

**Secretariat of the Commission for Environmental Cooperation
of North America**

**Article 15(1) Notification to Council that Development of a Factual Record is
Warranted**

Submitter(s):	Academia Sonorense de Derechos Humanos, A.C. Lic. Domingo Gutiérrez Mendivil
Party:	United Mexican States
Date of receipt:	14 February 2001
Date of this notification:	29 July 2002
Submission number:	SEM-01-001/Cytrar II

I. EXECUTIVE SUMMARY

Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC”), the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) may consider submissions asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. If the Secretariat finds that the submission meets the requirements of Article 14(1), it shall then determine whether the submission warrants requesting a response from the Party named in the submission, in accordance with Article 14(2). In light of any response from the Party, the Secretariat may notify the Council that it considers that the submission warrants developing an Article 15 factual record. By a two-thirds vote, the Council may instruct the Secretariat to prepare a factual record. The final factual record, again by a vote of two-thirds of the members of the Council, may then be made public.

This Notification contains the Secretariat’s analysis with respect to whether Submission SEM-01-001 (Cytrar II), filed 14 February 2001 by Academia Sonorense de Derechos Humanos, A.C. and Domingo Gutiérrez Mendivil (the “Submitters”) warrants developing a factual record. The submission asserts that Mexico is failing to effectively enforce its environmental law with respect to alleged violations in the construction and operation of the hazardous waste landfill known as Cytrar, and with respect to the Submitters’ access to information relating to those alleged violations.

On 24 April 2001, the Secretariat determined that the submission met the requirements of Article 14(1) of the NAAEC. In addition, considering the criteria set forth in NAAEC Article 14(2), the Secretariat determined that a response from the Party was warranted. On 4 June 2001 and 30 July 2001, Mexico provided information to the Secretariat about a pending international dispute resolution proceeding (hereinafter “the arbitration”), which according to the

Party precludes further processing of this submission, in accordance with Article 14(3)(a) of the NAAEC. In these communications, the Party did not provide any response to the assertions contained in the submission.

As described in this notification, the Secretariat determines that termination of the process of this submission under NAAEC Article 14(3)(a) is not warranted, because the matter raised in the submission is not subject to a pending proceeding. In accordance with NAAEC Article 15(1), the Secretariat notifies the Council that the submission warrants development of a factual record. The Secretariat considers that developing information in a factual record on the matters raised in the submission would advance the goals of NAAEC of promoting transparency, public participation and the effective enforcement of environmental law.

II. SUMMARY OF THE SUBMISSION

On 14 February 2001, Academia Sonorense de Derechos Humanos, A.C. and Lic. Domingo Gutiérrez Mendivil filed a submission with the Secretariat in accordance with Articles 14 and 15 of the NAAEC. The Submitters assert that the Mexican government is failing to effectively enforce its environmental law with respect to alleged violations in the construction and operation of the hazardous waste landfill known as Cytrar, and with respect to access to information relating to those alleged violations. This is the second submission filed with respect to the Cytrar landfill. The first submission, SEM-98-005, was terminated on 26 October 2000.

Cytrar is located near the city of Hermosillo in the state of Sonora, Mexico. The landfill is no longer operating, because in 1998 the environmental authority denied Cytrar, S.A. de C.V. renewal of its operating authorization. The submission asserts that Mexico has failed to effectively enforce with respect to Cytrar, Article 9 of the Federal Law of Environmental Protection (*Ley Federal de Protección al Ambiente—LFPA*) of 1982;¹ Articles 28, 29, 32, 153 and 159 Bis 3 of the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*); Article 7 of the LGEEPA Hazardous Waste Regulations (*Reglamento de la LGEEPA en Materia de Residuos Peligrosos—RRP*); Article 415 del of the Federal Criminal Code (*Código Penal Federal—CPF*);² and Mexican Official Standard NOM-057-ECOL-1993, which establishes the requirements for the design, construction and operation of controlled hazardous waste landfill cells (NOM-057).³

¹ The LFPA was in effect until 1988. The LGEEPA, which replaced it, essentially keeps the environmental impact provisions (Articles 28 through 30). Reference is made hereafter only to the current provisions.

² The penalties set forth in this article were modified by Decree on 1 February 2002, published in the Federal Official Gazette (*Diario Oficial de la Federación—DOF*).

