

Secretariat of the Commission for Environmental Cooperation

**Determination in accordance with Article 14(1)
of the North American Agreement on Environmental Cooperation**

Submitters: Greenpeace Mexico, A.C.
Frente Democrático Campesino
Unión Nacional de Productores Agropecuarios, Comerciantes,
Industriales y Prestadores de Servicio El Barzón, A.C. ("El
Barzón, A.C.")
Centro de Derechos Humanos de las Mujeres, A.C.

Represented by: Greenpeace Mexico, A.C.

Party: United Mexican States

Date of submission: 28 January 2009

Date of this determination: 6 January 2010

Submission I.D.: SEM-09-001 (*Transgenic Maize in Chihuahua*)

I. EXECUTIVE SUMMARY

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement") provide for 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) and the "Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation" (the "Guidelines"). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC 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, 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 NAAEC Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission.¹
2. On 28 January 2009, Frente Democrático Campesino, El Barzón, A.C., Centro de Derechos Humanos de las Mujeres, A.C., Greenpeace Mexico, A.C., and others² (the

¹ Full details regarding the various stages of the process as well as previous Secretariat Determinations and Factual Records can be found on the CEC's Citizen Submissions on Enforcement Matters website at: <http://www.cec.org/citizen/index.cfm?varlan=english>

² Between the filing date of submission SEM-09-001 and March 27 2009, the Secretariat received 5728 petitions claiming to join the submission. All of these petitions came from the same email address: write-a-letter@smtp-gw.greenpeace.org.

“Submitters”), filed a citizen submission with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) in accordance with Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or the “Agreement”). The Submitters assert that Mexico is failing to effectively enforce its environmental laws in connection with the control, inspection, investigation, and risk assessment of transgenic maize in Chihuahua, Mexico.

3. Upon analysis of submission SEM-09-001 (*Transgenic Maize in Chihuahua*, the “Submission”), the Secretariat has determined that it does not meet all the admissibility requirements of Article 14(1) of the Agreement. The Secretariat presents its reasons for this determination, below.

II. SUMMARY OF THE SUBMISSION

4. The Submitters assert that the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat); the Office of the Attorney General of the Republic (*Procuraduría General de la República*—PGR); the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa); the Ministry of Agriculture, Livestock Production, Rural Development, Fisheries, and Food (*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación*—Sagarpa); the Ministry of the Treasury and Public Credit (*Secretaría de Hacienda y Crédito Público*—SHCP), and the Interministerial Commission on the Biosafety of Genetically Modified Organisms (*Comisión Intersecretarial de Bioseguridad de los Organismos Genéticamente Modificados*—Cibiogem), are all failing to effectively enforce the environmental laws cited in the submission.³
5. The Submitters state that the above Mexican authorities are failing to effectively enforce Articles 4 and 17 of the Political Constitution of the United Mexican States (the “Mexican Constitution”); NAAEC Articles 5, 6, and 7; Articles 1, 2, 8, 9, 10, 15 and 16 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (the “Cartagena Protocol”); Articles 2 paragraphs I, II, VI, VII, XI, XII and XIII, 9 paragraphs I, II, III, IV, V, VIII, IX, X, XI, XIV, XV, XVI, XVII and XVIII, 12, 13, 17, 18, 28, 29, 32 paragraph I, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, 49, 60, 61, 62, 63, 65, 66, 86, 87, 88, 101, 102, 110, 111, 112, 113, 114, 115, 117, 119, and 120 of the Biosafety of Genetically Modified Organisms Act (*Ley de Bioseguridad de los Organismos Genéticamente Modificados*—“LBOGM”); Articles 1, 2 paragraph III, 15, 160, 161, 164, 165, 166, 170, 170 Bis, 182, 189, 190, 191, 192, 193, 198, 201, 202, 203, and 204 of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA), and Articles 420 Ter, 421, and 422 of the Federal Criminal Code (*Código Penal Federal*—CPF). The Submitters further assert that Mexico has not implemented various recommendations contained in *Maize and Biodiversity: the Effects of Transgenic Maize in Mexico*, a report produced by the CEC Secretariat in accordance with NAAEC Article 13.⁴

³ Submission, p. 2.

