

**Secretariat of the Commission for Environmental Cooperation**

**Secretariat notification in accordance with Articles 24.28 of the United States-Mexico-Canada Agreement**

**Submitters:** Center for Biological Diversity  
Animal Welfare Institute  
Natural Resources Defense Council  
Environmental Investigation Agency

**Party:** United Mexican States

**Submission date:** 11 August 2021

**Notification date:** 1 April 2022

**Submission no.:** SEM-21-002 (*Vaquita Porpoise*)

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**Executive Summary**

On 11 August 2021, the Secretariat of the Commission for Environmental Cooperation received submission SEM-21-002, asserting that Mexico is failing to effectively enforce its environmental laws to protect the vaquita porpoise (*Phocoena sinus*), which is critically endangered, and prevent illegal fishing of the totoaba (*Cynoscion macdonaldi*) in the gulf of California (see Figures 1 and 3 below).

The Center for Biological Diversity, Animal Welfare Institute, Natural Resources Defense Council, and Environmental Investigation Agency (“Submitters”) contend that Mexico is failing to effectively enforce the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS) and its regulation (the “LGVS Regulation”) as well as various orders focused on protecting the vaquita porpoise and eliminating illegal fishing of the totoaba which has a direct impact on the status of the vaquita.

Mexico’s response describes measures related to enforcing LGVS Article 55 and Article 56 of the LGVS Regulation; activities concerning the implementation of the 2020 Gillnets Order, including by the Ministry of Agriculture and Rural Development, the Ministry of the Navy, and the Office of the Federal Attorney for Environmental Protection. The response also includes information on activities aimed at enforcing the fishing and trade bans; progress on a plan to adopt implementation triggers, and other measures that Mexico is undertaking.

The Secretariat finds that a factual record could provide information on Mexico’s efforts to implement strategies and the effectiveness of its measures to enforce LGVS Article 55 and Article 56 of the LGVS Regulation to effectively control illegal traffic in totoaba within the CITES framework. A factual record could present information on the implementation of the totoaba fishing ban in the Gulf of California, the imposition of sanctions, and measures taken to effectively implement the ban. A factual record could also document the principal links, components, and organized groups involved in the illegal fishing, storage, distribution, transportation, and commercialization of the totoaba.

A factual record could report on the implementation of a mechanism to compensate fishermen in the Upper Gulf of California and other incentives for training the inshore fishing sector; totoaba

population data and information on its recovery in the Gulf of California; and information on facilities to raise totoaba in captivity for commercial purposes.

The Secretariat finds that a factual record could present information on Mexico's efforts to implement the 2015, 2017, and 2020 Gillnets Orders, including: the permanent ban on gillnet use; the characteristics of *agalleras*, their use, and their effects on marine fauna and biodiversity; the characteristics and effectiveness of devices or monitoring systems for vessels prescribed by the orders; any sanctions imposed, and the launch and landing sites prescribed by the orders. A factual record could provide information on the number and type of vessels detained by Mexican authorities; the number of vessels present each day; actions to address recidivism; net recovery; ongoing monitoring and surveillance measures and the effectiveness of such measures; and policies and programs encouraging the sustainable use of natural resources in the Upper Gulf of California for the benefit of all persons.

A factual record could also describe the roles played by various government bodies and the development of governance mechanisms to eradicate illicit traffic in totoaba swim bladders and promote the effective protection of the vaquita. Additionally, it could provide information explaining the interaction between the three orders and other legal and environmental policy instruments for the protection of the totoaba and the vaquita.

Based on the submission and Mexico's response, the Secretariat determines that there are central issues that remain unresolved regarding compliance with the relevant laws and orders. The Secretariat finds that submission SEM-21-002 warrants the preparation of a factual record on certain issues raised in the submission and due to the urgent situation facing these species.

## I. INTRODUCTION

1. On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA or CUSMA or "the Agreement") and the Agreement on Environmental Cooperation among the Governments of Canada, the United States of America, and the United Mexican States (the "Environmental Cooperation Agreement" or ECA) entered into force. From that date, the Submissions on Enforcement Matters (SEM) process, originally established by Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), is governed by USMCA Articles 24.27 and 24.28. The Secretariat of Commission for Environmental Cooperation (CEC or "the Commission")<sup>1</sup> remains responsible for implementing the SEM process, as stipulated in the ECA.<sup>2</sup>
2. USMCA Articles 24.27 and 24.28 provide a process for any national of a Party or entity organized under the laws of a Party to file a submission asserting that a Party is failing to effectively enforce its environmental laws. The CEC Secretariat (the "Secretariat") initially reviews submissions based on the requirements set out in USMCA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements, it then determines, in accordance with the criteria of Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party's

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<sup>1</sup> The Commission for Environmental Cooperation (CEC) was created in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), signed by Canada, the United States, and Mexico (the "Parties"). The constituent bodies of the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).

<sup>2</sup> Pursuant to Article 2(3) of the *Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada* ("Environmental Cooperation Agreement" or ECA), the CEC "will continue to operate under the modalities in place as of entry into force of [the ECA]." The constitutive bodies of the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).

response, the Secretariat then determines whether the matter warrants the preparation of a factual record and, if so, it informs the CEC Council and the Environment Committee,<sup>3</sup> providing its reasons as prescribed by USMCA Article 24.28(1); otherwise, it terminates the review of the submission.<sup>4</sup>

3. On 11 August 2021, the Center for Biological Diversity, the Animal Welfare Institute, the Natural Resources Defense Council, and the Environmental Investigation Agency, organizations established in the United States of America (“the Submitters”), filed a submission with the Secretariat in accordance with USMCA Article 24.27(1).<sup>5</sup> The Submitters assert that Mexico is failing to effectively enforce the General Wildlife Act (*Ley General de Vida Silvestre—LGVS*) and its regulation (the “**LGVS Regulation**”) as well as various administrative orders aimed at protecting the vaquita (*Phocoena sinus*), which has practically led to the extinction of the species. They state that illegal catch of totoaba (*Cynoscion macdonaldi*) has a direct impact on the status of the vaquita.
4. According to the Submitters, Mexico is failing to effectively enforce the following legal instruments:
  - a) Article 55 of the LGVS<sup>6</sup> and Article 56 of the LGVS Regulation;<sup>7</sup>
  - b) the Order establishing a fishing ban on the totoaba (*Cynoscion macdonaldi*) in the waters of the Gulf of California, from the mouth of the Colorado River to Río Fuerte, Sinaloa on the east coast and from the Colorado River to Bahía Concepción, Baja California on the west coast (the “**1975 Totoaba Fishing Ban**”);<sup>8</sup>
  - c) the Order temporarily suspending commercial fishing by means of gillnets and longlines operated on small craft in the Northern Gulf of California (the “**2015 Gillnets Order**”);<sup>9</sup>
  - d) the Order prohibiting specific fishing gear, systems, methods, and techniques, and restricting permissible hours, for fishing by small craft in marine waters under Mexican federal government jurisdiction in the Northern Gulf of California, establishing landing

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<sup>3</sup> The Environment Committee was established by USMCA Article 24.27(3) and its role is to supervise the implementation of Chapter 24 of the Agreement.

<sup>4</sup> More details on the various stages of the submissions on enforcement matters process, the public registry of submissions, and previous Secretariat determinations and factual records can be found on the CEC website at <<http://www.cec.org/submissions-on-enforcement/>>.

<sup>5</sup> SEM-21-002 (*Vaquita Porpoise*), USMCA Article 24.27(1) Submission (11 August 2021) [Submission], online at <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-sub\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-sub_en.pdf)>.

<sup>6</sup> *Ley General de Vida Silvestre*, in *Diario Oficial de la Federación* (DOF), 3 July 2000 [LGVS], online at <[www.diputados.gob.mx/LeyesBiblio/pdf/146\\_200521.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/146_200521.pdf)>.

<sup>7</sup> *Reglamento de la Ley General de Vida Silvestre*, DOF, 30 November 2006 [LGVS Regulation], online at <[www.diputados.gob.mx/LeyesBiblio/regley/Reg\\_LGVS.pdf](http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LGVS.pdf)>.

<sup>8</sup> *Acuerdo que establece veda para la especie Totoaba, Cynoscion macdonaldi, en aguas del Golfo de California, desde la desembocadura del Río Colorado hasta el Río Fuerte, Sinaloa en la costa oriental, y del Río Colorado a Bahía Concepción, Baja California, en la costa occidental* [1975 Totoaba Fishing Ban], DOF, 1 August 1975, online at <[www.dof.gob.mx/nota\\_detalle.php?codigo=4786520&fecha=01/08/1975](http://www.dof.gob.mx/nota_detalle.php?codigo=4786520&fecha=01/08/1975)>.

<sup>9</sup> *Acuerdo por el que se suspende temporalmente la pesca comercial mediante el uso de redes de enmalle, cimbras y/o palangres operadas con embarcaciones menores, en el Norte del Golfo de California*, DOF, 10 April 2015 [2015 Gillnets Order], online at <[www.dof.gob.mx/nota\\_detalle.php?codigo=5388486&fecha=10/04/2015](http://www.dof.gob.mx/nota_detalle.php?codigo=5388486&fecha=10/04/2015)>.

- sites, and mandating the use of monitoring systems by such craft (the “**2017 Gillnets Order**”),<sup>10</sup> and
- e) the Order regulating fishing gear, systems, methods, and techniques, and restricting permissible hours, for small and large craft in Mexican marine areas in the Northern Gulf of California, establishing landing sites, and mandating the use of monitoring systems by such craft (the “**2020 Gillnets Order**”).<sup>11</sup>
5. On 8 September 2021, the Secretariat found that the submission met the requirements of USMCA Article 24.27(1) and (2) and that it merited a response from the Government of Mexico pursuant to Article 24.27(3) in relation to the effective enforcement of the environmental laws listed in the preceding paragraph.<sup>12</sup>
6. On 31 January 2022, the Secretariat received the Government of Mexico’s response.<sup>13</sup> The Party maintains that the Secretariat should not have requested a response under Article 24.27(3) since, in its opinion, the submission does not demonstrate harm to the Submitters;<sup>14</sup> does not include information on private remedies available under Mexico’s law,<sup>15</sup> and is based exclusively on mass media reports.<sup>16</sup> The Party further contends that its commitments within the USMCA framework only become binding “as from its entry into force; i.e., as of 1 July 2020.”<sup>17</sup>
7. The response refers to enforcement measures related to enforcing LGVS Article 55 and Article 56 of the LGVS Regulation;<sup>18</sup> activities concerning the implementation of the 2020 Gillnets Order, including those implemented by the Ministry of Agriculture and Rural Development (*Secretaría de Agricultura y Desarrollo Rural—Sader*), the Ministry of the Navy (*Secretaría de Marina—Semar*), and the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente—Profepa*).<sup>19</sup> The response includes information on activities aimed at

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<sup>10</sup> *Acuerdo por el que se prohíben artes, sistemas, métodos, técnicas y horarios para la realización de actividades de pesca con embarcaciones menores en aguas marinas de jurisdicción federal de los Estados Unidos Mexicanos en el Norte del Golfo de California, y se establecen sitios de desembarque, así como el uso de sistemas de monitoreo para dichas embarcaciones*, DOF, 30 June 2017 [2017 Gillnets Order], online at <[www.dof.gob.mx/nota\\_detalle.php?codigo=5488674&fecha=30/06/2017](http://www.dof.gob.mx/nota_detalle.php?codigo=5488674&fecha=30/06/2017)>.

