Secretariat of the Commission for Environmental Cooperation

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

Submitters:	Comité de Derechos Humanos de Tabasco Asociación Ecológica Santo Tomás
Represented by:	Efraín Rodríguez León José Manuel Arias Rodríguez
Party:	United Mexican States
Revised submission:	3 October 2007
Original submission:	26 July 2007
Date of this determination:	8 April 2009
Submission I.D.:	**SEM-07-005 (*Drilling Waste in Cunduacán*)**

I. EXECUTIVE SUMMARY

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement") set out a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC and the "Guidelines for Submissions and Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation" (the "Guidelines"), the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1); otherwise, it then terminates the submission. Pursuant to Article 14(3), the Party may notify the Secretariat of the existence of pending judicial or administrative proceedings in which case, the Secretariat shall proceed no further.

2. On 26 July 2007, Comité de Derechos Humanos de Tabasco and Asociación Ecológica Santo Tomás (the "Submitters") filed a submission (the "original Submission") with the Secretariat, asserting that Mexico was failing to effectively enforce its environmental law in connection with a drilling sludge treatment and disposal project being developed by the company Consorcio de Arquitectura y Ecología ("Caresa") in the municipality of Cunduacán, Tabasco. On 12 September 2007, the Secretariat determined that the Submission did not conform to certain criteria set out in Article 14(1) including providing information on the environmental law in question, and so informed the Submitters. On 10 October, 2007, the Submitters filed a revised Submission (the "revised Submission") including information on the environmental law in question and information supporting their assertions.

3. On 13 December 2007, the Secretariat found that the submission met the requirements of NAAEC Article 14(1) and requested a response from Mexico pursuant to Article 14(2). On 12 May 2008, Mexico filed its Response (the "Response"), informing the Secretariat that it contained certain information confidential pursuant to NAAEC Article 39. On 15 May 2008, Mexico filed a summary for public disclosure of confidential information contained in the Response.

4. After analyzing the submission in light of the Response, **the Secretariat terminates submission SEM-07-005 pursuant to Article 14(3)(a), due to the existence of pending proceedings**. In accordance with Section 9.4 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the "Guidelines"), the Secretariat explains below its reasons for terminating the process with respect to this Submission.

II. SUMMARY OF THE SUBMISSION

5. The Submitters assert that Mexico is failing to effectively enforce Articles 28 paragraph IV, 35 *bis* 1, 170, and 170 *bis* of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—"LGEEPA") and Article 5(M) paragraph I of the Regulation to the LGEEPA respecting Environmental Impact Assessment (*Reglamento de la LGEEPA en Materia de Evaluación del Impacto Ambiental*—"REIA"). The Submitters assert that the Government of Mexico is failing to effectively enforce the latter environmental laws with regard to a project for construction and operation of a treatment plant for sludge, drill cuttings, wastewater, and industrial waste (the "Project") being developed by Caresa.[1] The Submitters assert that the Project in question is being carried out at a distance of 25 meters from human settlements in Cunduacán, Tabasco, without the required safety measures ordered in the environmental impact authorization having been put in place, thereby causing "health problems" to residents in the locality.[2]

6. According to the Submitters, Caresa initiated the Project on 6 September 2004, without holding the proper environmental impact authorization, and in order to obtain said authorization, Caresa allegedly provided false information concerning the commencement of activities in an Environmental Impact Statement (EIS), which was not submitted for review until December 2004.[3]

7. The Submitters further state that in April 2005 the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—"Profepa") informed the Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*—"DGIRA") responsible for reviewing and approving the EIS, that for backfilling at the site Caresa used drill cuttings with total petroleum hydrocarbon concentrations in

[1] Revised Submission, p. 10.
[2] Original Submission, pp. 2, 3, 6.
[3] *Ibid.*, pp. 3-4.