⁴ *Ibid.*, pp. 5, 7, 9, 10, 11, 12, 13.

6. The Submitters note that for the state of Chihuahua, classified by the National Institute of Ecology (*Instituto Nacional de Ecología*—INE) as a region of high maize diversity, there are records of the occurrence of 23 landraces of native maize and two of teocintle.⁵ They state that despite the existence of a documented case of gene flow from transgenic maize to conventional maize varieties, the biosafety measures prescribed by the environmental laws cited in the submission are not being enforced.⁶
7. The Submitters refer to “the failure of the Mexican authorities to take measures ensuring an adequate level of protection of native and hybrid maize varieties from GM [genetically modified] seeds” entering the country and being planted in Chihuahua.⁷ They assert a lack of measures to control and supervise storage, distribution, and commercialization of genetically modified maize. They further contend that measures contemplated in the environmental law that are necessary for adequate customs inspection and control of transgenic maize imported into Mexico have not been taken, citing risk assessment and prior informed agreement as examples.⁸ According to the Submitters, there is evidence of the importation, distribution, and cultivation of transgenic maize in the state of Chihuahua, in violation of the environmental law provisions cited in the submission. The Submitters assert that they were not notified of the status of a complaint filed with the PGR in connection with illegal growing of transgenic maize.⁹

III. ANALYSIS

8. NAAEC Article 14 authorizes the Secretariat to consider submissions from any person or non-governmental organization asserting that an NAAEC Party is failing to effectively enforce its environmental laws. As the Secretariat has found in previous Article 14(1) determinations,¹⁰ Article 14(1) is not intended to be an “insurmountable screening device”. This means that the Secretariat will interpret every submission in accordance with the Agreement and the Guidelines, yet without an unreasonably narrow interpretation and application of those Article 14(1) criteria. The Secretariat analyzed submission SEM-09-001 with that the latter perspective in mind.

A. Opening Sentence of Article 14(1)

9. The opening sentence of Article 14(1) allows the Secretariat to consider submissions “from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law....” The Submitters are nongovernmental organizations residing in Mexico. In addition, at the date of this determination, the

⁵ *Ibid.*, p. 14.

⁶ *Ibid.*, p. 1.

⁷ *Ibid.*, p. 8.

⁸ *Ibid.*, p. 8.

⁹ *Ibid.*, pp. 4-6.

¹⁰ See, in this regard, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998), and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

Secretariat received 5728 emails from persons wishing to join the Submitters of SEM-09-001;¹¹ however, it was not possible in all cases to confirm this interest, not only because most did not include contact information as per Section 3.4 of the Guidelines, but the Submitters did not confirm joinder of any persons writing in support of the Submission.¹²

10. As to the requirement in Article 14(1) that submissions concern matters which are ongoing, all of the assertions are in connection with a continuing alleged failure to ensure adequate levels of protection against alleged damage to biodiversity for conventional maize varieties as well as the alleged lack of capacity to investigate and process complaints regarding such alleged damage. The Secretariat considers that the assertions made in the Submission therefore concern the alleged existence of an ongoing failure by a Party to effectively enforce its environmental law.

1. Environmental law in question

11. The Secretariat analyzed the provisions cited in the submission and determines that some of them cannot be reviewed within the procedure established by NAAEC Articles 14 and 15 since they do not meet the definition of environmental law under NAAEC Article 45(2)(a).¹³ In making this determination, the Secretariat considers the primary purpose of the law in question, as defined by Article 45(2)(b) and (c).¹⁴ For purposes of Article 14(1), provisions that do not meet the definition of “environmental law” in Article 45(2) and thus, are not subject to further analysis are: Article 17 of the Constitution; Articles 5, 6 and 7 of NAAEC; Articles 1, 2, 12, sections II, III, IV, V, VI and VII; 28, 29, 102,

¹¹ Until 27 March 2009. These e-mails were almost all generated by an e-mail petition campaign from Greenpeace Mexico.

¹² “Submissions must include the complete mailing address of the Submitter.” Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “Guidelines”), Section 3.4.

