

Secretariat of the Commission for Environmental Cooperation

**Secretariat determination in accordance with Article 14(1)(2)
of the North American Agreement on Environmental Cooperation**

Submitters: Asociación Interamericana para la Defensa del Ambiente (AIDA)
Centro Mexicano para la Defensa del Medio Ambiente
Natural Resources Defense Council
Red Ecologista por el Desarrollo de Escuinapa
Amigos para la Conservación de Cabo Pulmo
WiLDCOAST
Sociedad de Historia Natural Niparajá
Greenpeace México
Los Cabos Coastkeeper
Alianza para la Sustentabilidad del Noroeste Costal
SUMAR

Represented by: Sandra Moguel, AIDA
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Party: United Mexican States

Original submission: 11 April 2013

Revised submission: 16 August 2013

Date of the determination: 12 November 2013

Submission no.: **SEM-13-001** (*Tourism Development in the Gulf of
California*)

I. INTRODUCTION

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”)¹ 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 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 Article 15(1).

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC) signed by Canada, Mexico, and the United States (the “Parties”) and published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) on 21 December 1993 [NAAEC]. The bodies of which the CEC is composed are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).

Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission.²

2. On 11 April 2013, Asociación Interamericana para la Defensa del Ambiente (AIDA) and Earthjustice, representing the aforementioned non-governmental organizations (the “Submitters”), filed an NAAEC Article 14 submission with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”). The Submitters assert that Mexico is failing to effectively enforce its environmental law in that it is “approving various projects for the construction and operation of tourism infrastructure in ecologically sensitive areas” of the Gulf of California.³
3. The Submitters assert that Mexico is failing to effectively enforce provisions of the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar Convention);⁴ the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention);⁵ the Mexican Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*);⁶ the Environmental Impact Regulation to the LGEEPA (*Reglamento de la LGEEPA en materia de Evaluación de Impacto Ambiental—REIA*);⁷ the Mexican Wildlife Act (*Ley General de Vida Silvestre—LGVS*);⁸ Mexican Official Standard NOM-022-SEMARNAT-2003, *Establishing the specifications for the preservation, sustainable use, and restoration of coastal wetlands in mangrove zones* (NOM-022),⁹ and Mexican Official Standard NOM-059-SEMARNAT-2010, *Environmental protection-Mexican native species of wild flora and fauna-Risk categories and specifications for inclusion, exclusion, or change-List of species at risk* (NOM-059).¹⁰
4. The Submitters assert that the development of tourism infrastructure projects in the Gulf of California is having a major impact on Bahía de la Paz, the El Mogote nesting área, the Cabo Pulmo coral reef, and the Marismas Nacionales wetland in Mexico and that

² Full details regarding the various stages of the process as well as previous Secretariat determinations and factual records can be found on the CEC website at <www.cec.org/submissions>.

³ SEM-13-001 (*Tourism Development in the Gulf of California*), Article 14(1) Submission (11 April 2011) [Original Submission], at 1.

⁴ *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, published in the DOF on 29 August 1986 and amended by: (i) the *Protocol to Amend the Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, adopted in Paris, France on 3 December 1982, and (ii) the *Amendments to Articles 6 and 7 of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, adopted at Regina, Canada, 28 May 1987 [Ramsar Convention].

⁵ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted in Paris on 16 November 1972, published in the DOF on 2 May 1984 [World Heritage Convention].

⁶ Mexican Environmental Protection Act, published in the DOF on 28 January 1988 [LGEEPA].

⁷ Environmental Impact Regulation to the LGEEPA, published in the DOF on 30 May 2000 [REIA].

⁸ Mexican Wildlife Act, published in the DOF on 3 July 2000 [LGVS].

⁹ Mexican Official Standard NOM-022-SEMARNAT-2003, *Establishing the specifications for the preservation, sustainable use, and restoration of coastal wetlands in mangrove zones*, published in the DOF on 10 April 2003 and amended by the *Decision adding specification 4.43 to Mexican Official Standard NOM-022-SEMARNAT-2003*, published in the DOF on 7 May 2004 [NOM-022].

¹⁰ Mexican Official Standard NOM-059-SEMARNAT-2010, *Environmental protection-Mexican native species of wild flora and fauna-Risk categories and specifications for inclusion, exclusion, or change-List of species at risk*, published in the DOF on 30 December 2010 [NOM-059].

appropriate environmental impact assessment and permit granting procedures were not followed, among other failures to enforce the environmental law.

5. On 24 May 2013, the Secretariat found that submission SEM-13-001 did not meet the eligibility requirements of Article 14(1) of the Agreement and therefore, on the basis of paragraph 6.1 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”),¹¹ notified the Submitters that they had 60 days – i.e., until 16 August 2013 – within which to file a submission that met all the requirements of NAAEC Article 14(1).
6. In particular, the Secretariat found that the submission did not provide sufficient information, and a revised submission should:
 - i. detail the status of the Los Pericúes project;
 - ii. clarify the failure to effectively enforce LGEEPA Article 34;
 - iii. identify the specific provisions of the Ramsar Convention which the Submitters believe are not being enforced along with additional information to ascertain whether the “management recommendations” can be considered environmental law in the sense of the NAAEC;
 - iv. clarify which of the assertions relate to the enforcement of LGEEPA Article 35 *bis*;
 - v. clarify whether they assert the failure to enforce LGEEPA Article 28;
 - vi. clarify which of the assertions relate to the enforcement of REIA Articles 24 and 58;
 - vii. clarify the relationship of the Centro Integralmente Planeado (CIP) Playa Espíritu project to the CIP Costa Pacífico project;
 - viii. present information concerning measures to protect sea turtles that were not considered in the Cabo Cortés environmental impact statement (EIS);
 - ix. present information concerning the non-applicability of the Mexican Sustainable Forestry Act (*Ley General de Desarrollo Forestal Sustentable—LGDFS*) as asserted;
 - x. present information to satisfy NAAEC Article 14(1)(c);
 - xi. clarify whether they are asserting a failure to effectively enforce the World Heritage Convention;

¹¹ *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, available at <www.cec.org/Guidelines> (viewed 12 September 2013) [Guidelines], paragraph 6.1:

Where the Secretariat determines that a submission does not meet the criteria set out in Article 14(1) of the Agreement or any other requirement set out in these guidelines, with the exception of minor errors of form contemplated in section 3.10 of these guidelines, the Secretariat will promptly notify the Submitter of the reason(s) why it has determined not to consider the submission.

- xii. present information to satisfy the requirement of NAAEC Article 14(1)(e).¹²
7. On 16 August 2013, the Submitters filed a revised submission with the Secretariat in accordance with NAAEC Article 14(1) and paragraph 6.1 of the Guidelines, in which they clarify the assertions and address matters requested by the Secretariat.
 8. The Secretariat finds that revised submission SEM-13-001 (*Tourism Development in the Gulf of California*) meets all the eligibility requirements of Article 14(1) and, with reference to the criteria of Article 14(2), warrants requesting a response from the Government of Mexico for the reasons presented below.
 9. Pursuant to paragraph 16.2 of the Guidelines,¹³ the Secretariat proceeds to review the submission in question, and summarizes relevant sections of the revised submission in following.¹⁴

II. ANALYSIS

10. NAAEC Article 14 authorizes the Secretariat to consider submissions of any nongovernmental organization or person asserting that an NAAEC Party is failing to effectively enforce its environmental law. As the Secretariat has noted in previous Article 14(1) determinations, Article 14(1) is not intended to be an insurmountable procedural screening device.¹⁵ The Secretariat reviewed the submission with that perspective in mind.
11. As a preliminary matter, the Secretariat proceeds to consider a minor error of form in the revised submission. The Secretariat notes that the length of the revised submission taken together with Appendix A, the latter containing various clarifications requested in the Article 14(1) determination, exceeds the number of pages recommended in paragraph 3.3 of the Guidelines.¹⁶ However, the Guidelines do not give the Submitter any guidance as to how to submit the revisions and clarifications requested by the Secretariat in its Article 14(1) determination. Guided by paragraph 6.1 of the Guidelines, the Secretariat finds that requirement regarding “minor errors of form” does

¹² SEM-13-001 (*Tourism Development in the Gulf of California*), Article 14(1) Determination (24 May 2013) [Article 14(1) Determination], §125.

