
Commission for Environmental Cooperation - Secretariat

Final Factual Record
Prepared in Accordance with Article 15 of the
North American Agreement on Environmental Cooperation
in relation to the

“Cruise Ship Pier Project in Cozumel, Quintana Roo”

Submission ID: SEM-96-001

Submitter(s) : Comité para la Protección de los Recursos Naturales, A.C.
Grupo de los Cien Internacional, A.C.
Centro Mexicano de Derecho Ambiental, A.C.

Concerned Party: United Mexican States

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LIST OF ACRONYMS

CEC	Commission for Environmental Cooperation
CINVESTAV	Research and Advanced Studies Center of the National Engineering Institute
CONSORTIUM H	Consortium for Real Estate Development and Promotion H, S.A. de C.V.
D.O.F.	Official Gazette of the Federation
DUDR	Decree of the Declaration of Uses and Reserves, Municipality of Cozumel, Quintana Roo
DZR	Refuge Zone Decree, for the protection of marine flora and fauna of the western coast of Cozumel, Quintana Roo
EIS	Environmental Impact Statement
EIS-90	Environmental Impact Statement in the General Modality for the construction of a Cruise Ship Pier in Cozumel, Quintana Roo, presented by Consortium H in August 1990.
EIS-96	Environmental Impact Statement in the General Modality for the Puerta Maya Project in Cozumel, Quintana Roo, presented by Consortium H in May 1996.
FONATUR	National Fund for the Promotion of Tourism
INE	National Institute of Ecology
IPN	National Institute of Engineering
JPAC	Joint Public Advisory Committee
LGEEPA	General Law for Ecological Balance and Protection of the Environment (or Environmental Law)
NAAEC	North American Agreement on Environmental Cooperation
NGOs	Non Governmental Organizations
NOM	Official Mexican Standards
PROFEPA	Federal Attorney's Office for Environmental Protection
PUMEX	Mexican Port Authority
Q.R.	Quintana Roo
RIA	Regulation concerning Environmental Impact (under LGEEPA)

SCT	Ministry of Communications and Transportation
SEDESOL	Ministry of Social Development
SEDUE	Ministry of Urban Development and Ecology
SEMARNAP	Ministry of Environment, Natural Resources and Fisheries

INTRODUCTION

On January 18, 1996, three nongovernmental organizations (NGOs), the Committee for the Protection of Natural Resources A.C., the International Group of One Hundred A.C. and the Mexican Center for Environmental Law A.C. (Submitters), presented a submission to the Secretariat of the Commission for Environmental Cooperation (CEC), alleging a “failure on the part of Mexican authorities to enforce their environmental law effectively with regard to the totality of the works of the ‘port terminal project in Playa Paraíso, Cozumel, Quintana Roo’”, pursuant to Article 14 of the North American Agreement on Environmental Cooperation (NAAEC).¹

Under Article 14 of the NAAEC, the Secretariat may consider a submission from any non-governmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. Where the Secretariat determines that the Article 14(1) criteria are met it shall decide whether the submission merits requesting a response from the concerned Party in accordance with Article 14(2). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance with Article 15. The Council may then instruct the Secretariat to prepare a factual record on the submission. The final factual record is made publicly available upon a 2/3 vote of the Council.

The CEC Secretariat reviewed the submission in accordance with subsections 1 and 2 of Article 14 of the NAAEC, and on February 8, 1996, requested a response from the Government of Mexico. This response was provided by the Mexican authorities on March 27, 1996. On June 7, 1996, the Secretariat informed the Council of its reasons for determining that the submission warranted developing a factual record. On August 2, 1996, unanimously and in accordance with Resolution No. 96-08, the Council instructed the Secretariat to prepare a factual record pursuant to Article 15 of the NAAEC and the “Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC” (Guidelines).

The Council directed the Secretariat in developing a factual record to “consider whether the Party concerned has failed to enforce effectively its environmental law since the NAAEC’s enactment on January 1, 1994.” It further directed that “in considering such an alleged failure to enforce effectively, relevant facts prior to January 1, 1994, may be included in the factual record.”

Article 15 of the NAAEC and the Guidelines, specify that: “in preparing a [draft] factual record, [as well as a final factual record], the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific, or other information that is (a) publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee (JPAC); or (d) developed by the Secretariat or by independent experts.”

In accordance with the NAAEC and the Guidelines, the Secretariat notified the JPAC of the instructions received from the Council for the development of a factual record, and requested that any relevant information for the development of a record be sent to the CEC Secretariat. The Secretariat also sent the Council’s instructions in writing to all persons and NGOs that had expressed an interest in the subject matter of the submission, requesting that any relevant information be sent to the Secretariat. Copies of the letters sent by the Secretariat are attached as Annex I.

¹ The full text of the submission as well as of the response from the Government of Mexico and the notice to Council from the Secretariat on the development of the factual record is available in the registry of submissions on the effective enforcement of environmental law on the CEC’s web page on the Internet: <http://www.cec.org>.

During the first stage of the development of the factual record, the Secretariat gathered, analyzed and catalogued information obtained during the process. During the second stage, the Secretariat characterized this information by selecting and identifying information relevant to the development of the record. During the third stage, the Secretariat drafted this document in accordance with Section 12 of the Guidelines, which states that “draft and final factual records prepared by the Secretariat will contain (a) a summary of the submission that initiated the process; (b) a summary of the responses, if any, provided by the concerned Party; (c) a summary of any other relevant factual information; and (d) the facts presented by the Secretariat with respect to the matters raised in the submission. The Draft Factual Record was presented to the Council on April 23, 1997, in accordance with Article 15.5(2) of the NAAEC. Finally, by July 1, 1997, the members of the Council had presented their comments on the Draft Factual Record.

The Secretariat submits to the Council the following:

FINAL FACTUAL RECORD IN RELATION TO THE “CRUISE SHIP PIER PROJECT IN COZUMEL, QUINTANA ROO”

I. SUMMARY OF THE SUBMISSION

A. SCOPE AND MAGNITUDE OF THE PROJECT

According to the Submitters, the “Cruise Ship Pier Project in Cozumel, Quintana Roo” forms an indivisible part of a larger-scale project which the Submitters refer to as the “Port Terminal Project”, comprising, in addition to the pier, a passenger terminal building, a means of access from the terminal to the cruise ship pier, a parking lot, and a public access road leading to the Chan-Kanaab highway.

The Submitters assert that the totality of the works comprising the “Port Terminal Project” was public knowledge, and therefore within the knowledge of the environmental authorities, before work commenced on the pier. The Submitters further allege that the environmental authorities were aware of the entire “Port Terminal Project”, in any event by no later than the Ministry of Communications and Transportation (SCT) granted the Concession to the Consortium for Real Estate Development and Promotion H, S.A. de C.V. (“Consortium H”) on July 22, 1993. The Submitters note that Condition One of the Concession indicated the character of these works.² Further, the Submitters maintain that, from the time of the entry into force of the Law of Ports (19 July 1993)³, which defines the term “terminal”, the nature of the works comprising the “Port Terminal Project” were of public knowledge.

The Submitters also claim that as of the date the Submitters filed the submission, January 18, 1996, the authorities issued “an authorization concerning an environmental impact report for the ‘Pier Project’, and two authorizations on two preventive reports, the first with respect to the ‘Concrete Plant Project,’ and the second with respect to the ‘Land Works Project.’” This, the Submitters claim, is contrary to Article 28⁴ of the General Law for Ecological Balance and Protection of the Environment (LGEEPA), the LGEEPA’s

² The first condition of the Concession which the Federal Government, through the Ministry of Communications and Transportation (SCT), granted to the Consortium for Real Estate Development and Promotion H, S.A. de C.V. (hereinafter Consortium H) states: “Purpose of the concession—The ‘Ministry’ grants to ‘Consortium H’ a concession for the use and development of an area of 51,465.297 square meters within the federal maritime zone of the Port of Cozumel, Quintana Roo, to build, operate, and develop a public Port Terminal pier for tourist cruise ships. ‘Consortium H’ undertakes to build, as part of the Port Terminal, within an area of 15,439.314 square meters of the land referred to in Antecedent IV, which is presently owned by the Government of the State of Quintana Roo, and within 4,707.747 square meters of the maritime federal zone, a passenger terminal building, a means of access from the terminal to the pier, a parking lot, and a public access road to the Chan-Kanaab highway, as set out in a plan to be approved by the ‘Ministry’”.

³ The Law of Ports defines a terminal in Section IV of Article 2 as “a unit inside or outside a Port, comprising works, installations, and surface areas, including a water zone, which permits the relevant port operation to be fully performed.”

⁴ Article 28 of the LGEEPA states that “Construction of public or private activities that may cause ecological imbalances or which exceed the limits and conditions set out in ecological/technical regulations and norms issued by the Federation to protect the environment, must receive prior authorization from the Federal Government, through the Ministry or federal or municipal entities, in conformity with the powers set out in this Law, and must be contingent as well on compliance with any requirements that may be imposed on them once their environmental impact has been evaluated, without prejudice to other authorizations which may be granted to these authorities”. In addition, the second paragraph of Article 28 states: “When the environmental impact of works or activities whose object is to exploit natural resources is evaluated, the Ministry shall require the concerned parties to include in the corresponding environmental impact report a description of the possible effects these works or activities may have on the relevant ecosystems, considering their elements as a whole, and not only the resources subject to development”.

Regulation concerning Environmental Impact (RIA), and the terms of the Concession. If these projects are undertaken in accordance with these authorizations, there will be no environmental impact report will be prepared for the totality of the “Port Terminal Project.”

Based on the above, the Submitters allege that “the environmental authorities are failing to enforce environmental law effectively (LGEEPA, Article 28), by authorizing the construction of the pier (which represents only part of the entire project), without evaluating as a whole the construction and operation of all of the works that constitute the Port Terminal.”

The Submitters conclude that “to accept the discretionary judgment of the authorities allowing the separation of individual works and their environmental impacts, fails to comply effectively with Article 28 of the LGEEPA, since Consortium H would not have to present a comprehensive EIS [Environmental Impact Statement] regarding all works that make up the “Port Terminal Project” (at least since the granting of the Concession in 1993).” According to the Submitters, “this discretionary decision undercuts the purpose of the environmental impact evaluation procedure by creating uncertainty with respect to the subject matter of the evaluation (*i.e.*, allowing any proponent to present ‘partial’ reports with respect to a single project). The decision further promotes inefficiency by preventing an adequate evaluation of the environmental impacts produced by the project and by failing to envisage the possible scenarios required for the evaluation of the project, thereby failing to prevent and avoid the real impacts that could be produced in each case.”

1. Related Projects/Cumulative Impacts

In addition, the Submitters maintain that the project, which they refer to as “Port Terminal”, is “related to an adjacent ‘Real Estate Tourist Development Project’, as described in Antecedent VIII of the Concession” granted by the SCT.⁵

Submitters claim that “the Environmental Impact Statement presented by Consortium H in August, 1990 (EIS-90), was incomplete, and should have taken account of the projects directly related to the work or proposed activity, in order to evaluate the cumulative environmental impact that these projects together will have.”

B. AUTHORIZATIONS AND EXTENSIONS

According to the Submitters, the environmental authority failed to apply environmental law effectively by allowing work to start on the “Port Terminal Project”. The Submitters allege that “when they presented their submission [on January 18, 1996], Consortium H had begun work on the “Port Terminal Project” without an environmental impact report addressing all the works included in the project, in breach of subsection e) of the Fifth Condition of the Port Terminal Concession.” This sub-section provides that “within a period of no more than three months from the date of the granting of this Concession (July 22, 1993), Consortium H must present to the Ministry a plan for completing the works. This will contain the

⁵ Antecedent VIII, entitled “Real Estate Tourist Development,” states that “on February 26, 1993, Inmobiliaria La Sol, S.A. de C.V. entered into a preliminary agreement with Nacional Financiera, S.N.C., as trustee for the Federal Government for the National Fund for the Promotion of Tourism (FONATUR) trust, through which the latter promised to create a trust to which the Fund would contribute a property of 430,352.04 square meters, for which Inmobiliaria La Sol S.A. de C.V. would act as trustee, and which would become a real estate tourist development, whose characteristics would be determined in a preliminary contract.”

following information (...) e) Report on the environmental impact of the construction and operation of the Terminal”.

The Submitters claim that, “when the third extension (of the environmental impact authorization) was granted in 1994, the authority should have considered the fact that, when the Law of Ports was enacted, and the Concession granted, both in 1993, the subject of the evaluation had changed, and so too had the environmental impacts that would be produced”. According to the Submitters, “this means that the evaluation of the subject of the concession should have been made in a comprehensive manner, without implying the retroactive application of the Law of Ports.”

C. LOCATION OF THE PROJECT

The Submitters claim that the project is located “within a protected natural area [established by the Refuge Zone Decree ((DZR), published in the Official Gazette of the Federation on July 11, 1980, and] known as the ‘Refuge for the protection of marine flora and fauna of the western coast of Cozumel’, an area subject to special legal protection.”

In the Submission, it is further alleged that, “with the enactment of the LGEEPA in 1988, the area protecting flora and fauna to which the DZR refers should be considered a protected natural area, whose specific purpose is to insure the rational use of ecosystems and their elements. Consequently, and in accordance with Articles 38, 54, and 83 of the LGEEPA, the Federation, the states and municipalities are required to: a) establish protective measures to insure ‘ecosystem preservation and restoration, especially with regard to those ecosystems that are most representative and those that are subject to deterioration or degradation’ (Article 38 LGEEPA); b) permit only (...) activities related to the preservation, repopulation, propagation, acclimatization, protection, and investigation of resident species, as well ‘...the use of natural resources (...) identified by studies, which will be governed by ecological/technical and land use norms established in the statement or in subsequent resolutions’ (Article 54 LGEEPA); and c) apply effectively Article 83 of the LGEEPA, which provides that ‘the use of natural resources in areas which serve as habitats for wild species of flora and fauna, whether threatened or in danger of extinction, must be carried out so as not to alter the conditions necessary for the subsistence, development, and evolution of these species’.”

D. LAND USE

The Submitters claim that “the environmental impact authorization set out in Resolution 410-3088 (which constitutes the environmental authorization for the project) fails to apply effectively Articles 13 of the RIA⁶ and of the DZR by not considering the connection of the project with the land use permitted by that declaration.” They also claim that, in accordance with the DZR, “it is arguable that the land on which the Project will be constructed and will operate does not lie within a zone designated for ‘port use’ on the Island of Cozumel. Rather, this zone is designated for high-density tourist use’, and therefore prohibits any use for port purposes.”

⁶ Article 13 of the RIA states that “the Ministry may request from the concerned party additional information to supplement the content of the environmental impact report, if this content does not provide sufficient detail to permit a proper evaluation. If necessary, the Ministry may further request the technical elements which served as a basis for determining the environmental impacts of the relevant work or activity, as well as the preventive measures and proposed mitigation. The Ministry will evaluate the environmental impact report when it is modified to meet the requirements of the regulation and its content is reviewed in accordance with the applicable instructions.”