¹³ Article 45 (2) (a) of NAAEC provides:

“2. For purposes of Article 14(1) and Part Five:

(a) ‘environmental law’ means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through

(i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,

(ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or

(iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.”

¹⁴ Article 45 (2) (b) and (c) of NAAEC provide:

“2. For purposes of Article 14(1) and Part Five:

(b) For greater certainty, the term “environmental law” does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.

(c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

110 and 111 of the **LBOGM**; and Articles 1 and 2 of **LGEEPA**. With respect to the provisions of the **Cartagena Protocol**, the Secretariat requires, inter alia, further information from the Submitters in order to determine whether it meets the NAAEC definition of Environmental Law, and provides its reasons for this finding below.

12. Concerning the alleged failure to enforce NAAEC Articles 5, 6, and 7, the Secretariat reiterates the position taken in previous determinations that these provisions cannot be considered for analysis within the citizen submissions process, unless an individual or non-governmental organization is authorized to demand their enforcement within Mexico's legal regime, which in this case is not evident.¹⁵ As to the recommendations contained in *Maize and Biodiversity: the Effects of Transgenic Maize in Mexico*, a report produced by the CEC Secretariat pursuant to Article 13(1) of the Agreement, cannot be considered for analysis under Article 14, since that Article 13(1) report is not part of the Party's environmental law as defined by Article 45(2) of the Agreement.¹⁶
13. Regarding Article 4 of the **Political Constitution of the United Mexican States**, the Secretariat has determined that it can analyze portions of this provision where the analysis is conducted in relationship with the environmental law in question. However, such an analysis would be limited to the fourth paragraph of Article 4 of the Mexican Federal Constitution.¹⁷ Also, such article is only considered where there is a necessary element in effective enforcement of the environmental law at issue. Concerning Article 17 of the Mexican Constitution, the Secretariat considers that this law does not meet the requirements of Article 45(2), and its primary purpose is not "protection of the environment or the prevention of a danger to human life or health".¹⁸
14. The Submitters assert that Mexico is failing to effectively enforce the **Cartagena Protocol**. The Secretariat must determine whether the Cartagena Protocol is environmental law as defined in the Agreement; however it proceeds cautiously in doing so, as the Cartagena Protocol is an international legal instrument that may not be fully enforceable at the domestic level in Mexico. The Secretariat therefore requires additional information from the Submitters to determine whether their assertions on effective enforcement under the Cartagena Protocol meet the definition of Environmental law in

¹⁵ SEM-98-001 (*Guadalajara*), Article 14(1) Determination (13 September 1999).

¹⁶ NAAEC Article 13(1) provides: "The Secretariat may prepare a report for the Council on any matter within the scope of the annual program. Should the Secretariat wish to prepare a report on any other environmental matter related to the cooperative functions of this Agreement, it shall notify the Council and may proceed unless, within 30 days of such notification, the Council objects by a two-thirds vote to the preparation of the report. Such other environmental matters shall not include issues related to whether a Party has failed to enforce its environmental laws and regulations. Where the Secretariat does not have specific expertise in the matter under review, it shall obtain the assistance of one or more independent experts of recognized experience in the matter to assist in the preparation of the report."

¹⁷ A circuit court has stated with respect to this that "[...] specifically, its content must be defined on the basis of a systematic, coordinated, and complementary interpretation...." ADEQUATE ENVIRONMENT FOR ENVIRONMENT AND WELL-BEING: CONCEPT, REGULATION AND REALIZATION OF THIS GUARANTEE. Novena época, Tribunales Colegiados de Circuito, *Semanario Judicial de la Federación* and *Gaceta*, vol. XXI, January 2005, *Tesis* [Decision] I.4o.A.447 A, p. 1799 administrative matter, isolated decision (*tesis*).

¹⁸ SEM-98-001 (*Guadalajara*), Article 14(1) Determination (13 September 1999).

NAAEC Article 45(2). The Secretariat notes that while the Submission describes alleged failures in effective enforcement of some parts of the Mexican Federal Laws quoted in the Submission, it fails to fully do so with regard to the Cartagena Protocol. The Submitters may further elaborate on their assertions concerning the Cartagena Protocol, having due regard to Guideline 5.1 by focusing on “any acts or omissions of the Party asserted to demonstrate such failure”, in a revised submission.