³ As well as the prior Ecological Technical Standard *NTE-CRP-010/88*, published in the DOF on 14 December 1988, and Mexican Official Standard *NOM-PA-CRP-006/93*, which would receive its current nomenclature, *NOM-057-ECOL-1993*, by reason of the Accord published on 22 October 1993.

According to the Submitters, Mexico failed to effectively enforce Articles 28, 29 and 32 of the LGEEPA by not requiring an environmental impact statement prior to the performance of works and activities at the landfill site now known as Cytrar, and by allowing the persons subsequently responsible to operate it without the appropriate authorization. Second, the submission asserts that the environmental authority failed to effectively enforce Article 153 of the LGEEPA and Article 7 of the RRP, which prohibit the import of hazardous waste for final disposal in Mexico and require the repatriation of hazardous waste generated under the temporary import regime. The submission claims that hazardous wastes abandoned by the company Alco Pacífico, S.A. de C.V. should have been repatriated to the United States but instead were disposed of in the Cytrar landfill. The third assertion of the submission is that Mexico did not take enforcement action regarding the alleged violation of the specifications under NOM-057 for the construction of confinement cells. The fourth assertion is that the Party has failed to effectively enforce CPF Article 415 by not bringing a criminal action following the denunciation of alleged environmental crimes concerning the matters described above, by one of the Submitters on 8 December 1997 and 3 December 1998. Lastly, the submission asserts that Mexico has violated the right to environmental information contemplated in Article 159 Bis 3 of the LGEEPA, by denying environmental information to the Submitters, principally with regard to the nature and origin of waste deposited in the Cytrar landfill.

III. SUMMARY OF THE RESPONSE OF MEXICO

In its response, received 4 June 2001, the Party asserts that “the Government of the United Mexican States is legally prevented from responding 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. [shareholder of Cytrar S.A. de C.V.], presumably arising from default on the Agreement for the Reciprocal Promotion and Protection of Investments (*Acuerdo para la Promoción y Protección Recíproca de Inversiones-APRI*) with Spain.”⁴ (translation from original) The Party therefore requested that the Secretariat proceed no further with submission SEM-01-001, pursuant to NAAEC Article 14(3)(a).

Following the Secretariat’s determination of 13 June 2001 that it did not have sufficient information to evaluate this assertion of the Party, on 30 July 2001 Mexico provided additional information to the Secretariat on the international dispute in question. Mexico asserts that, based on “the connexity of causes [...] between the Cytrar II submission and the international dispute subject to an ICSID arbitration proceeding, it is clearly demonstrated that ‘the matter (Cytrar II) is the subject of a pending judicial or administrative proceeding’ as provided in Article 14.3(a) of the NAAEC, and given that this proceeding began procedurally before the Cytrar II submission [...] the United Mexican States considers that submission should be deemed fully and absolutely concluded.” (translation from original)

⁴ ICSID, Case No. ARB(AF)/00/2, listed as number 27 in the list of pending cases.

The Party did not respond to the matters raised in the submission in either of the two communications sent to the Secretariat.

IV. ANALYSIS

A. Introduction

This Notification concerns the NAAEC Articles 14(3) and 15(1) stages of the process. The Secretariat previously determined that the submission met the requirements of Article 14(1) and that it merited a response from the Party, in consideration of the criteria of Article 14(2).

On 24 April 2001, the Secretariat determined that the submission met all requirements under Article 14(1) (a)-(f) of the NAAEC.⁵ As stated in that determination, the submission was filed with the Secretariat by an individual and a non-governmental organization, asserting that Mexico has failed to effectively enforce various articles of the LGEEPA, the RRP, the CPF and NOM-057. These provisions qualify as “environmental law” under NAAEC Article 45(2). Also, the Secretariat determined that the assertions met the temporal requirement of Article 14(1) because they referred to matters for which enforcement action could be taken at the time the submission was filed. The submission was filed in Spanish, the language designated by Mexico for such purposes. The Submitters clearly identify themselves in the submission, indicating that their domiciles are in the city of Hermosillo, Sonora, Mexico. The Secretariat determined that the information and documents provided by the Submitters are sufficient to review the submission, particularly considering that they have tried to obtain additional information that allegedly has been denied to them. The Secretariat concluded that the submission is not aimed at harassing industry but rather to promote the enforcement of environmental law in Mexico. The submission also asserts that the matter has been communicated in writing to the pertinent authorities in Mexico, principally through citizen complaints, information requests and *amparo* suits.

