariat that it should proceed no further, due to the existence of an arbitration proceeding to settle an international dispute. The Secretariat hereby provides its determination pursuant to NAAEC 14(3)(a).

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Mexico is failing to effectively enforce its environmental law in relation to the hazardous waste landfill known as Cytrar, located near the city of Hermosillo in the state of Sonora, Mexico, and in relation to the right to environmental information concerning this landfill. The landfill is no longer in operation, since in 1998, the environmental authority denied renewal of the operating authorization to Cytrar, S.A. de C.V. The submission makes five separate assertions concerning the effective enforcement of environmental law by Mexico in relation to the Cytrar landfill.

The Submitters assert that the Mexican government failed to effectively enforce Articles 28, 29 and 32 of the *General Law on Ecological Balance and Environmental Protection* (hereinafter, “LGEEPA”), concerning the hazardous waste landfill known as Cytrar, through its failure to require an environmental impact statement prior to the performance of works and activities at the landfill site, and by allowing the persons subsequently responsible to operate the landfill without the appropriate authorization.

The submission also asserts that the environmental authority failed to effectively enforce Article 153 of the LGEEPA and Article 7 of the *LGEEPA Regulation on Hazardous Waste (Reglamento de la LGEEPA en Materia de Residuos Peligrosos)*, which prohibit the importation of hazardous waste for final disposal and require the repatriation of hazardous waste generated under the temporary import regime, since in 1997, the Cytrar landfill received contaminated soil and other hazardous waste abandoned by the company Alco Pacífico, S.A. de C.V. for final disposal, which allegedly should have been returned to the country of origin.

According to the Submitters, the hazardous waste landfill did not observe the specifications of Mexican Official Standard *NOM-057-ECOL-1993 Establishing the requirements for the design, construction and operation of controlled hazardous waste landfill cells* with regard to the construction of the cells, and the Mexican government did not sanction this alleged violation of its environmental law.

The submission asserts that the Party failed to effectively enforce Article 415 of the *Federal Criminal Code (Código Penal Federal)* by failing to bring a criminal action following the report

¹ SEM-01-001 (Cytrar II), Determination under Articles 14(1) and (2) (24 April 2001).

of the facts filed by the Submitters on 8 December 1997 and the additional information provided by the Submitters on 3 December 1998.

Finally, the Submission asserts that in refusing to provide various environmental information relating to Cytrar to the Submitters, the Mexican government violated the right to environmental information contemplated in LGEEPA Article 159 Bis 3.

III. RESPONSE OF THE PARTY

In its response, received 4 June 2001, the Party asserts that “the Government of the United Mexican States is not legally able to respond to the matter in question, since it is the subject of an arbitration proceeding to settle an international dispute with the company Técnicas Medioambientales Tecmed, S.A. [an investment partner of Cytrar S.A. de C.V.], presumably arising from alleged non-compliance with the *Acuerdo para la Promoción y Protección Recíproca de Inversiones* (APRI) with Spain.” [Translation.]²

The Party therefore requests that the Secretariat proceed no further with its consideration of submission SEM–01–001, pursuant to the provisions of NAAEC 14(3)(a).

IV. ANALYSIS WITH REFERENCE TO NAAEC 14(3)

Although the NAAEC does not provide specific criteria for the Secretariat’s determination of whether a submission warrants the development of a factual record in light of a Party’s response,³ the Agreement requires the Secretariat to proceed no further with its consideration of a submission where the matter is the subject of a pending judicial or administrative proceeding. Specifically, Article 14(3)(a) provides as follows:

3. 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; and

² ICSID, Case No. ARB(AF)/00/2, listed as number 27 in the list of pending cases.

³ Article 15: Factual Record

1. If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

of any other information that the Party wishes to submit, such as

- i) whether the matter was previously the subject of a judicial or administrative proceeding[...]

The Secretariat has, in the context of other submissions, considered the provision invoked by the Party in its response, and it interpreted Article 14(3)(a) as providing for termination of the processing of a submission in two factual situations: first, the existence of a pending judicial or administrative proceeding, and second, the fact that the matter that is the subject of the submission is also the subject of the proceeding.⁴ In the case at hand, the Secretariat was able to confirm the existence of only the first of these situations.