E. SPECIES RESCUE PROGRAM

The Submitters maintain that “by establishing a ‘Species Rescue Program’ through Condition 24 of Resolution 410-3088, and by authorizing the operation of this program through Document DGNA-10809, dated November 25, 1994, SEDUE (Ministry of Urban Development and Ecology) and INE (National Institute of Ecology) violated Article Two of the DZR, which expressly prohibits any collection of marine flora and fauna that does not serve investigative purposes, and failed to apply effectively Articles 38, 44, 45 (subparagraph VII), 54, and 83 of the LGEEPA.”

II. SUMMARY OF THE RESPONSE PROVIDED BY THE ENVIRONMENTAL AUTHORITIES OF THE GOVERNMENT OF MEXICO

A. RETROACTIVE APPLICATION OF THE NAAEC AND INADMISSIBILITY OF SUBMISSION

The response from the Government of Mexico raises issues concerning the decision made by the Secretariat to accept the submission and to request a response from the Mexican Party.

The Government of Mexico notes that the acts on which the submission was based took place prior to the NAAEC entering into force, pre-dating the creation and establishment of the CEC. The Government of Mexico considers that in the case at issue the NAAEC is being applied retroactively, and also regards the submission inadmissible under Article 14.

The Government of Mexico argues that the submitters failed to provide reliable evidence demonstrating the character of the organizations they say they represent, since they did not supply any information regarding the incorporation particulars of the civil associations they purport to represent nor did they provide the by-laws of such associations. The Government of Mexico further contends that the provisions of Article 14(2)(a) of the NAAEC are being contravened, for the submitters have failed to demonstrate that the facts alleged constitute a direct transgression of the rights of the civil associations they purport to represent. It asserts that it may not be construed from the documentation presented by the submitters that the authority might have issued any resolution affecting their rights. The Government of Mexico asserts that the submitters did not exhaust the remedies available under the Mexican legislation and that, only one of them, the Comité para la Protección de los Recursos Naturales, A.C., availed itself of the popular complaint recourse, which does not in itself constitute an administrative recourse. Finally, the Mexican environmental authorities have pointed out that there is a lack of consistency between the issues raised in the submission and the objectives of the NAAEC, since the submitters failed to establish the necessary relationship between the alleged ecological damage to the flora and fauna of the Paraíso Reef and the also alleged violations to environmental laws.

B. SCOPE AND MAGNITUDE OF THE PROJECT

The Government of Mexico maintains in its response that “the premises of Submitters’ arguments are so seriously flawed as to distort the true nature of the matters at issue:

- [The Submitters] consider that environmental authorities should have undertaken an assessment of the environmental impact statement, which is referred to as ‘integral’, regarding the Concession granted by the SCT, as it appears from the second paragraph of Item III.4 of the submission.
- [The Submitters] believe that the project that is being carried out offshore in ocean waters is the same as that which could in the future be authorized onshore, as is the case for the port terminal and, on the other hand, they assert that there are onshore works which have already been authorized without the corresponding environmental impact statement having been previously filed, which is incorrect as made clear hereinafter.

- [The Submitters] consider as ‘onshore works’ the installation of a concrete manufacturing facility which they unduly refer to as ‘concrete manufacturing plant project.’”

The Government of Mexico maintains that “the port terminal comprises distinct projects; the project which involves the construction and operation of the pier complies with environmental impact requirements pursuant to the Environmental Impact Statement for the ‘Cruise Ship Pier in Cozumel, Quintana Roo’ project, presented in August, 1990 [EIS-90].”

The Government of Mexico argues that “the authority in charge of evaluating the effects of the work for strictly environmental purposes, did not regard the Concession as contemplating a comprehensive or global project.” When it reviewed the report [EIS-90], Mexico asserts, “it was only possible to evaluate the environmental impact of the works planned and authorized by the SCT. In 1990, the only such work was the construction of the pier, which was itself amenable to evaluation. From that year on, the environmental authority warned that the environmental impacts of any works constructed on land would also have to be evaluated as soon as these were authorized by the SCT.”

The environmental authorities add that “this warning shows that the Mexican environmental authority, at no time, attempted to elude their responsibility, nor did they avoid complying with the provisions of the applicable laws; on the contrary, it was always intended to subject any environmental effects likely to be generated by the Consortium H project to stringent controls. It is worth mentioning that in 1993 — three years after the EIS-90 — the SCT granted a Concession to Consortium H for the construction of a terminal in accordance with Article 11.16, section IV. 20, 21, 22, 23, 36 and the Sixth Interim Article of the Law of Ports in force. From the time of its granting the Concession implied a non-specific permission to undertake onshore works bordering upon the pier; however, as of today [27 March 1997] the SCT has not granted any specific authorization to undertake any referred-to works and, in any event, prior to their commencement such works will have to get an environmental impact assessment which as of today [27 March 1997] has not been granted. The Concession granted by the SCT is only a general authorization which is subject to conditions (amongst which there are environmentally related conditions); it is not an unrestricted authorization to undertake the works, since the involved Ministry only takes into account those aspects related to maritime communications when granting it, while the responsibility for evaluating the environmental effects of the Concession falls upon the environmental authority”.

In regard to the onshore works, the Mexican Government also claims that “since construction has not begun, the Submitters’ position is specious - they purport to demand an environmental impact report for works that have not yet been authorized.”

With regard to Article 28 of the LGEEPA, the Government of Mexico claims that the Article contains two conditions, and that “in the present matter, considering the type of works to be undertaken through the Concession, the condition provided in the first paragraph of Article 28 of the Environmental Law was met, since these works do not constitute use of natural resources as described in the second paragraph of this Article.”⁷ The Government also claims that “the second paragraph of Article 28 of the Environmental Law, referring to the use of natural resources, mentions only works or activities that use as primary raw material animal species, forest resources, aquifers, or subsoil, or uses that require the direct exploitation of

⁷ The second paragraph of Article 28 states that “when an evaluation of the environmental impact of works or activities that are designed to develop natural resources is involved, the Ministry shall request the interested parties to include in the corresponding environmental impact report a description of the possible consequences of these works or activities on the relevant ecosystem, considering the ecosystem as a whole, and not only the resources to be developed.”

these resources.” In other words, Mexico asserts that its “conduct complied literally with Article 28 since the Concession’s purpose is not the use of natural resources. Thus, the second paragraph of Article 28 does not apply.”

In closing, the Mexican authorities refer to Article 28 of the LGEEPA and point out that: “the works authorized to [Consortium H], through the Concession granted by the SCT, essentially encompass the construction, operation and exploitation of a cruise ship pier in the port terminal and, therefore, the said works do not constitute an exploitation of natural resources in the terms referred to, since, even though they are physical works located at sea, they do not imply the exploitation of the ocean either as a raw material or as a resource per se given that the Concession does not allow the corporation to carry on either extracting activities or those related to the direct exploitation of marine resources. In the case at issue, the use that might be made of ocean waters relates to the role these play as general waterways and, in any event, the activities to be undertaken are regulated under the specific regime of maritime communications”.

1. Related Projects/Cumulative Impacts

Mexico responds to the Submitters’ claims regarding the relation of the “Pier Project” to a real estate development by claiming that “there is no real estate development as suggested by the Submitters, and that the onshore works referred to by the Submitters constitute only complementary elements of the pier described in the 1993 Concession.”

C. AUTHORIZATIONS AND EXTENSIONS

The Government states that, “when it drafted its response to the Submission (on March 27, 1996), the SCT had only authorized work to be started on the Pier Project Works,” and that “the remaining works which, in accordance with the Concession, could in the future be authorized by the SCT, do not, to date (March 27, 1996), have an environmental impact report, since the Ministry has not yet authorized such works.”

The Mexican Government maintains that the Concession granted for the construction, operation, and development of the port terminal “remained subject to various conditions established in the enabling agreement, and that these conditions include some that are clearly subject to a condition precedent; for example, the First Condition.”⁸ Thus, “the time frame for presenting the environmental impact report for the work on land [established by sub-paragraph e) of the Fifth Condition of the Concession] has not yet expired, since, as the Concession provides, the proceeding in question is subject to a condition precedent with regard to the activities permitted by the Concession.”

The Government of Mexico claims that “it is inaccurate to state that, when the environmental authority issued the third extension of the authorization of the EIS-90, it should have considered that the subject of the evaluation had been modified, since the subject of the evaluation of the EIS-90, the project, ‘Pier for Cruise Ships in Cozumel, Quintana Roo’, has not changed. The authority evaluated the pier project in 1990 when the environmental impact report was approved. On April 13, 1994, the date on which the third

⁸ The third paragraph of the First Condition of the Concession states: “Consortium H undertakes to acquire the land mentioned in Antecedent IV and to donate this land to the Federal Government, within six months from the date of the granting of the title. This period will be extended if, through no fault of Consortium H, there is a delay in the state procedures for perfecting title.”

extension was granted, the environmental authority continued to refer to the authorization of the pier project.”

The Government’s response indicates that the authority’s actions “have been, and continue to be, consistent, because, the authority in charge of evaluating the effects of the work for strictly environmental purposes could not have accorded to the EIS-90 the scope of a global or comprehensive project, since, when it reviewed the report in 1990, it was only able to evaluate the environmental impact of the works planned and authorized up to that point.”

D. LOCATION OF THE PROJECT

The Government of Mexico alleges that “the pier construction project has nothing to do with the subject matter” of the Decree that declared a Refuge Zone for the protection of marine flora and fauna of the Western Coast of the island of Cozumel, since this Decree “was published in the Official Gazette of the Federation on June 11, 1980, based on findings by the now defunct Fisheries Department detecting a marked diminution in marine fauna and flora,” due to commercial and underwater/sport fishing “and therefore proposed to prohibit these activities.”

E. LAND USE

With respect to the Submitters’ claims regarding the project’s compliance with existing land use norms, the Government of Mexico states in its response that: “the authority’s acts do not contravene the legal authorities cited, the Directive,⁹ or the Refuge Zone Decree, since the Plan for the Uses and Reserves of Cozumel, Quintana Roo (island), demonstrates that the project’s land development falls within lot three, a lot designated for high-density tourist use.”

According to the Mexican Government, both the Concession and the environmental authorization “comply with land use norms, provided that the construction of the pier for tourist cruise ships is carried out in an area specifically designated for tourist use. In addition, Consortium H timely requested from the Municipal Council of Cozumel, Quintana Roo, a construction permit for this pier. This was granted by the Municipal Council, in strict compliance with norms governing the function and jurisdiction of the municipal authority.”

For the Government of Mexico, it is clear that “with regard to this matter, the Federal, State and Municipal authorities did not violate environmental law, specifically, those norms contained in Title I, Chapter V, of the Environmental Law, and Articles 10 and 16 of its Regulation. Rather, they complied strictly with these; although there is no doubt that these legal norms refer to human settlements and land use, there is also no doubt that the Municipal Council of Cozumel, Quintana Roo, authorized the construction of the pier for cruise ships in compliance with the General Law of Human Settlements and the relevant Municipal Plans and Programs. Moreover, within the Development Plan of this Municipality, the zone in which construction is being carried out is designated for ‘High Density Tourism’.”

Furthermore, the environmental authorities assert that “the Federal Government has never breached Article 13 of the Regulation, nor its corresponding Directive, and much less the Refuge Zone Decree’s prohibition on large or small-scale commercial fishing, underwater or sport fishing, or fishing for any type

⁹ Instructions for developing and presenting an Environmental Impact Statement of the general type referred to in Articles 9 and 10 of the RIA.

of marine flora or fauna, except fishing for scientific investigation. As can be noted, no provision of this decree refers to land use.”

F. SPECIES RESCUE PROGRAM

The Mexican environmental authorities state that “the Species Rescue Program imposed as Condition 24 on Consortium H is intended primarily to preserve the Paraíso coral reef, and therefore does not in any way contravene the Refuge Zone Decree. The term ‘rescue’ in the title of the program must obviously be understood as synonymous with the protection and safeguarding of marine species. It should be made clear that the construction of the pier could have, according to the evaluation made in the EIS-90, some negative effects on isolated coral patches outside the Paraíso coral reef. For this reason, it was decided to require the company to develop a protection program that would permit the relocation and replanting of corals in a favorable habitat, in order to mitigate any possible harm to these marine species.”

The authorities also note that “to serve as relocation sites, sites within the Paraíso coral reef with favorable characteristics for the replanted coral species were chosen. For these reasons, this program cannot be held to violate the Refuge Zone Decree. Indeed, the project does not cause any damage whatsoever to the coral reef, since the sea bed below the site designated for the construction of the pier is composed of sand terraces without reefs, as shown on page 18 of the technical report on the construction project and the operation of the cruise ship pier in Cozumel, Quintana Roo, prepared by the CINVESTAV-IPN—Mérida Unit, July 1994.”¹⁰

For these reasons, the Mexican Government concludes that “it is not true that the authority, through the species rescue program, has undertaken fishing or fish collection activities; but rather relocated these species in order to protect them.”

¹⁰ Reference to the *Technical Report on the Construction and Operation of the Cruise Ship Pier in Cozumel, Quintana Roo*, a project produced by the CINVESTAV (Research and Advanced Studies Center of the National Engineering Institute, Mérida Unit), July, 1994.

III. SUMMARY OF ALL OTHER RELEVANT FACTUAL INFORMATION

All the relevant factual information gathered by the Secretariat for the development of this factual record is presented in section “IV. Facts Presented By The Secretariat With Respect To The Matters Raised In The Submission”. All this information is also presented in chronological order in Annex II. All the documents that contain the relevant factual information are available for consultation in the office of the CEC Secretariat in the city of Montreal.

IV. FACTS PRESENTED BY THE SECRETARIAT WITH RESPECT TO THE MATTERS RAISED IN THE SUBMISSION

This section of the document contains facts that date as much from before as after the entering into force of the NAAEC. Facts that predate the entering into force of the NAAEC are included only as background and context for the facts that took place after January 1, 1994. Their inclusion in this document conforms to Council resolution No. 96-08 which stipulates: "In examining allegations of a failure to effectively enforce law, the Secretariat will be able to include facts that predate the 1st of January 1994 in the factual record".¹¹

A. SCOPE AND MAGNITUDE OF THE PROJECT

The scope and magnitude of the "Cruise Ship Pier Project in Cozumel, Quintana Roo" represents a central element of the different views expressed by the Submitters and the Government of Mexico. The Mexican civil associations argue that the project is of a larger magnitude than that claimed by the company and evaluated by the environmental authorities. In its response to the submission, the Mexican authorities assert that the "Cruise Ship Pier Project in Cozumel, Quintana Roo" is a single and independent project that stands apart from the land side development which, with the SCT's permission, may be constructed by Consortium H.

1. "Pier" and "Port Terminal" Terminology

In its reply, the Mexican Government maintains that "in evaluating the environmental impact report (EIS-90) in 1990, the environmental authorities considered the term 'pier' by reference to its existing uses, and to the invitation for bids issued by the SCT in 1989 for the construction of 'piers for tourist cruise ships, tourist marinas, shelter ports, piers and specialized cargo installations'." In other words, according to the Mexican authorities, at the time of the invitation for bids and of the EIS, the term "pier" was "used with reference to works carried out directly at sea, whose only purpose was to ensure that vessels could moor."