excess of permitted levels.[4] On 3 June 2005, DGIRA issued an environmental impact authorization, in which execution of the Project is made conditional upon cleanup work at the site consisting of removal, treatment and final disposal of sludge used for backfilling of the site in question.[5] According to the Submitters, despite this condition of prior site restoration imposed by DGIRA, the branch did not set a deadline for compliance, nor did it consider other measures for environmental and human health protection.[6] The Submitters assert that in August 2005 the matter was communicated in writing to the Profepa office in the state of Tabasco, requesting enforcement of the conditions of the environmental impact authorization, but allegedly the Submitters did not receive a satisfactory response.[7] They moreover indicate that they were not properly notified with regard to fines and safety measures applied by Profepa.[8]

III. SUMMARY OF MEXICO'S RESPONSE

A. Existence of pending proceedings

8. In its Response, Mexico notifies the Secretariat of the existence of an administrative proceeding before Profepa, an administrative action (*procedimiento contencioso administrativo*) in Federal Tax and Administrative Court (*Tribunal Federal de Justicia Fiscal y Administrativa*), and a criminal proceeding before the Office of the Attorney General of the Republic (*Procuraduría General de la República*—"PGR"),[9] all of which according to Mexico are directly related to the matter raised in the Submission. For this reason, Mexico requests that, pursuant to Article 14(3)(a) of the Agreement, the Secretariat proceed no further in processing the Submission.

B. Inadmissibility of the Submission

9. Mexico asserts that submission SEM-07-005 was inadmissible because the Submission does not clearly identify the submitting person and organization,[10] and therefore failed the test of NAAEC Article 14(1)(b) and Section 2.2 of the Guidelines. Mexico further asserts that since no documents were provided for proof of the domicile indicated in the Submission,[11] the Submission did not meet the requirements of NAAEC Article 14(1)(f). Finally, Mexico challenges the Secretariat's decision to allow the Submission, arguing that the Submission did not provide sufficient information to support the Submitters' assertions, as required by NAAEC Article 14(1)(c). Specifically, Mexico asserts that the Submission did not contain a

[4] Appendix to original Submission: Doc. EOO.-DGIFC.-0321/2005 of 26 April 2005, issued by the Industrial Inspection Branch (*Dirección General de Inspección Industrial*) of Profepa.
[5] Original Submission, p. 6.
[6] *Ibid.*
[7] *Ibid.*, pp. 6-7.
[8] *Ibid.*, p. 9.
[9] Response, p. 1.
[10] *Ibid.*, p. 15.
[11] *Ibid.*, pp. 19-20.

succinct narrative of the facts on which the allegation of Mexico's failure to enforce is based, and included no documentary evidence to support its contentions.[12]

C. Alleged failures to effectively enforce the environmental law

10. Mexico indicates that it investigated whether, at the site in question, works or activities were being carried out that could have caused serious ecological harm, and it verified whether Caresa held the required authorizations, licenses, and permits, and whether the company was in compliance with the safety measures applied in the environmental impact authorization. Mexico instituted an administrative proceeding that included two fines, one for violations under environmental impact law and one for non-compliance with the measures ordered by Profepa;[13] it verified compliance with corrective measures ensuing from an order issued as part of the administrative proceeding, and it requested that the tax authority undertake an administrative proceeding for collection of the second fine, filing a report of criminal conduct with the PGR against officials of Caresa for facts that may constitute an offence defined in Article 420 Quater, paragraph V of the Federal Criminal Code (*Código Penal Federal*—"CPF").[14]

11. Concerning the Submitters' allegation of failure to address and process two citizen complaints, Mexico states that both were duly processed and the Submitters were kept notified of their status.[15] As to the assertion that the Project was environmentally hazardous, Mexico contends that hazardous materials and wastes were considered in the EIS and that the processes and technologies associated with the Project were duly analyzed by DGIRA.[16] Mexico adds that through the issuance of the environmental impact authorization, the Project's execution was made conditional upon compaction and impermeabilization of the soil as well as placement of clay and a high-density polyethylene geomembrane in each of the waste treatment ponds in order to prevent infiltration of contaminants into the subsoil.[17]

12. Mexico refers to Caresa's disposal of contaminant-containing materials without prior authorization. It asserts in this regard that, as a condition for the Project, Mexico required a prior site restoration in order to prevent or minimize the Project's harmful environmental impacts.[18] Mexico maintains that it was effectively enforcing LGEEPA Article 28, which establishes the obligation to obtain environmental impact authorization prior to the performance of works or activities.