15. Concerning the **LBOGM**, the Secretariat considers in accordance with Article 45(2) that the law in question contains provisions the primary purpose of which is to regulate activities concerning genetically modified organisms with a view to protecting the environment and preventing a danger to human health viz. LBOGM Articles 1 and 2.¹⁹ In that regard, LBOGM provisions related to the following are considered for further analysis: principles guiding biosafety policy,²⁰ particularly for enforcing LBOGM; the relevant powers of Sagarpa,²¹ except those with no connection to the matter raised in the submission;²² coordination among the authorities in the event of an accidental release of genetically modified organisms (“GMOs”);²³ exercise of the SHCP powers as regards inspection of GMOs entering Mexico;²⁴ permit application for GMO release, the processing, issuance, validity, and effects of such permits, and the measures contained in such permits, as well as modifications to the conditions that originated a permit and concomitant permit holder obligations;²⁵ restrictions on the importation of GMOs;²⁶ requirements for risk assessment;²⁷ rules applicable to centers of origin;²⁸ labeling requirements for GMOs intended for planting in Mexico;²⁹ enforcement of Mexican Official Standards;³⁰ rules applicable to the conduct of inspection visits;³¹ establishment of safety measures or urgent measures,³² and infractions and fines for violations of the law.³³
16. Finally, the Secretariat proceeds no further with LBOGM provisions related to promotion of scientific and technological research, since the submission lacks any assertions in this regard.³⁴ Likewise, no further consideration is required for provisions related to the

¹⁹ LBOGM Articles 1 and 2 however, are only taken into consideration to guide the Secretariat in its analysis of enforceable provisions of the LBOGM noted in paragraph 15 of this determination, since the purpose of LBOGM Articles 1 and 2 is merely to define the nature, object, and scope of the LBOGM itself.

²⁰ LBOGM Article 9.

²¹ *Ibid.*, Articles 12 paragraph I and 13.

²² *Ibid.*, Article 12 paragraphs II, III, IV, V, VI and VII.

²³ *Ibid.*, Article 17.

²⁴ *Ibid.*, Article 18 paragraphs I, II, IV, and V.

²⁵ *Ibid.*, Articles 32, 33, 34, 36, 37, 38, 39, 42, 45, 46, 47, 48, and 49.

²⁶ *Ibid.*, Articles 40, 43.

²⁷ *Ibid.*, Articles 60, 61, 62, 63, 64, 65, and 66.

²⁸ *Ibid.*, Articles 86, 87, and 88.

²⁹ *Ibid.*, Article 101.

³⁰ *Ibid.*, Articles 112 and 113.

³¹ *Ibid.*, Article 114.

³² *Ibid.*, Articles 115 and 117.

³³ *Ibid.*, Articles 119 and 120.

³⁴ *Ibid.*, Articles 28 and 29.

characteristics of Mexican Official Standards³⁵ since the submissions on enforcement matters process is not oriented to analyze alleged deficiencies in environmental law such as those the Submitters asserts.

17. Concerning the **LGEEPA**, provisions related to the purpose of the act³⁶ and with the designation of biodiversity as a public good,³⁷ although these may guide the Secretariat in its analysis of the environmental law in question, are not considered for effective enforcement purposes. As to the provisions on the following: principles for law enforcement;³⁸ rules applicable to inspection and monitoring;³⁹ application of safety measures;⁴⁰ commission of environmental offenses;⁴¹ processing of citizen complaints;⁴² processing of requests for information;⁴³ authorization for Profepa to institute proceedings before judicial bodies;⁴⁴ responsibility of persons who affect biodiversity;⁴⁵ and formulation of technical opinions and reports;⁴⁶ these are all considered for further analysis, to the extent these provisions concern assertions regarding alleged failure to effectively enforce LGEEPA.