The Secretariat reviewed the submission considering the criteria under Article 14(2) of the NAAEC, and in its determination of 24 April 2001 concluded that the submission warranted a response from the Party.⁶ The submission addresses the remedies available under the laws of the Party that have been pursued, and the Secretariat considers that a reasonable effort has been made to pursue them. The Submitters indicate that they have initiated several administrative and judicial proceedings, including a citizen complaint, a denunciation of alleged environmental crimes, a complaint before the State Human Rights Commission and four *amparo* suits.⁷ The submission does not appear to be based exclusively on media reports, although the Submitters do refer to some news reports. The Submitters assert that “the harm caused to all residents of Hermosillo, Sonora by the existence of the Cytrar hazardous waste

⁵ SEM-01-001 (Cytrar II), Determination pursuant to Article 14(1) (24 April 2001).

⁶ Ibid.

⁷ See exhibits 5, 8, 12, 13, 15, 17, 27, 31 and 32 of the submission.

landfill is evident, polluting the soil and atmosphere with toxic waste exposed to the open air, and which will imminently pollute the water tables at the site, if they have already been polluted [*sic*].” (translation from original) The information included in the submission does not provide any certainty as to the existence of harm relating to the landfill, although there also does not appear to be publicly available information concerning compliance (by Cytrar, S.A. de C.V. and its predecessors) with the obligations and specifications required under Mexican environmental law to prevent the hazardous waste landfill from causing harm to human health and the environment, as stated in the submission.⁸ Lastly, the Secretariat considered that further study in this process of the matters raised in the submission, regarding the effective enforcement of environmental law on final disposal of hazardous waste and access to related information by interested parties, would contribute to furthering the goals of the NAAEC. Based on the above, on 24 April 2001, the Secretariat requested a response from Mexico to the submission.

The Party notified the Secretariat on 4 June 2001 that the matter raised in the submission is subject to an international proceeding and thus, in accordance with NAAEC Article 14(3)(a), the Secretariat should proceed no further. After examining the communication received, the Secretariat informed the Party that it did not have sufficient information to determine that it was impeded from continuing to process the submission in accordance with NAAEC Article 14(3)(a). The Secretariat indicated that Mexico still had 30 days to provide a response to the matters raised in the submission and/or the information necessary to determine whether the matter raised in submission SEM-01-001 (Cytrar II) is the same as the matter subject to the international dispute [ARB(AF)/00/2] involving Mexico.

In its response to the Secretariat’s determination, received 30 July 2001, Mexico provided additional information on the matter of the international dispute. Neither of the two communications sent to the Secretariat included a response by the Party to the matters raised in the submission.

B. Should the Secretariat proceed with the submission in accordance with NAAEC Article 14(3)(a)?

Under NAAEC Article 14(3)(a), when the matter raised in a submission is subject to a pending proceeding, the Secretariat terminates the process of the submission without further analyzing whether the development of a factual record is warranted. To apply this exceptional condition for terminating a submission, the Secretariat must ascertain that there is a “pending judicial or administrative proceeding” and that the matter raised in the submission is the subject matter involved in such proceeding.⁹ Also, there must be a reasonable expectation that the “pending judicial or administrative proceeding” invoked by the Party will address and potentially resolve

⁸ See pages 7 through 9 and exhibits 5, 8, 13, 15, 17, 20 through 23, 25, 26, 30, 32, 40 and 41 of the submission.

⁹ See in this regard SEM-99-001 (Methanex), Determination pursuant to Article 14(3) (30 June 2000), and the definition of “pending judicial or administrative proceeding” in NAAEC Article 45(3), including “an international dispute resolution proceeding to which the Party is party.”

the matters raised in the submission. In the case of this submission, and based on the Party's communications of 4 June 2001 and 30 July 2001, the Secretariat determines that the conditions under Article 14(3)(a) for terminating the process are not satisfied.

Mexico is the defendant in an arbitration proceeding to resolve an international dispute with the company Técnicas Medioambientales Tecmed, S.A. The proceeding is before the International Center for Settlement of Investment Disputes (ICSID), registered under case number ARB(AF)/00/2 and listed as number 27 of pending cases. The Party argues:

The international dispute arises because investments made in the territory of the United Mexican States, by the company "CYTRAR, S.A. DE C.V." owner of the hazardous waste landfill of the same name, located in the area of Hermosillo, municipality of Hermosillo, Sonora, Mexico have allegedly been affected [...]