For this reason, the environmental authority claims that "there is some confusion over the terms 'pier' and 'port terminal'." In addition, Mexico points out that "the term 'pier' was only formally integrated into Mexican law in 1993, when the official standard for maritime terminology (NOM-SCT-4-002-1993) was promulgated." This defines pier as "a work extending out to sea that may be used within a port to facilitate the loading or discharge of cargo and passengers, and which may serve as an installation for the mooring of ships." Mexico also notes that the term "Terminal," on the other hand, was only introduced on July 19, 1993, when the Law of Ports was enacted. This defines a terminal as "a unit inside or outside a port, comprising works, installations, and surface areas, including a water zone, which permits the relevant port operations to be fully performed."

The Mexican Government concludes in its response that "the confusion [over the terms of pier and terminal] arises precisely because the Concession granted to Consortium H was issued after the enactment of the Law of Ports, and therefore, in strict compliance with this law, the term 'terminal' was used, despite the fact that the invitation to bid issued in 1989, prior to the enactment of this law, referred to the term 'pier' by reference to the uses in effect at that time."

¹¹ The text of Council resolution No. 96-08 is available in the database of correspondence on the effective enforcement of environmental law on the CEC's web page on the Internet: <http://www.cec.org>.

2. Project description in accordance with Mexican environmental law

Part II of Article 10 of the RIA, in force since June 8, 1988, establishes the minimum information which an EIS in the “General Modality” must contain with respect to the description of a project.¹²

The directives¹³ for developing and presenting Environmental Impact Statements in the General Modality (to which Articles 9 and 10 of the RIA refer) establish that, in the description of the work or projected activity, “the proponent must present general information about this work or activity, in order to produce a general description. Additionally, the proponent should provide specific information about each stage, in order to obtain the necessary elements for evaluating the impact (positive or negative) of the work or activity.”

In the section on “Related Projects,” the directive states that the proponent “must explain if other projects will be required in the development of the work or activity.”

In the section entitled “Future Growth Policies,” the directive states that the proponent must “explain in general terms the strategy to be adopted by the company, indicating the extensions, future works, or activities that are planned for the area.”

a) Relevant facts prior to the entering into force of the NAAEC

1. The “Instructions for the Concession for Piers for Tourist Cruise Ships and Specialized Cargo Terminals” published by the Mexican Port Authority (PUMEX) in September of 1989 and employed by Consortium H to participate in the bidding contest set up by the SCT (on September 4, 1989) for the construction of piers for tourist cruise ships, contain the following definition:

“Piers for tourist cruise ships are defined as a grouping of maritime and land installations intended for the mooring of vessels and for the provision of passenger services to tourist cruise ships.” The Instructions further state that “the following are integral parts of tourist cruise ship piers: a) installations necessary for the berthing and mooring of cruise ships; b) land areas designated for construction and installations necessary to attend to cruise ship passengers and for locating services to ensure their comfort; c) parking areas for public and private vehicles used to transport passengers.”¹⁴

¹² This information, according to Part II of Article 10 of the RIA, must include a “description of the work or planned activity, starting with the selection of the site for the work and the development of the activity; the surface area required; the construction project; the erection and operation of the installations to be developed; the type of activity; the anticipated volume of production; necessary investments; the type and quantity of natural resources to be developed at the construction stage and during performance of the work or development of the activity; a waste management program, both during the construction and installation phases as well as during the operation or development of the activity; and a program for abandoning the works or ceasing activity.”

¹³ Instructions for developing and presenting an Environmental Impact Statement of the General type to which Articles 9 and 10 of the RIA refer.

¹⁴ Instruction for the *Concession of Piers for Tourist Cruise Ships and Specialized Cargo Terminals* published by the Mexican Port Authority (PUMEX) in September, 1989.

2. The Environmental Impact Statement in the General Modality for the construction of a Cruise Ship Pier in Cozumel, Quintana Roo, presented by Consortium H in August 1990 (EIS-90)¹⁵, to which Resolution 410-3088 (the environmental authorization) refers, contains the following description of the project:

The planned pier consists of a footbridge 257.2 meters long and 16 meters wide, supported by prefabricated reinforced concrete elements, allowing access to a two-berth pier 324 meters long, with exterior depths of 12 meters and interior depths of 10 meters, capable of respectively accommodating vessels of up to 320 meters and 260 meters. The pier consists of a platform 160 meters long and two mooring piers, linked by a footbridge supported by equally spaced reinforced concrete elements made from prefabricated materials. The pier will have a covered footbridge to protect passengers from the sun and rain, which can connect directly with the entry and exit doors of the vessel. The pier will offer drinking water, electric power, lighting, telephone, garbage collection, and fire fighting services.

In the “Related Projects” section of EIS-90, Consortium H states that:

In order to complement the cruise ship pier project, it is planned to reorganize the service presently offered to vessels by modifying the terminal installations currently operated by the Port Services of Cozumel, including relocating the Ferry Terminal and the related services necessary to attend to tourists’ needs efficiently.

In the “Future Growth Policies” section of EIS-90, Consortium H states that:

According to market studies, it is estimated that by 2010, eight vessels per day will arrive in Cozumel; this implies that the four vessels without pier space will have to be serviced by tenders, thus resulting in inconvenience for elderly tourists, who may be unwilling to disembark without fixed installations. It is estimated that part of this traffic could be channeled toward installations to be developed on the mainland.

3. On November 29, 1990, the General Directorate of Urban Development of SEDUE issued a technical opinion¹⁶ stating that, “in accordance with the Declaration of Uses and Reserves of the municipality of Cozumel, the proposed project lies in two zones: a) a maritime zone designated as a marine ecological reserve (it will thus be the responsibility of the Subministry of Ecology to outline the feasibility of constructing marine installations); [...] and (b) property on dry land which, although this is not noted in the EIS, should contain passenger terminal services that adequately resolve consolidation problems [...].” The opinion recommends that all information regarding installations on land be identified.

¹⁵ Environmental Impact Statement of the General type for the Construction of a Cruise Ship Pier in Cozumel, Quintana Roo, prepared by Consortium H, August 1990.

¹⁶ Document No. 310000-1905 to the Director General of Ecological Norms and Regulation, signed by the Director General of Urban Development of the SEDUE, November 29, 1990.

3. Related Projects/Cumulative Impacts

The Submitters maintain that the “Cruise Ship Pier Project in Cozumel, Quintana Roo” is related to a real estate development not identified by the company in the EIS-90. The Submitters claim that this omission prevented the authorities from evaluating the cumulative environmental impacts of the project.

The environmental authorities state that “there is no real estate development as suggested by the Submitters, and that the onshore works referred to by the Submitters constitute only complementary elements of the pier described in the 1993 Concession.”

a) Relevant facts prior to the entering into force of the NAAEC

1. On August 10, 1990, in a PUMEX document signed by the Minister of Communications and Transport, the SCT approved a request to Consortium H to build and operate a passenger terminal and cruise ship pier.¹⁷ The document states that “the project is complemented by a 43.3 hectares real estate and tourist development.”

2. In the “Related Projects” section of the EIS-90¹⁸, Consortium H states that: “in order to complement the cruise ship pier project, it is planned to reorganize the service presently offered to vessels by modifying the terminal installations currently operated by the Port Services of Cozumel, including relocating the Ferry Terminal and the related services necessary to attend to tourists’ needs efficiently.”

3. On July 8, 1992, Consortium H requested the support of the President of the Republic¹⁹ to obtain the Concession Contract from the SCT, stating that “on July 1, 1990 FONATUR informed us that our real estate project adjacent to the new cruise ship pier had been authorized.”

4. On May 24, 1993, Consortium H again stated to the SCT that the pier was only part of the Puerta Maya project, and described the first stages of this project.²⁰ The company committed to building the “port area” installations (terminal building, parking, warehouses and green areas, sanitary services, etc.), and referenced a document²¹ “in which the HASA Group of Spain will build ‘turnkey’ the first stage of the Puerta Maya project, which consists of the Port area, Village, Concessioned Federal Zone infrastructure, and the new cruise ship pier”.

b) Relevant facts subsequent to the entering into force of the NAAEC

1. Various videotapes in which representatives of Consortium H refer to the scope of the Puerta Maya project were obtained. In a 1994 Televisa newscast,²² the Director of Projects and Construction of Consortium H declared that “The first stage [of the Puerta Maya project] consists of construction of the cruise ship pier, a means of access to it and its port area, a maritime federal zone on land, with

¹⁷ Authorization for Port Infrastructure Investment signed by the Executive Director of the PUMEX Planning Department and approved by the SCT Secretary on August 10, 1990.

¹⁸ Environmental Impact Statement of the General type for the Construction of a Cruise Ship Pier in Cozumel, Quintana Roo, prepared by Consortium H, August 1990.

¹⁹ Letter of the Director General of Consortium H to the President of Mexico, July 8, 1992.

²⁰ Letter from Consortium H to the Head of General Coordination of SCT Port Authorities, May 24, 1993.

²¹ The Secretariat has not obtained this document.

²² Minute 30:30 of tape #1.

infrastructure, and a village, which includes services such as shops, restaurants, bars, a hotel zone, etc.. The second stage includes a golf club, with villas, and a clubhouse; a third stage includes a high-rise luxury hotel; and the fourth stage includes a world-class spa.”

The President of Consortium H mentioned in another interview with a Televisa reporter that “the Puerta Maya project” not only “deals with cruise ships”, but “plans to construct hotel and condominiums, in order to attract tourism unrelated to cruise ships.” He said in the same interview that “we will build condominiums and hotels”, which will be occupied “thanks to the Puerta Maya project.”²³

2. On February 16, 1995, Consortium H presented to the INE a “Master Plan describing the number and type of tourist service installations that the Federal Tourist Development Project [Puerta Maya] will offer and provide.” This document states that the EIS and the additional information related to “this Project” authorizes only “what is set out in the first and second conditions” (of the environmental authorization), and requests that the environmental authority indicate if a Preventive Report²⁴ is the appropriate procedure for authorizing “the construction of buildings of any type or infrastructure on dry land supporting the Pier.”²⁵

3. On May 23, 1995, the INE replied to Consortium H, stating that, for the “construction of any type of support infrastructure on dry land for the Cruise Ship Pier in Cozumel, it would be necessary to present an Environmental Impact Statement, rather than a Preventive Report.”²⁶

4. On May 14, 1996, Consortium H presented an Environmental Impact Statement, for the “Puerta Maya” Project (EIS-96) in Cozumel, Quintana Roo.²⁷ The company declared that it submitted the Environmental Impact Statement “...in order to comply with [the INE document] D.O.O. DGNA-2137, of May 23, 1995”; this document consisted of the Environmental Impact Statement in its General Modality for the “Real Estate Development project called ‘Puerta Maya’,” which includes “the construction and operation of a terminal, a port area designed to provide the services for which this concession was granted, and the infrastructure necessary for tourism.”

²³ Minutes 1:20:50 and 1:26:20, respectively, of tape #1.

²⁴ The “Preventive Report”, according to article 7 of the RIA, is the document that must be presented “[w]hen any person that intends to carry out work or activity requiring prior authorization pursuant to article 5 of the Regulation [RIA], deems that the environmental impact of the work or activity will not cause ecological imbalance, or exceed the limits and conditions set forth in the technical ecological norms and regulations issued by the Federation for the protection of the environment, ... prior to beginning such work or activity concerned. After analyzing the report, the Department [SEMARNAP] shall inform the party as to whether or not the presentation of a environmental impact statement is required, and of the form in which it must be formulated, and shall inform them of current technical ecological norms applicable to the work or activity concerned.”

²⁵ Letter from Consortium H to the Director General of Management and Environmental Impact of the INE, February 16, 1995.

²⁶ Document No. 2137 of the General Directorate of Environmental Norms, May 23, 1995. The document makes no mention of the “Federal Tourist Development,” whose “Master Plan” was submitted by the company on February 16, 1995.

²⁷ Letter from Consortium H to the General Directorate of Environmental Norms, May 14, 1996, with receipt acknowledged by the environmental authority on May 17, 1996.

The section on related projects of EIS-96²⁸ states that “the principal project related to the development of this project is the construction and operation of the ‘Cruise Ship Pier in Cozumel, Quintana Roo’, presently under construction, and situated 350 meters South of the existing ‘Tourist Pier’.”

With regard to the description and extension of the project, the company states:

At the center of the property, the Plan provides for a Port Area with a surface area of 15,000 sq. meters, of which 1,276 sq. meters may be built upon, with two reception areas on two piers on the quay at both ends of the property. These will be linked by a pedestrian walkway and a distribution area; access to the complex from the inter-city traffic site will be provided by a square and an internal vehicular circulation system, with parking for visitors. At the peripheries of the property will be located the mixed use areas, comprising a Tourist Use area of 25,000 square meters and a Commercial Use area of 20,000 square meters, including one to three story buildings to house guests in transit and shops of various types, as well as recreational, administrative, medical, and parking services.²⁹

B. AUTHORIZATIONS AND EXTENSIONS

1. Authorizations

According to the Submitters, the environmental authority failed to apply effectively Mexican environmental law by authorizing work to start on the “Port Terminal Project”. Submitters point out that the First Condition of the Concession which the company received from the SCT on July 22, 1993, required it to construct a port terminal that included, in addition to the pier, “a passenger terminal building, a means of access from the terminal to the tourist cruise ship pier, a parking lot, and a public access road to the Chan-Kanaab highway.”³⁰

The Submitters also allege that the Law of Ports, enacted on July 19, 1993, and which governs the Concession,³¹ defines a port terminal as “a unit established inside or outside a port, comprising works,

²⁸ *Environmental Impact Statement for the “Puerta Maya” project in Cozumel, Quintana Roo*, presented by Consortium H on May 14, 1996.

²⁹ A complete list of the works which comprise the architectural program of the project “Puerta Maya” is included in the *Environmental Impact Statement for the “Puerta Maya” project in Cozumel, Quintana Roo*, presented by Consortium H on May 14, 1996.

³⁰ The First Condition of the Concession granted by the Federal Government, through the Ministry of Communications and Transportation, to Consortium H states: “Purpose of the concession—‘The Ministry’ grants to ‘Consortium H’ a concession for the use and development of an area of 51,465.297 square meters of the maritime federal zone of the port of Cozumel, Quintana Roo, for the construction, operation, and development of a pier of the public port terminal for tourist cruise ships. Consortium H agrees to build, as part of the port terminal, in an area of 15,439.314 square meters of the land referred to by Antecedent IV, which is presently owned by the Government of the State of Quintana Roo, and 4,704.747 square meters of the land maritime federal zone, a terminal building for passengers, a means of access from the terminal to the cruise ship pier, a parking lot, and a public access road to the Chan-Kanaab highway, in accordance with a project to be approved by ‘the Ministry’”.