18. In regard to the **CPF** provisions cited in the submission, the Secretariat considers that their primary purpose is the protection of the environment and the prevention of danger to human life or health.⁴⁷ The Secretariat considers Article 420 *Ter* in its analysis while provisions cited in the submission which establish applicable penalties and safety measures are considered only to the extent such provisions they have not been enforced in court proceedings such as criminal prosecutions.⁴⁸

2. Assertions for further analysis by the Secretariat

19. The Secretariat hereby determines that the submission contains certain assertions on the effective enforcement of environmental law as opposed to alleged deficiencies of the law itself. In making this determination, the Secretariat is cognizant of Article 5 of the Agreement, which sets out certain measures that the Parties may take for effective enforcement of their environmental law.⁴⁹

³⁵ *Ibid.*, Articles 102, 110, 111.

³⁶ LGEEPA Article 1.

³⁷ *Ibid.*, Article 2.

³⁸ *Ibid.*, Article 15.

³⁹ *Ibid.*, Articles 160, 161, 164, 165, 166.

⁴⁰ *Ibid.*, Articles 170 and 170 bis.

⁴¹ *Ibid.*, Article 182.

⁴² *Ibid.*, Articles 189, 190, 191, 192, 193, 198.

⁴³ *Ibid.*, Article 201.

⁴⁴ *Ibid.*, Article 202.

⁴⁵ *Ibid.*, Article 203.

⁴⁶ *Ibid.*, Article 204.

⁴⁷ See other determinations on this topic: SEM-06-003 (*Ex Hacienda El Hospital II*) and SEM-06-004 (*Ex Hacienda El Hospital III*) (consolidated) Notificación conforme al artículo 15(1) (12 May 2008).

⁴⁸ CPF Articles 421 and 422.

⁴⁹ *Cfr.* SEM-98-003 (*Great Lakes*) Determination pursuant to Article 14(1) and (2) (8 September 1999).

i) Assertions concerning the lack of measures ensuring an adequate level of protection for conventional maize varieties

20. The Submitters assert that on 19 September 2008, the National Food and Agriculture Inspection Service (*Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria*—Senasica) “detected and scientifically confirmed the presence of genetically modified maize” in the locality of Valle de Cuauhtémoc, Chihuahua.⁵⁰ They state that, despite having detected this situation, the authorities “took no effective measures to stop this crop in the state of Chihuahua”⁵¹ nor took “measures to inspect and supervise seed storage, distribution, and sales centers supplying the region’s farmers.”⁵² They further assert that customs authorities are not exercising their authority to prevent the entry into Mexico of genetically modified maize, particularly maize bound for the state of Chihuahua.⁵³
21. The Submitters allege the absence of mechanisms to safeguard biosafety in Mexico,⁵⁴ since the special protection regime for maize has not been made operational, centers of origin and genetic diversity have not been determined, and the areas in which the species occur have not been located.⁵⁵ They add that the permitting system for experimental planting of genetically modified maize⁵⁶ is not being implemented and that the release of these organisms has not been subject to adequate risk analysis and assessment,⁵⁷ nor to measures that could be taken in relation to control of accidental releases,⁵⁸ labeling,⁵⁹ public consultation,⁶⁰ access to information⁶¹ and, in general, mechanisms to protect centers of origin and genetic diversity.⁶² The Submitter’s assertion concerning the alleged lack of measures ensuring an adequate level of protection for conventional maize varieties presented in the Submission, may be revised through the NAAEC articles 14 and 15 mechanism.

ii) Assertions concerning the alleged lack of timely processing of complaints and the alleged lack of capacity to investigate and prosecute infractions related to the illegal presence of genetically modified seeds in maize crops

⁵⁰ Submission, p. 5.

⁵¹ *Ibid.*, p. 5. *Cfr.* LBOGM, Article 9, Section XV.

⁵² *Ibid.*, p. 8. *Cfr.* LBOGM Articles 2, Sections VII and VIII, IX; 9, Section III, 18, Section III; and 36. CPF Article 420 *Ter*.

⁵³ *Ibid.*, p. 8. LBOGM Articles 9, Section III; and 18.

⁵⁴ *Ibid.*, p. 10. *Cfr.* LBOGM Article 9, Sections III and IV.

⁵⁵ *Ibid.*, p. 10. *Cfr.* LBOGM Articles 86, 87 and 88.