<sup>11</sup> *Acuerdo por el que se regulan artes, sistemas, métodos, técnicas y horarios para la realización de actividades de pesca con embarcaciones menores y mayores en Zonas Marinas Mexicanas en el Norte del Golfo de California y se establecen sitios de desembarque, así como el uso de sistemas de monitoreo para tales embarcaciones*, DOF, 24 September 2020 [2020 Gillnets Order], online at <[www.dof.gob.mx/nota\\_detalle.php?codigo=5601153&fecha=24/09/2020](http://www.dof.gob.mx/nota_detalle.php?codigo=5601153&fecha=24/09/2020)>.

<sup>12</sup> SEM-21-002 (*Vaquita Porpoise*), Article 24.27(2) and (3) Determination (8 September 2021) [Article 24.27(2) and (3) Determination], online at: <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-det\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-det_en.pdf)>, at §49.

<sup>13</sup> SEM-21-002 (*Vaquita Porpoise*), Article 24.27(4) Response (31 January 2022) [Response], online at: <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-rsp\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-rsp_en.pdf)>.

<sup>14</sup> Response at §4–5.

<sup>15</sup> *Id.* at §17–25.

<sup>16</sup> *Id.* at §26–30.

<sup>17</sup> *Id.* at §33–5.

<sup>18</sup> *Id.* at §37–43.

<sup>19</sup> *Id.* at §46–68.

enforcing the fishing and trade bans;<sup>20</sup> the application of the government’s plan to adopt implementation triggers,<sup>21</sup> and other measures that Mexico is implementing.<sup>22</sup>

8. Pursuant to USMCA/CUSMA Article 24.28(1), the CEC Secretariat reviewed submission SEM-21-002 (*Vaquita Marina*), in light of the response from the Government of Mexico, to determine whether it warrants the preparation of a factual record.
9. The Secretariat finds that the submission in light of the response warrants the preparation of a factual record in relation to the implementation of measures for the protection of the vaquita (*Phocoena sinus*) and the totoaba (*Cynoscion macdonaldi*) in connection with the effective enforcement of the provisions of LGVS Article 55 and Article 56 of the LGVS Regulation, the 1975 Totoaba Fishing Ban, the 2015 Gillnets Order, the 2017 Gillnets Order, and the 2020 Gillnets Order, and presents its reasons below.

## II. ANALYSIS

### A. Preliminary matters

10. This section elaborates on the reasons previously set out in its determination of 8 September 2021<sup>23</sup> in the interest of the transparency of the SEM process and, with the understanding that the Secretariat previously stated its reasoning for reviewing the submission and requesting a response from Mexico pursuant to Articles 24.27(3).

#### i) The submission alleges harm to the person making the submission

11. Mexico contends that the submission does not “demonstrate harm” to the Submitters and that it therefore did not warrant a response under USMCA Article 24.27(3)(a).<sup>24</sup> The Party asserts that this provision “makes no reference to the relationship between harm and the alleged failure to effectively enforce environmental law.”<sup>25</sup> Furthermore, Mexico alleges that the Secretariat should have found a “causal relationship ... between the assertions made and the alleged negative impacts caused to the Submitters” and that ultimately the Submitters “failed to demonstrate that the alleged failure to enforce caused them harm.”<sup>26</sup>
12. As the Secretariat stated in its first determination under the USMCA,<sup>27</sup> the Secretariat is guided by the provisions of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”) to ensure predictable, consistent implementation of the SEM process, now under USMCA/CUSMA. Paragraph 7.4 of the Guidelines provides as follows:

In considering whether the submission alleges harm to the person or organization making the submission, the Secretariat will consider such factors as whether:

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<sup>20</sup> *Id.* at §69–81.

<sup>21</sup> *Id.* at §85–7.

<sup>22</sup> *Id.* at §88–90.

<sup>23</sup> Article 24.27(2) and (3) Determination.

<sup>24</sup> Response at 4, title of subsection (a).

<sup>25</sup> *Id.* at §12.

<sup>26</sup> *Id.* at §15–16.

<sup>27</sup> SEM-20-001 (*Loggerhead Turtle*), Article 24.27(2) and (3) Determination (8 February 2021), at §6–7.

- a) the alleged harm is due to the asserted failure to effectively enforce environmental law; and
  - b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health...
13. In its Article 24.27(2) and (3) determination, the Secretariat presented information on the gradual loss of vaquita specimens in the Upper Gulf of California; illegal totoaba fishing to the detriment of the vaquita; illegal activities reported since 1976; the inclusion of the totoaba in Appendix I of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES); insufficient conservation efforts since the declaration of the Upper Gulf of California and Colorado River Delta Biosphere Reserve (*Reserva de la Biosfera del Alto Golfo de California y Delta del Río Colorado*; the “Biosphere Reserve”) in 1993; and documentation of at least two decades of regulation that has allegedly been insufficient in its enforcement.<sup>28</sup> The information presented by the Secretariat was provided by the Submitters, as attachments to the submission, and was cited accordingly.<sup>29</sup>
14. The Secretariat recalls that Mexico has maintained that harm can be demonstrated—in the context of the SEM process—by demonstrating a failure to enforce the law. For instance, in the case of an alleged failure to enforce provisions establishing the “scope of authority regime on environmental impact assessment”, a source of “strict liability” on the part of the authority was sufficient to demonstrate harm.<sup>30</sup> The response to SEM-21-002 corroborates the question of harm asserted by the Submitters with respect to the existence of “international trafficking rings for totoaba”;<sup>31</sup> the alleged illicit totoaba exploitation;<sup>32</sup> and recovery of nets “for a total length of 73,101 meters,” putting the vaquita in imminent danger.<sup>33</sup>
15. Thus, the Secretariat considers the question of harm at the request of Mexico and confirms that the submission asserts that a) the alleged harm caused by illegal trade in parts and derivatives of totoaba associated with illicit activities jeopardizing vaquita specimens “is due to the asserted failure to effectively enforce environmental law,”<sup>34</sup> and b) the alleged harm to both the species *Cynoscion macdonaldi* and *Phocoena sinus* “relates to the protection of the environment.”<sup>35</sup> Therefore, submission SEM-21-002 meets the criterion of Article 24.27(3)(a).

**ii) The submission demonstrates that private remedies available under the Party’s law have been pursued**

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<sup>28</sup> Article 24.27(2) and (3) Determination at §41.

<sup>29</sup> In its determinations, the Secretariat follows a rigorous citing practice to its sources, which is maintained throughout all the stages of the process, until the development of factual records. Cf. *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* [Guidelines], paragraph 12.2, *in fine*.

<sup>30</sup> SEM-19-002 (*City Park Project*), NAAEC Article 14(3) Response (26 March 2020), at 5-6.

<sup>31</sup> Response at §67.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Cf. Guidelines, paragraph 7.4(a).

<sup>35</sup> *Id.* at paragraph 7.4(b).

16. Mexico contends that the Submitters do not demonstrate that they have pursued the remedies available to them under the Party's domestic law.<sup>36</sup> It contends that Article 189 of the General Ecological Equilibrium and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) and LGVS Article 107, cited in the citizen complaint filed in 2017, are not cited in submission SEM-21-002,<sup>37</sup> and that the complaint is related to environmental impact approvals.<sup>38</sup>
17. Paragraph 7.5(b) of the Guidelines provides that “in considering whether private remedies available under the Party's law...have been pursued...the Secretariat will be guided by whether:”
  - 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.<sup>39</sup>
18. During its Article 24.27(3) review, the Secretariat reviewed Appendix C of the submission, containing a citizen complaint (*denuncia popular*) filed by the legal representative of one of the Submitters.<sup>40</sup>
19. The citizen complaint appended by the Submitters was made pursuant to the provisions of the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos*), the Convention on Biological Diversity, the International Covenant on Economic, Social, and Cultural Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the FAO Code of Conduct for Responsible Fisheries, the North American Agreement on Environmental Cooperation, the LGEEPA, and its Environmental Impact Assessment Regulation.<sup>41</sup> The citizen complaint cited Mexico's environmental impact law in relation to fishing activities in the Biosphere Reserve and their impact on the effective protection of the vaquita,<sup>42</sup> a matter closely related to the central concerns raised by the Submitters in SEM-21-002.
20. The citizen complaint presents arguments on the magnitude of the threats facing the vaquita;<sup>43</sup> it states that the species is listed in NOM-059-Semarnat-2010,<sup>44</sup> and it further states that Mexico has measures for protection of the totoaba and the vaquita in the Upper Gulf of California, including<sup>45</sup>

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<sup>36</sup> Response at §17.

<sup>37</sup> *Id.* at §18.

<sup>38</sup> *Id.* at §20(i).

<sup>39</sup> Guidelines, paragraph 7.5(b).

<sup>40</sup> Submission, Appendix C: Citizen Complaint (*Denuncia Popular*) with respect to the illegal fishing in the Upper Gulf of California (14 March 2017) [Complaint].

<sup>41</sup> Complaint at 1–2.

<sup>42</sup> It should be noted that when considering the citizen complaint, the authorities had at their disposal various provisions of environmental impact law relating to the use of natural resources in a protected natural area. These include LGEEPA Articles 28 paragraphs X and XII and 48; Article 81 paragraph II of the Protected Natural Areas Regulation of the LGEEPA, and Articles 5(R) paragraph II, 5(T) paragraph II, and 54 of the of the Environmental Impact Assessment Regulation of the LGEEPA.

<sup>43</sup> Complaint at 2.

<sup>44</sup> Mexican Official Standard NOM-059-Semarnat-2010, *Protección ambiental-Especies nativas de México de flora y fauna silvestres-Categorías de riesgo y especificaciones para su inclusión, exclusión o cambio-Lista de especies en riesgo*, DOF, 30 December 2010.

<sup>45</sup> Complaint at 2–3.

the declaration of the Biosphere Reserve covering the vaquita's range,<sup>46</sup> the *Order Establishing the Refuge Area for the Protection of the Vaquita* (the "2005 Vaquita Refuge Order"),<sup>47</sup> and the *Protection Plan for the Vaquita within the Refuge Area Located in the Western Portion of the Upper Gulf of California* (the "Vaquita Protection Plan").<sup>48</sup> Also, the citizen complaint states that the last report of the International Committee for the Recovery of the Vaquita ("CIRVA") notes "a dramatic decline in the population of the species" and recommends a permanent ban on gillnets in the entire known habitat of the vaquita.<sup>49</sup>

21. The citizen complaint further states that the 2015 Gillnets Order is in force; that fishing activities are taking place within a protected natural area, and that fishing activities within the Biosphere Reserve have been approved "in contravention of the management and conservation plans for the critical zone as well as the protected area plans for aquatic species."<sup>50</sup> The complaint requests an extension of the 2015 Gillnets Order in order to avoid greater harm to the vaquita due to fishing activities.<sup>51</sup>
22. The Secretariat finds that the citizen complaint is a reasonable effort to pursue private remedies available in Mexico, and that it states the same concerns raised in the submission about protection measures for the totoaba and the vaquita involving the management of fishing activities within the Biosphere Reserve and its restricted-use subzones that are inhabited by wildlife populations.<sup>52</sup> Therefore, the Secretariat has found no reason to revise its Article 24.27(2) and (3) determination.