³¹ The Law of Ports defines a terminal in Section IV of Article 2 as “a unit inside or outside a Port, comprising works, installations and surface area, including a water zone, which permits the relevant port operation to be fully performed.”

installations and surface areas, including a water zone, which permits the relevant port operations to be fully performed.”

Consequently, the Submitters claim that the sum total of the works that make up the “Port Terminal Project” had been publicly known since July 1993, and must have been known by the environmental authority. They allege that the authorities “should not have authorized work to start”³² [on August 12, 1994] without having evaluated as a whole the works which comprise the ‘port terminal’ project.”

The Submitters claim, moreover, that the authorization to start work on the “Cruise Ship Pier Project”, violated subparagraph (e) of the Fifth Condition of the Concession, since it provides that “no later than three months from the date of the granting of this Title [July 22, 1993], Consortium H must present the Ministry with an overall plan for the works. This plan must contain the following information: (...) e) Report on the environmental impact of the construction and operation of the Terminal.”

The response submitted by the Government of Mexico on March 27, 1996, states, first, that the onshore development of the port terminal [which dates back to the 1993 Concession] “has not been authorized”. Second, it points out that “to argue, as the Submitters do, that with the enactment of the Law of Ports [on July 19, 1993] the object of the environmental impact report of the EIS-90 had changed, (since the SCT authorized Consortium H to build a port terminal and not a pier), is to fail to take into account that the object of the environmental impact report of the EIS-90 is, and was, the construction of a pier.”

The Government claims in its reply that the Concession granted in 1993 by the SCT for the construction of a port terminal “logically embraces the construction of the pier and also includes the construction of specific land works, but that, with respect to these works, the concession makes their authorization contingent upon donating to the Federal Government the tracts of land occupied by the works (First Condition of the Concession),³³ and upon the approval of the relevant environmental impact report.

The Mexican Government also contends that “the environmental authorities have already assessed the effects of the pier construction; however, until now, they have not approved the undertaking of the onshore works which are connected to the 1993 Concession, because the Condition regarding the real estate property transfer herein above mentioned has not yet been fulfilled. It must be mentioned that the environmental authorities have already rejected a preventive report submitted by the corporation, and made it clear to the promoters that they have to submit an environmental impact statement of the ‘general type’ and not only the said preventive report, but that, it would also be necessary that they first fulfill the Condition requiring the donation of the lands, where the terminal is to be built, to the Federal Government”. It also alleges that “from the issues pointed out, it follows that the environmental authorities have acted according to law and that it would be absurd to pretend that they again assess the pier construction works, given that the 1993 Concession was granted for a port terminal. The construction of the pier has already been assessed and is under way. What the environmental authorities must do in the future, in order to comply with their duties, is to assess the environmental impact statement of onshore works, if, indeed, the corporation fulfills the Condition established in the respective Title, in order for construction to be allowed.

³² Document No. 7853 of the General Directorate of Environmental Norms, notifying Consortium H that “construction on the project may commence”, August 12, 1994.

³³ The third paragraph of the First Condition of the Concession states: “Consortium H undertakes to acquire the land mentioned in Antecedent IV and to donate this land to the Federal Government, within six months of the date of the granting of the title. This period will be extended if, through no fault of Consortium H, there is a delay in the state procedures for perfecting title.”

It must be made clear, in any event, that the referenced onshore works are merely the elements that complement the pier under the terms of the 1993 Concession and, in no way, do they constitute a distinct real estate development as claimed by the submitters”.

In other words, the Mexican Government states that, until March 27, 1996, the onshore works of the port terminal had not been authorized or evaluated for environmental impacts, since such a review was subject to fulfillment of the First Condition of the Concession granted by the SCT.

The environmental authorities state in their reply that “the authorities had already rejected a Preventive Report presented by the company [for the construction onshore], indicating that the Company had to present an environmental impact report in the General Modality, and not a Preventive Report, and also that it was first necessary for the company to donate to the Federal Government the tract where the terminal would be built.”

With respect to the Fifth Condition of the Concession, the authorities state that “the period for presenting the environmental impact report for the onshore works [three months calculated from the granting of the Concession] has not yet expired” [as of March 27, 1996], and that this period will begin to run once the Company has complied with the First Condition of the Concession.

The Government responds that “the environmental authority’s duty in performing its function is to evaluate the environmental impact of the construction on land to determine whether the company has complied with the condition established in the relevant provision as a requirement for starting work.”

a) Relevant facts prior to the entering into force of the NAAEC

1. On August 10, 1990, SCT approved, in a PUMEX document signed by the Minister of Communications and Transport, the Concession Application of Consortium H to construct and operate a passenger terminal and cruise ship pier.³⁴

2. On December 19, 1990, SEDUE informed Consortium H that the project entitled “Cruise Ship Pier in Cozumel” had been authorized, subject to 64 conditions that the Corporation will have to fulfill prior to and during the construction and operation of the pier. Of these, 12 relate to aspects of a legal and administrative nature, one has to do with the pier site, 15 deal with the protection and conservation of marine species, 18 refer to building issues, 13 relate to the operation stage, four deal with waste management and one is of general applicability. Condition Number 19 provides that “the construction on dry land of any type of building or infrastructure for the pier is strictly prohibited, since the only construction authorized is that indicated in the first condition of this document, which was explicitly described in the Environmental Impact Statement. The quantity and type of installations needed for the pier to render its intended services were not mentioned in this document, and are thus not subject to this authorization.”³⁵

3. On May 11, 1993, the Government of Quintana Roo wrote to Consortium H that “it approves the Puerta Maya tourist project,” and that instructions have been forwarded to the Minister of Public Works

³⁴ Authorization for Port Infrastructure Investment, signed by the Executive Director of the Planning Committee of PUMEX and approved by the Secretary of SCT, August 10, 1990.

³⁵ Resolution 410-3088 of the General Directorate of Ecological Norms and Regulation of the Subministry of Ecology of the SEDUE, December 19, 1990.

and Urban Development of the State Government to grant the authorization immediately” to “the Puerta Maya Project in the Land/Maritime Federal Zone,”...“so that construction may start as soon as possible.”³⁶

4. On July 22, 1993, the SCT granted to Consortium H a Concession for the construction, operation, and development of a public port terminal for tourist cruise ships in Cozumel, Quintana Roo.³⁷ Condition One of the Concession states: “Purpose of the concession—The ‘Ministry’ grants to ‘Consortium H’ a concession for the use and development of an area of 51,465.297 square meters within the federal maritime zone of the Port of Cozumel, Quintana Roo, to build, operate, and develop a public Port Terminal pier for tourist cruise ships. ‘Consortium H’ undertakes to build, as part of the Port Terminal, within an area of 15,439.314 square meters of the land referred to in Antecedent IV, which is presently owned by the Government of the State of Quintana Roo, and within 4,707.747 square meters of the maritime federal zone, a passenger terminal building, a means of access from the terminal to the pier, a parking lot, and a public access road to the Chan-Kanaab highway, as set out in a plan to be approved by the ‘Ministry’”.

5. Antecedent X of the Concession granted by the SCT to the company indicates that, “according to Provisional Article VI of the Law of Ports, ‘Consortium H’ has chosen that this concession be regulated, as to its granting, by the provisions of this law” [recently-enacted Law of Ports (1993)].³⁸

6. Antecedent VI of the Concession granted by SCT to the company on July 22, 1993,³⁹ states that on June 19, 1992, SEDUE “issued a favorable report regarding the environmental impact of the construction and operation of the port terminal for tourist cruise ships to which this Concession refers,” and adds that the Ministry of Social Development (SEDESOL) ratified this report on May 26, 1993. On the other hand, the Fifth Condition of the same Concession establishes that “within a period of not more than three months from the date of the granting of this title, ‘Consortium H’ must present to the ‘Ministry’ a construction plan which should contain the following documents : [...] e) Report on the environmental impact of construction and operation of the terminal.” On December 19, 1990, SEDUE issued a favorable environmental impact resolution⁴⁰ for the “Cruise Ship Pier Project in Cozumel, Quintana Roo”,⁴¹ and the

³⁶ Letter of the Government of the State of Quintana Roo to Consortium H, May 11, 1993. This communication responded to a letter sent by Consortium H, which confirmed the granting of a concession contract by SEDUE on December 31, 1986, to Inmobiliaria La Sol. The letter adds that the company “complied with each and every requirement imposed by SEDUE, now SEDESOL, the Government of the State, and the Municipality of Cozumel; the Master Plan having been approved, with the only pending requirement for receiving the definitive permit being the authorization” of the Government of Quintana Roo. The Concession granted by the SCT to Consortium H in Antecedent VII indicates that “Inmobiliaria La Sol, which belongs to the same business group as Consortium H, obtained from SEDUE on December 22, 1986, a concession title DZF-139/86 (file 53-21381), for the use and development of a surface area of 25,297.80 square meters of the maritime federal zone for exclusive use for recreation and multiple tourist services, in the location known as Playa Paraíso, in Cozumel, Quintana Roo.”

³⁷ Concession granted by the Federal Government, through the Ministry of Communications and Transport, to Consortium H, July 22, 1993.

³⁸ The Provisional Sixth Article of the Law of Ports establishes that “Physical or legal persons who have filed submissions under examination or who have fulfilled the prerequisites for obtaining the concession, permit, or authorization upon the enactment of this legislation may opt for their granting through the provisions of this law, or through the provisions of the laws of Maritime Commerce and Navigation and of General Means of Communication.”

³⁹ Concession granted by the Federal Government, through the Ministry of Communications and Transportation, to Consortium H, July 22, 1993.

⁴⁰ The environmental impact resolution is the document which, according to article 20 of the RIA, “[a]fter evaluating the environmental impact statement of the work or activity concerned, submitted in the appropriate form, the

environmental authorization was extended on June 19, 1992. The Secretariat of the CEC has no information from which to determine whether a favorable environmental impact resolution exists regarding the construction and operation of the port terminal issued by SEDUE on June 19, 1992, and ratified by SEDESOL on May 26, 1993, to which Antecedent VI of the Concession of SCT refers.

7. On December 23, 1993, the SCT informed Consortium H that it could begin “work on the construction of the tourist cruise ship pier, subject to the prior authorization of the Ministry of Social Development.” The document adds that construction of the works which are authorized “is subject to the provisions in the environmental authorization” issued by SEDUE in 1990, and states that “before starting construction of the land terminal adjacent to the pier, the draft project must be presented for approval by this Ministry (SCT), pursuant to the First and Fifth conditions of the Concession.”⁴²

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On August 12, 1994, INE informed Consortium H that “work on the [Cruise Ship Pier in Cozumel] Project may start.”⁴³

2. On September 13, 1994, the sale of land by the Government of the State of Quintana Roo to Consortium H was concluded through formal delivery and acceptance of the land. The donation of the land to the Federal Government in order to comply with the First Condition of the Concession remained pending.⁴⁴

3. On December 16, 1996, Consortium H contacted the General Directorate for Port and Merchant Marine Affairs of SCT to respond to its document dated July 22, 1993, in which SCT set out the requirements and procedures to formalize the donation to the Federal Government of a portion of the land acquired from the Government of the State of Quintana Roo [September 13, 1994]. Consortium H stated that “it had all of the documents to enable it to enter into the appropriate donation contract,” and requested that SCT designate “the place and date when the donation should take place.”⁴⁵

4. On December 20, 1996, INE through the General Directorate of Ecological Regulation and Environmental Impact, “authorized the Consortium for Development and Real Estate Promotion H, S.A. de C.V., to construct and operate the works referred to in the second paragraph, First Condition, of the Concession. These consist of: 1. Port area (passenger terminal building); 2. open space (access from

Department [SEMARNAP] shall formulate and [give notice of to] the interested parties, in which it may: I. [a]uthorize the work or activity to be carried out in the terms and conditions indicated in the corresponding statement; II. [a]uthorize the proposed work or activity to be carried out, on the condition that the project be modified or relocated, or III. [d]eny authorization.”

⁴¹ Resolution 410-3088 of the General Directorate of Ecological Norms and Regulation of SEDUE, 19 December 1990.

⁴² Document of the Concessions Directorate of the General Directorate of Ports and Merchant Marine of the SCT, December 23, 1993.

⁴³ Document No. 7853 of the General Directorate of Environmental Norms, August 12, 1994. The document warns that the works may be initiated “only when they develop in strict compliance with the provisions of Resolution 410-3088, as well as its 16 technical requirements.”

⁴⁴ Delivery and Reception deed for the above land by the Governor of Quintana Roo; the General Secretary of Government; the Municipal President of Cozumel; and the President of Consortium H.

⁴⁵ Letter of Consortium H to the Director General of Ports and Merchant Marine of the SCT, December 16, 1996.

the Terminal to the tourist cruise ship pier); and 3. parking (parking and public access road).”⁴⁶ The authorization was subject to six terms and seventeen conditions.

5. In the same document dated December 20, 1996, the INE informed Consortium H that “it did not authorize the construction of works for Tourist-Commercial use, contained in an area of 47,178.80 square meters referred to in the Environmental Impact Statement” [EIS-96].⁴⁷

6. As of February 10, 1997, according to information presented by Consortium H, the first condition of the Concession granted by the SCT had not been fulfilled. Consequently, the donation of the land had not taken place, the last requirement for fulfilling this First Condition. According to the Mexican environmental authorities, this condition must be realized before the Fifth Condition, subparagraph e) is operative [the period of three months from the granting of the Concession to present the environmental impact report for the Port Terminal].

2. Extensions

The Submitters claim that the various extensions granted by SEDUE and INE to the environmental authorization of the “Cruise Ship Pier Project in Cozumel, Quintana Roo” violate “the general principle of law that a non-existent act cannot be validly extended, since both the third and the fourth extensions were granted after the expiration of the periods of the preceding extensions.”

In response, the environmental authorities state that “with regard to the argument concerning the irregular character of the extensions, it should be pointed out that, even if these extensions were granted subsequent to the expiration of the relevant periods, Consortium H requested these extensions before the expiration of these periods.” The delays were incurred “as a result of the time required by the authority to verify completely the subject matter to be evaluated. These administrative delays in any case only prejudiced Consortium H; these circumstances are, in no way whatsoever, likely to cause environmental harm and they do not imply a lack of diligence on the part of the authorities in carrying out their control duties aimed at the preservation and conservation of the environment. It would be inconsistent, from an environmental standpoint, if, as a result of the time allowed having elapsed, the authorities were to issue value judgments with no sound support; this is why the time extensions resulted from the need to ensure that the environmental legal provisions were duly complied with and to guarantee the preservation of the ecological balance”.

The Government further responds that “if the authority did not offer immediate answers [to the extension requests], this was because it took all the time necessary to verify the fulfillment of the conditions during the development of the project.” It also maintains that “the extensions referred to were subject to a condition precedent with regard to the authorization to begin work. Accordingly, and since the approval of the EIS-90 was granted conditionally, it was necessary, in the opinion of the authority, to verify that the requirements established in the conditions were satisfied by the company.”

⁴⁶ Document No. 08168 of December 20, 1996, sent to Consortium H by the Director General of Ecological Regulation and Environmental Impact.