13. As to the Submitters' assertion that Mexico failed to penalize Caresa for disposal of drilling sludge without adequate preventive measures, Mexico notes that it ordered the necessary safety measures and applied sanctions for non-compliance with these measures. Mexico further states that Profepa filed a report of environmental offenses committed by Caresa with

[12] *Ibid.*, pp. 21, 40-42.
[13] The first fine, in the amount of P$1,658,673.60, was assessed on 11 August 2006, while the second, for P$1,719,380, was assessed on 15 January 2007.
[14] Response, pp. 43-44.
[15] *Ibid.*, pp. 46-49.
[16] *Ibid.*, p. 54.
[17] *Ibid.*, p. 56.
[18] *Ibid.*, p. 64.

the PGR.[19] The foregoing facts substantiate, in Mexico's view, the assertion that Profepa ordered Caresa to take a set of urgent measures and that non-compliance with these measures gave rise to administrative penalties and a criminal proceeding against the company.[20]

IV. REASONING OF THE SECRETARIAT

14. This determination corresponds to the stages of the citizen submission procedure contemplated in NAAEC Article 14(3). The Secretariat has considered Mexico's procedural objections in its Response concerning the admissibility of the submission, and does not find compelling reasons to modify its determination of 13 December 2007. Now, in light of information provided in Mexico's Response regarding the existence of pending proceedings, the Secretariat, in accordance with Article 14(3)(a), determines that it can proceed no further with Submission SEM-07-005 and sets out its reasons for such determination as follows.

A. Admissibility of the submission with reference to NAAEC Article 14(1)(b), (c), and (f)

15. Mexico asserts that the Secretariat should not have allowed submission SEM-07-005 because it does not meet the requirements of NAAEC Article 14(1)(b), (c), and (f).

16. NAAEC **Article 14(1)(b)** and Section 2.2 of the Guidelines provide that the Secretariat is authorized to consider a submission that "clearly identifies" the person or organization making it. Mexico asserts that the submission does not clearly identify the persons and organizations making it, since no documents were attached that clearly identify Efraín Rodríguez León, José Manuel Arias Rodríguez, and the associations Comité de Derechos Humanos de Tabasco, A.C. and Asociación Ecológica de Santo Tomás, A.C.; nor were the charters of these associations or their entries in the Public Register of Property (*Registro Público de la Propiedad*) included.[21]

17. The Secretariat found in its determination of 13 December 2007, that it is sufficient for the person or organization making a submission to state their name and address in order for the Secretariat to clearly identify the Submitters and ascertain their residence or establishment in the territory of a Party. Neither the NAAEC nor the Guidelines set out the requirements for confirming the identification and residence of a submitter as Mexico asserts in its Response.

18. NAAEC **Article 14(1)(c)** stipulates that a submission must provide "sufficient information to allow the Secretariat to review [it], including any documentary evidence on which the submission may be based". Section 5.3 of the Guidelines specifies that a submission must contain a "succinct account of the facts" on which it is based. Mexico alleges that the submission does not meet this requirement, because the assertions the Submitters make are not substantiated in a "succinct account of the facts".[22]

[19] *Ibid.*, pp. 66-69.
[20] *Ibid.*, pp. 71-74.
[21] *Ibid.*, p. 16.
[22] *Ibid.*, p. 21.

19. The Secretariat found that the facts described and the documentary evidence attached to the Submission were however sufficient to allow the Secretariat to review the Submission, as well as to support the central assertion therein, which was Mexico's alleged failure to effectively enforce the conditions of the environmental impact permit governing the execution of a drilling waste treatment and final disposal project in Cunduacán, Tabasco. For example, the Submitter supplied the Secretariat with:

    a) Official communication PFPA.27.07/00073/2005, dated 10 January 2005, issued by the Profepa branch office in Tabasco and official Communications SPADS/1189/2004, dated 19 November 2004, and issued by the Direction of Environmental Assessment and Protection of Sedespa. These documents relate to site visits at the Project site and the assertion that neither Profepa nor Sedespa found evidence of soil contamination.