¹³ Para. 16.2 of the Guidelines states, “The Secretariat is encouraged to develop documents using only relevant information, reducing wherever possible the volume of material produced that would then need to be translated.”

¹⁴ A summary of the original submission is found in Article 14(1) Determination, note 12 *supra*, §§6-17, available at <<http://goo.gl/R1wUBj>> (viewed 12 September 2013).

¹⁵ See SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); SEM-98-003 (*Great Lakes*), Article 14(1)(2) Determination (8 September 1999).

¹⁶ The Spanish version of paragraph 3.3 of the Guidelines as adopted 11 July 2012 reads:

Las Peticiones no deberán exceder 15 páginas mecanografiadas en hojas tamaño carta [Submissions shall not exceed 15 letter-sized pages], o su equivalente en formato electrónico, excluyendo la información de apoyo.

The English version, reads: “Submissions *should* not exceed 15 pages,” indicating that the stated page limit is advice.

not compel the Secretariat to terminate a citizen submission¹⁷ nor to abandon the timely processing thereof.¹⁸ In addition, the Council of the CEC has noted that citizen submissions “should be processed in a timely and efficient manner in order to meet the public’s expectations regarding the process.”¹⁹ Consistent with the spirit of transparency²⁰ and public participation²¹ pervading the NAAEC, the Secretariat now proceeds to conduct its NAAEC Article 14(1)(2) review of submission SEM-13-001.

A Opening paragraph of Article 14(1)

12. The opening paragraph 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.” In its determination of 24 May 2013, the Secretariat concluded that the Submitters are non-governmental organizations or persons and that the submission in fact refers to a situation that is ongoing.²²
13. The Secretariat also found that the following provisions qualify as environmental law in the sense of NAAEC Article 45(2): LGEEPA Articles 28, 34, 35, and 35 *bis*;²³ REIA Articles 13, 24, 36, 44, 57, 58, and 59;²⁴ LGVS Articles 5 paragraph II and 60 *ter*;²⁵ NOM-022, and NOM-059.²⁶ However, the Secretariat found that the relationship of some of these provisions to the assertions made in the submission should have been elucidated.²⁷
14. With the information provided in the revised submission, the Secretariat now proceeds to determine whether the following provisions qualify as environmental law under NAAEC Article 45(2): Article 3 of the Ramsar Convention; Resolutions VII.16, VIII.3, and X.24 of the Conference of the Parties of the Ramsar Convention; the reports of the Joint Mission to Cabo Pulmo and the Ramsar Mission to Marismas Nacionales, and Article 4 of the World Heritage Convention.

¹⁷ Paragraph 6.1 of the Guidelines states that minor errors of form are not a justification for terminating a submission. *Cf.* SEM-09-002 (*Wetlands in Manzanillo*), Article 15(1) Notification (19 August 2013), §132.

¹⁸ Guidelines, paragraph 3.11: “The Secretariat, the Parties, and the Council will make their best efforts to take all actions necessary to process a submission in a timely manner.”

¹⁹ Council Resolution 01-06 (29 June 2001), “Response to the Joint Public Advisory Committee (JPAC) Report on Lessons Learned regarding the Articles 14 and 15 Process.”

²⁰ NAAEC, published 21 December 1993 in the DOF, Article 1: “The objectives of this Agreement are to:... (h) promote transparency and public participation in the development of environmental laws, regulations and policies.”

²¹ *Ibid.*, preamble: “*EMPHASIZING* the importance of public participation in conserving, protecting and enhancing the environment” (emphasis in original).

²² As regards the Los Pericúes project, the Submitters clarified that it is not addressed by the submission.

²³ Article 14(1) Determination, note 12 *supra*, §§33, 43.

²⁴ *Ibid.*, §44.

²⁵ *Ibid.*, §53.

²⁶ *Ibid.*, §§55, 57.

²⁷ The Secretariat requested further information about the assertions concerning failures to effectively enforce LGEEPA Articles 25, 34 and 35 *bis* (§§43, 36 and 35), and REIA Articles 24 and 58 (§§46 and 50); Article 14(1) Determination, note 12 *supra*.

1) Environmental law in question

i. Article 3 of the Ramsar Convention

15. The Submitters assert that Mexico is failing to effectively enforce the Ramsar Convention in relation to the protection of Marismas Nacionales, Bahía de la Paz, and Cabo Pulmo.²⁸ In this regard, the Secretariat concluded in its first determination that, pursuant to Article 133 of the Constitution, international treaties are incorporated into the Mexican legal framework and considered an integral part of domestic law, and therefore requested the Submitters to specify which provisions of the Ramsar Convention they consider to be related to Mexico's alleged failure of enforcement.²⁹
16. In their revised submission, the Submitters cite Articles 3.1 and 3.2 of the Ramsar Convention, which establish the obligation of the Contracting Parties to formulate and implement their planning so as to promote the conservation of wetlands,³⁰ as well as to stay informed of changes to the ecological character of wetlands in their territory that are on the *List of Wetlands of International Importance*.³¹ The primary purpose of the provisions in question is the protection and wise use of wetlands, and therefore the Secretariat finds that for these reasons – in addition to the reasons presented in its initial determination³² – Articles 3.1 and 3.2 of the Ramsar Convention meet the NAAEC Article 45(2) definition of environmental law.

ii. Articles 6.1 and 6.2 of the Ramsar Convention and Resolutions VII.16, VIII.3 and X.24 of the Conference of the Parties of the Ramsar Convention

17. The revised submission also asserts that Resolutions VII.16, VIII.3 and X.24 of the Conference of the Parties of the Ramsar Convention should be considered environmental law in the sense of the NAAEC.³³ The Submitters base this assertion on the text of Article 6 of the Ramsar Convention and the fact that Mexico is a Party to the Conference, which adopted these resolutions unanimously.³⁴
18. Article 6.1 of the Ramsar Convention provides for the establishment of the Conference of the Contracting Parties (“COP”) to review and promote the implementation of the Convention. In addition, Article 6.2 establishes the advisory nature of the Conference

²⁸ Submission, note 3 *supra*, at 14.

²⁹ Article 14(1) Determination, note 12 *supra*, §§29-30.

³⁰ Ramsar Convention, Article 3.1: “The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.”

³¹ *Ibid.*, Article 3.2: “Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8.”

³² Article 14(1) Determination, note 12 *supra*, §29. Also relevant are the following determinations: SEM-09-002 (*Wetlands in Manzanillo*), Article 14(1) Determination (9 October 2009), §16; SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1)(2) Determination (3 March 2010), §20.

³³ SEM-13-001 (*Tourism Development in the Gulf of California*), Appendix to the revised Article 14(1) Submission (16 August 2013) [Revised Submission], at A-2 to A-4.

³⁴ *Ibid.*, at A-2.

and the matters that may be discussed in that forum, as well as the existence of recommendations issued by the Conference.³⁵ The Secretariat finds that both provisions do not qualify as environmental law in the sense of the NAAEC, since the primary purpose of Article 6(1) of Ramsar is the establishment of the COP,³⁶ and Article 6(2) establishes the competencies of the Conference of the Parties. NAAEC Article 45(2)(c) requires the Secretariat to consider the primary purpose of a provision by analyzing its operation independent of the law or statute it is part of. It cannot be said that the establishment of the COP and determination of the COP's competences is in and of itself environmental law in the sense of Article 45(2)(a), even if the greater purpose of the Ramsar Convention does meet the definition of environmental law. Thus, given the character of Articles 6.1 and 6.2 of the Ramsar Convention and the fact that they can only be implemented by the Conference of the Parties to the Ramsar Convention, and are not enforceable environmental law, the Secretariat finds that these may only be used to guide the further review and consideration of Resolutions VII.16, VIII.3 and X.24.