⁴⁷ Document No. 08168 of December 20, 1996 sent to Consortium H by the Director General of Ecological Regulation and Environmental Impact.

a) Relevant facts prior to the entering into force of the NAAEC

1. On November 12, 1991, the SEDUE granted an extension of one year, beginning on October 21, 1991, for the construction of the “Cruise Ship Pier Project in Cozumel.”⁴⁸ The purpose of the extension application was to obtain an extension of the deadline set in the EIS-90 authorization until the Concession was issued.

2. On June 19, 1992, the SEDUE granted an extension of one year beginning on June 1, 1992, for the construction of the “Cruise Ship Pier Project in Cozumel.”⁴⁹ The purpose of the extension application was to obtain an extension of the deadline set in the EIS-90 authorization until the Concession was issued.

3. On November 22, 1993, the General Directorate of Environmental Norms of SEDUE informed Consortium H that “work on the project cannot commence,” because “the environmental authorization has expired.”⁵⁰ The document explains that “to date, the work commencement notification required by Condition 62 has not been received, and since the extension was granted for one year, the extension has now expired.”

4. On December 3, 1993, Consortium H replied to the General Directorate of Environmental Norms that it “considered the favorable Environmental Impact Assessment to be fundamentally valid, since there had been no change in the circumstances under which it was issued, and that its expiration is only a temporal matter that can be wholly resolved through a request that we shall submit for your consideration when the SCT issues permission to begin work.”⁵¹

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On January 4, 1994, Consortium H requested from the General Directorate of Environmental Norms an extension of 180 days in the environmental authorization issued on December 19, 1990, for the “Cruise Ship Pier Project in Cozumel”.⁵² The corporation informed the environmental authorities that “on 22 December 1993 it received from the [SCT] an official notice bearing the reference OF.112.201.-2497/93, which allows us to start the construction works for the cruise ship pier.” In its document, the corporation points out that “for the purpose of fulfilling Condition Number 3 as provided under [Resolution] 410-3088 issued by this Branch on 18 December 1990, it be granted a 180-day extension in connection with authorization 410-02208 issued by the Branch under your responsibility”.

2. On March 7, 1994, the company renewed its request for an extension to the General Directorate of Environmental Norms, pointing out that if this body “thinks that the technical reasons and circumstances substantiating Resolution 410-3088 of December, 1990, are not valid, and consequently that the

⁴⁸ Document No. 410-02644, signed by the Director General of Ecological Norms and Regulation of the SEDUE, November 12, 1991.

⁴⁹ Document No. 410-02208, signed by the Director General of Ecological Norms and Regulation of the SEDUE, June 19, 1992.

⁵⁰ Document No. 010892 of the General Directorate of Environmental Norms to the President of the Administration Council of Consortium H, November 22, 1993.

⁵¹ Letter of Consortium H to the Director General of Environmental Norms, December 3, 1993.

⁵² Letter of Consortium H to the Director General of Environmental Norms, January 4, 1994.

construction of the tourist cruise ship pier should not proceed where officially authorized, it should inform the company of this, justifying its reasons with reference to Article 16 of the Constitution.”⁵³

3. On April 13, 1994, the environmental authority informed Consortium H that a new extension was granted for the authorization, in view of the fact that the company had the authorization of the SCT to commence work and that “the technical circumstances on which Resolution 410-3088 of December 19, 1990, was based had not changed.”⁵⁴ The transmittal does not mention the document sent by the General Directorate of Environmental Norms to the company on November 22, 1993, to notify the company that the department no longer had the authorization relating to Environmental Impact, since the one-year extension previously granted had lapsed.

4. On October 11, 1994, Consortium H requested a further one-year extension for the environmental authorization.⁵⁵ In this request, the company stated that it “has been complying with the terms established in the said official [Resolution] 410-3088, as it was exhorted to do under the last paragraph of the extension notice issued by this authority on 13 April of the current year”.

5. On December 16, 1994, the INE granted a new extension of the authorization for the Cruise Ship Pier for 365 calendar days from October 14, 1994.⁵⁶

6. On November 8, 1995, the environmental authority granted a new extension for the project authorization until October 14, 1996.⁵⁷ The purpose of the extension application was to continue carrying on the project works so as to be in a position to complete them and thus comply with the Concession. The environmental authorities exhorted the Corporation to “continue expediently abiding by the terms and the technical considerations established by this Institute [INE] for the project at issue”.

7. On July 2, 1996, Consortium H requested another extension of the authorization for a further 180 days, beginning October 15, 1996.⁵⁸ In its application, the Corporation requests an extension “in order for my client to be in a position to complete the works needed for the construction of the cruise ship pier in the Island of Cozumel, Quintana Roo, thereby complying with the Concession granted”

3. Extension to the environmental authorization of April 13, 1994.

The Submitters note that “in granting the third extension [of the authorization for the environmental impact report in April 1994], the authority must have considered the fact that, since 1993, with the enactment of the Law of Ports and the Concession, the object of the evaluation was no longer the same, nor were the environmental conditions and impacts which would be produced by the project.” According to the Submitters, “this means that evaluation of the subject of the concession should have been made in a comprehensive manner, without this resulting in the retroactive application of the Law of Ports.”

⁵³ Letter of Consortium H to the Director General of Environmental Norms, March 7, 1994.

⁵⁴ Document 2741 of the General Directorate of Environmental Norms, signed by the Director of Environmental Impact and Risk, April 13, 1994.

⁵⁵ Letter from Consortium H to the Director of Environmental Impact and Risk, October 11, 1994.

⁵⁶ Document 11230, signed by the Director General of Environmental Norms of the INE, December 16, 1994.

⁵⁷ Document 05029, signed by the Director General of Environmental Norms, November 8, 1995.

⁵⁸ Letter of Consortium H to the Director of Environmental Impact and Risk, July 2, 1996.

The Government of Mexico indicates in its reply that “it is inaccurate to state that when the environmental authority issued the third extension for the authorization of the EIS-90, the Directorate had to consider that the subject of the evaluation had been modified, since the subject of the evaluation of the EIS-90, (the Cruise Ship Pier Project in Cozumel), had not changed. In 1990, when the environmental impact report was authorized, the authority evaluated the pier project. On April 13, 1994, the date of the third extension, the environmental authority continued to refer to the same pier project authorization.”

The authority’s actions, according to the Government response, “are and have been consistent, because, as has been established, for strictly environmental purposes, the authority in charge of evaluating the effects of the work could not have accorded EIS-90 the scope of a comprehensive or global project, since when it reviewed the relevant report in 1990, it could only evaluate the environmental impact of the works planned and authorized up to that point.”

a) Relevant facts prior to the entering into force of the NAAEC

1. On August 10, 1990, SCT approved in a PUMEX document signed by the Minister of Communications and Transport, the request that Consortium H be granted a concession to construct and operate a passenger terminal and cruise ship pier.⁵⁹
2. On July 19, 1993, the Law of Ports was published in the Official Gazette of the Federation and entered into force. This includes the new concept of “Terminal”.⁶⁰
3. On July 22, 1993, SCT awarded to Consortium H a Concession to build, operate, and develop a public port terminal for cruise ships in the Port of Cozumel.⁶¹

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On April 13, 1994, the Director General of Environmental Norms granted an extension for environmental authorization, since Consortium H had “an authorization to commence work on the pier issued by the SCT,” and “the technical circumstances” on which Resolution 410-3088 of December 19, 1990, was issued “have not yet changed.”⁶²

⁵⁹ Authorization of Port Infrastructure Investment, signed by the Executive Director of the PUMEX Planning Commission and approved by the SCT Secretary.

⁶⁰ The Law of Ports defines a terminal in Section IV of Article 2 as “a unit inside or outside a Port, comprising works, installations and surface area, including a water zone, which permits the relevant port operation to be fully performed.”

⁶¹ The first Condition of the Concession which the Federal Government, through the Ministry of Communications and Transportation (SCT), granted to the Consortium for Real Estate Development and Promotion H, S.A. de C.V. states: “Purpose of the concession—the ‘Ministry’ grants to ‘Consortium H’ a concession for the use and development of an area of 51,465.297 square meters in the federal maritime zone of the Port of Cozumel, Quintana Roo, to build, operate, and develop a public Port Terminal pier for tourist cruise ships. ‘Consortium H’ undertakes to build, as part of the Port Terminal, within an area of 15,439.314 square meters of the land referred to in Antecedent IV, which is presently owned by the Government of the State of Quintana Roo, and within 4,707.747 square meters of the maritime federal zone, a passenger terminal building, a means of access from the terminal to the pier, a parking lot, and a public access road to the Chan-Kanaab highway, as set out in a plan to be approved by ‘the Ministry’.”

⁶² Document 2741 to Consortium H from the Directorate of Environmental Impact and Risk, April 13, 1994.

C. LOCATION OF THE PROJECT

Matters relating to the location of the “Cruise Ship Pier Project in Cozumel” are also significant considering the distinct views of the Submitters and the Mexican environmental authorities.

The Mexican civil associations argue in their submission that the project is situated “in an area subject to a special protective legal regime” decreed in June, 1980, to be a “refuge for the protection of marine fauna and flora on the West Coast of Cozumel Island, Q. Roo” (DZR).

The Submitters also point out that “with the enactment of the LGEEPA in 1988, the flora and fauna protection area referred to by the DZR is considered a protected natural area, whose specific purpose is to insure the rational use of ecosystems and their elements, and that consequently, the Federation, the States, and the Municipalities are required to comply with Articles 38,⁶³ 54⁶⁴, and 83⁶⁵ of the LGEEPA.”

The Mexican environmental authorities assert that the pier construction project has no relation to the subject matter of the DZR, since “the Refuge Zone Decree was published in the Official Gazette of the Federation on June 11, 1980, as a result of the detection by the now defunct Fisheries Department of a marked diminution in the flora and fauna of the Western Coast of the Island of Cozumel.” The reply of the Government states that “the sole purpose of the Decree is to prohibit commercial and sport/underwater fishing, since these activities affect the biological and ecological characteristics of the site.”

a) Relevant facts prior to the entering into force of the NAAEC

1. The West Coast of the Island of Cozumel, Quintana Roo, was declared a refuge zone for the protection of marine fauna and flora by a decree published on June 11, 1980, in the Official Gazette of the Federation. Article One states: “We hereby declare a refuge zone for the protection of marine flora and fauna on the West Coast of the Island of Cozumel, State of Quintana Roo. This zone extends from the high water mark and the isobar fifty meters out to sea, along the length of the island, starting at the customs pier and ending at the southernmost point, Punta Ce-Larain.”

⁶³ Article 38 establishes that “the Federation, federal entities, and municipalities shall establish protective measures for natural areas, to insure the preservation and restoration of the ecosystems, especially those that are the most representative and those that are subject to deterioration and degradation.”

⁶⁴ Article 54 establishes that “the protection areas for wild and aquatic flora and fauna shall be established in accordance with the provisions of this Law, of the Federal Hunting and Federal Fishing Laws, and of other applicable laws, in locations that contain habitats whose equilibrium and preservation depend on the assistance, transformation, and development of wild and aquatic flora and fauna species. In such areas, it is permissible to carry out activities related to the preservation, repopulation, propagation, acclimatization, refuge, and investigation of these species, as well as activities relating to education and diffusion of this subject matter. Likewise, the use of natural resources by communities that live there at the time of the issuance of the relevant declaration, or may in the future arise, according to studies undertaken, may be authorized. This use will be governed by ecological/technical norms and land use norms established in this declaration or in the resolutions modifying it.”

⁶⁵ Article 83 establishes that “the development of natural resources in areas which are the habitat of wild species of flora or fauna, especially of native, threatened, or endangered species, must be undertaken so as not to alter the conditions necessary for the subsistence, development and evolution of these species.”

Article Two states: “Commercial fishing, both large and small scale, sport/underwater fishing, or any other type of gathering of marine flora and fauna are prohibited in the zone referred to in the previous article, unless these activities serve scientific purposes.”⁶⁶

2. On May 11, 1990, the General Directorate of Ecological Norms and Regulation informed Consortium H that “the ‘Cruise Ship Pier Project in Cozumel’ cannot be authorized as submitted.” The document refers to a report issued on April 6, 1990, by the General Directorate of Ecological Conservation of Natural Resources, which states that the project “is situated within the Protected Natural Coral Reef area of Cozumel,” and adds that construction “will have negative impacts on various threatened coral species”, as a result of which “it is recommended that the project not be authorized.”⁶⁷

3. On November 22, 1990, the General Directorate of Ecological Norms and Regulation sent to Consortium H a document⁶⁸ informing it that “on November 8, 1990, the revision of the document presented [referring to EIS-90] has commenced,” and that “a technical report has been requested from the General Directorate of Ecological Conservation of Natural Resources,⁶⁹ as well as an opinion from the General Directorate of Urban Development of this Ministry.”⁷⁰

4. On December 19, 1990, the General Directorate of Ecological Norms and Regulation authorized the “Cruise Ship Pier Project in Cozumel”, stating that, for this authorization it had requested the “opinions of the General Directorates of Urban Development and of Ecological Conservation of Natural Resources.” The authorization does not refer to the location of the project in a protected natural area.⁷¹

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On July 19, 1996 the Decree whereby the zone known as Arrecifes de Cozumel, located in front of the shore line of the Municipality of Cozumel, State of Quintana Roo, with a total area of 11,987-87-50 hectares, is declared a natural protected area with the character of a National Marine Park, is published in the Official Gazette of the Federation.⁷²

⁶⁶ Decree declaring the west coast of the Island of Cozumel, Quintana Roo a refuge zone for the protection of marine flora and fauna, D.O.F. July 11, 1980.

⁶⁷ Document No. 412.2.4251 of the General Directorate of Ecological Conservation of Natural Resources, April 6, 1990. This document relied on the Marine Environmental Feasibility Study in relation to the Cruise Ship Pier in Cozumel prepared by Hydrologic Associates U.S.A., November, 1989. On November 19, 1990, the General Directorate confirmed, responding to a question by the Association of Diving Operators of Cozumel, A.C., that “it is not appropriate to undertake this project.” Document presented to the Presidency of this Association on November 19, 1990.

⁶⁸ Document No. 410-2827 from the General Directorate of Ecological Norms and Regulations, November 22, 1990.

⁶⁹ The document is not available.

⁷⁰ On November 29, 1990, the General Directorate of Urban Development of SEDUE issued a technical opinion that states that “in accordance with the Declaration of Uses and Reserves of the municipality of Cozumel, the proposed project occupies two zones: a) a maritime zone designated as a marine ecological reserve; this means that it is the responsibility of the Under Ministry of Ecology to determine the feasibility of the construction of marine installations.”

⁷¹ Resolution 410-3088 of the General Directorate of Ecological Norms and Regulation of the subministry of Urban Development and Ecology of the SEDUE, December 19, 1990.

⁷² Official Gazette of the Federation (First Section) of 19 July 1996.