**iii) The submission is not exclusively based on mass media reports**

23. Mexico states that SEM-21-002 "is exclusively based on mass media reports"<sup>53</sup> and that the Submitters "make ample reference to newspaper articles in support of the Vaquita Porpoise Submission."<sup>54</sup> The response transcribes some passages from the submission that refer to reports published in various media outlets.<sup>55</sup>
24. USMCA Article 24.27(3)(d) stipulates that in deciding whether to request a response, the Secretariat must be guided by whether "the submission is not drawn *exclusively* from mass media reports."<sup>56</sup> Paragraph 7.6 of the Guidelines reads as follows:

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<sup>46</sup> *Decreto por el que se declara área natural protegida con el carácter de Reserva de la Biósfera, la región conocida como Alto Golfo de California y Delta del Río Colorado, ubicada en aguas del Golfo de California y los municipios de Mexicali, Baja California, de Puerto Peñasco y San Luis Río Colorado, Sonora*, DOF, 10 June 1993.

<sup>47</sup> *Acuerdo mediante el cual se establece el área de refugio para la protección de la vaquita (Phocoena sinus)*, DOF, 8 September 2005, online at <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=2091268&fecha=08/09/2005](https://www.dof.gob.mx/nota_detalle.php?codigo=2091268&fecha=08/09/2005)> [2005 Vaquita Refuge Order].

<sup>48</sup> *Programa de protección de la vaquita marina dentro del área de refugio ubicada en la porción occidental del Alto Golfo de California*, DOF, 29 December 2005, online at <[https://www.dof.gob.mx/nota\\_detalle.php?codigo=2105125&fecha=29/12/2005](https://www.dof.gob.mx/nota_detalle.php?codigo=2105125&fecha=29/12/2005)> [Vaquita Protection Plan].

<sup>49</sup> Complaint at 3.

<sup>50</sup> *Id.* at 10.

<sup>51</sup> *Id.* at 11.

<sup>52</sup> Cf. Article 54 of the Protected Natural Areas Regulation to the LGEEPA.

<sup>53</sup> Response at 7, heading of subparagraph (c).

<sup>54</sup> *Id.* at §27.

<sup>55</sup> *Id.*

<sup>56</sup> Emphasis added.

In taking into account whether a submission is drawn exclusively from mass media reports... the Secretariat should consider if other sources of information relevant to the assertion(s) in the submission were reasonably available to the Submitter.

25. While the submission references reports from various media outlets, the Submitters did not exclusively draw on these reports in making their assertions or use them as the sole basis for their assertions. The Secretariat finds it reasonable that the Submitters note circumstances concerning the illegality of the clandestine fishing that persists in the area, and that the Submitters included relevant reports from the media to provide context. All things considered, the media statements and reports were not a substantive basis for the Secretariat's request for a response from Mexico.
26. The Submitter's assertions are based on information and data, from different sources including: the North American Conservation Action Plan for the Vaquita;<sup>57</sup> a report providing an update on the status of the vaquita up to December 2020;<sup>58</sup> a report published on the IUCN website concerning the number of vaquitas in the Zero Tolerance Area;<sup>59</sup> the IUCN information sheet on the conservation status of the vaquita;<sup>60</sup> a report prepared by the Environmental Investigation Agency discussing illegal totoaba fishing and its impact on the vaquita population,<sup>61</sup> and various reports issued by CIRVA on the conservation measures implemented by Mexico.<sup>62</sup> The submission also cites, for example, a map by the IUCN addressed to the ministers responsible for Semarnat, Sader, and Semar, urging them to "focus all measures on the sole imminent threat to the species: bycatch in gillnets."<sup>63</sup>
27. The Secretariat reiterates that the submission is not based exclusively on mass media reports.

**iv) The SEM mechanism continues under the USMCA**

28. Mexico argues that "at the moment when the USMCA came into force, it superseded the North American Free Trade Agreement (NAFTA) pursuant to clause 1 of the Protocol; that is, the provisions of NAFTA became invalid, 'without prejudice to those provisions set forth in the

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<sup>57</sup> Commission for Environmental Cooperation, "*Phocoena Sinus*: North American Conservation Action Plan," 2008, online at <<http://www.cec.org/publications/vaquita/>>.

<sup>58</sup> International Union for the Conservation of Nature, Cetacean Specialist Group, *Vaquita update October through December 2020*, 26 January 2021, [Vaquita Update October-December 2020] online at <[www.iucn-csg.org/vaquita-update-october-through-december-2020/](http://www.iucn-csg.org/vaquita-update-october-through-december-2020/)>.

<sup>59</sup> L. Rojas-Bracho, et al., *Report on using expert elicitation to estimate total unique vaquitas and calves in the Zero Tolerance Area with recommendations for future research efforts*, 2021, online at <[www.iucn-csg.org/wp-content/uploads/2021/04/Vaquita-Report-on-Using-Expert-Elicitation-Final.pdf](http://www.iucn-csg.org/wp-content/uploads/2021/04/Vaquita-Report-on-Using-Expert-Elicitation-Final.pdf)>.

<sup>60</sup> L. Rojas-Bracho and B.L. Taylor, *Phocoena sinus: The IUCN Red List of Threatened Species 2017*, online at <<https://www.iucnredlist.org/species/17028/50370296>>.

<sup>61</sup> Environmental Information Agency, *Facing Extinction: Survival of the Vaquita Depends on Eliminating the Illegal Trade in Totoaba*, November 2017, online at <[https://eia-international.org/wp-content/uploads/EIA\\_Ocean\\_report\\_briefing\\_Vaquita\\_Final.pdf](https://eia-international.org/wp-content/uploads/EIA_Ocean_report_briefing_Vaquita_Final.pdf)>.

<sup>62</sup> International Committee for the Recovery of the Vaquita (CIRVA), *Report of the Eleventh Meeting of CIRVA, La Jolla, California*, 19–21 February 2019; CIRVA, *Report of the Third Meeting of CIRVA, Ensenada, Baja California*, 18–24 January 2004; CIRVA, *Report of the Tenth Meeting of CIRVA, La Jolla, California*, 11–12 December 2017.

<sup>63</sup> International Union for the Conservation of Nature, Species Survival Commission, *Urgent Letter sent from IUCN Species Survival Commission to Mexican Authorities to correct false information about vaquita decline*, 26 March 2021, online in English and Spanish at <<https://iucn-csg.org/urgent-letter-sent-from-iucn-species-survival-commission-to-mexican-authorities-to-correct-false-information-about-vaquita-decline/>>.

USMCA that refer to provisions of the NAFTA.”<sup>64</sup> On this basis, Mexico argues that enforcement measures prior to 1 July 2020 should not be reviewed, since this would violate Article 24 of the Vienna Convention on the Law of Treaties.<sup>65</sup> The Secretariat proceeds to consider the good faith principle in the implementation of the USMCA and the potential application of estoppel to Mexico’s arguments.

29. **The good faith principle and continuity of the SEM process.** The Parties performed their obligations under the NAAEC, when it was in force, and now perform obligations under the USMCA in accordance with the principle of good faith in Article 26 of the Vienna Convention on the Law of Treaties.<sup>66</sup> The commitments made by the Parties under both agreements must be performed and implemented in good faith.<sup>67</sup>
30. The Secretariat, the Parties, and the Council have held that facts relating to the effective enforcement of environmental law that occurred prior to the entry into force of a treaty may produce effects after the date of its entry into force. The Secretariat has stated that facts and acts from prior to the entry into force of a treaty may create ongoing obligations and are relevant to clarifying whether there are failures to effectively enforce environmental law.<sup>68</sup> The Secretariat has maintained that an environmental law enforcement obligation may arise from an ongoing or persistent situation.<sup>69</sup>
31. The Council has instructed the Secretariat to prepare factual records including relevant facts from prior to the entry into force of the NAAEC. For example, in *Cozumel*, the Council instructed the Secretariat:
- in developing the factual record, to consider whether the Party concerned “is failing to effectively enforce its environmental law” since the NAAEC’s entry into force on January 1, 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to January 1, 1994, may be included in the factual record;<sup>70</sup>
32. These instructions were repeated in many CEC Council resolutions, allowing consideration of facts that occurred prior to the entry into force of the NAAEC.<sup>71</sup>

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<sup>64</sup> Response at §34.

<sup>65</sup> Vienna Convention on the Law of Treaties, done at Vienna, Austria on 23 May 1969, DOF, 14 January 1975.

<sup>66</sup> *Id.*, Article 26: “*Pacta sunt servanda*. Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

<sup>67</sup> Cf. R.K. Gardiner, *Treaty Interpretation* (New York: Oxford University Press, 2008), at 152:

In its general role, good faith is included in the Vienna Convention’s fundamental proposition on the law of treaties, in its article 26, that treaties establish binding obligations for the parties ‘and must be performed by them in good faith’.

<sup>68</sup> SEM-96-001 (*Cozumel*), NAAEC Article 15(1) Notification (7 June 1996), p.6: “In light of the possibility that a present duty to enforce may originate from, in the language of the Vienna Convention, a situation which has not ceased to exist, the Secretariat does not view the further study of this matter as constituting retroactive application of the NAAEC, nor would such study contravene the language of Article 14 of the NAAEC.”

<sup>69</sup> SEM-97-001 (*BC Hydro*), NAAEC Article 15(1) Notification (27 April 1998), at 15 (“if a situation arising in the past continues to exist, it may be the subject of an Article 14 submission”).

<sup>70</sup> SEM-96-001 (*Cozumel*), Council Resolution 96-08 (2 August 1996), p. 2 (emphasis added).