⁵⁶ *Ibid.*, p. 10. *Cfr.* LBOGM Articles 13, Section III, 34, 42, 45, 46, 47, 48 and 49.

⁵⁷ *Ibid.*, p. 10. *Cfr.* LBOGM Articles 13, Section II; 61, 62, 63, 65, 66.

⁵⁸ *Ibid.*, p. 10. *Cfr.* LBOGM Articles, Section XIV; 115, Section III; and 117.

⁵⁹ *Ibid.*, p. 10. *Cfr.* LBOGM Article 101.

⁶⁰ *Ibid.*, p. 11. *Cfr.* LBOGM Article 33.

⁶¹ *Ibid.*, p. 11. *Cfr.* LBOGM Articles 9, Section XI; 33 and 61, Section I.

⁶² *Ibid.*, p. 10. *Cfr.* LBOGM Articles 9, Sections I, III, IV, V, X, XV and XVI; 13, Sections II, IV and VI; 17 and 86.

22. The Submitters assert that they filed complaints with the PGR and Sagarpa but did not obtain a satisfactory response.⁶³ They note that on 26 September 2007, representatives of the Submitters filed a complaint with the Sagarpa official in the state of Chihuahua in which they requested an investigation of impacts on sites where transgenic seed has been planted.⁶⁴ They state that on 2 October 2007, one of the Submitters filed a complaint with the PGR for possible commission of the offense under CPF Article 420 Ter and that on 1 November 2007 and 25 September 2008, the same Submitter filed additional information with the investigative agency of the Office of the Public Prosecutor (*Ministerio Público*).⁶⁵ They allege that despite their complaints, they have not observed or been notified of any progress on the investigations. In this regard, the Secretariat notes that the Submission does not cite a provision requiring the PGR to notify the complainant on the progress or status of an ongoing criminal investigation. The Submitters may cite any such relevant provision in a revised version of their submission, failing which the Secretariat cannot consider the assertion of the alleged obligation of the PGR to inform the complainant of the status of its complaint.
23. The Submitters refer to the lack of capacity to inspect and verify the presence of genetically modified seeds in maize crops.⁶⁶ They allege that Profepa inspectors do not have sufficient capacity to perform adequate sampling, nor is there allegedly adequate coordination with the specialized biosafety authorities.⁶⁷ They add that the investigative procedures carried out under the responsibility of the PGR and Profepa have been dilatory, deficient as regards the gathering of evidence, and lacking in terms of their investigative and intelligence capacity. The Submitters assert that as a consequence of the alleged lack of technical and legal capacity, there have been no results from the investigations,⁶⁸ nor has there been any order of safety measures available under the law, such as closures, seizures, or neutralization, in light of the alleged risk that such activities pose.⁶⁹ The Secretariat considers that the assertion concerning the alleged lack of capacity to investigate and prosecute infractions related to the illegal presence of genetically modified seeds in maize crops may be further considered.

B. The six requirements of NAAEC Article 14(1)

24. While the submission in part meets the requirement of the opening sentence of Article 14(1), the Secretariat notes that the Submission as a whole does not meet all the requirements listed in that article. The Secretariat hereby explains its reasons for having reached this conclusion.

⁶³ *Ibid.*, p. 5 *Cfr.* LGEEPA Article 182 and 189.

⁶⁴ Submission, pp. 3-4.

⁶⁵ *Ibid.*, p. 4.

⁶⁶ *Ibid.*, pp. 6, 10-11. *Cfr.* LBOGM Articles 9, Section XV; 13, Sections VII and VIII; 112, 113, 114 and 115.

⁶⁷ *Ibid.*, pp. 5-6. *Cfr.* LBOGM Article 17, 18, fracción IV, 66 and 86. LGEEPA Article 15, Section IX.

⁶⁸ *Ibid.*, p. 6.

⁶⁹ *Ibid.*, p. 13. *Cfr.* LBOGM Articles 115, 117 and 120. LGEEPA Articles 160, 161, 164, 165, 166, 170, 170 *bis* and 202. CPF Article 421.