19. In the first place it should be noted that the 10th Meeting of the Conference of the Parties of the Ramsar Convention adopted Resolution X.24, "Climate Change," which states that this resolution "wholly updates and supersedes Resolution VIII.3 on *Climate change and wetlands: impacts, adaptation and mitigation*."³⁷ Therefore, no further consideration is given to Resolution VIII.3, cited in the submission.
20. The resolutions of the Ramsar Convention COP are primary instruments for its implementation, particularly as regards the conservation, management, and wise use of wetlands and their flora and fauna, by the Contracting Parties.³⁸ However, the legal status of its resolutions and recommendations does not appear at first blush to be "environmental law" in the sense of the NAAEC. On this point, while some resolutions refer to the interpretation of the Ramsar Convention,³⁹ Resolutions X.24 and VII.16 "urge" or "encourage" the Contracting Parties to adopt certain measures without giving any indication that the Contracting Parties have agreed to consider them binding. Mexican courts have ruled on the binding character of other international treaties.⁴⁰ The Ramsar Convention does not make the observance of resolutions mandatory, a fact confirmed by Article 6.2 of the Convention, which in effect provides that the Conferences of the contracting Parties are advisory in nature.⁴¹ The Secretariat finds that, absent further information from the Party as requested below that may inform this determination regarding the legal status of the COP Resolutions, Resolutions X.24 and VII.16 do not qualify as environmental law in the sense of the NAAEC.

³⁵ Article 6 of the Ramsar Convention.

³⁶ Cf. NAAEC Article 45(2)(a)(iii).

³⁷ Ramsar Convention, Resolution X.24, "Climate Change and Wetlands," paragraph 27.

³⁸ *Ibid.*, Article 6.2(d).

³⁹ See, for example, Resolution 4.4, "Implementation of Article 5 of the Convention"; Resolution 4.1, "Interpretation of Article 10 bis Paragraph 6 of the Convention."

⁴⁰ See INTER-AMERICAN CONVENTION ON HUMAN RIGHTS. DOES NOT ESTABLISH THE MANDATORY AND BINDING CHARACTER (FOR THE PURPOSES OF AMPARO) OF THE RECOMMENDATIONS OF THE COMMISSION TO WHICH IT GAVE RISE. *Tribunales Colegiados de Circuito, Semanario Judicial de la Federación y su Gaceta*, vol. XVIII, Ninth Period, July 2003, at 1063, thesis II.2º.P.77.P.

⁴¹ Article 6.2 of the Ramsar Convention: "Such conferences shall be *advisory* in nature and shall be competent [to]:..." (emphasis added).

21. The Secretariat nonetheless finds that resolutions adopted under the Ramsar Convention are intended to guide its implementation. The Contracting Parties have taken note that their commitments derive both from the text of the Convention and from the decisions, resolutions, and recommendations adopted within the Framework for the Implementation of the Ramsar Convention.⁴² Moreover, Article 6.3 of the Ramsar Convention makes it mandatory that those responsible at all levels for wetlands management be informed of the recommendations adopted by “such Conferences”.⁴³
22. It is clear, pursuant to Articles 6.1 and 6.2 of the Ramsar Convention, that the resolutions in question constitute an implementing mechanism integral to the operation of the international wetlands protection system. In addition, given that the implementation of Resolutions X.24 and VII.16 requires that they be communicated to the governmental entities of the Party in question, it is relevant to consider the manner in which their implementation is being brought about. Such consideration gives meaning to the Submitters’ assertion concerning the authorities’ alleged failure to take account of Resolutions X.24 and VIII.3 in the context of the environmental impact assessment process for the Entre Mares, Paraíso del Mar, Cabo Cortés, and CIP Playa Espíritu projects. The Secretariat notes that the legal status of COP resolutions has been treated differently among international and domestic courts.⁴⁴ For example, a Dutch domestic court found that the resolutions of the Ramsar COP concerning environmental impact assessments, were in fact binding and enforceable under Dutch law, and that therefore COP resolutions had to be considered for EIAs in Ramsar wetlands.⁴⁵ One scholar summarized the court’s decision in the Dutch case in question:

The Crown referred to the Vienna Convention on the Law of Treaties’ provisions on interpretation, discussed further below, and noted that a tribunal could, under Article 31(3)(a) take into account subsequent agreements of the parties to the treaty when interpreting the treaty. The Crown also noted that the resolutions and recommendations⁴⁶ had been adopted by unanimous vote in which The Netherlands had participated. The Crown concluded that the resolutions and recommendations regarding environmental impact assessments were therefore binding on the Netherlands. Accordingly, a failure to perform EIAs as required by these resolutions and recommendations amounted to a failure to comply with the Ramsar Convention itself.⁴⁷

⁴² Ramsar Convention, 4th Meeting of the Conference of the Contracting Parties, Annex to Doc.C.4.12, “Resolution on the Framework for the Implementation of the Convention and Priorities for Attention, 1991-1993.”

⁴³ *Ibid.*, Article 6.3:

The Contracting Parties shall ensure that those responsible at all levels for wetlands management shall be informed of, and take into consideration, recommendations of such Conferences concerning the conservation, management and wise use of wetlands and their flora and fauna.

⁴⁴ See Annecoos Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 MICH. J. INT’L L. 231 (2009). Available online at <<http://goo.gl/nFT9Ny>> (last viewed 8 November 2013).

⁴⁵ *Ibid.*, at note 145 citing Verschuuren and the *Lac Wetland* case.

⁴⁶ [Of the Ramsar Conference of the Parties]

⁴⁷ Wiersema, note 44 *supra*, at 49-50.

23. Mexico, in any response, may wish to address the legal status in Mexican law of the Ramsar COP resolutions cited by the Submitters, and if these are applicable to environmental assessments on Ramsar wetlands in Mexico.

iii. Reports of the Joint Mission to Cabo Pulmo and the Ramsar Mission to Marismas Nacionales

24. Ramsar Advisory Missions (Ramsar Missions) are a technical assistance mechanism adopted in Recommendation 4.7 of the Conference of the Parties in 1990,⁴⁸ whose primary purpose is to offer assistance to Parties having wetlands that merit priority attention due to the alteration of their ecological characteristics.⁴⁹ Ramsar mission reports are not binding on Mexico because, as in the case of recommendations, there does not appear to be any provision of the Convention making compliance with them mandatory. Therefore, the Secretariat finds that the reports of the Ramsar Missions to Cabo Pulmo and Marismas Nacionales do not qualify as environmental law under NAAEC Article 45(2).
25. Nevertheless, the Secretariat also recognizes that these reports can serve to guide the review of the Submitters' assertions, since in any case they are instruments detailing Mexico's obligations under Article 3 of the Ramsar Convention, which is environmental law in accordance with NAAEC Article 45(2).

iv. Article 4 of the World Heritage Convention

26. The World Heritage Convention came into force in Mexico on 23 May 1984 and since then has been an integral part of domestic law.⁵⁰ In particular, Article 4 stipulates that "Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State...."⁵¹ In addition, the "natural heritage" mentioned in Article 4 includes "precisely delineated areas which constitute the habitat of threatened species of animals and plants,"⁵² which are designated by each Contracting Party under Article 11(3) of the World Heritage Convention, and particularly, in the case at hand, the site known as "Cabo Pulmo."⁵³ Additionally, Article 5(d) sets out the obligation of the Parties to take the measures, including legal and administrative measures, necessary for effective heritage protection and

⁴⁸ Ramsar Convention, Recommendation 4.7, "Mechanisms for Improved Application of the Ramsar Convention."

⁴⁹ Cf. Report of the Ramsar Advisory Mission to Marismas Nacionales, 9 August 2010, §1.2, available at <<http://goo.gl/MT1rce>> (viewed 12 September 2013).

⁵⁰ See note 5 *supra* and §15 *supra*.

⁵¹ Article 4 of the World Heritage Convention.

⁵² *Ibid.*, Article 2, §2.

⁵³ Revised Submission, note 33 *supra*, Appendix I, at A-7. The islands and protected natural areas of the Gulf of California, including Cabo Pulmo, were submitted by Mexico for consideration under Article 11(3) of the World Heritage Convention and inscribed on the World Heritage List by means of the decisions of the 29th Session of the World Heritage Committee held in Durban, South Africa, 10-17 July 2005.

conservation. The Secretariat finds that Article 4 of the World Heritage Convention qualifies as environmental law under NAAEC Article 45(2) in that its primary purpose is the protection of the environment through the protection of the habitat of plants and animals.