    b) Executive summary of the Project's environmental impact statement. This document—filed before DGIRA on December 2004—indicates that the status of the Project was at zero per cent progress and is related to the Submitters' assertion of the alleged false information filed by the company to obtain the environmental impact authorization.

    c) Official communication EOO.-DGIFC.-0321/2005, dated 26 April 2005, issued by Profepa's Industrial Inspection Branch. In this document Profepa requested DGIRA to:

        > [d]eny the environmental impact authorization to the company Caresa for the Project located in the Municipality of Cunduacán, Tabasco, until [the company can] demonstrate to this Ministry that it has removed said materials and, in any case, conducted cleanup work, since the company initiated the construction of the project without the referred authorization.

    d) Official communication S.G.P.A./DGIRA.DDT.0337.05, dated 3 June 2005, issued by DGIRA, asserting that Caresa:

        > [U]sed drilling cuts with concentrations of petroleum hydrocarbons in a greater quantity than allowed by Profepa [and that] said cuts were used for backfilling of the proposed site for developing the project.

    e) Administrative decision in file PFPA/SII/DGIFC/47/0003-06, dated 11 August 2006, issued by Profepa's Industrial Inspection Branch, which documents a fine imposed on Caresa for failing to conduct the required measures in the environmental impact authorization.

20. Thus, the Submission included information to support central assertions made by the Submitters.

21. NAAEC **Article 14(1)(f)** stipulates that a submission must be "filed by a person or organization residing or established in the territory of a Party". Mexico contends that fulfillment of this requirement must be demonstrated by presentation of a certificate of domicile or residence, or any other document serving as authentic proof of domicile or

residence. In Mexico's view, mere assertion of domicile on the part of the Submitter is insufficient to meet the requirements of Article 14(1)(f). Mexico further states that the Submitters gave indication of domicile but did not attach any proof thereof,[23] and that for this reason the Submission should not have been admitted.

22. Nothing in the Guidelines or NAAEC indicates that proof of domicile must be given in the manner indicated by Mexico in it Response.

23. The Secretariat is required by the opening sentence of Article 14(1) and guided in Guideline 7 to determine whether or not a submission meets the six criteria set out in Article 14(1). In order to make such determination, it is often necessary for the Secretariat to interpret the meaning of the provisions of Article 14(1). That the Secretariat may interpret its constitutive instruments is supported by the doctrine of "effectiveness" in public international law, which has been described in a recent international arbitral award as follows:

> [I]nternational organisations have regularly approached the interpretation of their constituent instruments [...] by way of the concept of institutional "effectiveness". Even though the governing text may not explicitly empower the organisation to act in a particular manner, international law authorizes, indeed requires, the organisation, should it find it necessary, if it is to discharge all its functions effectively, to interpret its procedures in a constructive manner directed towards achieving the objective the Parties are deemed to have had in mind. The same is true of international judicial organs. (Territorial Dispute (Libyan Arab Jamahiriya/Chad) Judgment, ICJ Reports 1994, pp. 6, 25 and the cases there cited in support of "one of the fundamental principles of the interpretation of treaties, consistently upheld by international jurisprudence, namely, that of effectiveness. . . .").[24]

24. The Secretariat, although neither a court nor a dispute resolution body, is an integral part of an international organization, the CEC, and in order to make determinations as required by Articles 14 and 15 and thus effectively carry out its mandate, considers that it must necessarily be able to interpret the provisions of Articles 14 and 15, and related sections of NAAEC such as Article 45. The Secretariat is further informed in the Guidelines para. 5.6(b) to consider "whether further study of the matters raised [in a submission] would advance the goals of [NAAEC]." The Secretariat, in assessing whether a submission meets the requirements of Article 14(2), must also consider pursuant to Article 14(2)(b) whether "the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of [the] Agreement." In accordance with Article 31(1) of the 1969 Vienna Convention on the Law of Treaties[25] (the "Vienna Convention"), "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Secretariat is given direction in various parts of the Guidelines and NAAEC to interpret and apply the provisions of Articles 14 and 15 of NAAEC in light of NAAEC's object and

[23] *Ibid.*, pp. 20-21.
[24] Eritrea-Ethiopia Boundary Commission, Statement of 27 November 2006, UN Security Council Doc. S/2006/992, 15 December 2006, 9-34, at 14.
[25] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

purpose; i.e. "the goals of NAAEC." Article 31(1) of the Vienna Convention is helpful in elucidating this task.