- a. The submission meets the requirement of Article 14(1)(a)⁷⁰ since it is made in writing in a language designated by the Party for the purpose of submissions, in this case Spanish.⁷¹
- b. The submission satisfies Article 14(1)(b),⁷² since the information provided clearly identifies the persons making the submission. However, as regards persons who sent emails expressing their wish to join submission SEM-09-001, it was impossible to identify them pursuant to Section 3.4 of the Guidelines, and they therefore do not qualify as submitters. Moreover, the Submitters did not express any wish to enjoin further submitters, nor did they endorse the aforementioned e-mails as forming part of the Submission.⁷³
- c. The submission does not completely meet the requirement of Article 14(1)(c),⁷⁴ since although it provides sufficient information to allow the Secretariat to review it, it is lacking certain pieces of documentary evidence on which it appears to be based.

Section 5.3 of the Guidelines provides as follows:

Submissions must contain a succinct account of the facts on which such an assertion is based and *must provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based.* (emphasis added)

Submission SEM-09-001 does in fact present a summary of the alleged practices of importation, distribution, and cultivation of transgenic maize in the state of Chihuahua without the corresponding authorization,⁷⁵ and provides documentary

⁷⁰ “The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

(a) is in writing in a language designated by that Party in a notification to the Secretariat”.

⁷¹ NAAEC Article 19 stipulates that the official languages of the CEC are Spanish, French, and English, all having equal status. Likewise, Section 3.2 of the Guidelines stipulates that “Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions.”

⁷² “The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

(b) clearly identifies the person or organization making the submission;”

⁷³ The requests by 5728 persons to join and be given the status of the Submitters were sent through a single complaints page available on the Internet at <<http://www.greenpeace.org/mexico/participa-como-ciberactivista/maiz>>. The email address in all cases was write-a-letter@smtp-gw.greenpeace.org.

⁷⁴ “The Secretariat may consider a submission [...] if the Secretariat finds that the submission:

(c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based”

⁷⁵ Submission, pp. 3-5.

copies of two complaints filed by the Submitters with the PGR⁷⁶ and of representations made to this body.⁷⁷

The Secretariat notes however that, when the Submitters cite provisions applicable to the citizen complaint process and to administrative proceedings, they state that they pursued remedies before Profepa⁷⁸ and that Mexico has allegedly not properly processed “administrative proceedings and remedies filed by the Submitters,”⁷⁹ yet they do not include the corresponding documentary evidence. The foregoing consideration is further informed by Section 5.6 of the Guidelines, which establishes that during the Secretariat’s initial review of a submission, it must ascertain *prima facie* whether the submission addresses the criteria listed in NAAEC Article 14(2).

Sections 5.6(c) and (d) of the Guidelines provide as follows:

The Submission should address the factors for consideration identified in Article 14(2) to assist the Secretariat in its review under this provision. Thus, the Submission should address:

...

c) The actions, including private remedies, available under the Party’s law that have been pursued (Article 14(2)(c));

d) The extent to which the Submission is drawn exclusively from mass media reports (Article 14(2)(d)).

In relation to Guideline 5.6(c), the Secretariat requests that the Submitters provide copies of the administrative remedies or citizen complaints filed with Profepa or Semarnat mentioned in the Submission.

As to paragraph Section 5.6(d) of the Guidelines, the Secretariat finds that, apart from documents supporting that complaints were made before authorities in relation to the matter raised in the submission, and the transgenic maize report published by the Secretariat in 2004 (prior to the entry into force of the LBOGM), the Submitters do not attach other documentary information not drawn from mass media reports to support their assertions.⁸⁰ While the inclusion of information appearing in journals does not —by itself— justify the Secretariat’s not considering a submission further, the Secretariat notes that the Submitters

⁷⁶ Submission, Appendix 6, Complaint filed with the Specialized Unit for the Investigation of Environmental Offenses and Offenses Defined in Special Laws (*Unidad Especializada en Investigación de Delitos contra el Ambiente y Previstos en Leyes Especiales*) of the PGR on 2 October 2007; Appendix 10, complaint filed with the PGR official in the state of Chihuahua on 29 September 2008.

⁷⁷ Submission, Appendices 7, 8, 9, 11, Appearance of complainant before PGR, clarifying motion, provision of evidence and amendment of the complaint filed with the Specialized Unit for the Investigation of Environmental Offenses and Offenses Defined in Special Laws of the PGR.