2) Assertions of failures to effectively enforce the environmental law

27. Since the Secretariat has previously reviewed the central assertions of the submission, it will not present any further reasoning here in this regard, except to consider the clarifications presented in the revised submission.

i. Failures to effectively enforce the environmental law in connection with the environmental impact assessment procedure⁵⁴

28. In its determination of 24 May 2013, the Secretariat found the following assertions to qualify for review:
- i) The alleged failure to effectively enforce REIA Article 36, as regards consideration of the best and most complete information available in the preparation of the EIS for the Cabo Cortés and CIP Playa Espíritu projects.⁵⁵
 - ii) The alleged failure to effectively enforce LGEEPA Article 35 and REIA Article 44, as regards the assessment of the cumulative impacts of the CIP Playa Espíritu, Cabo Cortés, Paraíso del Mar, and Entre Mares projects and the piecemeal consideration given to these projects.⁵⁶ It is noted that the revised submission clarifies that the name of the CIP Costa del Pacífico project was changed to CIP Playa Espíritu⁵⁷ and that documents referring to the former should therefore be taken to refer to the CIP Playa Espíritu project.
 - iii) The alleged failure to effectively enforce LGVS Article 5 paragraph II, in relation to the lack of implementation of precautionary, mitigation, and preventive measures in the case of the Cabo Cortés, CIP Playa Espíritu, and Paraíso del Mar projects.⁵⁸
29. Moreover, in regard to the incorporation of zoning instruments into the environmental assessment procedure, the Secretariat finds that the assertion relating to the declaration of a Forest Protection Zone (*Zona Protectora Forestal Vedada*) for the land surrounding the city of La Paz and its relationship to the Paraíso del Mar project, with reference to LGEEPA Article 35, qualifies for review.⁵⁹
30. As to the alleged inconsistency of the Cabo Cortés project with the Local Environmental Zoning Plan (*Programa de Ordenamiento Ecológico Local*) of the municipality of Los Cabos, the Submitters detail in the revised submission that among

⁵⁴ Cf. Article 14(1) Determination, note 12 *supra*, §§59-79.

⁵⁵ *Ibid.*, §§60-1.

⁵⁶ *Ibid.*, §§62-6.

⁵⁷ Revised Submission, note 33 *supra*, at A-5.

⁵⁸ Article 14(1) Determination, note 12 *supra*, §§67-74.

⁵⁹ *Ibid.*, §§75-7.

the sea turtle protection measures not found in the Cabo Cortés EIS was the advisory opinion of the National Protected Natural Areas Commission (*Comisión Nacional de Areas Naturales Protegidas*—Conanp), which recommends measures as specific as low-level amber-colored lighting as well as the adoption of mechanisms to inform visitors about the beach as a sea turtle nesting area.⁶⁰ A review of the Cabo Cortés EIS corroborates that it includes a section on protection of turtle nesting sites that proposes the design and implementation of a sea turtle protection plan as well as specific restrictions on the lighting to be used on the beach.⁶¹ In addition, condition 12 of the Cabo Cortés environmental impact approval (AIA) reiterates, *inter alia*, Conanp’s advice regarding the adoption of visitor information mechanisms.⁶² Therefore, the Secretariat finds that this assertion does not warrant further review.

a) Technical opinions issued by other entities in the context of the environmental impact assessment procedure

31. The revised submission asserts that, pursuant to REIA Article 24, Semarnat solicited the technical opinion of various entities during the environmental assessment process for the CIP Playa Espíritu project. However, the Submitters maintain that these opinions were ignored by Semarnat, which, “abusing the discretionality which the law affords it,” approved the CIP Playa Espíritu project over the objections of the entities consulted.⁶³
32. The Secretariat was able to corroborate that the CIP Costa del Pacífico AIA contains the technical opinions mentioned by the Submitters. Furthermore, the National Water Commission (*Comisión Nacional del Agua*) concluded that the developers should have obtained the prior approval of this body for artificial aquifer recharge projects,⁶⁴ while other entities, such as the National Biodiversity Commission (*Comisión Nacional para el Conocimiento y Uso de la Biodiversidad*—Conabio),⁶⁵ the Wildlife Branch (*Dirección General de Vida Silvestre*),⁶⁶ the Federal Coastal Zone and Coastal Environments Branch (*Dirección General de Zona Federal Marítimo Terrestre y Ambientes Costales*)⁶⁷ and Conanp,⁶⁸ openly expressed concern about the project. It should be emphasized that Conanp specifically stated the project lacked environmental viability.⁶⁹

⁶⁰ Revised Submission, note 33 *supra*, at A-5.

⁶¹ Corporativo Acuicultura Profesional S.A. de C.V., Environmental Impact Statement for the Cabo Cortés project, Mexico, 2008, ch. VI, at 29-30 [Cabo Cortés EIS].

⁶² Environmental Impact and Risk Branch, Semarnat, file no. S.G.P.A./DGIRA (24 January 2011), containing the environmental impact approval for the Cabo Cortés project, at 135-6 [Cabo Cortés AIA].

⁶³ Revised Submission, note 33 *supra*, at A-4.

⁶⁴ Environmental Impact and Risk Branch, Semarnat, file no. S.G.P.A./DGIRA/DG/1167/11 (9 February 2011), containing the environmental impact approval for the Centro Integralmente Planeado Costa del Pacífico project, at 42 [CIP Costa del Pacífico AIA].

⁶⁵ *Ibid.*, at 40-1.

⁶⁶ *Ibid.*, at 43.

⁶⁷ *Ibid.*, at 51-2.

⁶⁸ *Ibid.*, at 46.

⁶⁹ *Ibid.*

33. The Secretariat finds that the assertion of failure by the Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*—DGIRA) to give consideration to the opinions of other entities in relation to the CIP Playa Espíritu project qualifies for further review by the Secretariat.

b) Publication of the environmental impact statements (EIS) pursuant to LGEEPA Article 34

34. In their revised submission, the Submitters assert that Semarnat is failing to effectively enforce the part of LGEEPA Article 34 relating to the publication of the EIS in the Semarnat Environmental Gazette. In particular, they affirm that Semarnat's publication is incomplete because it does not include the appendices to the EIS. This omission, the Submitters maintain, makes it hard for the public to review the projects, since, while "it is possible to ascertain what the project consists of ... it is not possible to make comments or study the proposal."⁷⁰
35. The Submitters, however, do not mention any specific case in which the EIS was published without its appendices, nor do they present any information to support their assertion that this is a "routine practice" of Semarnat. Therefore, in the absence of information to support this assertion, the Secretariat finds that no further review of it is necessary.

ii. Assertions concerning the effective enforcement of LGVS Article 60 *ter*, NOM-022, and NOM-059 and the non-applicability of the LGDFS⁷¹

36. On 24 May 2013, the Secretariat found that the following assertions qualify for review:
- i. the alleged failure to effectively enforce LGVS Article 60 *ter* and NOM-022 in connection with the approval of the Entre Mares and Paraíso del Mar projects;⁷²
 - ii. the alleged failure to effectively enforce NOM-059 (concerning wildlife species or populations at risk) with the approval of the Paraíso del Mar, Entre Mares, and Cabo Cortés projects.⁷³
37. The revised submission clarifies the assertion relating to the non-applicability of the LGDFS as regards the implementation of the forested land use change for the site of the Paraíso del Mar project. The Submitters cite the second paragraph of LGVS Article 1, which provides that "the sustainable use of timber and non-timber forest resources and of species whose entire life cycle is spent in water shall be regulated by the forestry and fisheries acts, respectively, *except in the case of species or populations at risk*."⁷⁴

⁷⁰ Revised Submission, note 33 *supra*, at A-1.

⁷¹ *Cf.* Article 14(1) Determination, note 12 *supra*, §§80-92.

⁷² *Ibid.*, §§80-4.

⁷³ *Ibid.*, §§85-92.

⁷⁴ Second paragraph of LGVS Article 1, cited in Revised Submission, note 33 *supra*, at A-6 (emphasis added).