25. In light of the foregoing, and having carefully reviewed Mexico's Response regarding application of NAAEC Articles 14(1)(b), (c), and (f), the Secretariat considers that:

    a) The ordinary meaning of the words "clearly identify the person or organization making the submission" in Article 14(1)(b) taken in the context of that Article, do not explicitly require the types of documentation that Mexico asserts in its Response, rather the Submitters in this case could be clearly identified through the information supplied to the Secretariat, such as names, addresses, and contact details which the Secretariat also verified in subsequent correspondence. The object and purpose of Article 14(1)(b) to clearly identify the submitter appears to be at least three-fold: first, to help establish whether a submission is *bona fides*, and together with Article 14(1)(f) whether it is from a person or organization residing in or established in the territory of a Party; second, to enable the Secretariat to communicate as necessary with the submitter in accordance with the applicable provisions of the Agreement and the Guidelines, particularly those requiring the Secretariat to communicate in writing by reliable means (Guideline 3.7) and to inform the submitter of the progress of its submission (Guideline 3.9); and third, to allow the Party concerned to ascertain whether there are any pending proceedings or matters involving the submitter. There was in this Submission, no doubt of the Submitters' identity which would have warranted a request for the types of documents that Mexico now asserts would be necessary for proper application of Article 14(1)(b). Mexico's Response did not include evidence or argument refuting the Submitter's identity. However, had a doubt regarding the identity of the Submitters been raised either in its initial review of the Submission or during analysis of Mexico's Response, the Secretariat would have undertaken to clarify the Submitters' identity, possibly through a request for the types of information Mexico set out. Where the Submitters' identity could not have been clearly established in accordance with Article 14(1)(b), the Secretariat would have proceeded no further with the Submission;

    b) Article 14(1)(c) requires that a submission "provides *sufficient* information to allow the Secretariat to *review* the submission [emphasis added]," but Mexico in challenging the Secretariat's decision to request a Response from Mexico, appears to be asking the Secretariat to apply deeper levels of review found in later stages of the process to an Article 14(1)(c) review. Article 14(1)(c) does not appear however, to be concerned with consideration of the merits of assertions raised in a submission, as Article 15(1) does for the purpose of determining whether a factual record is warranted. Moreover, there is no definition in the Guidelines or the Agreement for what constitutes either a "succinct account of the facts" or what "documentary evidence" might be necessary to review a submission. Here again, the Secretariat must use its discretion in interpreting the ordinary meaning of Article 14(1)(c). The requirement in Article 14(1) that a submission must contain "sufficient information" to allow the Secretariat to "review" it, appears to mean simply that the submission must include information such that the Secretariat can ascertain whether it satisfies the criteria in the checklist of Article 14(1)(a) through (f) or not; most of which criteria could reasonably be characterized as administrative in nature.

As to Mexico's contention that the Submission contained no succinct account of the facts, it is important to consider that Guideline 3.3 limits the length of the submission to no more than 15 typed pages of letter-size paper. A submission is required to recount the facts pertaining to items (a) through (f) of Article 14(1) within those 15 pages, and to address the criteria set out in Guidelines paragraph 5. The Submission in this case was 11 pages in length including citations, and contained assertions relating to a time-span of over two years. The Secretariat considers that the Submitters in this matter provided a succinct account of the facts such that the Secretariat could conduct an initial review of the Submission in accordance with Article 14(1);