<sup>71</sup> See SEM-96-001 (*Cozumel*), Council Resolution 96-08 (2 August 1996); SEM-97-001 (*BC Hydro*), Council Resolution 98-07 (24 June 1998); SEM-97-002 (*Río Magdalena*), Council Resolution 02-02 (7 March 2002); SEM-97-006 (*Oldman River II*), Council Resolution 01-08 (16 November 2001); SEM-98-006 (*Aquanova*), Council

33. The desire to continue the SEM process following the conclusion of NAAEC is corroborated in various instruments. For example, the preamble to USMCA Chapter 24 acknowledges the intent of the Parties to promote the effective enforcement of environmental law; the preamble to the ECA affirms the long history of cooperation under the NAAEC and the desire of the Parties to “build on this engagement”;<sup>72</sup> ECA Article 2(3) has stipulations guaranteeing the continuity of the CEC according to the same modalities under which it was created,<sup>73</sup> and ECA Article 2(4) stipulates that submissions originally filed under NAAEC Article 14 will continue to be processed in accordance with that agreement.<sup>74</sup>
34. It may be observed that the obligation to continue to implement the SEM process did not come into being at the entry into force of the USMCA; rather, it is an uninterrupted commitment agreed to by the Parties on 1 January 1994, as may be ascertained from an analysis of the ECA and from the Parties’ acts in implementing the USMCA.
35. **Estoppel and continuity of the USMCA.** Estoppel precludes a party from taking a legal position in contradiction of its previous stance when another party has relied on that position either to the advantage of the first party or to the detriment of the second party.<sup>75</sup> Mexico has indicated its intention to continue implementation of the SEM process. In its response to submission SEM-20-001 (*Loggerhead Turtle*), for example, Mexico discussed enforcement activities that occurred prior to 1 July 2020.<sup>76</sup> Now, with respect to submission SEM-21-002, the Party offered information in the appendices to the response on inspection and surveillance measures taken prior to the entry into

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Resolution 01-09 (16 November 2001); SEM-99-002 (*Migratory Birds*), Council Resolution 01-10 (16 November 2001); SEM-00-004 (*BC Logging*), Council Resolution 01-12 (16 November 2001); SEM-00-005 (*Molymex II*), Council Resolution 02-03 (17 May 2002); SEM-02-001 (*Ontario Logging*), Council Resolution 04-03 (12 March 2004); SEM-02-003 (*Pulp and Paper*), Council Resolution 03-16 (11 December 2003); SEM-03-003 (*Lake Chapala II*), Council Resolution 08-01 (30 May 2008); SEM-03-004 (*ALCA-Iztapalapa II*), Council Resolution 05-05 (9 June 2005); SEM-03-005 (*Montreal Technoparc*), Council Resolution 04-05 (20 August 2004); SEM-04-005 (*Coal-fired Power Plants*), Council Resolution 08-03 (23 June 2008).

<sup>72</sup> ECA, Preamble.

<sup>73</sup> This is confirmed, for example, by the *Headquarters Agreement between the Government of Canada and the Commission for Environmental Cooperation*, which took effect on 5 October 2020 and confirms the CEC’s status as an international organization. The same is true for the list of international organizations in the United States.

<sup>74</sup> This is the case for the following submissions that were active as at the date of entry into force of the USMCA: SEM-18-002 (*Metrobús Reforma*), SEM-19-002 (*City Park Project*), and SEM-18-003 (*Hydraulic Fracturing in Nuevo León*).

<sup>75</sup> International Law Commission, *Yearbook of the International Law Commission*, vol. 2 (1963), A/CN.4/SER.A/1963/ADD.1 (*per* SR Waldock), at 40, quoted in S. Reinhold, “Good faith in international law,” *UCL Journal of Law and Jurisprudence* 2(1): 40–63 (2013), at 54:

Under the principle of estoppel, a party is not permitted to take up a legal position that is in contradiction with its own previous representations or conduct, when another party has been led to assume obligations towards, or attribute rights to the former party in reliance upon such representations or conduct.

The Inter-American Court of Human Rights has been recognizing in its jurisprudence the general principle that a State that is taking a legal position cannot contradict itself in future positions. *See*: International Legal Office for Cooperation and Development, *Solicitud de Opinión Consultiva presentada por la República de Ecuador*, hearing 24-25 August 2017, and Inter-American Court of Human Rights. Case of *Abrill Alosilla et al. v Peru*. Sentence. Judgment of March 4, 2011 (Merits, Reparations and Costs).

<sup>76</sup> SEM-20-001 (*Loggerhead Turtle*), Article 24.27(4) Response (28 May 2021), at 10-12 (information on actions conducted by Semar between 2017-2021; by Conapesca between 2016-2021; by Profepa between 2015-2021; and, by Conanp between 2017-2019. Also, Mexico submitted the Semarnat Report of Activities (2017-2018), among other documents dated prior to 1 July 2020).

force of the USMCA that influence the current status of the vaquita and the totoaba. Nor can it be ignored that Mexico has cited the Guidelines, established in accordance with the NAAEC, for procedural acts relating to submission SEM-21-002.<sup>77</sup> Canada, for its part, offered relevant factual information dating from before the entry into force of the USMCA in its response to the *Fairview Terminal* submission.<sup>78</sup>

36. It would be contrary to the practice that the Parties have established when implementing the NAAEC and the USMCA in good faith if Mexico maintains a new interpretation of the SEM process. The acts of the Parties reflect that they did not terminate their ongoing commitment to implementing the SEM process; indeed, they have shown good faith in implementing it as an ongoing obligation since 1 January 1994.<sup>79</sup>
37. The Secretariat confirms that a response from Mexico was merited with regard to the facts in submission SEM-21-002 and that this included actions occurring prior to the entry into force of the USMCA and with effects that persist. This is consistent with good faith in the implementation of the USMCA Parties' obligations. The Secretariat invites the Council to reiterate statements in line with those made in previous Council Resolutions to allow the SEM process to consider relevant facts existing prior to the entry into force of the USMCA.

#### **B. On the assertions in submission SEM-21-002**

38. The Secretariat proceeds to consider whether, in light of Mexico's response, the preparation of a factual record is warranted regarding the asserted failure to effectively enforce measures in connection with the deaths of vaquita porpoise (*Phocoena sinus*) and the illegal fishing of totoaba (*Cynoscion macdonaldi*) specimens.
39. The Secretariat bears in mind that imposing sanctions is not a Party's only means to enforce the law and that it has to prioritize its inspection and surveillance efforts on sites where wildlife parts and derivatives are handled, as well as where the transport, import, and export thereof take place.
40. Mexican law prescribes various means for the government to conduct wildlife and habitat law enforcement. In particular, with respect to punitive acts of law enforcement, LGVS Article 5 paragraph IX recognizes that the authorities must observe:

Criteria in order for sanctions to play not only a punitive role but also to translate into measures contributing to and favoring the transition to sustainable development; as well as for focusing on inspection efforts at sites where services are provided for taking, marketing, processing, handling, and preparation of wildlife parts and derivatives, and those where the transport, import, and export thereof take place.<sup>80</sup>

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<sup>77</sup> Semarnat, Legal Affairs Coordinating Unit (*Unidad Coordinadora de Asuntos Jurídicos*), file no. 112/2014 (4 November 2021), whereby Mexico gave notice of an extension of the period in which to file a Party response pursuant to paragraph 19.9 of the Guidelines.

<sup>78</sup> SEM-21-001 (*Fairview Terminal*), Article 24.27(4) Response (28 June 2021), at 4–5.

<sup>79</sup> The Parties' commitment to implement the SEM process in NAAEC Articles 14 and 15—and now under USMCA—is different from the obligation to effectively enforce environmental law in NAAEC Article 5(1). This obligation was replicated in USMCA Article 24.4(1). Compliance with NAAEC Article 5(1) and USMCA Article 24.4(1) obligations are enforceable among the Parties through compliance mechanisms set out in the relevant sections of each agreement. For NAAEC, this is Part Five: "Consultation and Resolution of Disputes"; for the USMCA, it is Article 24.29: "Environment Consultations" (*et seq.*).

<sup>80</sup> LGVS Article 5 paragraph IX

Thus, the implementation of inspection and surveillance measures is one criterion for the effective enforcement of environmental law.

**i) Effective enforcement of LGVS Article 55 and Article 56 of the LGVS Regulation**

41. The Submitters assert that Mexico is failing to effectively enforce LGVS Article 55,<sup>81</sup> by failing to take measures to effectively enforce CITES in connection with illegal trafficking in totoaba (*Totoaba macdonaldi*). The totoaba is listed in CITES Appendix I.
42. The Submitters assert that Mexico is failing to effectively enforce LGVS Article 55 that establishes:

The import, export, or re-export of wildlife specimens, parts, and derivatives included in the Convention on International Trade in Endangered Species of Wild Fauna and Flora shall be conducted in accordance with said Convention, the provisions of this Act, and the provisions flowing from it, it being prohibited to import, export, re-export, and/or market ivory in violation of the international treaties to which Mexico is a party and of the applicable legislation.<sup>82</sup>
43. Also, the Submitters assert that Mexico is failing to effectively enforce Article 56 of the LGVS Regulation,<sup>83</sup> which provides:

The import, export, and re-export of biological materials of species included in the appendices to CITES shall be subject to the provisions of said Convention.
44. The legal framework and procedures established by CITES allow the parties to the Convention to regulate international trade in species listed in its appendices under a system of authorizations and certificates. Appendix I of CITES lists endangered species that are or may be affected by trade. Trade in such species is “subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.”<sup>84</sup> In this respect, CITES establishes the requirements for the export, re-export, and import of specimens, which includes inspection by the scientific and administrative authorities of the states participating in the export and import in question.<sup>85</sup>
45. To support the assertion that Mexico is failing to effectively enforce Article 56 of the LGVS Regulation, the Submitters maintain that Mexico has not implemented measures to restrict “the import, export and re-export of biological material of species included in the appendices of CITES”<sup>86</sup> This applies specifically to the totoaba (*Totoaba macdonaldi*), which is included in CITES Appendix I. The totoaba is considered endangered; it may be affected by trade, and it is subject to particularly strict regulation in order not to endanger further its survival. Its commercial use is authorized only under exceptional circumstances.<sup>87</sup>
46. In its response, Mexico contends that the General Wildlife Branch (*Dirección General de Vida Silvestre*—DGVS) of the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat) is the CITES administrative authority in Mexico and that the LGVS and LGVS Regulations cited in the submission are being implemented in Mexico

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<sup>81</sup> Submission at 2.

<sup>82</sup> LGVS, Article 55.

<sup>83</sup> *Id.* at 5–6.

<sup>84</sup> CITES Article II(1).

<sup>85</sup> *Id.* Article III.

<sup>86</sup> Submission at 5–6.