38. In addition, the Submitters state that Semarnat, in the Paraíso del Mar AIA, acknowledges the presence of protected mangrove species in the project area; specifically, white mangrove (*Laguncularia racemosa*), red mangrove (*Rhizophora mangle*) and black mangrove (*Avicennia germinans*); all of these listed in NOM-059 in the category of species at risk. In the Submitters' opinion, given the presence of species at risk on the project site, the LGVS and not the LGDSF should apply, with all of the concomitant legal implications for forest exploitation.⁷⁵ Nevertheless, the Submitters assert that there is no reference anywhere in the AIA to the applicability of the LGVS to the Paraíso del Mar project.⁷⁶
39. Likewise, the Secretariat, in reviewing the Paraíso del Mar AIA, found no reference whatsoever to LGVS Article 1, whether in the justification given for the approval or in the section addressing the issue of the land use change.⁷⁷ Therefore, and in light of the considerations presented in the revised submission, the Secretariat finds that the assertion concerning the non-applicability of the LGDFS in the context of the land use change approval for the Paraíso del Mar project warrants further review.

iii. Failure to exercise the power to suspend works or activities lacking environmental impact approval⁷⁸

40. In its determination of 24 May 2013, the Secretariat found that the assertion of Profepa's alleged failure to suspend works and activities under REIA Article 59 qualified for review.⁷⁹ In this connection, the revised submission links the enforcement of REIA Articles 57 and 58 to Profepa's alleged failures of enforcement with respect to the Paraíso del Mar project. The Submitters emphasize that, by failing to halt construction and operation on the Paraíso del Mar project, Profepa also failed to enforce REIA Articles 57 and 58, which provide for the implementation of "corrective or urgent enforcement" measures in the case of projects operating without environmental impact approval, as is the case of the Paraíso del Mar project.⁸⁰

iv. Assertions concerning the Ramsar Convention⁸¹

41. With additional information having been provided in the revised submission, the Secretariat proceeds to conclude the review of the assertions concerning the Ramsar Convention.⁸²
42. Marismas Nacionales, Bahía de la Paz, and Cabo Pulmo (hereinafter, the "Ramsar sites") were recognized as Ramsar wetlands of priority international importance in

⁷⁵ Revised Submission, note 33 *supra*, at A-5 and A-6.

⁷⁶ *Ibid.*

⁷⁷ Environmental Impact and Risk Branch, Semarnat, file no. S.G.P.A./DGIRA/DEI/0397/04 (9 March 2004), containing the environmental impact approval for the Desarrollo Paraíso del Mar project, preamble clauses 1 and 35, respectively [Paraíso del Mar AIA].

⁷⁸ *Cf.* Article 14(1) Determination, note 12 *supra*, §§93-5.

⁷⁹ *Ibid.*

⁸⁰ Revised Submission, note 33 *supra*, at A-5.

⁸¹ *Cf.* Article 14(1) Determination, note 12 *supra*, §§93-5.

⁸² Article 14(1) Determination, note 12 *supra*, §99.

1995, 2007, and 2008, respectively. With these recognitions, Mexico took on a set of obligations to protect and preserve these wetlands in accordance with the Ramsar Convention.⁸³

43. The Submitters affirm that Mexico is failing to fulfill its obligations within the framework of the Ramsar Convention.⁸⁴ In particular, they refer to Article 3 of the Convention, which imposes obligations on the contracting parties in the areas of monitoring, conservation, and wise use of Ramsar sites.⁸⁵ Going further, they state that the wise use of wetlands is defined within the framework of the Ramsar Convention as “the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development.”⁸⁶
44. The Submitters reiterate that the Paraíso del Mar and CIP Playa Espíritu projects, adjacent to the Ramsar sites, were approved by Semarnat without the measures necessary to preserve the ecological and hydrological processes operating at these sites.⁸⁷ In addition, they assert that after approving the construction and operation of the Paraíso del Mar, Entre Mares, Cabo Cortés, and CIP Playa Espíritu projects, Semarnat failed to take steps to monitor or review the ecological status of the Ramsar sites.⁸⁸
45. The Submitters base their assertions on the reports of the Ramsar Missions to the sites in question. For example, the Joint Mission to Cabo Pulmo concluded that the Cabo Cortés AIA, “focusing as it does on solid waste, fails to take account of the assessment of all the indirect and cumulative impacts related to the project specifically.”⁸⁹ Additionally, the report notes that “the Cabo Pulmo National Park site is threatened as per the Ramsar Convention guidelines.”⁹⁰ The report of the Ramsar Mission to Marismas Nacionales, for its part, states with respect to the CIP Playa Espíritu project that tourism development of the magnitude, occupation density, and design proposed by the National Tourism Fund (*Fondo Nacional de Turismo*—Fonatur) is unviable given the environmental importance of the area for the Government of Mexico and the international community as a Ramsar wetland, the coastal zoning regulations, and the pressures on and vulnerability of the Marismas Nacionales system.⁹¹
46. The revised submission also asserts that Mexico is failing to effectively enforce Resolution VII.16 of the Ramsar Convention, on the importance of rigorous

⁸³ *Ibid.*, at 2-3; Conanp, Information Sheet on the Marismas Nacionales Ramsar Wetlands (22 June 1995); Conanp, Information Sheet on the Ensenada de la Paz Wetlands (27 October 2007); Conanp, Information Sheet on the Cabo Pulmo Wetlands (8 August 2007).

⁸⁴ Revised Submission, note 33 *supra*, at A-2.

⁸⁵ Article 3 of the Ramsar Convention.

⁸⁶ Resolution IX.1 Annex A, “A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character,” §22, available at <<http://goo.gl/GAz91f>> (viewed 12 September 2013).

⁸⁷ Revised Submission, note 33 *supra*, at A-2.

⁸⁸ *Ibid.*

⁸⁹ Joint Mission of the Ramsar Convention, the World Heritage Convention, and the International Union for the Conservation of Nature to the Cabo Pulmo Ramsar and World Heritage Site, report of 6 August 2012, conclusion 3, at 5 and 21, available at <<http://goo.gl/Mv311I>> (viewed 12 September 2013).

⁹⁰ *Ibid.*, conclusion 4, at 5 and 21.

⁹¹ Ramsar Advisory Mission No. 67, Laguna Huizache-Caimanero (Ramsar Site No. 1689) and Marismas Nacionales Ramsar Site (Ramsar Site No. 732), report of 9 August 2010, conclusion 6.5.1, available at <<http://goo.gl/nllGXx>> (viewed 12 September 2013).

environmental impact assessment, and Resolution X.24, on the wise management of wetlands and their resilience to climate change.⁹² The Secretariat has previously determined that these resolutions are implementation instruments for the environmental law in question and notes that in addition, pursuant to Article 6(3) of the Ramsar Convention, the authorities responsible for wetland management must be informed of and consider such resolutions and recommendations “concerning the conservation, management and wise use of wetlands and their flora and fauna”.⁹³

47. The Secretariat considers it relevant to note that Resolution IX.1 of the Ramsar Convention, where it contextualizes the phrase “sustainable development” as it relates to wetland preservation, states that “it is not appropriate to imply that ‘development’ is an objective for every wetland.”⁹⁴
48. In light of the considerations set out in the revised submission, the Secretariat finds that Mexico in any response, may wish to address the alleged failures to effectively enforce Articles 3.1 and 3.2 of the Ramsar Convention, and provide its opinion on the legal status of Resolutions X.24 and VII.16 and whether they apply to the AIA process for the relevant Ramsar sites in the Submitters’ assertions.

v. Assertions concerning the World Heritage Convention⁹⁵

49. The Submitters assert that Mexico is failing to enforce Article 4 of the World Heritage Convention, which, according to the submission, imposes obligations on the Government of Mexico with a view to protecting and conserving the natural heritage located within its borders, passing that heritage on to future generations and, to these ends, making maximal use of the resources at Mexico’s disposal.⁹⁶
50. In 2005, Cabo Pulmo National Park was one of the protected areas of the Gulf of California which Mexico added to the UNESCO world heritage list.⁹⁷ The Submitters contend that Mexico is failing to enforce Article 4 of the World Heritage Convention because, in their view, Mexico failed, in approving the Cabo Cortés project, to consider a set of factors detailed in the report of the Joint Mission to Cabo Pulmo. Among the factors allegedly not considered by Mexico were increases in marine traffic, waste, and water demand, which could harm the health of the reef.⁹⁸
51. In light of the clarifications provided by the Submitters, the Secretariat finds that the effective enforcement of Article 4 of the World Heritage Convention in relation to the Cabo Cortés project qualifies for review.

⁹² Revised Submission, note 33 *supra*, at A-2 and A-3.

⁹³ Article 6.3 of the Ramsar Convention. *Cf.* §§21-22 *supra* (emphasis in original).

⁹⁴ Resolution IX.1 Annex A, note 86 *supra*, note 3:

The phrase “*in the context of sustainable development*” is intended to recognize that whilst some wetland development is inevitable and that many developments have important benefits to society, developments can be facilitated in sustainable ways by approaches elaborated under the Convention, and it is not appropriate to imply that “development” is an objective for every wetland.