The international dispute derives from the enforcement of environmental law by the then-existing Semarnap [Secretariat of Environment, Natural Resources and Fisheries], given that on 25 November 1998 the renewal of the landfill's operating authorization was denied and its closure ordered. That is, the international dispute subject to arbitration centers on the authority's act denying an authorization, in this case for operation [...]

In addition, the cause of the Cytrar II submission arises, from the standpoint of the submitters' arguments, because of the issuance or denial of authorizations or permits, since each of the four petitionary points refer, in essence, to the authority's act authorizing the operation of the hazardous waste landfill, the movement of contaminated soil, the construction of landfill cells or access to environmental information, as the case may be.

Based on the above, establishing the *connexity of causes*,¹⁰ understood to be an identity existing between two diverse actions with identity of causes, between the Cytrar II submission and the international dispute subject to an ICSID arbitration proceeding, it is clearly demonstrated that "the matter (Cytrar II) is the subject of a pending judicial or administrative proceeding" under the provisions of Article 14.3(a) of the NAAEC, and given that this proceeding began procedurally before the Cytrar II submission, as established in point 4 of this communication, the United Mexican States considers that submission should be deemed fully and absolutely concluded." (translation from original) [emphasis added]¹¹

¹⁰ The theses of jurisprudence supporting the connexity, in accordance with the Supreme Court of Justice's interpretation of the Laws of the United Mexican States, is attached. [note from original].

¹¹ See pages 3 through 5 of Mexico's response of 30 July 2001.

Article 14(3)(a) provides: “The Party shall advise the Secretariat ... whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further.” The Secretariat considered whether the NAAEC contemplates termination of a submission due to “connexity of causes” (as defined by Mexico in its response) with a pending proceeding. Connexity of causes, as used by Mexico, would appear to apply to proceedings ultimately caused by the same triggering event, but involving different legal and factual issues. NAAEC Article 45 contains definitions for purposes of Article 14(3), but it does not include a definition of “matter.” However, neither the text nor the objectives of the Agreement suggest that the term “matter” should be given the broad construction as would derive from applying the principle of connexity of causes. The Secretariat has previously construed provisions of the Agreement narrowly when a broader reading could defeat the objectives of the Agreement by too liberally allowing Article 14(3)(a) to cut off further review.¹²

It is incumbent upon the Party invoking NAAEC Article 14(3)(a) to show that the matters raised in a submission are the same as those subject to a pending proceeding. In the current case, while the submission and the pending arbitration both refer to the Cytrar landfill, they address different issues. As Mexico indicates, the arbitration centers on the *denied renewal of the authorization* to operate the Cytrar landfill, which allegedly caused harm to Tecmed’s investment. By contrast, the submission centers on alleged *failures to effectively enforce* environmental laws with respect to presumed violations of the LGEEPA, the RRP, the CPF and NOM-057-ECOL-1993 in connection to the Cytrar landfill (alleged failure to conduct an environmental impact assessment, alleged illegal disposal of waste, alleged violation of general cell construction specifications and denied access to information).

Moreover, the arbitration does not refer to a failure to effectively enforce environmental law; nor does the submission refer to the interests of Cytrar investors or to the denied renewal of the authorization to operate the landfill in 1998. Thus, Mexico has not argued that any of the factual or legal matters raised in the submission would necessarily arise in the arbitration, and the Secretariat has no reason to believe this would happen. For Article 14(3)(a) to apply so as to terminate a submission, there must be a reasonable expectation that the “pending judicial or administrative proceeding” invoked by the Party will address and potentially resolve the matters raised in the submission. As far as the Secretariat can foresee, the arbitration is not likely to address, and potentially resolve, the Submitters’ concern that Mexico is failing to effectively enforce its environmental law with respect to the Cytrar landfill. Nor is there any reason to believe that a factual record would interfere with the arbitration.