According to Article 45(3)(b), a “judicial or administrative proceeding” for purposes of Article 14(3), includes “an international dispute resolution proceeding to which the Party is party”. In this regard, it is clear that an arbitration proceeding before the International Centre for Settlement of Investment Disputes (ICSID) for the settlement of an international dispute in relation to the alleged default by a Party to the NAAEC of a bilateral agreement with another state (such as the *Acuerdo para la Promoción y Protección Recíproca de Inversiones entre los Estados Unidos Mexicanos y el Reino de España*) qualifies as an “international dispute resolution proceeding.” Mexico, in its response of 4 June 2001, asserts, and the list of cases pending resolution before the ICSID confirms, that there is indeed a pending proceeding for the resolution of a dispute initiated by Técnicas Medioambientales Tecmed, S.A. against the United Mexican States.⁵

However, the Secretariat was unable to determine that the matter that is the subject of submission SEM-01-001 (Cytrar II) is also the subject of the pending international proceeding, since it could not ascertain the subject of the international proceeding. In its response, Mexico asserts:

The relationship between these cases arises from the fact that the hazardous waste landfill referred to by the citizen submission was purchased on 17 November 1997 by the company Cytrar S.A. de C.V., of which the company Técnicas Medioambientales Tecmed S.A. is an investment partner. [Translation.]⁶

⁴ See, in this regard, SEM-99-001 (Methanex) Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (30 June 2000).

⁵ However, two clarifications are in order. First, Mexico is not a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and we therefore assume that the framework within which this arbitration is occurring is that of the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes. Second, that the foundation for the arbitration in question is not “as provided by chapter 11 Investments, Articles 1005 and 1110, of the North American Free Trade Agreement,” since said Articles of NAFTA do not apply to disputes with Spain; rather, we assume that it is Articles IV.1, V and XI of the *Acuerdo para la Promoción y Protección Recíproca de Inversiones entre los Estados Unidos Mexicanos y el Reino de España*.

⁶ Response of Mexico, 1 June 2001, received 4 June 2001.

In the opinion of the Secretariat, the fact that there be an investment relationship between the company that initiated the international proceeding in which Mexico is a Party (Técnicas Medioambientales Tecmed S.A.) and the company whose operations are asserted by the submission to be related to failures to effectively enforce the law (Cytrar, S.A. de C.V.) does not necessarily imply that the subject of the international dispute is the same of that of the submission.

Under NAAEC 15(1), the Secretariat has broad discretion to determine whether or not a submission warrants the development of a factual record, and must provide the reasons for its determination. Only in the specific case where the matter that is the subject to a submission is the subject of a pending proceeding is the Secretariat authorized to proceed no further with its consideration of a submission without analyzing the subject matter of the submission in greater depth to determine whether it warrants the development of a factual record. In order to dismiss a submission on these exceptional grounds, it is clear that the Secretariat must ascertain that it is presented with a situation that requires dismissal under NAAEC 14(3)(a). Also, it follows from this article that the Party will notify the Secretariat of all facts necessary to reach such a determination. In view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect. For example, the Secretariat determined in one case that it should give no further consideration to a submission based on an analysis of the Party's detailed explanation of the identity between the matter that was the subject of the submission and the matter that was the subject of the related international dispute, as supported by the arbitration notice for that dispute.⁷

In the arbitration case to which Mexico refers, the Secretariat may infer from the information available on the ICSID Web site that the proceeding has not gone beyond the constitution of the tribunal.⁸ To have reached this stage (as set out in the Appendix to the Acuerdo, Title Three, paragraph 1) the investor must have: (i) notified Mexico of its intention to file a claim for arbitration and (ii) filed the arbitration claim with the ICSID. Based on these documents, for example, it would be possible to ascertain the nature of the dispute in this arbitration proceeding so as to determine whether it coincides with the matter that is the subject of the submission. However, neither these documents, nor any other detailed description of the subject matter of the arbitration proceeding, have been provided to the Secretariat.

V. DETERMINATION

⁷ See SEM-99-001 (Methanex) Determination in Accordance with Article 14(3) (30 June 2000).

⁸ <http://www.worldbank.org/icsid/cases/cases.htm>

The Secretariat considers that it lacks sufficient information to determine that it should proceed no further with its consideration of the submission pursuant to NAAEC 14(3)(a), as the Party asserts. However, since only the regular period of time has elapsed for the Party to file a response further to this request from the Secretariat, the Party has the remaining 30 days in which to provide the Secretariat with a response to the submission and/or the information necessary to determine that the matter that is the subject of submission SEM-01-001 (Cytrar II) is the same as the matter that is the subject of the international dispute [ARB(AF)/00/2] in which Mexico is a party.

Respectfully submitted, 13 June 2001.

Secretariat of the Commission for Environmental Cooperation

(original signed)
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