⁹⁵ *Cf.* Article 14(1) Determination, note 12 *supra*, §105.

⁹⁶ Revised Submission, note 33 *supra*, at A-7.

⁹⁷ Report of the Joint Mission to Cabo Pulmo, note 89 *supra*, at 13.

⁹⁸ Revised Submission, note 33 *supra*, at A-7.

B The six requirements of NAAEC Article 14(1)

52. The Secretariat now proceeds to review the revised submission with reference to the six requirements of NAAEC Article 14(1).
53. In its determination of 24 May 2013, the Secretariat found that the submission met the requirements of NAAEC Article 14(1)(a), (b), (d), and (f).⁹⁹ However, the Secretariat also found that some assertions in the submission did not meet the requirements of Article 14(1)(c) and (e). With the revised submission and its appendices as provided by the Submitters, the Secretariat now finds that the submission meets all the requirements of Article 14(1) and proceeds to present the reasons for such determination.
54. The Secretariat recalls that the NAAEC Article 14–15 process may not set up insurmountable procedural barriers in the review of documents filed in support of a submission, and conducts its review with that idea in mind.¹⁰⁰
55. To meet the requirement of Article 14(1)(c), the revised submission includes hyperlinks to the additional information requested by the Secretariat in its first determination.¹⁰¹ To wit, there are hyperlinks to the following documents: judgment of 3 August 2010 in the Eleventh Metropolitan Regional Chamber of the Federal Tax and Administrative Court (*Tribunal Federal de Justicia Fiscal y Administrativa*—TFJFA), on the action in nullity (*juicio de nulidad*) in the case of the Paraíso del Mar AIA;¹⁰² diagnostic report on the marshland system associated with the Terrestrial Regional Environmental System of the CIP Costa Pacífico Project;¹⁰³ judicial review action filed by Carlos Eduardo Simental against the CIP Costa del Pacífico AIA;¹⁰⁴ the Paraíso del Mar AIA;¹⁰⁵ the DGIRA document responding to the application for a declaration of expiration of the Cabo Cortés AIA;¹⁰⁶ judicial review action against the Cabo Cortés AIA;¹⁰⁷ electronic communication of 9 July 2012 from spokespersons for the community of Cabo Pulmo;¹⁰⁸ forested land use change approval for the Cabo Cortés project;¹⁰⁹ report of the

⁹⁹ Article 14(1) Determination, note 12 *supra*, §§101, 102, 114 and 124, respectively.

¹⁰⁰ Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1)(2) Determination, note 32 *supra*, §58; SEM-97-003 (*Quebec Hog Farms*), Article 15(1) Notification (29 October 1999), at 6-7.

¹⁰¹ Article 14(1) Determination, note 12 *supra*, §113.

¹⁰² TFJFA, Eleventh Metropolitan Regional Chamber, decision in file no. 32183/06-17-11-3 (3 August 2010) [TFJFA Paraíso del Mar decision of 3 August 2010].

¹⁰³ *Diagnóstico del sistema de marismas asociado al Sistema Ambiental Regional Terrestre del proyecto CIP Costa Pacífico*, Instituto de Geografía, UNAM, Mexico, 2010.

¹⁰⁴ Carlos Eduardo Simental Crespo, Judicial Review 11/2012, file no. XV/2012/11.

¹⁰⁵ Semarnat, Environmental Impact and Risk Branch, file no. S.G.P.A./DGIRA/DEI/0397/04 (9 March 2004), containing the environmental impact approval for the Desarrollo Paraíso del Mar project.

¹⁰⁶ Semarnat, Environmental Impact and Risk Branch, file no. S.G.P.A./DGIRA/DG/1919 (6 March 2012), containing the response to the application for a declaration of expiration of the approval due to default on the conditions of the Cabo Cortés AIA.

¹⁰⁷ Mirna Manuela Cañedo Castro *et al.*, Judicial Review 403/2011, file no. XV/2011/403.

¹⁰⁸ Electronic communication from spokespersons of the community of Cabo Pulmo to Coalición Cabo Pulmo Vivo, 9 July 2012.

¹⁰⁹ Semarnat, Federal Office in the State of Baja California Sur, file no. SEMARNAT-BCS.02.02.0905/09 (4 August 2009), containing the forested land use change approval for the Cabo Cortés project.

Ramsar Mission to Marismas Nacionales;¹¹⁰ action in nullity filed by Hansa Baja Investments against the decision voiding the Cabo Cortés AIA.¹¹¹ The Submitters clarified that they are not providing the decisions issued in files PFPA/BCS/DQ/79/0018-05 and PFPA/BCS/DQ/79/0127 on 13 August 2011 because they do not have them.¹¹²

56. The Secretariat finds that the revised version of the submission now meets the requirement of Article 14(1)(c),¹¹³ since it provides sufficient information to allow the Secretariat to review it.
57. Likewise, for the purpose of meeting the requirement of Article 14(1)(e), the Submitters state that Annex C of the report of the Joint Mission to Cabo Pulmo notes the occurrence of a meeting of 15 November 2011 that was attended by authorities from Semarnat and Conanp along with diplomats from Ramsar, IUCN, and UNESCO.¹¹⁴ In addition, they provide hyperlinks to the following documents:
- i) Application for a declaration of expiration of the Cabo Cortés AIA, filed by Francisco Javier Castro Lucero on 5 December 2011;¹¹⁵
 - ii) Stenographic version of the testimony of Juan Rafael Elvira Quesada (former minister of the environment and natural resources) on 28 March 2012 before the Senate of the Republic, where the concerns surrounding the Cabo Cortés project were expressed to him;¹¹⁶
 - iii) Letter from Amigos por la Conservación de Cabo Pulmo to the Commissioner for Protected Natural Areas, expressing concerns about the Cabo Cortés project;¹¹⁷
 - iv) Electronic communications of 12 July 2013 with Semarnat authorities, informing them of the filing of this citizen submission;¹¹⁸
 - v) Letter from civil society organizations to the Commissioner for Protected Natural Areas, requesting implementation of the recommendations of the Joint Mission to Cabo Pulmo.¹¹⁹

¹¹⁰ Report of the Ramsar Mission to Marismas Nacionales, note 91 *supra*.

¹¹¹ Hansa Baja Investments, action in nullity against administrative decision no. 403/2011 whereby Semarnat voided the Cabo Cortés AIA (4 September 2012).

¹¹² Revised Submission, note 33 *supra*, at A-7.

¹¹³ NAAEC, note 1 *supra*, Article 14(1)(c):

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;

¹¹⁴ Report of the Joint Mission to Cabo Pulmo, note 89 *supra*, Annex C.

¹¹⁵ Francisco Javier Castro Lucero, application for declaration of expiration of Cabo Cortés AIA, 5 December 2011.

¹¹⁶ Stenographic version of the working meeting of the Senate Environment, Natural Resources and Fisheries Commission, chaired by Senator Francisco Agundis Arias, Mexico City, 28 March 2012.

¹¹⁷ Judith Castro Lucero, representing Amigos por la Conservación de Cabo Pulmo, letter to Luis Fuego Mac Donald, National Commissioner for Protected Natural Areas, Cabo Pulmo, B.C.S., 18 October 2011.

¹¹⁸ Electronic communications of 12 July 2013 with federal authorities.

58. The report of the Joint Mission to Cabo Pulmo notes the concerns expressed by civil society organizations to the federal authorities, to the effect that the Government of Mexico is failing to fulfill its environmental obligations by systematically approving coastal developments such as the Cabo Cortés project.¹²⁰ In addition, the report notes that the environmental authorities heard members of the community express their concerns not only about Cabo Cortés, but about the overall model of tourism development adopted in the region.¹²¹
59. The Secretariat has previously determined that in order to meet the requirement of having communicated a matter to the relevant authorities of the Party, it is sufficient that such communications would refer to the same assertions.¹²² Therefore, and in light of the information provided in the revised submission, the Secretariat finds that the revised submission meets the requirement of NAAEC Article 14(1)(e) and paragraph 5.5 of the Guidelines.
60. In summary, the Secretariat finds that revised submission SEM-13-001 (*Gulf of California*) meets all the eligibility requirements of NAAEC Article 14(1).