D. LAND USE

The Submitters allege that the environmental impact authorization contained in Resolution 410-3088 “fails to apply effectively Article 13 of the RIA⁷³ and of the DZR [they apparently refer to the Decree of the Declaration of Uses and Reserves of the Municipality of Cozumel published in the Official Gazette of the State of Quintana Roo on March 9, 1987 (DUDR)], by not considering the connection of the project with the land uses set out in this declaration.”

The Submitters further state that “the location where construction is planned, and where the project is to be operated from, is not within a zone designated for “port use” in the Island of Cozumel, but rather is designated for “high density tourist use,” and that any use for port purposes should therefore be considered “prohibited.”

In this respect, the Government of Mexico states in its reply that its conduct does not contravene the legal provisions cited, “since the Declaration of Uses and Reserves of Cozumel, Quintana Roo (island) notes that the land development of the project (as well as the “Pier Project”) are located within the site of tract 3, which is designated for ‘high density’ tourist use.”

According to the Mexican government, both the SCT Concession as well as the authorization of the EIS-90 “comply with the provisions regulating land use and development, because the construction of the tourist cruise ship pier is being undertaken in an area specifically designated for this use, namely, tourism.”

In addition, the authorities state that “Consortium H requested in a timely fashion from the Cozumel Municipality, Quintana Roo, a construction permit for this pier, granted by this Municipality in strict compliance with the norms that govern the jurisdiction and operation of the municipal authority.”

The Government of Mexico concludes that “it never violated the provisions of Article 13 of the Regulation, nor the corresponding Directives; and certainly never violated the provisions of the Refuge Zone Decree,” since this latter document “does not refer in any of its provisions to land use.”

a) Relevant facts prior to the entering into force of the NAAEC

1. The Declaration of Uses and Reserves of the Municipality of Cozumel, Quintana Roo (DUDR), published in the Official Gazette on March 9, 1987, provides with regard to “High Density Tourist Use,” that prohibited uses include “building maritime installations that could affect coral reefs” and “placing more than 50% of the beach front under construction.” Permitted uses include “tourist hotel use, tourist residential use and ancillary commercial tourist use,” as well as “public beaches and ancillary installations.”⁷⁴

⁷³ The third paragraph of Article 13 of the RIA establishes that “the Ministry shall evaluate the environmental impact report when it conforms to the regulation and its formulation complies with the corresponding instruction.” Section IV, entitled “Relationship with the norms and regulations on land use” of the Instructions for Development and Presentation of an Environmental Impact Statement in the General Modality states that: “In this section the soliciting party must consult the Ministry of Urban Development, State or Federal, to verify that the use of the land corresponds to norms and regulations.”

⁷⁴ Declaration of Uses and Reserves of the Municipality of Cozumel, Quintana Roo, Official Gazette of the State of Quintana Roo, March 9, 1987.

2. A Marine Environmental Feasibility Study presented in November, 1989, by Inmobiliaria La Sol (a company affiliated to Consortium H), states that the proposed pier “could be built at the extreme northwest corner of the island with less risk to the fragile coral reefs,” but adds that in this zone, “there are no adequate land installations to receive tourists.” In addition, “the island shelf is less broad and shallow, and would require a much larger pier, a new highway, and more environmental disruption.”⁷⁵

3. The EIS-90, presented by Consortium H for the “Cruise Ship Pier Project in Cozumel”, states that “potentially the most important damage during construction [of the pier] would be to the neighboring coral reef communities. The most probable impact would be caused by drilling and dredging activities.” As a result, “these operations have been eliminated from the proposed construction system.” The document further points out that the possible impacts can be “reduced to a minimum, and even eliminated, if sediments and/or water clouding are controlled.” Among its conclusions, the document points out that “there is a zone, 400 meters to the south of the present pier, where there are no coral reef formations; the major impacts that could arise from the construction of a new pier are the production of sediments, which means that construction materials such as dredging, drilling, and explosives, which cause damage to coral reefs, must be avoided; the construction system for the proposed pier will minimize negative impacts, reducing them to a minimum so that they will not damage the coral reefs; it is possible to recover and restore an important number of organisms that make up the coral reef.”⁷⁶

4. In Section IV of EIS-90, entitled “relationship with norms and regulations on land use,” Consortium H points out, on the one hand, that “in relation to bodies of water, the coral reefs in the southwestern part of the island constitute an area decreed on June 11, 1980, as a ‘Refuge Zone for the protection of marine flora and fauna of the Western Coast of the Island of Cozumel, Quintana Roo’” and, on the other hand, that “the studies carried out show that the selected area is the most adequate, and that construction of the pier without considerable negative impact is feasible.” The document does not describe the relationship of the project with the norms and regulations on land use in accordance with the Declaration of Uses and Reserves of the Municipality of Cozumel, Quintana Roo, published in the Official Gazette on March 9, 1987.

5. On November 29, 1990, the Director General of Urban Development sent to the Director General of Ecological Norms and Regulation of SEDUE its technical opinion⁷⁷ with regard to the “Cruise Ship Pier Project in Cozumel”. The document states that, according to the DUDR, “the project is compatible with existing land use norms”.

⁷⁵ Marine Environmental Feasibility Study with reference to the Cruise Ship Pier in Cozumel, prepared by Hydrologic Associates U.S.A., Section IV, Alternatives to the Proposed Project, November, 1989.

⁷⁶ The study states that, in order to quantify the possible environmental impacts of the project, “a screening method was used, which considers the most important in terms of size and importance, and ranks both on a scale from 1 to 10. The ranking for the supratide environment is (10,1); for the intertide, infratide, and coastal terrace environments, (10,1); for the coastal terrace, taking into consideration other impacts provided by the filtration and the relatively small quantities of concrete that could spill into the sea, (2,1); for the coral reef of the first terrace, (3,1); for the sand bank with calcareous algae, (2,1); for the coral reef at the second terraces (3,1); for the sand bank and the sponge and fish communities (2,1); for the cliff environment (3,1).” The Environmental Impact Statement in the General Modality for the Construction of a Cruiser Pier in Cozumel, Quintana Roo”, August 1990.

⁷⁷ Document No. 3100000-1905 from the Director General of Urban Development to the Director General of Ecological Norms and Regulation, November 29, 1990.

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On July 18, 1994, Consortium H provided the INE⁷⁸ with technical opinions by the Research and Advanced Studies Center of the National Engineering Institute, Mérida Unit (CINVESTAV), from Gustavo de la Cruz Aguero, Master in Sciences, Mauricio Garduño, Master in Sciences, and Dr. Eric Jordan. Three of the above studies concluded that the cruise ship pier project, as it was described in 1990, would not have a negative environmental impact on the Paraíso coral reef, whereas another study came to a contrary conclusion.

2. The “Technical Report of CINVESTAV” indicates that “north of [Deep South Paraíso Coral Reef] two groups of coral patches were discovered. One group is contiguous, (...), while the second group is immediately south of the Tourist Pier. As the authorization points out, the project pier is situated between these two groups of coral patches.” Thus, “the authorized location for the construction of the pier in Condition One, 350 meters from the Tourist Pier instead of the 400 meters originally proposed, constitutes a better alternative in terms of the ecological costs and the additional direct impacts involved.” The CINVESTAV considers that the “absence of coral reef development, a sea bed of low biological density, and the distance to the South Paraíso Coral Reef, are elements which favor this site”, even though it states that “there exists an additional ecological cost not determined in the EIS [presented by the company in 1990], namely the inevitable elimination of the coral patches [identified with] numbers 6, 7, and 8.” In any event, such patches “make up a small proportion of the sum of formations included in this study and remain in a state of minimal development.” To conclude, the CINVESTAV considers that “there is no basis for the claim that the construction of the project pier would damage the South Paraíso Coral Reef,” and adds that such a project is “ecologically feasible,” as long as the “relevant conditions and recommendations” are fulfilled.⁷⁹

3. Gustavo de la Cruz Aguero, Master in Sciences, pointed out in his “Technical Opinion” that “the selection of the site “is optimal and represents the lowest ecological burden for the area in question,” since “there is no coral reef growth in this site.” He also pointed out that “The Environmental Impact Statement (...) for the construction of a cruise ship pier in Cozumel, Quintana Roo, (...) are technically correct (...). In the Technical Opinion it is also stated that “the site chosen for the potential construction of the pier (...) is the best location within the area considered (...)” and that “(...) no technical or legal elements were found which may lead to the assumption that the potential construction and operation of the pier project will destroy the Paraíso South Reef thereby affecting natural resources and jeopardizing subsurface tourism activities, nor was it found that as a result of it being located within a natural protected area, such project must not or could not be developed there”.⁸⁰

4. Mauricio Garduño Andrade, Master in Sciences, affirmed in his “Technical Opinion” that “the zone 350 meters from the present pier is an area with a low density of life (...),” and is “a zone that cannot rightfully be considered a coral reef.” Thus, “a pier can be built without causing irreparable harm to the coral reef [Paraíso]” (Opinion on the Construction of a Berthing Pier in Cozumel, Quintana Roo,

⁷⁸ Letter from Consortium H to the President of INE, stating that the studies were commissioned “in response to the verbal request made” previously by this office, so that the experts “could issue technical reports” on the pier project. July 18, 1994.

⁷⁹ Technical Opinion on the Construction and Operation of a Cruise Ship Pier in Cozumel, Quintana Roo, elaborated by the CINVESTAV, July, 1994.

⁸⁰ Technical Opinion on the Construction and Operation of a Cruise Ship Pier project in Cozumel, Quintana Roo, prepared by Gustavo de la Cruz, M. Sc., July, 1994.

Mexico, by Mauricio Garduño, M.Sc., July, 1994). The study also emphasizes that: “a field visit was performed in order to corroborate some of the statements made in the reports previously analyzed, and accurately assess the current conditions of the site where the pier is purportedly to be built. It was first and foremost verified that the zone which is located 350 meters from the current pier is an area with a low density of life. It is a sandy zone; the community is made of *Holimeda sp* and *Udolsa sp* algae. Colonies of corals belonging to the species *Manicina Aerolata*, young and adult snails of the *Strombus Gigas* species and other adult snails of the *Strombus sp* species, and one specimen of a mollusk known as “cayo de hacha” (probably *Pinna Carnea*) were observed. It may not be considered as a reef zone”. The study adds that “as far as the distance from the works to the Paraíso Reef is concerned, it was found that the pier is located approximately 300 meters from the beginning of the strip formed by the Paraíso Reef. Between this point and the pier there are 6 reef patches, the closest one being 50 meters away and the farthest one 160 meters away approximately. The area of these formations is between 100 and 200 square meters. It is obvious that these are the reef structures which are more likely to suffer some impact due to the pier construction. The aerial photograph shows very clearly their relative location in regard to the pier and their relative size in regard to the Paraíso Reef”. Finally, the study mentions that “Given the type of construction intended to be built, the generation of sediments will not be substantial enough to harm the reef. This is a commitment made by the corporation, as it appears from the Environmental Impact Statement [EIS-90] submitted to the SEDESOL. It would seem as though the distance from the pier to the reef is not significant enough for scuba diving activities to be jeopardized (...). Recently (May 1994), a cruise ship anchored in the Paraíso Reef. As a consequence a coral formation tip was split in two. It will probably be more prudent to have a pier built in order to prevent those accidents that imperil the integrity of the reef from occurring (...).”

5. The “Professional Opinion” of Dr. Eric Jordan stated that “the area where the new pier is to be built corresponds to the northern part of the coral reef complex of Paraíso, where both temporary coral communities and well established coral reefs are mixed in with each other.” The location of the project “passes above the shallow Paraíso coral reef and comes very close to the coral reefs of group P of Deep Paraíso, and is a relatively short distance from the northern sector of the principal group of Deep Paraíso.” The study indicates that “in terms of the damage that may be caused to the coral community in the study area, the costs of the construction of the new pier are very high,” and recommends building it “in another location, in an area where no coral reefs exist.”⁸¹ The study explains that this recommendation is prompted not only by a concern over the effects of the direct impacts, but also by a concern over the use of nets to mitigate the indirect effects of the work caused by stirring up sediments.⁸² The document claims that the use of nets to contain sediments is necessary in order to avoid negative effects on the coral community outside the direct impact area, but adds that these nets “can also cause serious damage if they are placed on, or near, areas with coral reefs.”⁸³ The study also states that if it were decided, for other

⁸¹ Professional Opinion on the Possible Effects of the Construction and Operation of a New Pier for Tourist Cruiser Ships in the Coral Reefs of Cozumel, prepared by Eric Jordan Dahlgren, July 14, 1994.

⁸² Condition 23 of Resolution 410-3088 of the General Directorate of Ecological Norms and Regulation, dated December 19, 1990, states that “due to the sensitive nature of the reef zone, before construction is started, and for as long as construction continues, the company should install fine mesh nets over the construction area, using weights and floats to surround the project area, with the understanding that these weights will under no circumstances be anchored in nearby coral reefs. The mesh nets should be placed horizontally from the coast [...] and back to the coast, and vertically from the sea bed to 0.050 meters above the water surface at high tide.

⁸³ The study describes three “principal problems caused by the use of nets in this type of environment, especially the use of nets able to retain fine sediments.” First, the net “must cover the entire width of the platform, blocking and altering water currents, as a sea wall might do. This will cause a wide variety of changes, particularly as far as the

reasons, to build the new pier at this location, it would be desirable to do two things: first, “with regard to six directly impacted areas, to transplant as many organisms as possible to favorable areas that are a distance from the effects of the pier’s construction”. Second, “in regard to indirectly impacted areas,” to pump to the shore the sediments that have accumulated within nets, in order to avoid their redistribution once these nets are lifted.

6. On November 8, 1994, the Government of Quintana Roo requested INE in writing to “reconsider its authorization with regard to the site proposed by the company for the construction of the pier.”⁸⁴ The document explains that “in accordance with the opinion of the technical staff” that participated in “a detailed inspection of the area in which construction is planned” the Paraíso coral reef “would be damaged seriously, both by construction activity and by operation of the pier.”

7. On February 23, 1995, the INE responded to the Government of Quintana Roo that “due to a lack of arguments showing the existence of supervening environmental impacts not foreseen during the project evaluation procedure”, the INE “lacks technical and legal grounds for any reconsideration of the resolution issued on December 19, 1990.”⁸⁵

8. On March 29, 1995, SEMARNAP stated that “with the relocation of the project [ordered by the environmental authority in Condition 1 of the environmental authorization], the axis of the pier would remain further away from the group of coral patches in the extreme north of the Paraíso coral reef. This would allow a reduction in the impacts so that no more than 3% of the group is affected.”⁸⁶

9. On May 14, 1996, in the EIS for the “Puerta Maya” project, Consortium H indicates that “the appropriate land use for its property and this project is one of ‘High Density Tourist Use’.”⁸⁷

E. SPECIES RESCUE PROGRAM

The “Species Rescue Program” established by the environmental authority in Resolution 410-3088, through Condition 24, represents another matter viewed differently by the Submitters and the Government. According to the Submitters, with the establishment of this Program, “SEDUE and INE contravened the provisions of Article Two of the DZR,⁸⁸ which expressly prohibits the collection of any type of marine

displacement and depositing of natural sediments is concerned.” Second, “in order to keep the net fixed in the appropriate position” during construction, “a massive anchoring system will have to be used, which will almost certainly cause serious damage to the marine environment.” Finally, the sediments deposited in the net “will be of considerable quantity, and will accumulate slowly. Thus, when the net is removed, these sediments will be exposed to normal water currents, and will be redistributed along the length and width of the platform, causing enormous direct impacts.”