<sup>87</sup> CITES, Appendices I, II, and III, online at <<https://cites.org/eng/app/appendices.php>>.

by means of “authorization, permit, or certificate for the import, export, or re-export of wildlife specimens, parts, and derivatives” registered with the National Regulatory Improvement Commission (*Comisión Federal de Mejora Regulatoria*—“Cofemer”).<sup>88</sup> The Party also states that this is sufficient for compliance with the provisions of CITES related to permits and certificates. According to the Party, the DGVS reports “no record of any complaint filed by any oversight body, ministerial authority, or the Convention itself concerning any alleged failure to enforce Article 55 of the General Wildlife Act or Article 56 of its regulation.”<sup>89</sup>

47. The Secretariat, however, did not identify information in the response on how Mexico, acting through the DGVS, is implementing LGVS Article 55 and Article 56 of the LGVS Regulation. For example, the response does not explain how the DGVS consults with other scientific and law enforcement entities such as the National Biodiversity Commission (*Comisión Nacional para el Conocimiento y Uso de la Biodiversidad*—Conabio), the National Aquaculture and Fisheries Commission (*Comisión Nacional de Acuacultura y Pesca*—Conapesca), the National Fisheries Institute (*Instituto Nacional de Pesca*—Inapesca), Profepa, and others.<sup>90</sup> The response does not discuss horizontal coordination through the Interministerial Monitoring Committee (*Comité Intersecretarial de Seguimiento*) of CITES in Mexico to prevent illegal trade in totoaba; it does not state whether there are operational activities addressing CITES compliance in the North American region within the framework for implementation of LGVS and its regulations; it does not explain whether the Trilateral Committee for Wildlife and Ecosystem Conservation and Management is operating; it does not state whether permits for the operation of facilities for raising totoaba in captivity have been considered or granted. The response does not address commitments between Mexico, the United States, and China within the CITES framework, nor does it state whether there is an ongoing exchange of information; or whether there is coordination and wildlife-related intelligence activities, specifically with respect to transportation, distribution, and consumption of totoaba. The response does not describe how all of this is incorporated into the DGVS’s enforcement decisions and policies in the context of its efforts to effectively enforce the environmental law in question.
48. The Secretariat finds that the response is insufficient to appreciate the magnitude of the problem of illegal traffic in totoaba. A factual record could provide information on Mexico’s efforts to implement strategies and the effectiveness of its measures to enforce LGVS Article 55 and Article 56 of the LGVS Regulation to effectively control illegal traffic in totoaba within the CITES framework. As context for the Secretariat’s recommendation, the Second Comprehensive Report to CITES (December 2021), attached by Mexico to its response, states as follows:

It must be acknowledged, however, that despite the will of the Government of Mexico and its partners in this matter, such as China and the United States of America, clandestine fishing and illegal trade in swim bladders continue to exist, at a smaller scale than that which occurred years ago, but they have not been eradicated. This underscores the imperative and urgent need for both Mexico and the countries identified as intermediate and final destinations for these products to be more involved, individually and cooperatively, in

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<sup>88</sup> Response at §37.

<sup>89</sup> *Id.* at §39.

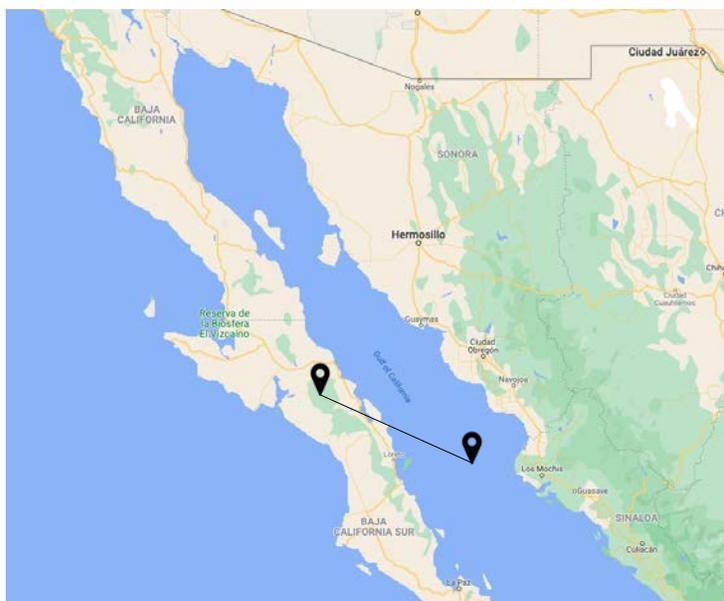
<sup>90</sup> See Conabio, Directory of CITES authorities in Mexico, online at <<https://www.biodiversity.gob.mx/planeta/cites/index/directorio-de-authorities-cites-mexico>>.

interdicting these environmental crimes, which are ultimately attacks on the rights of persons in that they deprive us of a healthy environment for our development and well-being.<sup>91</sup>

**ii) Effective enforcement of the 1975 Totoaba Fishing Ban**

49. The Submitters assert that Mexico is failing to effectively enforce the 1975 Totoaba Fishing Ban. The order imposing the ban acknowledges that the population statistics for the totoaba “exhibit a notably declining pattern” in the areas of Santa Clara Peñasco and San Felipe, as well as in the vicinity of the mouth of the Colorado River, the Islas Encantadas, Santa Inés Bay, and San Rafael Bay;<sup>92</sup> that the decline in its population continues despite the measures taken to restrict the catch throughout the year;<sup>93</sup> that due to its limited distribution, the totoaba is particularly vulnerable to commercial and sport fishing;<sup>94</sup> and that a total ban on totoaba fishing in the Gulf of California is therefore established with the aim of protecting the species.<sup>95</sup> The ban prescribed by the order covers the area in the Gulf of California, between Río Fuerte, Sinaloa and Bahía Concepción, Baja California Sur, as shown in Figure 1.

**Figure 1. Approximate boundaries of the area established in the 1975 Totoaba Fishing Ban**



Source: CEC Secretariat, based on the 1975 Totoaba Fishing Ban

<sup>91</sup> Response, Appendix MX-023, *Acciones emprendidas y resultados obtenidos para la protección y conservación de la vaquita marina (Phocoena sinus) y la totoaba (Totoaba macdonaldi)*, 2° Informe Exhaustivo ante la Convención sobre el Comercio Internacional de Especies Amenazadas de Fauna y Flora Silvestre (CITES), Profepa, December 2021, at 3, online at: <<https://cites.org/sites/default/files/eng/com/sc/74/S-SC74-28-05-A3.pdf>>.

<sup>92</sup> 1975 Totoaba Fishing Ban, second recital.

<sup>93</sup> *Id.* at third recital.

<sup>94</sup> *Id.* at fifth recital.

<sup>95</sup> *Id.* at Article 1.

50. Despite the Submitters' citation of the ban and the Secretariat's request in its Article 24.27(2) and (3) determination, Mexico's response does not present information that confirms enforcement of the 1975 Totoaba Fishing Ban, nor does it elaborate on Mexico's efforts to effectively enforce this ban according to its terms and scope, which remain in effect.
51. The Secretariat finds that a factual record could present information on the implementation of the totoaba fishing ban in the Gulf of California, particularly within the designated area in the order;<sup>96</sup> the sanctions imposed pursuant to the applicable law,<sup>97</sup> and the measures taken to effectively implement the ban. A factual record could also document relevant information on controlling illegal traffic in totoaba in the Upper Gulf of California, including information on the principal links, components, and organized groups involved in the chain of extraction (fishing), storage, distribution, transportation, and commercialization;<sup>98</sup> information on the characteristics of the fishing gear used, and information on the effects on biodiversity from the use of gillnets. In addition, a factual record could provide information explaining the interactions between the order in question and other legal and environmental policy instruments for preventing and penalizing illegal totoaba fishing in the Gulf of California.
52. A factual record could report on the implementation of a mechanism to compensate fishermen in the Upper Gulf of California and other incentives for training the inshore fishing sector; totoaba population data from studies conducted in the Gulf of California (conservation status, numbers of specimens, projections, and methodology for estimating these); information on the existence of facilities to raise totoaba in captivity for commercial purposes, the effectiveness of such methods, legal considerations, and assessment of strategies; reports assessing the totoaba population and its recovery following the establishment of bans; as well as research, education, information generation, and information dissemination activities. All this could raise awareness of the various public policy instruments that have been put in place to address the risks facing the totoaba comprehensively and effectively in the Upper Gulf of California.
53. Based on the reasoning set out in section II(A)(iv) of this notification, the Secretariat finds it relevant to include information on the effective enforcement of the 1975 Totoaba Fishing Ban prior to the entry into force of the USMCA.

### **iii) Administrative orders implemented in 2015, 2017, and 2020**

54. The Secretariat finds that Mexico's enforcement measures are contained in a series of administrative orders and that a factual record should provide information on the instruments

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<sup>96</sup> 1975 Totoaba Fishing Ban:

Article 2. The fishing of totoaba, *Cynoscion macdonaldi*, in the waters of the Gulf of California from the mouth of the Colorado River to Río Fuerte, Sinaloa on the east coast and from the Colorado River to Bahía Concepción, Baja California on the west coast is strictly prohibited.

<sup>97</sup> *Id.* at Article 3.

<sup>98</sup> National Human Rights Commission (*Comisión Nacional de los Derechos Humanos—CNDH*), Recommendation 93/2019 *Sobre la falta de cumplimiento a diversas disposiciones jurídicas que tienen por objeto la protección, conservación y recuperación de la vaquita marina (Phocoena sinus) la totoaba (Totoaba macdonaldi) y demás especies endémicas que habitan en la Reserva de la Biosfera Alto Golfo de California y Delta del Río Colorado*, Comisión Nacional de los Derechos Humanos, at §60-61 (11 October 2019), online at <[https://www.cndh.org.mx/sites/default/files/documentos/2019-10/Rec\\_2019\\_093.pdf](https://www.cndh.org.mx/sites/default/files/documentos/2019-10/Rec_2019_093.pdf)>.

preceding the 2020 Gillnets Order. Even though the 2015 and 2017 orders are no longer in force, these instruments reflect much of Mexico's efforts on this matter, as evident in its response, which confirms the need to consider their effectiveness from an ongoing perspective.

**a. Effective enforcement of the 2015 Gillnets Order**

55. The Submitters assert that Mexico is failing to effectively enforce the 2015 Gillnets Order which references various other administrative orders, such as the 2005 Vaquita Refuge Order and the Vaquita Protection Plan,<sup>99</sup> and acknowledges that the vaquita (*Phocoena sinus*) is an endemic species of the Upper Gulf of California with a limited distribution,<sup>100</sup> that it is the most threatened of the world's 128 cetacean species,<sup>101</sup> and that it is listed in NOM-059-Semarnat-2010. In order to protect the vaquita, this order temporarily suspended the use of gillnets and longlines in commercial fishing by smaller craft in the northeast of the Gulf of California, within the Biosphere Reserve (Figure 2).<sup>102</sup> The implementation of the 2015 Gillnets Order is the responsibility of Profepa and Conapesca.<sup>103</sup>

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<sup>99</sup> 2015 Gillnets Order, Recital.