C NAAEC Article 14(2)

61. Having determined that the submission meets the requirements of NAAEC Article 14(1), the Secretariat now proceeds to review the submission in order to determine whether it warrants requesting a response from the Party pursuant to NAAEC Article 14(2) and paragraph 7.2 of the Guidelines.

(a) Whether the submission alleges harm to the person or organization making it

62. A perusal of the submission makes clear that the Submitters are civil society organizations with a shared interest in protecting the marine and coastal ecosystems of the Gulf of California, particularly the coral reefs and mangrove woodlands.¹²³ The Submitters assert that Mexico's alleged systematic failure to effectively enforce the environmental law in connection with the approval of tourism projects on the Gulf of California has caused the ecological deterioration of the region and a lack of certainty as regards biodiversity and the affected human communities in the project areas.¹²⁴ According to the Submitters, proof of this assertion is provided by the Paraíso del Mar project, which has operated without the applicable approval, causing severe damage to Bahía de la Paz.¹²⁵ In addition, the Submitters note the reports of the Ramsar Missions to Marismas Nacionales and Cabo Pulmo, which acknowledge the risks posed by the

¹¹⁹ Asociación Interamericana para la Defensa del Ambiente *et al.*, letter to Luis Fueyo Mac Donald, National Commissioner for Protected Natural Areas, 28 June 2013.

¹²⁰ Cf. Report of the Joint Mission to Cabo Pulmo, note 89 *supra*, at 37-8.

¹²¹ *Ibid.*, at 41.

¹²² SEM-00-02 (*Neste Canada*), Article 14(1) Determination (17 April 2000), at 5, available at <<http://goo.gl/QLPdny>> (viewed 12 September 2013).

¹²³ Original Submission, note 3 *supra*, at 15.

¹²⁴ Article 14(1) Determination, note 12 *supra*, §8.

¹²⁵ Original Submission, note 3 *supra*, at 3.

CIP Playa Espíritu and Cabo Cortés projects to sites that are in fact under international governance due to their richness and environmental importance to Mexico and the international community.¹²⁶

63. Guided by paragraph 7.4 of the Guidelines, the Secretariat finds that the alleged damage is due to the alleged failure to effectively enforce the environmental law and is related to environmental protection, and therefore meets the requirement of Article 14(2)(a).

(b) Whether the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement

64. The Secretariat finds that submission SEM-13-001 (*Gulf of California*) raises matters whose further study in this process would advance the goals of the NAAEC, and specifically those of Article 1(a), (b), (c), (f), (g), and (h).¹²⁷

(c) Whether private remedies available under the Party's law have been pursued

65. The Secretariat proceeds to assess whether the submission meets the criteria of NAAEC Article 14(2)(c) and paragraph 7.5 of the Guidelines, i.e., whether private remedies available under the Party's law have been pursued.¹²⁸
66. As regards the Paraíso del Mar project, on 6 October 2006, Ciudadanos Preocupados, A.C. filed an action in nullity against the Paraíso del Mar AIA before the TFJFA, which

¹²⁶ Revised Submission, note 33 *supra*, at A-4.

¹²⁷ “The objectives of this Agreement are to:

- (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
- (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;

...

- (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- (g) enhance compliance with, and enforcement of, environmental laws and regulations;
- (h) promote transparency and public participation in the development of environmental laws, regulations and policies;...

¹²⁸ Paragraph 7.5 of the Guidelines states:

In considering whether private remedies available under the Party's law, such as those identified in Article 6(3), have been pursued by the Submitter and others, the Secretariat will be guided by whether:

- a) continuing with the submission process could duplicate or interfere with private remedies being pursued or that have been pursued, in particular those that involve the Party, and in such cases the Secretariat should consider terminating the process in whole or in part; and
- b) reasonable actions have been taken by the Submitter to pursue private remedies prior to making a submission, bearing in mind that barriers to the pursuit of some remedies may exist in particular cases.

was decided on 3 August 2010 in the Eleventh Metropolitan Regional Chamber.¹²⁹ Additionally, Centro Mexicano de Derecho Ambiental (Cemda) filed a public complaint with Profepa, alleging that works are being carried out without the applicable environmental impact approval.¹³⁰ The Secretariat notes that after a long series of legal challenges, the Eleventh Metropolitan Regional Chamber of the TFJFA issued a new judgment voiding the Paraíso del Mar AIA and ordering the DGIRA to issue a new decision taking account of the arguments set out in the new judgment.¹³¹ According to the Submitters, all possible legal avenues in relation to the Paraíso del Mar project have been exhausted.¹³²

67. As to the Entre Mares project, the Submitters state that CEMDA filed an action in nullity against the Entre Mares AIA.¹³³ This action was decided on 2 August 2012 by the Fifth Metropolitan Regional Chamber of the TFJFA, which voided the AIA.¹³⁴ According to the Submitters, the project developers filed an appeal against the judgment on 2 August 2012, the outcome of which is still pending.¹³⁵
68. In relation to the CIP Playa Espíritu project, the Submitters state that in October 2011, CEMDA filed a judicial review action against the CIP Costa del Pacífico AIA, and they attach a copy of this action to their revised submission.¹³⁶ Apparently, the legal actions relating to the project in question are ongoing.¹³⁷
69. Finally, as regards the Cabo Cortés project, the Submitters mention a series of proceedings¹³⁸ culminating on 14 June 2012 with the revocation of the Cabo Cortés AIA as a result of a judicial review action filed by members of the community of Cabo Pulmo on 1 July 2011.¹³⁹ Challenging this decision, Hansa Baja Investments filed an action in nullity on 4 September 2012 in TFJFA against the revocation.¹⁴⁰ According to the Submitters, while it is true that the cancellation of the Cabo Cortés AIA was

¹²⁹ TFJFA Paraíso del Mar Decision of 3 August 2013, note 102 *supra*. The Secretariat bears in mind that the original submission referred to “CEMDA” as the party to this dispute. Original Submission, note 3 *supra*, at 4.

¹³⁰ CEMDA, public complaint filed with Profepa (22 February 2013). Original Submission, note 3 *supra*, note 20.

¹³¹ TFJFA, Eleventh Metropolitan Regional Chamber, decision in file no. 32183/06-17-11-3 (14 January 2013) [TFJFA Paraíso del Mar Decision of 14 January 2013], at 64.

¹³² Original Submission, note 3 *supra*, at 15.

¹³³ *Ibid.*, at 5.

¹³⁴ TFJFA, Fifth Metropolitan Regional Chamber, public version of the judgment in file no. 4083/11-17-05-7 (2 August 2012) [TFJFA Entre Mares Decision of 2 August 2012], at 57.

¹³⁵ Original Submission, note 3 *supra*, at 5.

¹³⁶ Motion for revocation 403/2011, file no. XV/2011/403, against file no. S.G.P.A./DGIRA/DG/1167/11 containing the CIP Costa del Pacífico AIA, filed by Carlos Eduardo Simental Crespo with the DGIRA on 27 October 2011. Revised Submission, note 33 *supra*, at A-6.

¹³⁷ Original Submission, note 3 *supra*, at 5.

¹³⁸ *Ibid.*, at 6.

¹³⁹ Judicial Review 403/2011, file no. XV/2011/403, Division of Management for Environmental Protection (*Subsecretaría de Gestión para la Protección Ambiental*) (14 June 2012).

¹⁴⁰ Hansa Baja Investments, action in nullity filed in TFJFA against decision 403/2011 of the Division of Management for Environmental Protection revoking the environmental impact approval for the Cabo Cortés project (4 September 2012).

announced on 17 June 2012, Hansa Baja Investments filed a new motion seeking to void the cancellation on 24 November 2012; thus the litigation is apparently ongoing.¹⁴¹

70. Guided by the criteria of paragraph 7.5 of the Guidelines, the Secretariat finds that the submission accords with the Article 14(2)(c) factor for requesting a response from the Party. In the first place, the Secretariat finds that to continue processing the submission will not duplicate efforts nor interfere with pending proceedings since the Article 14 process is “an information-sharing mechanism established to promote public participation regarding the effective enforcement of environmental law in North America.”¹⁴² As such, the submissions mechanism is different in purpose and nature from any appeals body (judicial or administrative, domestic or international) in that its determinations do not contain judgments or conclusions regarding the effective enforcement of environmental law.¹⁴³ In addition, the Secretariat has previously found that there would be no undue interference or duplication of effort where an ongoing proceeding has passed the stage of party pleadings or¹⁴⁴ where the processing of a remedy is not timely,¹⁴⁵ and bears in mind that, in practice, the processing of a citizen submission cannot practically lead to conflicting judgments under the doctrine of *lis alibi pendens*.¹⁴⁶
71. Out of an abundance of caution however, the Secretariat lacks sufficient information to conduct the relevant review at this stage of the processing of the submission; the Party in question may provide the Secretariat with the necessary information concerning any pending proceedings under NAAEC Article 14(3)(a). In this regard, and consistent with paragraph 9.6 of the Guidelines, and the spirit of transparency pervading the NAAEC¹⁴⁷, and international custom with regard to interpretation of treaties,¹⁴⁸ the Secretariat may consider the partial or total termination of the submission if the Party notifies the Secretariat in writing that the matter is the subject of a pending proceeding that was initiated by the relevant authorities of the Party, in accordance with the Party’s

¹⁴¹ Original Submission, note 3 *supra*, at 7.