⁷⁸ Submission, p. 6.

⁷⁹ *Ibid.*, p. 13.

⁸⁰ The Submitters attach a press release announcing Senasica’s findings genetically modified maize on four lots in the Rural Development District (*Distrito de Desarrollo Rural—DDR*) of Valle de Cuauhtémoc, as well as various press clippings reporting the alleged presence of transgenic maize crops in Chihuahua.

mentioned other documents related to their assertions, such as the Senasica report,⁸¹ information about the maize landraces and species of teocintle found in Chihuahua,⁸² or information about the alleged consequences of the release of genetically modified organisms for human health and biodiversity. Such information was not included with the Submission.⁸³

Moreover, the submission suggests that the relevant authorities have not provided information related to the matter raised by the Submitters, despite the Submitters' requests.⁸⁴ The Submitters may specify in any revised version, the nature of these requests and provide copies thereof, so that in conformance with Guideline 7.5, the Secretariat can determine whether other sources of information relevant to the assertions in the submission were reasonably available to the Submitter.⁸⁵

- d. The submission satisfies Article 14(1)(d),⁸⁶ since the assertions refer to Mexico's alleged failure to effectively enforce its environmental law in connection with the importation, storage, planting and, in general, the marketing of transgenic maize in the state of Chihuahua. It is also not evident from the submission that the Submitter is either a competitor that "may stand to benefit economically from the submission", or that the Submission is not aimed at promoting enforcement "rather than harassing industry", in accordance with Guideline 5.4.
- e. The submission satisfies Article 14(1)(e),⁸⁷ and the Submitters attach information indicating that the matter at issue has been communicated in writing to the relevant authorities. The Submitters attach copies of the complaints filed with the PGR and Sagarpa, entities that are responsible for the enforcement of provisions relating to the biosafety of genetically modified organisms, and these are entities which qualify as "relevant authorities" of the Party in accordance with Guideline 5.5. The Secretariat notes however that the Submitters did not attach information about responses to these communications, if any, and finds that they should provide such information in a revised version of their submission to the extent it exists.

⁸¹ *Cfr.* Submission, p. 5.

⁸² *Cfr.* Submission, p. 14.

⁸³ *Cfr.* Submission, p. 12.

⁸⁴ Submission, p. 5.

⁸⁵ Guidelines, Section 7.6: "In considering whether a response from the Party concerned should be requested when the submission is drawn exclusively from mass media reports, the Secretariat will determine if other sources of information relevant to the assertion in the submission were reasonably available to the Submitter."

⁸⁶ "The Secretariat may consider a submission [...] if the Secretariat finds that the submission: (d) appears to be aimed at promoting enforcement rather than at harassing industry"

⁸⁷ "The Secretariat may consider a submission [...] if the Secretariat finds that the submission: (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response"

- f. Finally, the submission meets Article 14(1)(f),⁸⁸ since it is filed by organizations established in the territory of a Party.

IV. DETERMINATION

25. For the foregoing reasons, the Secretariat finds that submission SEM-09-001 (*Transgenic Maize in Chihuahua*) does not meet all the admissibility requirements under Article 14(1). Pursuant to Sections 6.1 and 6.2 of the Guidelines, the Secretariat hereby notifies the Submitters that they have 30 days in which to file a submission that meets all the requirements of Article 14(1). If the revised submission is not received by **5 February 2010**, the Secretariat will proceed no further with respect to SEM-09-001.

(original signed)

Paolo Solano

Legal Officer, Submissions on Enforcement Matters Unit

(original signed)

Dane Ratliff

Director, Submissions on Enforcement Matters Unit

- cc: Mr. Enrique Lendo, Mexico Alternate Representative
Mr. David McGovern, Canada Alternate Representative
Ms. Michelle DePass, US Alternate Representative
Mr. Evan Lloyd, Acting Executive Director, CEC
Submitters

⁸⁸ “The Secretariat may consider a submission [...] if the Secretariat finds that the submission: (f) is filed by a person or organization residing or established in the territory of a Party.”