c) In the same vein as the discussion above in point a), the Secretariat does not consider that the ordinary meaning of Article 14(1)(f) carries with it a requirement of producing to the Secretariat documentary evidence proving that the submitter is residing in or established in the territory of a Party.[26] Nothing in the Guidelines or in the Agreement specify that any such proof be provided for the Secretariat to be able to ascertain whether a submission meets the criteria of Article 14(1)(f). Article 14(1)(f) appears to be concerned simply with establishing that the submitter is from a Party to NAAEC, and not some other State outside NAAEC. In this submission, the Submitters provided names, telephone numbers, an address, and e-mail addresses in Mexico, and the original Submission was apparently stamped by an official in the municipality of Cunduacán. The Secretariat thus had no information on the face of the Submission which could have led it to believe that the Submitters were not a "person or an organization residing in or established in the territory of a Party." However, had a doubt regarding the identity of the Submitters been raised either in the Secretariat's initial review of the Submission or in light of Mexico's Response, the Secretariat would have promptly undertaken to clarify the Submitters' residence or establishment in the territory of a Party. Where the Submitters' residences or establishment in the territory of a Party could not be clearly determined in accordance with Article 14(1)(f), the Secretariat would have proceeded no further with the submission.

26. In light of the above discussion, the Secretariat recalls previous determinations regarding Article 14(1), namely that "a submission is not expected to contain extensive discussion of each criterion and factor in order to qualify under Article 14(1) […] for more in-depth consideration."[27]

[26] The Secretariat finds further support for the view that it is within the Secretariat's discretion to interpret Article 14(1)(b) and (f) in this manner, because of the duty of the Secretariat to safeguard the identity of a submitter, should the submitter so wish, pursuant to NAAEC Article 11(8)(a), and Guideline 17.1 When the Secretariat must safeguard the identity of the Submitter in accordance with NAAEC Article 11(8)(a) and Guideline 17.1, it appears to be within the sole discretion of the Secretariat to determine the identity of the Submitter, as the identity of the Submitter may not be revealed to a third party.

[27] SEM-98-003 (*Great Lakes*) Determination Pursuant to Article 14(1) and (2) (8 September 1999), at p. 3, available from http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=50, site last checked on 27 February 2009.

B. Existence of pending proceedings

27. Mexico requested that information concerning pending proceedings relating to this matter be kept confidential and proprietary as permitted by NAAEC Article 39(1) and (2). Section 17.3 of the Guidelines states, "confidential or proprietary information provided by a Party […] may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted" and encourages the Party to "furnish a summary of such information or a general explanation of why the information is considered confidential or proprietary." On 15 May 2008, Mexico filed a summary of the confidential information for public disclosure relating to pending proceedings involving the same matter raised by the Submitters.

28. In its Response, Mexico requested that pursuant to Article 14(3)(a), the Secretariat dismiss submission SEM-07-005 due to the existence of pending judicial or administrative proceedings. In the latter connection, Mexico cited an administrative proceeding before Profepa, an administrative action in Federal Tax and Administrative Court, and a criminal proceeding before the PGR.

29. NAAEC Article 45(3)(a) defines a judicial or administrative proceeding as:

> a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order;

30. The Secretariat has found in previous determinations[28] that where it applies these exceptional grounds for terminating a submission, it must verify whether the proceeding in question qualifies as a judicial or administrative proceeding in the sense of Article 45(3); whether it is being pursued by the Party in a timely fashion and in accordance with its law and is related to the same matter addressed in the submission, and whether the proceeding invoked by the Party in its response has the potential to resolve the matter raised in the submission. The Secretariat has also found that the exclusion of proceedings within the scope of Article 45(3)(a) helps avoid duplication of effort and prevent interference with pending litigation.

31. The Secretariat has previously determined that the NAAEC Article 45(3)(a) concepts of "judicial or administrative proceeding" and the words "pursued by a Party" must be construed as those judicial or administrative proceedings that are initiated by one of the Parties:

[28] "In view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect"; SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (13 June 2001). Cfr. SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*), Article 15(1) Notification (18 May 2005); SEM-04-005 (*Coal-fired Power Plants*), Article 15(1) Notification (5 December 2005); SEM-05-002 (*Coronado Islands*), Article 15(1) Notification (18 January 2007).