¹⁴² Council of the CEC, Resolution 12-06, “Adoption of revised *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*” (11 July 2012), available at <<http://goo.gl/iQgzXb>> (viewed 12 September 2013) (emphasis added).

¹⁴³ Cf. SEM-09-002 (*Wetlands in Manzanillo*) Article 15(1) Notification, note 17 *supra*, §108.

¹⁴⁴ SEM-03-003 (*Lake Chapala II*), Article 15(1) Determination (18 May 2005), at 20.

¹⁴⁵ SEM-05-002 (*Coronado Islands*), Article 15(1) Determination (18 January 2007), at 12-15.

¹⁴⁶ SEM-07-001 (*Minera San Xavier*), Article 15(1) Determination, (15 July 2009), §§40-5.

¹⁴⁷ “By limiting the ambit of ‘judicial or administrative proceedings’ to those actions pursued by governments, [Article 45(3)(a)] appears to contemplate the preemptory nature of directed efforts undertaken by a government in a timely manner to secure compliance with environmental law. 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 are taken almost exclusively by the official government bodies charged with enforcing or implementing the law.” SEM-96-003 (*Oldman River I*), Article 15(1) Determination (2 April 1997), available at <<http://goo.gl/XWX0Qe>> (viewed 13 September 2013), at 3.

¹⁴⁸ See *Vienna Convention on the Law of Treaties*, Article 31(3)(b), 1155 U.N.T.S. 331, 8 I.L.M., entered into force on 27 January 1980.

law, is related to the assertions in the submission, and is related to the environmental law in question.¹⁴⁹

72. Moreover, in accordance with paragraph 7.5(b) of the Guidelines,¹⁵⁰ the Secretariat reiterates its understanding that Article 14(2)(c) is not intended to impose the requirement that all possible actions or remedies under the Party's law must be exhausted before a response can be requested.¹⁵¹
73. In light of the foregoing considerations, the Secretariat finds that the Submitters have pursued private remedies available under the Party's law in accordance with Article 14(2)(c) and section 7.5 of the Guidelines, and that further consideration of the submission will not duplicate or interfere with pending proceedings.

(d) Whether the submission is drawn exclusively from mass media reports

74. As regards Article 14(2)(d), the Secretariat finds that the submission is not based on mass media reports but on the Submitters' direct knowledge. This is obvious from a consideration of the technical and legal information contained in the appendices to both the original and revised submissions.
75. In summary, having reviewed the revised version of the submission in light of the criteria listed in NAAEC Article 14(2) and paragraph 7 of the Guidelines, the Secretariat finds that the assertions of systematic failure to enforce the environmental law in relation to tourism infrastructure projects in the Gulf of California warrant a response from the government of the United Mexican States.

III. DETERMINATION

76. The Secretariat, having conducted its NAAEC Article 14(1) review of submission SEM-13-001 (*Gulf of California*), finds that it meets the requirements of that article for the reasons set out herein.
77. In addition, taking account of the criteria of NAAEC Article 14(2), the Secretariat finds that the submission warrants requesting a response from the interested Party, in this case the United Mexican States, in regard to the Submitters' assertions concerning the alleged failure to effectively enforce the following provisions:
- i) REIA Article 36, as regards consideration of the best and most complete information available in the preparation of the EIS for the Cabo Cortés and CIP Playa Espíritu projects (§ 28(i) *supra*);
 - ii) LGEEPA Article 35 and REIA Article 44, as regards the assessment of the cumulative impacts of the CIP Playa Espíritu, Cabo Cortés, Paraíso del Mar,

¹⁴⁹ See SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 15(1) Determination (20 December 2010), §§71-7.

¹⁵⁰ See note 128 *supra*.

¹⁵¹ See SEM-09-002 (*Wetlands in Manzanillo*), Article 14(1)(2) Determination (13 August 2010), §63; SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1)(2) Determination (3 March 2010), §39; SEM-07-001 (*Minera San Xavier*), Article 14(1)(2) Determination (29 June 2007), at 10.

- and Entre Mares projects and the piecemeal consideration given to these projects (§ 28(ii) *supra*), and in relation to the declaration of a Forest Protection Zone for the land surrounding the city of La Paz, which declaration is allegedly applicable to the Paraíso del Mar AIA (§ 29 *supra*);
- iii) LGVS Article 5 paragraph II, in relation to the lack of implementation of precautionary, mitigation, and preventive measures in the case of the Cabo Cortés, CIP Playa Espíritu, and Paraíso del Mar projects (§ 28(iii) *supra*);
 - iv) REIA Article 24, in relation to the alleged non-consideration of the technical opinions of various entities for the approval of the CIP Costa del Pacífico project (§§ 31-33 *supra*);
 - v) LGVS Article 60 *ter* and paragraphs 4.0, 4.16, and 4.42 of NOM-022, in relation to the approval of the Entre Mares and Paraíso del Mar projects (§§ 36(i) *supra*);
 - vi) NOM-059 with the approval of the Paraíso del Mar, Entre Mares, and Cabo Cortés projects (§ 36(ii) *supra*);
 - vii) LGVS Article 1, in relation to the non-applicability of the LGDFS as regards the implementation of the forested land use change for the mangrove woodland at the site of the Paraíso del Mar project (§§ 37-39 *supra*);
 - viii) REIA Articles 57, 58, and 59, in relation to the failure to exercise the power to suspend works or activities of the Paraíso del Mar project (§ 40 *supra*);
 - ix) Article 3 of the Ramsar Convention in relation to the Paraíso del Mar, CIP Playa Espíritu, Entre Mares, and Cabo Cortés projects (§§ 41-48 *supra*);
 - x) Article 4 of the World Heritage Convention in relation to the Cabo Cortés project and the protection of the Cabo Pulmo coral reef (§§ 49-51 *supra*).
78. The Party, in its response, may specify how the provisions of the Ramsar Convention are being enforced in light of Ramsar Resolutions VII.16, VIII.3, and X.24 as well as the respective reports of the Ramsar Mission to Marismas Nacionales and the Joint Mission to Cabo Pulmo. Likewise, with regard to the enforcement of Article 4 of the World Heritage Convention, the Party may specify how that provision is being enforced, with reference to Article 5 of the Convention and to the observations of the Joint Mission to Cabo Pulmo.
79. In addition, the Party may give notice of the existence of pending proceedings, if any, pursuant to NAAEC Article 14(3)(i) (see § 71 *supra*).
80. As stipulated by NAAEC Article 14(3), the Party may provide a response to the submission within the 30 days following receipt of this determination; i.e., by 8 January 2014. In exceptional circumstances, the Party may give written notice of the extension of this period to 60 days; i.e., by 20 February 2014.
81. Copies of the Secretariat's determination as well as annexes of the original and revised submission are available in the SEM registry.

Respectfully submitted for your consideration this 12 November 2013.

Secretariat of the Commission for Environmental Cooperation

(signature in original)
Per: Dane Ratliff
Director, Submissions on Enforcement Matters Unit

(signature in original)
Per: Paolo Solano
Legal Officer, Submissions on Enforcement Matters Unit

cc: Mr. Enrique Lendo, Alternate Representative, Mexico
Mr. Dan McDougall, Alternate Representative, Canada
Ms. Michelle DePass, Alternate Representative, United States
Ms. Irasema Coronado, PhD., Executive Director, Secretariat of the CEC
Submitters