In the case of the Methanex submission (SEM-99-001), for example, the Secretariat determined that it was impeded from continuing the process because the same allegations raised in the submission were, along with others, the subject of a Chapter 11 arbitration under the

¹² See SEM-97-006 (Oldman River II) Notification pursuant to Article 15(1) (19 July 1999); SEM-97-001(BC Hydro) Notification pursuant to Article 15(1) (27 April 1998); SEM-98-004 (BC Mining) Notification pursuant to Article 15(1) (11 May 2001); and SEM-00-004 (BC Logging) Notification pursuant to Article 15(1) (27 July 2001).

North American Free Trade Agreement (NAFTA).¹³ In that case, the submission and the international arbitration were both initiated by the same person (Methanex Corporation), and the matter raised in the Methanex submission (that the United States and the state of California were not effectively enforcing their environmental law on underground gasoline storage tanks) was expressly the subject, among others, of the Methanex NAFTA proceeding.

Because the matters raised in the submission are not subject to a pending proceeding, the Secretariat determines that it is not barred from continuing the process of submission SEM-01-001, under NAAEC Article 14(3)(a).

C. Reasons why the submission warrants development of a factual record

In accordance with NAAEC Article 15(1), the Secretariat considers that the submission warrants the development of a factual record. Absent a response from Mexico to the allegations in the submission, the Secretariat's consideration at this stage is based solely on the submission and on the objectives of the NAAEC.

The submission contains allegations that Mexico has failed to effectively enforce its environmental law with respect to the Cytrar landfill by: failing to require an environmental impact assessment, allowing the final disposal in Cytrar of hazardous waste from Alco Pacífico, failing to enforce specifications for the construction of landfill cells, failing to prosecute alleged environmental crimes, and denying access to environmental information.

1. Allegations concerning environmental impact assessment

The Submitters assert that Mexico failed to effectively enforce Articles 28, 29 and 32 of the LGEEPA, with respect to the hazardous waste landfill currently known as Cytrar, by failing to require an environmental impact statement prior to the construction and operation of the landfill and by allowing the subsequent owners to operate the landfill without the appropriate environmental impact authorization. The submission asserts that the landfill never obtained an environmental impact authorization and cites an excerpt from a memorandum by the Head of Legal Affairs at the National Institute of Ecology, dated 28 January 1998, which states:

It should be noted, with regard to the environmental impact statement and risk study that you request, that the company in question (referring to CYTRAR, S.A., DE C.V.) did not have the obligation to file those studies, because when it began procedures with the General Bureau of Environmental Pollution Prevention and Control [...], in the year 1986, it complied with the provisions of the Federal Law of Environmental Protection [...] ¹⁴ (translation from original)

¹³ See SEM-99-001 (Methanex) Determination pursuant to Article 14(3) (30 June 2000).

¹⁴ See quote on page 11 of the submission.

The Submitters claim that the environmental impact evaluation was required of the landfill from the start, under Article 9 of the LFPA. According to the submission, even if that were not the case, an environmental impact authorization would be required of the landfill under the 1988 LGEEPA. The Submitters argue that application of the LGEEPA to require an environmental impact authorization of an existing landfill would not violate the constitutional provision against retroactive application of the law, because the environmental impact requirement stems from a law of public order and social interest.¹⁵ According to the Submitters, despite the government's assertion that the environmental impact assessment requirement was not applicable to Cytrar S.A. de C.V., that company prepared an environmental impact statement in 1994, which allegedly was never approved. This raises questions about what triggered it and how the government processed it.

The Secretariat considers that development of a factual record with respect to this submission is warranted, particularly in the absence of a response from the Party, to gather information on the enforcement by Mexico of the environmental impact assessment obligations of Cytrar, S.A de C.V., after 1 January, 1994, when the NAAEC entered into force.

2. Allegations concerning final disposal of hazardous waste from Alco Pacifico in Cytrar

Another assertion by the Submitters is that Mexico is failing to sanction the alleged violation of Article 153 of the LGEEPA and Article 7 of the RRP, purportedly committed by the final disposal in Cytrar of hazardous waste that the Submitters claim should have been repatriated to the United States. Article 153 of the LGEEPA and Article 7 of the RRP prohibit the import of hazardous waste for final disposal in Mexican territory and require the repatriation of hazardous waste generated under the temporary import regime.¹⁶

According to the Submitters, in 1997 the Cytrar landfill received for final disposal contaminated soil and other hazardous waste abandoned by the company Alco Pacifico, S.A. de C.V. The Submitters state that Alco Pacifico lead smelter operated under the maquila regime at El Florido, Tijuana, BC., and was shut down by the environmental authorities in April 1991. The submission claims that Alco Pacifico abandoned contaminated soil and hazardous waste illegally imported from the United States, as well as waste generated from raw materials brought into the country under the temporary import regime, all of which should have been returned to the country of origin. According to the submission, the Mexican government arranged for the final disposal in Cytrar of the waste abandoned by Alco Pacifico. The Los Angeles Superior Court,¹⁷ in the United States, presumably provided for that purpose US\$2 million, which was

¹⁵ See pages 3, 9 through 12 and exhibits 10 and 19 of the submission.