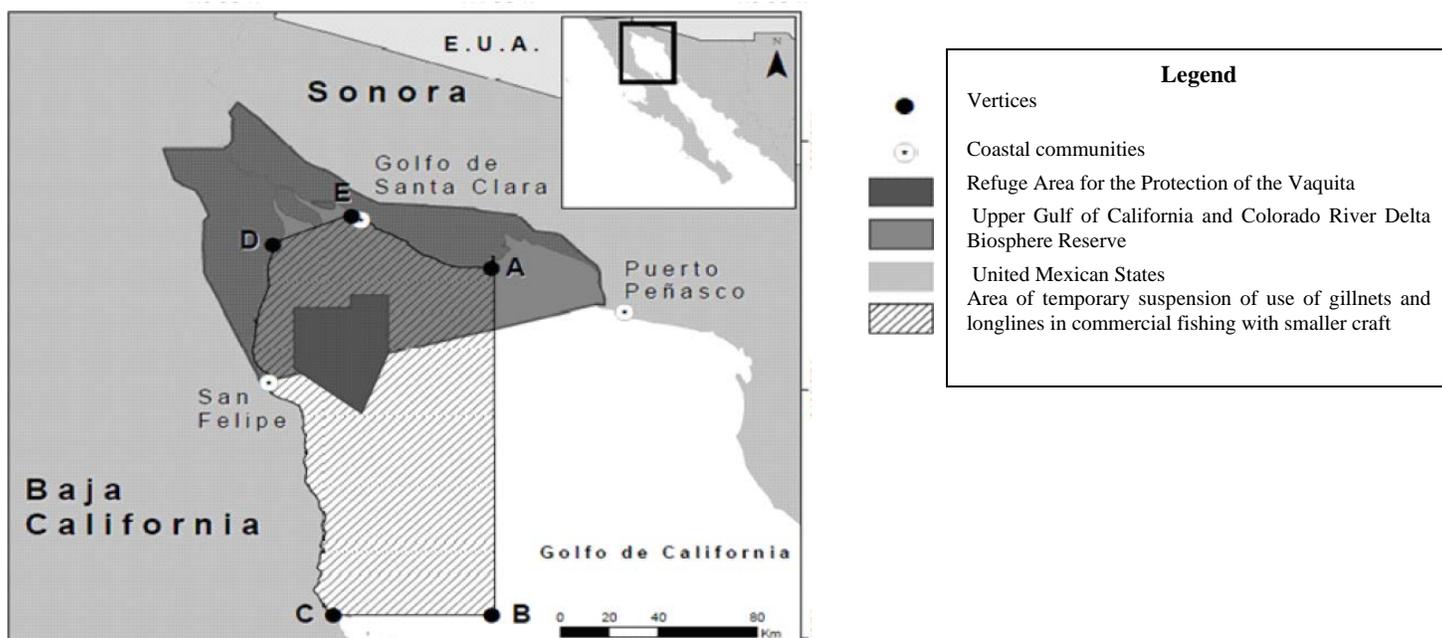
<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at Article 1.

<sup>103</sup> *Id.* at Article 3.

**Figure 2. Area in which fishing with gillnets and longlines is suspended in the northwestern Gulf of California**



Source: 2015 Gillnets Order, Appendix I

56. Mexico’s response does not present information on enforcement measures for the 2015 Gillnets Order, since it contends that this was not in force on the effective date of the USMCA.
57. The Secretariat finds that a factual record is warranted regarding Mexico’s efforts to implement the 2015 Gillnets Order before it was supplanted by the 2017 Gillnets Order. It points out that CIRVA stated in 2014 that “ [d]espite all efforts made to date...the vaquita population is declining at 18.5%...and [CIRVA] strongly recommends that the Government of Mexico enact emergency regulations establishing a gillnet exclusion zone.”<sup>104</sup> A factual record can present information on the temporary suspension of the use of gillnets in the fishing area established in the order in question; the enforcement of sanctions established under the applicable law, and the taking of measures for its effective implementation. In addition, a factual record could provide information explaining the interaction between the 2015 Gillnets Order and other legal and environmental policy instruments to protect the vaquita inside the protection area.
58. Based on the reasoning set out in section II(A)(iv) of this notification, the Secretariat finds it relevant to include information on the effective enforcement of the 2015 Gillnets Order prior to the entry into force of the USMCA.

<sup>104</sup> CIRVA, *Report of the Fifth Meeting of CIRVA*, Ensenada Baja California, 8-10 July 2014, p. 9.

**b. Effective enforcement of the 2017 Gillnets Order**

59. The Submitters assert that Mexico is failing to enforce the 2017 Gillnets Order which sets out essentially the same considerations in the preamble to the 2015 Gillnets Order and acknowledges that “there exist fish of commercial interest that are distributed in waters under federal jurisdiction of the northern Gulf of California” that are “eligible for use under a management system that ensures the maintenance of the populations.”<sup>105</sup>
60. With the purpose of protecting the vaquita, the 2017 order is applicable to all smaller fishing craft within the area it establishes (see Figure 3)<sup>106</sup> and permanently bans the use of gillnets, including those known as *agalleras*, operated passively (as “sleepers”) for fishing within the marine zone designated in the order in the northern Gulf of California.<sup>107</sup> In addition, it bans night fishing activities (including sport fishing) by smaller craft<sup>108</sup> and requires fishing concession and permit holders to install and operate a monitoring system as prescribed by Article 125 of the General Sustainable Fishing and Aquaculture Act (*Ley General de Pesca y Acuacultura Sustentables—LGPAS*).<sup>109</sup>

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<sup>105</sup> 2017 Gillnets Order, Recital.

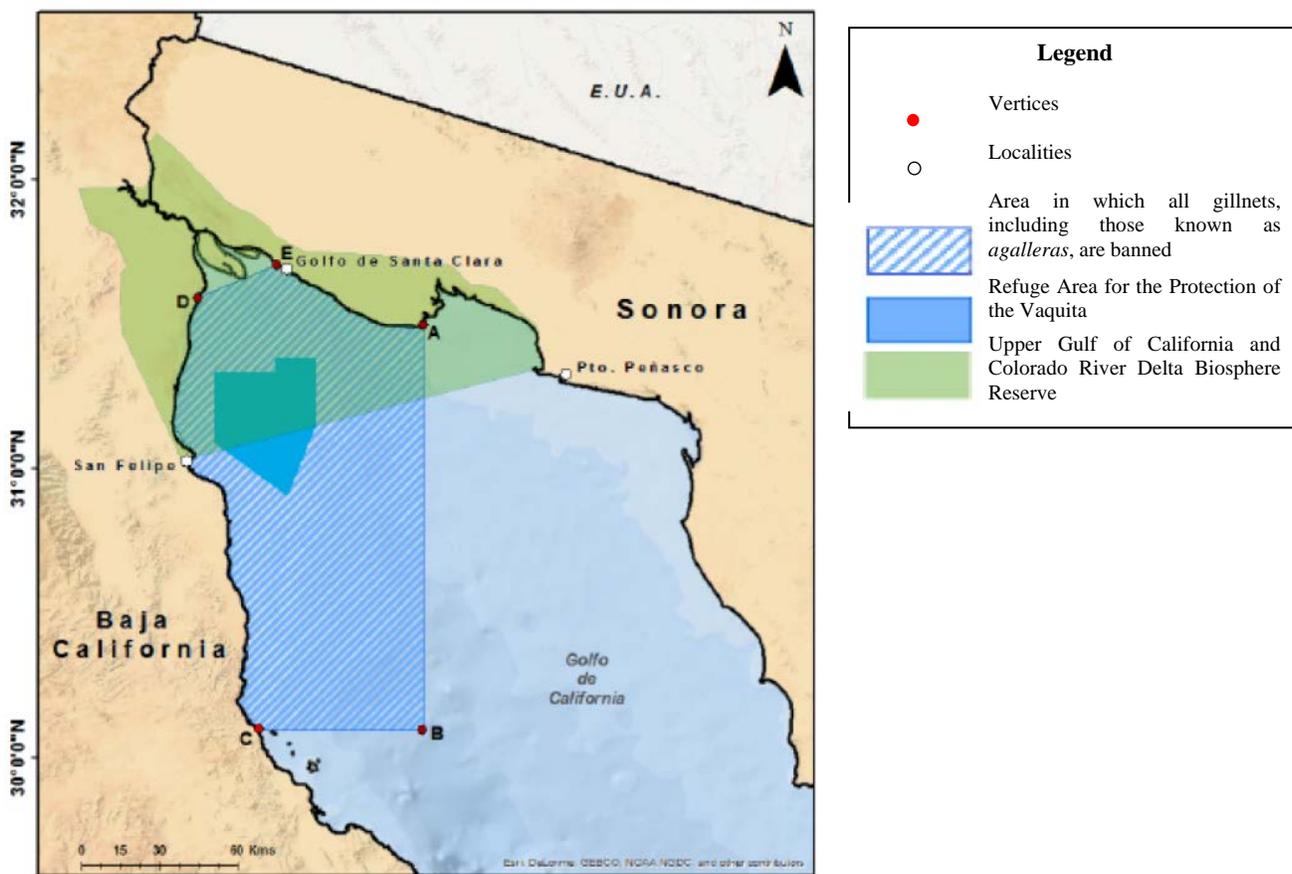
<sup>106</sup> *Id.* at Article 1.

<sup>107</sup> *Id.* at Article 2.

<sup>108</sup> *Id.* at Article 3.

<sup>109</sup> *Ley General de Pesca y Acuacultura Sustentables*, DOF, 24 July 2007, Article 125.

**Figure 3. Map of the area in which gillnets, including those known as *agalleras*, are banned in the northern Gulf of California**



Source: 2017 Gillnets Order, appendix

61. In its response, Mexico states that “the 2017 Gillnets Order was in force on the date of entry into force of the USMCA” but that “it was repealed three months later, on 24 September 2020, with the entry into force of the 2020 Gillnets Order,”<sup>110</sup> and that the relevant inspection and surveillance measures under the responsibility of Semarnat, Sader, and Semar are therefore incorporated into the section relating to the 2020 Gillnets Order.
62. In light of the reports submitted by Semar, Profepa, and Sader, which include measures predating the entry into force of the USMCA, the Secretariat observes that illicit fishing, take, use, and trade in totoaba are continuing; that there are reports of night-time fishing;<sup>111</sup> that the status of lost or

<sup>110</sup> Response at §45.

<sup>111</sup> 2017 Gillnets Order, Article 3.

missing fishing gear from smaller craft is unknown;<sup>112</sup> and that the response provides no information on whether a monitoring system, as required by the corresponding concessions or permits, exists.<sup>113</sup>

63. The Secretariat notes that in 2019, the National Human Rights Commission (*Comisión Nacional de los Derechos Humanos*—CNDH) issued a recommendation concerning violations of the human right to a healthy environment in which it emphasized the urgency to design and implement the new initiative for the sustainability of the northern Gulf of California proposed by Semarnat and Sader.<sup>114</sup> Furthermore, the Secretariat bears in mind the considerations that led to the 2017 Gillnets Order and the report presented by Mexico to CITES in 2021 that emphasizes “the imperative and urgent need” for Mexico and other countries to be involved in interdicting clandestine fishing and illegal trade in totoaba.<sup>115</sup>
64. A factual record could present information addressing Mexico’s efforts to implement the 2017 Gillnets Order, including: the permanent ban on the use of gillnets; the characteristics of *agalleras*, their use, and the harm they cause to marine fauna; the characteristics and effectiveness of the devices or monitoring systems for vessels prescribed by the order; any sanctions imposed under the applicable law; the launch and landing sites prescribed by the order; and, in general, the measures taken to effectively implement the order with a sustainability focus on primary activities such as fishing in the Upper Gulf of California region. A factual record could also describe the roles played by various government bodies and the development of governance mechanisms to eradicate illicit traffic in totoaba swim bladders and promote the effective protection of the vaquita. Also, it could provide information explaining the interaction between the order in question and other legal and environmental policy instruments for the protection of the totoaba and the vaquita.
65. Based on the reasoning set out in section II(A)(iv) of this notification, the Secretariat finds it relevant to include information on the effective enforcement of the 2017 Gillnets Order prior to the entry into force of the USMCA.