> In other words, where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination of the allegations of non-enforcement. The examples listed in Article 45(3)(a) support this approach, since the kinds of actions enumerated [in the article] are taken almost exclusively by the official government bodies charged with enforcing or implementing the law.[29]

32. The Submitters assert that Caresa did not comply with condition 2 of the environmental impact authorization, which makes execution of the Project conditional upon site restoration and installation of a geomembrane.

33. On 6 October 2005, Profepa made an inspection of Caresa to verify compliance with the environmental law and, in particular, the status of compliance with the conditions of the environmental impact authorization. As a result of the inspection, on 10 February 2006, Profepa ordered Caresa to take urgent measures including the actions necessary to clean up the site where the Project was being developed and to remove all backfilling material used on the site. As a consequence of the company's noncompliance with these orders, on 11 August 2006, Profepa assessed a fine of $1,658,673.60 pesos and ordered the company to take corrective measures to remediate the site in question and, in particular to fulfill condition 2 of the environmental impact authorization.

34. On 23 October 2006, Profepa found that Caresa had failed to comply with the measures ordered. Consequently, on 15 January 2007, Profepa issued an order in which it assessed a second fine of P$1,719,380. On 23 April 2007, Profepa made another inspection visit to Caresa during which it confirmed noncompliance with the corrective measures ordered. Mexico notes that the administrative proceeding is currently stayed, since Caresa appealed the order of 11 August 2006.

35. Caresa filed an administrative action in Federal Tax and Administrative Court. On 18 January 2008, the court set aside the order of 11 August 2006. On 5 March 2008, Profepa appealed for review of that decision. Mexico notes in its Response that the appeal filed by Profepa is still pending.

36. Mexico further states in its Response that a criminal investigation against Caresa is now being conducted by the Federal Justice Department (*Ministerio Público de la Federación*) as a result of a report of criminal conduct filed by Profepa in connection with facts related to the offense defined by CPF Article 420 Quater, paragraph V, which provides as follows:

> Anyone who commits any of the following acts is liable to one to four years of imprisonment and 300 to 3000 days' fine:
> [...]

[29] SEM-96-003 (*Oldman River I*), Secretariat Determination under Article 15(1) (2 April 1997).

> V. Failure to perform or comply with technical, corrective, or safety measures necessary to avert environmental harm or risk that are ordered or imposed by an administrative or judicial authority.

37. While an ongoing criminal investigation into the possible commission of environmental offenses does not fall within the definition of NAAEC Article 45(3), the Secretariat has determined that it can proceed no further with its analysis of the Submission. The Secretariat has previously found that criminal investigations of the matters at the heart of a submission entail a degree of confidentiality and sensitivity, and therefore the preparation of a factual record in these circumstances also poses the potential risk of interfering with any criminal investigation.[30]

38. As to the proceedings to which Mexico refers in its Response, these were initiated by the relevant authorities of Mexico; they are based in the Party's law, and they fit —with the exception of a criminal investigation— within the concept of an administrative proceeding under NAAEC Article 45(3)(a). Additionally, from the information provided to the Secretariat it is evident that these proceedings are at a procedural stage where, if preparation of a factual record were to be recommended, the result could be to interfere with or duplicate the proceedings. Finally, the Secretariat observes that the matters addressed by these pending proceedings relate to the assertions made in the Submission.

V. DETERMINATION

39. Without opining on the merits of the concern expressed by the Submitters with regard to the possible environmental impacts of the Project, and in particular, that DGIRA issued the required environmental impact authorization subsequent to commencement of work on the Project; for the reasons stated herein, the Secretariat has determined that it can proceed no further with its review of Submission SEM-07-005 (*Drilling Waste in Cunduacán*) in view of the existence of pending proceedings initiated by Mexico. In accordance with Section 9.4 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, the Submitters and the Council of the CEC are hereby notified that the process relating to this submission is now terminated.

Secretariat of the Commission for Environmental Cooperation

per: Dane Ratliff
Director, Submissions on Enforcement Matters Unit

[30] SEM-00-004 (*BC Logging*), Article 15(1) Notification (27 July 2001).

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