¹⁶ See pages 3 through 6, 12 and 13, and exhibits 15 and 37 through 39 of the submission.

¹⁷ The reference for this decision of the Superior Court of California, County of Los Angeles was not provided.

apparently part of a fine imposed by the same court on the carrier company S.R.S./Quemetco for the illegal transport of hazardous waste to the Alco Pacifico site.¹⁸

The Secretariat considers that development of a factual record with respect to this submission is warranted, particularly absent a response from the Party, to gather information on the final disposal of the Alco Pacifico waste in Cytrar, and on the effective enforcement of Article 153 of the LGEEPA and Article 7 of the RRP in connection with that matter.

3. Allegations concerning construction specifications for landfill cells

The third assertion in the submission is that Mexico has failed to take enforcement action against Cytrar's alleged failure to observe the specifications of Mexican Official Standard *NOM-057-ECOL-1993*¹⁹ in the construction of the landfill cells. According to the authorizations issued by the National Institute of Ecology to Cytrar, the landfill had one cell with a capacity of 16,200 m³ in 1996 and a new cell with a capacity of 110,000 m³ in 1997.²⁰

To support the assertion that the NOM-057 specifications were not met, the submission includes an excerpt of an environmental impact statement filed by Cytrar in 1994, describing the cell design.²¹ The Submitters assert that "... the containment walls of the Cytrar landfill cells do not have the cement layer mentioned in [the environmental impact statement] and in some areas there does not appear to be a 30 cm sand layer. The materials used as an alternative for the 60 cm concrete wall required in paragraph 5.1.5 of Mexican Official Standard NOM-CRP-006-ECOL/1993 [currently NOM-057] do not even remotely have a resistance of 240 kg/cm²."²² (translation)

As stated in the 24 April 2001 request for a Party response to this submission, the Submitters as private parties do not have powers of verification and may be limited by technical and economic reasons from obtaining information from sources other than the environmental authority.²³ The Submitters claim that the authorities have refused their requests that compliance with the construction specifications be verified. The submission indicates that, despite the refusal to verify the cells, the government announced in July 1998 that it would perform an environmental audit to ensure that, if necessary, prevention or remediation measures would be taken before sealing the landfill cells. The Submitters claim that the government has no intention of performing that audit, because, in February 2001, the government announced that it had given the company a 45-day period to seal the landfill. The Secretariat has no information on whether any of these actions has been carried out.

¹⁸ See pages 6 to 8, and exhibits 20 to 23 of the submission.

¹⁹ Establishing the requirements for the design, construction and operation of controlled hazardous waste landfill cells.

²⁰ See exhibits 3 and 4 of the submission.

²¹ Which the environmental authority did not approve, according to the Submitters.

²² See pages 6, 7 and 12 and exhibit 19 of the submission.

²³ SEM-01-001 (Cytrar II) Determination pursuant to Article 14(1) (24 April 2001).

The Secretariat considers that development of a factual record with respect to this allegation of the submission is warranted, particularly absent a response from the Party that may have allowed for a better understanding of Mexico's enforcement of the landfill cells specifications in NOM-057 with respect to Cytrar.

4. Allegations concerning environmental crimes

The fourth allegation in the submission is that the Party has failed to effectively enforce Article 415 of the CPF, which provides for a penalty of three months to six years of imprisonment and a fine of the equivalent to 1,000 to 20,000 times the daily minimum wage, for undertaking any activity with hazardous materials or waste that causes or may cause harm to public health, natural resources, fauna, flora or the ecosystems, without authorization from the federal competent authority or in contravention of the permit specifications.²⁴ On 8 December 1997 and 3 December 1998, the Submitter denounced as environmental crimes the alleged lack of an environmental impact authorization, the alleged illegal disposal of hazardous waste from Alco Pacifico in Cytrar, and the alleged violation of the specifications for the construction of landfill cells, referred to in the preceding sections.²⁵ Under LGEEPA Article 182 any person may denounce alleged environmental crimes with the agency responsible for criminal investigations and prosecutions (*Ministerio Público Federal*). The Secretariat considers that development of a factual record is warranted, particularly in the absence of a response from the Party, to gather information on the processing of the denunciation by the Submitter and the status of any criminal investigation thereof.