### c. Effective enforcement of the 2020 Gillnets Order

66. The Submitters contend that Mexico is failing to effectively enforce the 2020 Gillnets Order. The 2020 Gillnets Order was issued jointly by Sader, Semarnat, and Semar;<sup>116</sup> it acknowledges the value of protecting the vaquita;<sup>117</sup> it states that the conservation of this species is associated with protection of the totoaba;<sup>118</sup> it also affirms that Mexico decided to establish various fishing bans,

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<sup>112</sup> *Id.* at Article 4.

<sup>113</sup> *Id.* at Article 5.

<sup>114</sup> CNDH Recomendation 93/2019.

<sup>115</sup> Response, Appendix MX-023, 2<sup>o</sup> Informe Exhaustivo ante the Convención on the Comercio Internacional de Especies Amenazadas de Fauna and Flora Silvestre (CITES), at 3.

<sup>116</sup> 2020 Gillnets Order, Recital.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

some temporary and others permanent, between 2015 and 2018,<sup>119</sup> and it states that it issued the order in question after consulting with certain technical bodies.<sup>120</sup>

67. Following the promulgation of the 2020 Gillnets Order, Mexico issued the *Enforcement Plan for the Zero Tolerance Area and the Refuge Area for the Protection of the Vaquita* (the “Enforcement Plan”).<sup>121</sup> The Submitters assert that the Enforcement Plan is insufficient because it fails to specify inspection and surveillance measures as well as measures for the recovery, disposal, destruction and recycling of illegal, abandoned or lost nets.<sup>122</sup> The Submitters contend that Mexico published the plan almost three months late<sup>123</sup> and that various entities, including CIRVA, have acknowledged that efforts must be expanded to create a net-free area.<sup>124</sup> In addition, they state that the Parties to CITES urged Mexico to intensify efforts and to secure resources to expand gillnet removal efforts.<sup>125</sup>
68. The Submitters contend that the administrative order establishing triggers for the implementation of measures to protect the vaquita (the “Implementation Triggers Order”) is in manifest violation of the 2020 Gillnets Order.<sup>126</sup> They maintain that not only was it issued eight months late, but it also violates Article 13 of the 2020 Gillnets Order, which states that the Zero Tolerance Area (ZTA) is to be patrolled and surveyed “in such a way as to provide real-time response capabilities to avoid any case of violation of the Order.”<sup>127</sup> They also maintain that the government’s plan to use implementation triggers allows violation of the ZTA, in which fishing is “permanently and totally” prohibited.<sup>128</sup> Additionally, the Submitters assert that while Article 10 of the 2020 Gillnets Order provides for surrender of fishing gear to Conapesca, they requested information on this and were told that “no documents containing the requested information could be found.”<sup>129</sup>
69. The Submitters contend that following the promulgation of the 2020 Gillnets Order, Mexico “immediately” failed to effectively enforce restrictions established in this instrument; that in December 2020, the IUCN published data on maps to document that “illegal fishing remains at high levels and takes place day and night” and documented illegal fishing activities between October and

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Plan de Aplicación en la Zona de Tolerancia Cero y el Área de Refugio para la Protección de la Vaquita Marina*, DOF, 20 January 2021, online at <[www.dof.gob.mx/nota\\_detalle.php?codigo=5610105&fecha=20/01/2021](http://www.dof.gob.mx/nota_detalle.php?codigo=5610105&fecha=20/01/2021)>.

<sup>122</sup> Submission at 6.

<sup>123</sup> *Id.*

<sup>124</sup> CIRVA, *Report of the Eleventh Meeting of the Comité Internacional para la Recuperación de la Vaquita (CIRVA)*, online at <<https://www.iucn-csg.org/wp-content/uploads/2019/03/CIRVA-11-Final-Report-6-March.pdf>>.

<sup>125</sup> Submission at 6.

<sup>126</sup> *Acuerdo por el que se establecen los indicadores, factores detonantes y acciones predeterminadas, de conformidad con el artículo décimo séptimo del Acuerdo por el que se regulan artes, sistemas, métodos, técnicas y horarios para la realización de actividades de pesca con embarcaciones menores y mayores en zonas marinas mexicanas en el norte del Golfo de California y se establecen sitios de desembarque, así como el uso de sistemas de monitoreo para tales embarcaciones*, publicado el 24 de septiembre de 2020, DOF, 9 July 2021, online at <[www.dof.gob.mx/nota\\_detalle.php?codigo=5623442&fecha=09/07/2021](http://www.dof.gob.mx/nota_detalle.php?codigo=5623442&fecha=09/07/2021)>.

<sup>127</sup> 2020 Gillnets Order, Article 13.

<sup>128</sup> Submission at 7.

<sup>129</sup> Transparency Unit (*Unidad de Transparencia*), Conapesca, response to request no. 0189700216820 (3 February 2021).

December 2020.<sup>130</sup> These documents show the existence of hundreds of longlines within the ZTA and a total of 1,185 longlines counted in November 2020 alone “with nearly all these pangas actively gillnetting.”<sup>131</sup>

70. The 2020 Gillnets Order delimits the area in which active or passive use and operation of gillnets, including those known as *agalleras*, and any modified version thereof, are banned (see Figure 4).<sup>132</sup> Among other things, the order establishes a permanent prohibition on the use of gillnets and specifies that fishing gear may not be used in any fishing activity, nor deployed, nor recovered for any other purpose, nor kept on board a vessel or in anyone’s possession in the area established by the order.<sup>133</sup> The order also establishes the requirements for continuing to hold a concession or permit; places a ban on fishing and transit between 4:00 p.m. and 5:00 a.m.; requires reporting of any interaction with marine mammals, and requires that smaller and larger craft be equipped with monitoring equipment. It establishes as mandatory —and without exceptions— the inspection of smaller crafts with concession or permits to operate in the area; defines authorized launch and landing sites; forbids transshipment of fish products; provides that the authorities must conduct “patrols and surveillance 24-hours a day, year-round using maritime, aerial, and satellite methods,” or any other means or technology, in order “to provide real-time response capabilities.”<sup>134</sup>
71. The order in question also provides that fishing of any type, with any craft, including sport fishing, is permanently and totally banned within the ZTA.<sup>135</sup> It also bans travel or navigation by any unauthorized vessel in the area.<sup>136</sup>

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<sup>130</sup> International Union for the Conservation of Nature, Cetacean Specialist Group, *Vaquita Update October through December 2020*, 26 January 2021, online at <<https://iucn-csg.org/vaquita-update-october-through-december-2020/>>.

<sup>131</sup> Submission at 9.

<sup>132</sup> 2020 Gillnets Order, Articles 1 and 2.

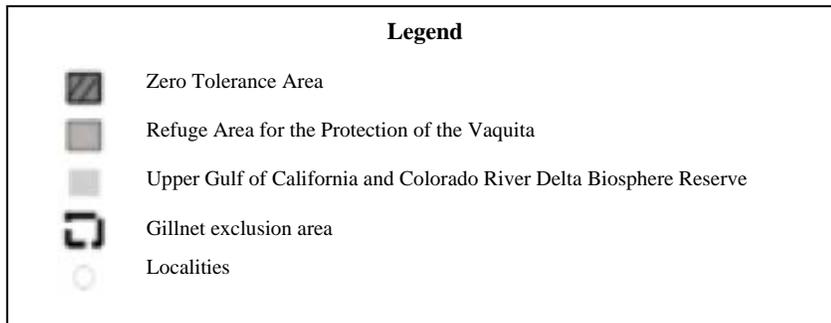
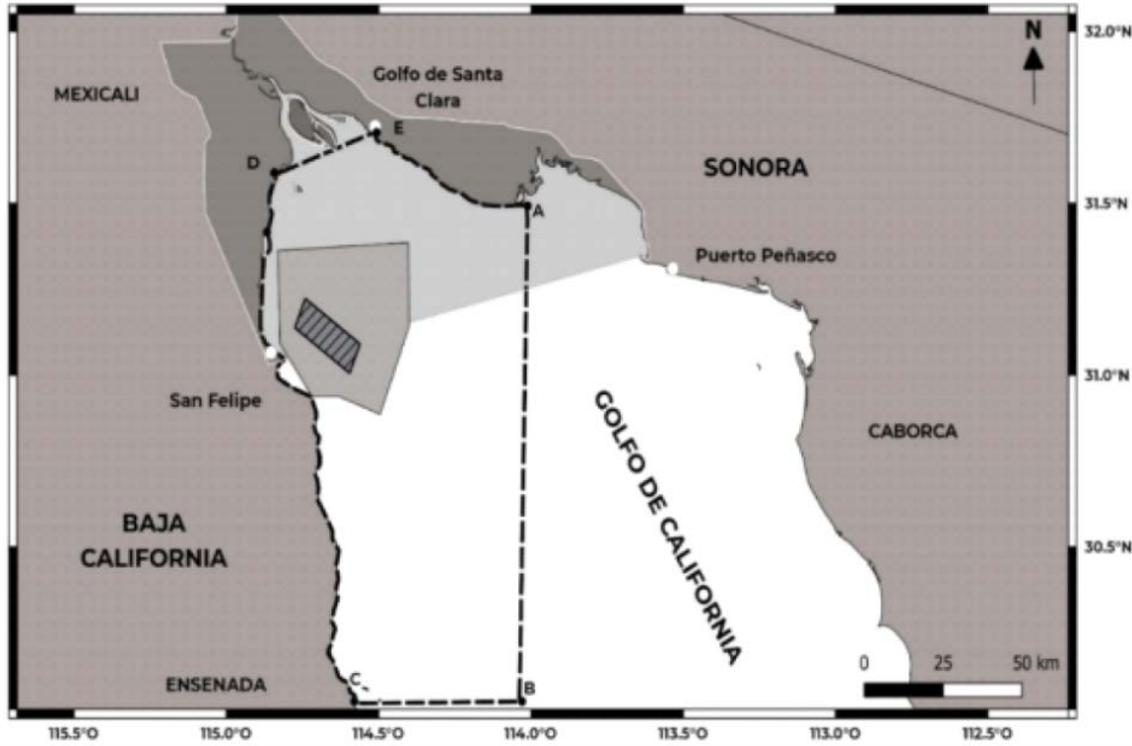
<sup>133</sup> *Id.* at Article 2.