⁸⁴ Letter from the Governor of Quintana Roo to the Presidency of INE, November 8, 1994.

⁸⁵ Document N.D.O.P. 0026 from the Presidency of INE to the Minister of the Environment and Territorial Management of the Government of the State of Quintana Roo, February 23, 1995.

⁸⁶ Document No. 1719 of March 29, 1995, to the Ecological and Environmental Commission of the House of Representatives, in which it points out that “with the relocation of this project, the proximity of the axis of the pier to the northernmost group of coral reef patches suggests that less than 3% of the area of the patches” will be affected.

⁸⁷ Environmental Impact Statement, General Modality of the “Puerta Maya” Project in Cozumel, Quintana Roo, May 14, 1996.

⁸⁸ Article Two of the DZR states: “Large or small-scale commercial fishing, sport/underwater fishing, or any other type of collection of marine flora and fauna are prohibited, unless carried out for scientific investigation purposes, in zones referred to by the previous article.”

fauna and flora for purposes other than investigation, and also failed to apply effectively Articles 38,⁸⁹ 44,⁹⁰ 45 (subparagraph VII),⁹¹ 54⁹² and 83⁹³ of the LGEEPA.”

The environmental authorities respond in their reply that “the Species Rescue Program imposed as Condition 24 on Consortium H, has, as a fundamental objective, the preservation of the Paraíso coral reef, and thus does not contravene in any way the Refuge Zone Decree.”

According to the authorities, “the term ‘rescue’, used in the title of the program, must obviously be understood as synonymous with the protection and safeguarding of marine species.” The Government response states that “the construction of the pier, according to the evaluation of the EIS-90, could have some negative effects on isolated coral patches outside the Paraíso coral reef; consequently it was decided to require the company to develop a protection program that would permit the relocation and reimplantation of corals in a favorable habitat, with the objective of mitigating any possible damage to these marine species.”

The Government also points out that “the re-establishment activities have been made the responsibility of the [CINVESTAV], one of the most prestigious national research centers, which reports that to date the program has evolved with positive results.” It mentions that “sites within the Paraíso coral reef with favorable characteristics for the reintroduced coral species were chosen as relocation sites.”

The environmental authorities allege that, for the above reasons, “this program cannot be considered to violate the Refuge Zone Decree. In fact, this project will cause no damage whatsoever to the coral reef, since the sea bed in the site authorized for the construction of the pier is composed of sand terraces without coral reef development, as is shown in Page 18 of the technical report on the construction and operation of the Cruise Ship Pier in Cozumel, Quintana Roo, prepared by the [CINVESTAV]” in July, 1994.

⁸⁹ Article 38 establishes that: “The Federation, the federal entities, and the municipalities shall establish measures protecting the natural areas, in order that the preservation and restoration of ecosystems be ensured, especially those which are most representative and those which are subject to deterioration or degradation.”

⁹⁰ Article 44 establishes that: “In accordance with this and other applicable laws, the natural areas of the national territory referred to in this chapter, may be subject to protection as ecological reserves, for the purposes, effects, and manners that may be set out in these laws, subject to limitations which the appropriate authorities may impose so that only the necessary social and environmental uses and development take place in them.”

⁹¹ Sub-paragraph VII of Article 45 states that: “The designation of protected natural areas has as its purpose: (...) VII. Protecting natural settings of culturally and nationally important zones, monuments, and sites of ecological, historical, and artistic importance.”

⁹² Article 54 states that: “The protected areas for wild aquatic flora and fauna shall be set up in conformity with the provisions of this Law, the Federal Laws of Hunting and Federal Laws of Fishing, and all other applicable laws, in locations which contain habitats whose balance and preservation depend on the assistance, transformation, and development of aquatic flora and fauna species. In these areas, it will be permissible to undertake activities related to the preservation, repopulation, propagation, acclimatization, refuge, and investigation of these species, as well as matters related to education and diffusion of these subjects. The exploitation of natural resources may also be allowed for communities that live there at the moment of the issuance of the appropriate declaration, or that may arise according to studies. These must comply with technical/ecological norms and land uses that may be established in the same declaration or in the resolutions that modify it.”

⁹³ Article 83 states: “The development of natural resources in areas that serve as habitat of wild species of flora and fauna, especially native, threatened, or endangered ones, must be carried out so that the necessary conditions for the subsistence, development, and evolution of these species are not altered.”

The response of the Government states that “the authority, through the Species Rescue Program , has not undertaken fishing or collection of species. Rather, what was carried out was the relocation of these species in order to protect them.”

a) Relevant facts prior to the entering into force of the NAAEC

1. Article 36 of the RIA establishes that “Physical or legal entities that, for economic purposes, wish to undertake exploitation or use of natural resources, or repopulation, relocation, recuperation, transplanting, or sowing of wild or aquatic flora and fauna species, in natural areas protected by the Federation, including those identified in Parts I through VII of the law, must obtain prior approval from the Environmental Ministry relating to environmental impact. Approval is required when, in compliance with the relevant declarations, it is the responsibility of the Ministry to coordinate and to implement the conservation, administration, development, and oversight of the areas involved.”⁹⁴

2. Resolution 410-3088 of December 19, 1990 (environmental authorization) establishes in Condition 24 that “[Consortium H] must undertake at the site preparation stage, before the placing of the sediment mesh, a rescue of slow-moving and non-sessile benthic species for transportation to a subsequent destination in accordance with instructions from the General Directorate of Ecological Conservation of Natural Resources.” Furthermore, “it is strictly forbidden to maintain in captivity the rescued marine species.” It is also stated that “the company must present to the General Directorate of Ecological Conservation of Natural Resources of this Ministry for its authorization and coordination, before the initial stage of preparation, a species collection program, indicating capture and handling methods, and identifying the place to which the species will be relocated.”⁹⁵

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On March 8, 1994, the Institute of Sea Sciences and Limnology, Puerto Morelos Station, indicates in a “technical opinion” that “in general” the methodology related to the collection of species is “correct”, but recommends that this program “not be restricted to non-sessile species.”⁹⁶

2. On August 12, 1994, the General Directorate of Environmental Norms⁹⁷ informed Consortium H that the project may commence, as long as it is carried out in strict compliance with the provisions of Resolution 410-3088 (environmental authorization), as well as the 16 technical considerations, including “the Species Rescue Program to be carried out by CINVESTAV”.

3. On September 28, 1994, Consortium H presented to the environmental authorities the “Species Rescue Program”.⁹⁸

⁹⁴ Regulation of the General Law for Ecological Balance and protection of the Environment in Matters of Environmental Impact, D.O.F., June 7, 1988.

⁹⁵ Resolution 410-3088 from the General Directorate of Ecological Norms and Regulation of the Subministry of the SEDUE, December 19, 1990.

⁹⁶ Letter to the CESC (Ecosystems Consultants S.C.) in response to the request to present a technical opinion on the project “Environmental Interactions of the Pier Construction Project and Puerta Maya Marine Terminal” and the “Program of Benthic Species Rescue for the Cruise Ship Pier Project” in Cozumel, Q.R., March 8, 1994.

⁹⁷ Document No. 7853 of the General Directorate of Environmental Norms to Consortium H, August 12, 1994.

⁹⁸ Letter from Consortium H directed to the Director of Environmental Impact and Risk, September 28, 1994.

4. On November 25, 1994, the General Directorate of Environmental Norms approved the implementation of the “Species Rescue Program”.⁹⁹

5. On April 26, 1995, the Committee for the Protection of Natural Resources [one of the Submitters] presented a Public Complaint to PROFEPA against the transplantation of species belonging to the coral reef, claiming that these activities authorized by INE were carried out inadequately and with incompetent personnel, and attaching as evidence a video showing the mismanagement that took place.¹⁰⁰

6. On July 3, 1995, PROFEPA, Quintana Roo District, responded to the Popular Complaint of May 5, 1995, relating to the “Transplantation of corals in inadequate form and with incompetent personnel”.¹⁰¹

7. On January 12, 1996, Consortium H informed the Director General of Environmental Management and Impact that the Species Rescue Program concluded on October 15, 1995.¹⁰²

⁹⁹Document No. 10809 of the General Directorate of Environmental Norms, November 25, 1994.

¹⁰⁰Popular Complaint from the Committee for the Protection of Natural Resources to PROFEPA, April 26, 1995.

¹⁰¹Document PFPA-D.E-PSQ-032/95, July 3, 1995.

¹⁰²Letter from Consortium H to the Director General of Management and Environmental Impact, January 12, 1996.

ACKNOWLEDGMENTS

The Secretariat would like to thank the government of Mexico and Consortium H, for the courtesy and conscientiousness with which they responded to the various requests for information, without which the preparation of the Factual Record would have been considerably more difficult. The Secretariat would also like to acknowledge and express our appreciation to all organizations and individuals furnishing information for the preparation of this Factual Record.

ANNEX I: MODEL LETTERS SENT BY THE SECRETARIAT

NAME
POSITION

This is to inform you that on August 2 of this year the Council of the Commission for Environmental Cooperation (CEC) instructed the Secretariat to prepare a Factual Record pursuant to the submission filed by three Mexican Non Governmental Organizations pertaining to “the failure to effectively enforce environmental legislation by Mexican authorities in regard to the port terminal project in Playa Paraíso, Cozumel, Quintana Roo.”

In preparing the Factual Record, the Secretariat, in accordance with the provisions of Section 15.4 of the North American Agreement on Environmental Cooperation, “shall consider any information furnished by a Party, and may consider any relevant technical, scientific or other information that: a) is publicly available; b) submitted by interested non-governmental organizations or persons; c) submitted by the Joint Public Advisory Committee; or d) developed by the Secretariat or by independent experts.”

Considering that the institution under your responsibility might have relevant information for the preparation of this Factual Record, the CEC Secretariat will be contacting you through Beatriz Bugada, chief of the Mexican Liaison Office, to whom you may also forward any information that might be relevant for the preparation of the said Record, to her office located on Av. Del Parque # 22, Col. Tlacopac, c.p. 01049, México D.F. Tel/fax : (525) 6.61.20.61.

I wish to thank you for the attention you will be giving to this matter and avail myself of this occasion to send you my warm regards,

Sincerely,

Victor Lichtinger
Executive Director

NAME
POSITION

As you already know, the Secretariat of the Commission for Environmental Cooperation (CEC), under instructions from its Council composed of the Secretaries and Ministers of the Environment of the United States, México and Canada, is preparing a Factual Record pursuant to the submission filed by three Mexican Non-Governmental Organizations pertaining to “ the failure to effectively enforce environmental legislation by Mexican authorities in regard to the port terminal project in Playa Paraíso, Cozumel, Quintana Roo.”

In accordance with the provisions of section 15.4 of the North American Agreement for Environmental Cooperation, the information to be considered by the Secretariat includes, among other sources, that which is “submitted by interested non-governmental persons or organizations.”

Given that you or your organization have explicitly stated your interest in the case under consideration, we are inviting you to submit to this Secretariat, as soon as possible, the information that you might have and that, in your opinion, should be included in the referred to Factual Record. We would be most thankful should you be kind enough to forward this information in writing to Beatriz Bugada, Chief of the Mexican Liaison Office, located on Av. Del Parque # 22, Col. Tlacopac, c.p. 01049, México D.F. Tel/fax : (525) 6.61.20.61.

I avail myself of this opportunity to send you my warm regards,

Sincerely,

Victor Lichtinger
Executive Director

MEMBER OF THE JPAC

As you already know, on August 2 of this year the Council of the Commission for Environmental Cooperation instructed the Secretariat to prepare a Factual Record pursuant to the submission filed by three Mexican Non-Governmental Organizations pertaining to “ the failure to effectively enforce environmental legislation by Mexican authorities in regard to the port terminal project in Playa Paraíso, Cozumel, Quintana Roo.”

In preparing the Factual Record, the Secretariat must consider, *inter alia*, the information furnished by the Joint Public Advisory Committee, in accordance with the provisions of Section 15.4 (c).

I am therefore asking you to forward any information which might prove relevant for the preparation of the Record to Beatriz Bugada, to the Mexican Liaison Office located on Av. Del Parque # 22, Col. Tlacopac, c.p. 01049, México D.F. Tel/fax : (525) 6.61.20.61.

I wish to thank you for the attention you will be giving to this matter and avail myself of this occasion to send you my warm regards,

Sincerely,

Victor Lichtinger
Executive Director

ANNEX II: CHRONOLOGY OF EVENTS

1980

On **June 11, 1980**, the Decree whereby the West Coast of Cozumel Island, Q. Roo, is declared a “refuge for the protection of marine fauna and flora” (DZR), is published in the Official Gazette of the Federation.

1987

On **March 9, 1987**, the Declaration of Uses and Reserves of the Municipality of Cozumel, Quintana Roo (DUDR) is published in the Official Gazette of the State.

1989

In **September of 1989**, the Mexican Port Authority (PUMEX) publishes the Instructions for the Concession for Piers for Tourist Cruise Ships and Specialized Cargo Terminals, which correspond to the ones employed by Consorcio de Desarrollo y Promociones Inmobiliarias H (Consortium H), to participate in the bidding contest set up by the Ministry of Communications and Transport (SCT), for the construction of piers for tourist cruise ships, on September 4, 1989.

In **November of 1989**, Inmobiliaria La Sol (a Company affiliated with Consortium H) presents to the environmental authorities a Marine Environmental Feasibility Study relating to the project “Cruise Ship Pier in Cozumel”.

1990

On **April 6, 1990**, the General Directorate of Ecological Conservation of Natural Resources of the Ministry of Urban Development and Ecology (SEDUE) issues the report which states that the project (“Cruise Ship Pier Project”) “is situated within the Protected Natural Coral Reef Area of Cozumel” and adds that construction (of the Pier) “will have negative impacts on various threatened coral species”, as a result of which “it is recommended that the project not be authorized”.

On **May 11, 1990**, the General Directorate of Ecological Norms and Regulation of SEDUE informs Consortium H that “the ‘Cruise Ship Pier Project in Cozumel’ cannot be authorized as submitted”.

On **July 1, 1990**, FONATUR informs Consortium H that the real estate project adjacent to the new Cruise Ship Pier has been authorized.

On **August 10, 1990**, in a PUMEX document signed by the Minister of Communications and Transport, the SCT approves a request by Consortium H to build and operate a passenger terminal and a Cruise Ship Pier. The document states that “the project is complemented by a 43.3 hectare real estate and tourist development”.

On **October 26, 1990**, Consortium H submits to the General Directorate of Ecological Norms and Regulation of the SEDUE the “Environmental Impact Statement, General Modality, for the Construction of a Cruise Ship Pier Project in Cozumel, Quintana Roo” (EIS-90).