5. Allegations concerning access to environmental information

Lastly, the submission asserts that Mexico has failed to effectively enforce the right to environmental information contemplated in Article 159 Bis 3 of the LGEEPA, by failing to provide the Submitters various items of environmental information relating to Cytrar. On 16 July 1998, the Submitter filed a request for information, principally on the nature and origin of the waste deposited in the Cytrar landfill. On 28 June 1999, the government declined to provide the information and the Submitters filed an *amparo* suit against this refusal. On 12 July 2000, the federal judiciary found the government's decision to be lacking justification, in violation of the guarantees of legality provided in Constitutional Articles 14 and 16. The court thus ordered the environmental authority to issue a well-founded and justified response to the information request, which had not been issued at the time the submission was filed.²⁶ The Submitters assert

²⁴ The penalties set forth in this article were modified by the Decree of 1 February 2002, published in the DOF.

²⁵ See pages 6, 14 and 15 and exhibits 8 and 15 of the submission.

²⁶ See exhibit 32 of the submission.

the Party is thereby failing to effectively enforce its environmental law concerning access to environmental information.

Other information the government allegedly refused to provide to the Submitters includes information concerning the agreement whereby which the Office of the Federal Attorney General for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—PROFEPA) and the Los Angeles Superior Court arranged for the disposal in Cytrar of the waste abandoned by Alco Pacífico.²⁷

As the Secretariat noted in its determination of 24 April 2001, the Submitters' concerns appear to be largely based on the lack of information that could change their perception that the Cytrar hazardous waste landfill failed to comply with environmental law and poses a high health risk to the city of Hermosillo. Specifically, there does not appear to be publicly available information on compliance (by Cytrar and its predecessors) with the obligations and specifications applicable to hazardous waste landfills under Mexican environmental law.²⁸ The Secretariat considers that development of a factual record is warranted with respect to the allegations in this submission of a failure to provide access to environmental information in connection to Cytrar.

In sum, the conditions under Article 14(3)(a) for terminating the process are not satisfied because the matter raised in the submission is not the subject of the pending proceeding invoked in the Party's communications of 4 June 2001 and 30 July 2001. Particularly absent a response from Mexico to the allegations in the submission, all of the matters raised in the submission remain open and the Secretariat considers that they warrant development of a factual record. Compliance with and effective enforcement of environmental law regarding final disposal of hazardous waste and access to relevant information by interested parties are relevant to the NAAEC's goals to enhance the effective enforcement of environmental laws, achieve higher levels of environmental protection and compliance with the Parties' laws, and to promote transparency and citizen participation.²⁹

V. RECOMMENDATION

For the reasons set forth in this notification, the Secretariat hereby notifies the Council that it considers submission SEM-01-001 (Cytrar II) warrants the development of a factual record. The submission raises questions that remain open about the effective enforcement of Articles 28, 29, 32, 153 and 159 Bis 3 of the LGEEPA, Article 7 of the RRP, Article 415 of the CPF and NOM-057-ECOL-1993 in connection with the Cytrar hazardous waste landfill in Hermosillo, Sonora, Mexico. Developing a factual record with respect to the Cytrar II Submission would

²⁷ See pages 6 through 8 and exhibits 20 to 23 of the submission.

²⁸ See SEM-01-001 (Cytrar II) Determination pursuant to Article 14(1) (24 April 2001) and pages 7 through 9 and exhibits 5, 8, 13, 15, 17, 20 through 23, 25, 26, 30, 32, 40 and 41 of the submission.

²⁹ See NAAEC Preamble, fifth and sixth paragraphs, and Articles 1(a), (e), (g), (h) and 5(1).

contribute to furthering the goals of the NAAEC, particularly those of enhancing the effective enforcement of environmental laws and promoting public participation through access to information.

Respectfully submitted for your consideration on this 29 of July 2002.

(Original signed)

Victor Shantora

Acting Executive Director