On **November 22, 1990**, the General Directorate of Ecological Norms and Regulation of the SEDUE sends to Consortium H a document informing it that “on November 8, 1990, the revision of the document presented [referring to EIS-90] has commenced”, and that “a technical report has been requested from the General Directorate of Ecological Conservation of Natural Resources, as well as an opinion from the General Directorate of Urban Development of this Ministry [SEDUE]”.

On **November 29, 1990**, the General Directorate of Urban Development of the SEDUE issues a technical opinion stating that “in accordance with the Declaration of Uses and Reserves of the Municipality of Cozumel, the proposed project lies in two zones: a) a maritime zone designated as a marine ecological reserve, it will thus be the responsibility of the Sub-Ministry of Ecology to outline the feasibility of constructing marine installations; [...] and b) property on dry land which, although this is not noted in the EIS [EIS-90], should contain passenger terminal services that adequately resolve consolidation problems in the area. The document states that according to the DUDR “the project is compatible with existing land use norms”, and “recommends that the information relating to land installations be identified”.

On **December 19, 1990**, the General Directorate of Ecological Norms and Regulation of the SEDUE authorizes the project entitled “Cruise Ship Pier in Cozumel, Quintana Roo”, subject to 64 conditions with which the Corporation will have to comply prior to and during the construction and operation of the pier.

1991

On **November 12, 1991**, the SEDUE grants an extension of one year, beginning on October 21, 1991, for the construction of the “Cruise Ship Pier Project in Cozumel”. The purpose of the extension request consisted in having the term for the EIS-90 authorization extended, awaiting the issuance of the Concession Title.

1992

On **June 19, 1992**, the SEDUE grants an extension of one year, beginning on June 1, 1992, for the construction of the “Cruise Ship Pier Project in Cozumel”. The purpose of the extension request consisted in having the term for the EIS-90 authorization extended, awaiting the issuance of the Concession Title.

On **July 8, 1992**, Consortium H requests the support of the President of the Republic to obtain the Concession Contract from the SCT, and states that “on July 1, 1990 FONATUR informs us that our Real Estate Project adjacent to the new Cruise Ship Pier has been authorized”.

1993

On **May 11, 1993**, the Government of the State of Quintana Roo writes to Consortium H that “it approves the Puerta Maya Tourist Project” and that instructions have been forwarded to the Ministry of Public Works and Urban Development of the State Government “to grant the authorization immediately” to “the Puerta Maya Project in the Land/Maritime Federal Zone” and “so that the construction may start as soon as possible”.

On **May 24, 1993**, Consortium H again states to the SCT that the Pier is only part of the Puerta Maya Project, and describes the first stages of this project. The Company commits to building the “Port Area” installations (terminal building, parking, warehouses and green areas, sanitary services, etc.), and refers to a document “in which the HASA Group of Spain will build ‘Turnkey’ the first stage of the Puerta Maya Project, which consists of the Port Area, Village, Concessioned Federal Zone Infrastructure and the New Cruise Ship Pier”.

On **July 19, 1993**, the Law of Ports is published in the Official Gazette of the Federation and enters into force. This includes the new concept of “Terminal”.

On **July 22, 1993**, the SCT grants to Consortium H the Concession for the construction, operation and development of a Public Port Terminal for Tourist Cruise Ships in Cozumel, Quintana Roo.

On **November 22, 1993**, the General Directorate of Environmental Norms of the SEDUE informs Consortium H that “work on the project cannot commence” because this Company “does not have a valid Environmental Impact Authorization from the National Institute of Ecology”. The document explains that “to date the work commencement notification required by Condition 62 has not been received, and since the extension was granted for one year, the extension has now expired”.

On **December 3, 1993**, Consortium H replies to the General Directorate of Environmental Norms that it “considers the favorable Environmental Impact Assessment to be fundamentally valid, since there has been no change in the circumstances under which it was issued, and that its expiration is only a temporal matter that can be wholly resolved through a request that we shall submit for your consideration when the SCT issues permission to begin work”.

On **December 23, 1993**, the SCT informs Consortium H that it may “begin work on the construction of the Tourist Cruise Ship Pier, subject to the prior authorization of the Ministry of Social Development”. The document adds that the construction of the works which are authorized “is subject to the provisions in the Environmental Authorization” issued by the SEDUE in 1990, and states that “before starting construction of the land terminal adjacent to the pier, the draft project must be presented for approval by this Ministry [SCT], pursuant to the First and Fifth conditions of the Concession Title”.

1994

On **January 4, 1994**, Consortium H requests from the General Directorate of Environmental Norms an extension of 180 days in the environmental authorization issued on December 19, 1990 for the “Cruise Ship Pier Project in Cozumel”. The Company informs the environmental authorities that “on December 22, 1993 it received from the Ministry of Communications and Transport Resolution OF.112.201.-2497/93 that allows us to commence construction on the Tourist Cruise Ship Pier”. In the document, the Company points out that “with the intention of complying with Condition number 3 of the authorization granted by this General Directorate by Resolution 410.3088 dated December 19, 1990, we be granted an extension of 180 days in authorization 410-02208 issued by this General Directorate under your responsibility”.

On **March 7, 1994**, the Company renews its request for an extension to the General Directorate of Environmental Norms, pointing out that if this body “thinks that the technical reasons and circumstances substantiating Resolution 410-3088 of December 1990 are not valid, and consequently that the construction

of the Tourist Cruise Ship Pier should not proceed where officially authorized, it should inform the Company of this, justifying its reasons with reference to Article 16 of the Constitution”.

On **March 8, 1994**, the Institute of Sea Sciences and Limnology, Puerto Morelos Station, indicates in a “technical” opinion that “in general” the methodology related to the collection of species “is correct”, but recommends that this program “not be restricted to non-sessile species”.

On **April 13, 1994**, the General Directorate of Environmental Norms grants an extension of the environmental authorization in view of the fact that Consortium H has “the authorization to commence work on the Pier issued by the SCT” and that “the technical circumstances on which” Resolution 410-3088 of December 19, 1990 “was based, have not changed”.

On **July 18, 1994**, Consortium H provides the National Institute of Ecology (INE) with technical opinions by the Research and Advanced Studies Center of the National Engineering Institute, Mérida Unit (CINVESTAV-IPN), from Gustavo de la Cruz Agüero, Master in Sciences, Mauricio Garduño, Master in Sciences and Dr. Eric Jordán. Three of the mentioned studies concluded that the Cruise Ship Pier Project, as it was described in 1990, would not have a negative environmental impact on the Paraíso Coral Reef, whereas another study came to a contrary conclusion.

On **August 12, 1994**, the INE informs Consortium H that “work on the project [Cruise Ship Pier in Cozumel] may commence”, as long as it is carried out in strict compliance with the provisions of Resolution 410-3088 (environmental authorization), as well as with the 16 technical considerations, including “the Species Rescue Program to be carried out by CINVESTAV-IPN”.

On **September 13, 1994**, the sale of land by the Government of the State of Quintana Roo to Consortium H is concluded through formal delivery and acceptance of the land. The donation of the land to the Federal Government, in order to comply with the First Condition of the Concession Title, remains pending.

On **September 28, 1994**, Consortium H presents to the environmental authorities the “Species Rescue Program”.

On **October 11, 1994**, Consortium H requests a further one-year extension for the environmental authorization. The Company asserts in this document that “it has been complying with the conditions established in Resolution 410-3088 [environmental authorization], as it was exhorted to do under the last paragraph of the extension Resolution issued by this authority on April 13 of the current year”.

On **November 8, 1994**, the Government of Quintana Roo requests INE in writing to “reconsider its authorization with regard to the site proposed by the Company for the construction of the Pier”. The document explains that “in accordance with the opinion of the technical staff” that participated in a “detailed inspection of the area in which construction is planned”, the Paraíso Coral Reef “would be seriously damaged both by construction activity and the operation of the Pier”.

On **November 25, 1994**, the General Directorate of Environmental Norms approves the implementation of the “Species Rescue Program”.

On **December 16, 1994**, the INE grants a new extension of the authorization for the Cruise Ship Pier, for 365 calendar days, from October 14, 1994.

1995

On **February 16, 1995**, Consortium H presents to the INE a “Master Plan describing the number and type of tourism service installations that the Federal Tourism Development Project [Puerta Maya] will offer and provide”. This document states that the EIS and the additional information related to “this project” authorizes only “what is set out in the First and Second Conditions” (of the environmental authorization), and requests that the environmental authority indicate if a Preventive Report is the appropriate procedure for authorizing “the construction of buildings of any type or infrastructure on dry land supporting the Pier”.

On **February 23, 1995**, the INE responds to the Government of Quintana Roo that “due to a lack of arguments showing the existence of supervening environmental impacts not foreseen during the project evaluation procedure”, the Institute “lacks technical and legal grounds for any reconsideration of the resolution issued on December 19, 1990 [environmental authorization]”.

On **March 29, 1995**, the Head of the Ministry of Environment, Natural Resources and Fisheries (SEMARNAP) sends a letter to the Ecological and Environmental Commission of the H. House of Representatives, in which she points out the most relevant facts that illustrate the situation of the Cruise Ship Pier Project in Cozumel and the respective undertakings of the INE. In this document the environmental authority states:

- That the authorities of the SEDUE, the Ministry of Social Development (SEDESOL) and the SEMARNAP assessed the environmental impact of the project in the location determined by the authorities of SCT, the Ministry of Tourism and the State Government of Quintana Roo.
- That the purpose of the Decree published on June 11, 1980 in the Official Gazette of the Federation, declaring “the west coast of the Island of Cozumel, Quintana Roo, as a refuge for the protection of the marine flora and fauna”, was to restrain commercial fishing activities and subaquatic sports fishing, due to the fact that a significant decline in the flora and fauna of the coral reef of the said coast, particularly in regard to pink snails (*Strombus gigas*), had been detected. To that effect, Article Two of the said Decree prohibits the mentioned activities, as well as any kind of biologic collection which is not intended for scientific research; however, it does not prohibit other activities.
- That the Government of Quintana Roo committed its support through the sale of land located along the Cozumel-Chan-Kanaab south coastal road, inland facilities which are indirectly related to the project. And that “given the obvious interest of the said government, expressed through the sale of the land and the granting of the corresponding authorizations”, and on the basis of the analysis of the environmental impact performed by the environmental authority based on the opinion of academic experts, Consortium H had been granted authorization to commence construction.
- That “the environmental impact resolution granted by the INE does not command construction, nor does it require that the project be carried out: it only implies that, if the project is indeed undertaken, the conditions set forth be thoroughly fulfilled”. And she made it clear that: “The Government of the State of Quintana Roo, the Municipal Government or the competent federal authorities may revoke its decisions and not authorize the project, in which case the INE would not have any competence whatsoever”.

- That “with the relocation of the Project [ordered by the environmental authority in Condition 1 of the Authorization], the axis of the Pier would remain further away from the northernmost group of coral patches of the Paraíso Reef. This would allow a reduction in the impacts so that no more than 3% of the group would be affected”.

On **April 26, 1995**, the Committee for the Protection of Natural Resources (one of the submitters) presents a Popular Complaint to the Federal Attorney’s Office for Environmental Protection (PROFEPA) against the transplantation of species belonging to the coral reef, claiming that these activities authorized by INE have been carried out inadequately and with incompetent personnel, and attaching as evidence a video showing the mismanagement that has taken place.

On **May 23, 1995**, the INE replies to Consortium H, stating that for the “construction of any type of support infrastructure on dry land for the ‘Cruise Ship Pier in Cozumel’, it will be necessary to present an Environmental Impact Statement, in its General Modality, rather than a Preventive Report”.

On **July 3, 1995**, the PROFEPA, Quintana Roo District, responds to the Popular Complaint of May 5, 1995 relating to the “Transplantation of corals in inadequate form and with incompetent personnel.”

On **November 8, 1995**, the environmental authority grants a new extension for the project authorization until October 14, 1996. The purpose of the extension request consisted in pursuing the development of the project works, in order to be in a position to conclude such works, thereby complying with the Concession Title. The environmental authority exhorted the Company to “keep on adequately complying with the Terms and Technical Considerations provided by this Institute for the referenced project”.

1996

On **January 12, 1996**, Consortium H informs the Director General of Environmental Management and Impact that the Species Rescue Program has concluded on October 15, 1995.

On **May 14, 1996**, Consortium H presents an Environmental Impact Statement for the “Puerta Maya” Project [EIS-96] in Cozumel, Quintana Roo. The Company declares that it submits the document “...in order to comply with [INE Document] D.O.O. DGNA-2137 of May 23, 1995”; this document consists of the Environmental Impact Statement, in its General Modality, for the “Real Estate Development Project called ‘Puerta Maya’, which includes the construction and operation of the Terminal, a Port Area designed to provide the services for which this concession was granted, and the Infrastructure necessary for tourism”.

On **July 2, 1996**, Consortium H requests a prolongation of the extension to the authorization, for an additional period of 180 days beginning on October 15, 1996. In its letter the Company requests an extension “in order for the company to be in a position to conclude those works which are necessary for the construction of the Tourist Cruise Ship Pier in the Island of Cozumel, Quintana Roo, thereby complying with the Concession Title granted”.

On **July 19, 1996**, the Decree whereby the zone known as the Cozumel Coral Reefs, located in front of the coast line of the Municipality of Cozumel, State of Quintana Roo, with a total area of 11,987-87-50 hectares, is declared a Natural Protected Area with the character of a National Marine Park, is published in the Official Gazette of the Federation.

On **December 16, 1996**, Consortium H contacts the Director General for Ports and Merchant Marine Affairs of SCT to respond to its document dated July 22, 1993, in which the SCT set out the requirements and procedures to formalize the donation to the Federal Government of a portion of the land acquired from the Government of Quintana Roo (on September 13, 1994). Consortium H states that “it has all of the documents to enable it to enter into the appropriate donation contract” and requests that the SCT designate “the place and date when the donation should take place”.

On **December 20, 1996**, INE, through the General Directorate of Ecological Regulation and Environmental Impact, “authorizes the Consortium for Development and Real Estate Promotion H, S.A. de C.V. [Consortium H] to build and operate the works referred to in the second paragraph, First Condition of the Concession. These consist of: 1. Port Area (passenger terminal building); 2. Open Space (access from the terminal to the tourist cruise ship pier); and 3. Parking (parking and public access road)” . The authorization was subjected to six terms and seventeen conditions. In the same document dated December 20, 1996, the INE informs Consortium H that “it does not authorize the construction of works for Tourist-Commercial use, contained in an area of 47,178.80 square meters, referred to in the Environmental Impact Statement submitted [EIS-96]”.

1997

As of **February 10, 1997**, according to the information presented by Consortium H, the First Condition of the Concession granted by the SCT had not been fulfilled. Consequently, the donation of the land had not taken place, the last requirement for fulfilling this First Condition. According to the Mexican environmental authorities, this Condition must be realized before the Fifth Condition, subparagraph e) is operative (the period of three months from the granting of the Title to present the Environmental Impact Report for the Port Terminal).

ANNEX III: MAPS