<sup>134</sup> *Id.* at Articles 3 to 9 and 13.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

**Figure 4. Map of the northern Gulf of California area in which gillnets, including those known as *agalleras*, are banned**



Source: 2020 Gillnets Order, Article 1

72. Mexico contends in its response that section 7 of the Enforcement Plan specifies various inspection and surveillance measures, among them the drafting of an inspection plan for fishing communities, cooperatives, and ship owners in order to inspect, seize, and/or destroy illegal fishing gear and/or

craft; production of the relevant inspection report; and execution of continuous law enforcement (including patrolling) with respect to illegal totoaba fishing.<sup>137</sup>

73. Concerning the enforcement of the 2020 Gillnets Order, the response mentions the following measures taken by Sader, Semar, and Profepa:

**a) Inspection and surveillance measures taken by Sader**

74. Mexico states that Sader has held prevention sessions, implemented “checkpoints,” and carried out land and water surveillance tours, vessel checks, and vehicle checks in the localities of San Felipe, Baja California and Santa Clara, Sonora.<sup>138</sup> It states that Conapesca<sup>139</sup> produced 36 inspection records<sup>140</sup> and has opened a total of 8 administrative proceedings “resulting in the destruction and/or retention of gillnets”.<sup>141</sup> The Party also contends that Sader is currently making administrative arrangements to implement a standard form for reporting interactions with marine mammals and for lost and/or missing fishing gear,<sup>142</sup> and it reports that measures are being taken and negotiations are underway to reinstate “fishing comparability” with the US Government.<sup>143</sup> Concerning the surrender of fishing gear to Conapesca by concession and permit holders in the region, Mexico reports that this constitutes “a voluntary act by the owners of the nets, protected by the constitutional right enshrined in Article 16.”<sup>144</sup>

75. The measures reported by Mexico mostly correspond to those carried out in 2020 and 2021, although activities carried out at different times from 2018-2021 are included.

76. Although Mexico reports the number and type of inspection activities, as well as the administrative proceedings opened, it does not present results or performance indicators as to their effectiveness. Nor is it stated whether the administrative proceedings have had any impact on the recovery of the totoaba or the vaquita. The response does not shed light on how various restrictions set out in the 2020 Gillnets Order were implemented, such as the requirements for continuing to hold concessions and permits;<sup>145</sup> the inspection of monitoring systems for smaller and larger craft (as applicable); the precautionary seizures of such craft,<sup>146</sup> or the measures to promote voluntary surrender of gillnets.<sup>147</sup> Although Mexico reports that it is working on a standard form to report interactions with marine mammals, the response does not indicate whether other measures have been implemented to effectively enforce the reporting obligation established by the order.<sup>148</sup>

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<sup>137</sup> Response at §47 and Appendix MX-031, Semar, *Plan de Aplicación en la Zona de Tolerancia Cero y Área de Refugio para la Protección de la Vaquita*, DOF, 20 January 2021, available online at: <[www.dof.gob.mx/nota\\_detalle.php?codigo=5610105&fecha=20/01/2021](http://www.dof.gob.mx/nota_detalle.php?codigo=5610105&fecha=20/01/2021)>.

<sup>138</sup> Response at §52 and Appendix MX-011, “Information Declared Confidential by the Party.”

<sup>139</sup> Response, Appendix MX-009, Conapesca, file no. UAJ.-13228/290921 (4 October 2021).

<sup>140</sup> Response at §54 and Appendix MX-012, “Information Declared Confidential by the Party.”

<sup>141</sup> Response at §53.

<sup>142</sup> Response at §54 and Appendix MX-013, file on paper without letterhead, signed by Lic. Francisco Conzuelo Gutiérrez, Abogado General, file no. 110.01/2723/2021 (1 October 2021).

<sup>143</sup> Response at §55 and Appendix MX-016.

<sup>144</sup> Response at §58 and Appendix MX-017.

<sup>145</sup> 2020 Gillnets Order, Article 3.

<sup>146</sup> *Id.* at Articles 6–7.

<sup>147</sup> *Id.* at Article 10.

<sup>148</sup> *Id.* at Article 5.

77. Mexico does not report the status of the Special Program for Marking Fishing Gear and Equipment on Smaller Craft (*Programa Especial de Marcaje de Artes y Equipo de Pesca para las Embarcaciones Menores*), which was supposed to be fully implemented by 25 March 2022;<sup>149</sup> it does not report on the registry of gillnets used outside the area delimited in the order;<sup>150</sup> it does not discuss the semiannual evaluation of the Enforcement Plan and the 2005 Vaquita Refuge Order;<sup>151</sup> it does not discuss the work, the coordination, or the measures implemented by the Intragovernmental Group on Sustainability in the Upper Gulf of California (*Grupo Intragubernamental sobre la Sostenibilidad en el Alto Golfo de California*),<sup>152</sup> nor is there any reference to measures taken by the Collaborative Group on Enforcement of the Order (*Grupo de Colaboración sobre Aplicación del Acuerdo*), which had to be established no later than 30 days following the entry into force of the 2020 Gillnets Order to “facilitate exchange of law enforcement information.”<sup>153</sup>

**b) Inspection and surveillance measures taken by Semar**

78. According to Mexico’s response, Semar reported that inspection and surveillance measures in the Upper Gulf of California region were carried out to preserve the vaquita and to reduce the illegal traffic of totoaba “in conjunction and coordination with the responsible authorities, under the applicable laws and orders.”<sup>154</sup> In addition, the information provided by Semar refers to measures taken under the framework agreement for collaboration with Semarnat and Profepa on implementation and reinforcement of inspection and surveillance in the Upper Gulf of California (2014), the Comprehensive Strategy for the Upper Gulf of California (*Estrategia Integral para la Atención del Alto Golfo de California*, 2015), and the collaboration agreement between Semarnat, Sea Shepherd Conservation Society, and Museo Ballenero de Baja California Sur, A.C. with the object of carrying out a plan to remove ghost nets from the Upper Gulf of California.<sup>155</sup>
79. Semar reports that it took part in drafting the 2020 Gillnets Order and that it conducted inspections of 321 ships, 3,420 smaller craft, 1,393 vehicles, 8,280 persons, and 15 facilities. It further mentions the seizure of 14 vessels, recovery of 151 items of fishing gear totaling 38,582 meters of fishing net, as well as the detention of 5 persons.
80. Despite the data related to activities on inspection and seizure of equipment, Semar’s report does not include any evaluations to determine the effectiveness of the measures adopted. Nor does it report on measures taken within the framework of the Intragovernmental Group, mentioned above,

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<sup>149</sup> *Id.* at Transitory Article 2.

<sup>150</sup> *Id.* at Transitory Article 3.

<sup>151</sup> *Id.* at Transitory Article 5.

<sup>152</sup> *Id.* at Transitory Article 6. The Intergovernmental Group on Sustainability in the Upper Gulf of California includes representatives of the following ministries: Environment and Natural Resources; Economy; Treasury and Public Credit; Labour and Social Security; Civil Safety and Protection; Wellness; External Relations; Office of the Attorney General of the Republic; Tax Administration Service, and other federal bodies. See also: Guidelines for the organization and functions of the Intragovernmental Group on the Sustainability in the Upper Gulf of California (*Lineamientos para la organización y funciones del Grupo Intragubernamental sobre la sustentabilidad en el Alto Golfo de California*), DOF January 15 2021.

<sup>153</sup> *Id.* at Transitory Article 7.

<sup>154</sup> Response, Appendix MX-018, Semar, file no. SSPC-848/2021 (7 October 2021).

<sup>155</sup> *Id.*

nor on any evaluation measures such as those carried out within the framework of the Results-based Budget (*Presupuesto Basado en Resultados*) of the Ministry of the Treasury or by the National Council for Evaluation of Social Development Policy (*Consejo Nacional de Evaluación de la Política de Desarrollo Social*), among others.

**c) Inspection and surveillance measures taken by Profepa**

81. Mexico's response makes reference to 359 inspection measures taken during 2020 and 293 inspection measures in the Upper Gulf of California from January to October 2021, consisting of "water and land tours, [and] launch and landing inspections, in collaboration with other federal government agencies."<sup>156</sup> The response also includes an appendix with confidential surveillance reports produced by Profepa.<sup>157</sup>
82. In addition, the response refers to four complaints filed with the Office of the Attorney General of the Republic (*Fiscalía General de la República*—FGR). Of the cases mentioned, 75% are at the initial stage, while the status of the remaining 25% is unknown. As for international coordination with Interpol, Mexico refers to two Red Notices<sup>158</sup> and one Eco Message.<sup>159</sup> From September 2019 to November 2021, Mexico reported the execution of 10 arrest warrants and 2 searches.<sup>160</sup> Concerning cases of illicit possession and transportation of totoaba not associated with organized crime, Profepa secured 6 convictions from September 2019 to November 2021, in which 9 Mexican nationals were sentenced to prison and to payment of environmental compensation in an amount of \$59,784,257.66 pesos. To date, there have been 29 investigation files, of which 20 (69%) are still open, 2 (7%) did not lead to charges, 1 (3.4%) was sent for temporary archiving, and 6 (20.7%) have already been sentenced. The response reports the seizure of 2,363 totoaba swim bladders in Mexico as well as fines amounting to a total of \$276,924,447.66 for repair of environmental harm. The response states that between September 2019 and September 2021, a total of 384 nets, for a total length of 73,101 meters, were recovered.<sup>161</sup>
83. The Secretariat notes that the response does not reference the effectiveness rate of inspection and surveillance measures, and does not provide factors to assess the effectiveness of enforcement measures implemented by Mexico for totoaba and vaquita protection. In this regard, it observes that of 29 investigation files, only 6 (20.7%) led to convictions.
84. The Secretariat finds that in terms of institutional matters, a factual record would yield information on the roles, powers, and coordination measures of Semarnat, Profepa, Sader, Semar, and other public and private entities involved in the effective enforcement of the environmental law in

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<sup>156</sup> Response at §65.

<sup>157</sup> Response, Appendix MX-019, Profepa, "Confidential reports on Inspection Measures."

<sup>158</sup> Interpol, Red Notices, online at <<https://www.interpol.int/en/How-we-work/Notices/View-Red-Notices>>("Red Notices are issued for fugitives wanted either for prosecution or to serve a sentence. A Red Notice is a request to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal action.").

<sup>159</sup> An Eco Message is a notice sent to the Interpol community that has been implemented for the purpose of improving information exchange in cases of environmental crimes; see 63<sup>rd</sup> session of ICPO-Interpol General Assembly, Resolution AGN/63/RES/12 (1994), online at <<https://www.interpol.int/es/content/download/6311/file/GA-1994-RES-12.pdf?inLanguage=eng-GB>>.

<sup>160</sup> Response at §67.

<sup>161</sup> *Id.*

question, with respect to the 2020 Gillnets Order in particular. It could explain the role played by Conabio, the National Protected Natural Areas Commission (*Comisión Nacional de Áreas Naturales Protegidas*), Conanp, and Inapesca as administrative bodies assisting with the implementation of measures for the protection and conservation of the vaquita and the totoaba. It could also provide information on cross-cutting policies aimed at promoting sustainable development in the Upper Gulf of California region and could yield further understanding of Mexico's coordination and participation within CIRVA and CITES as international forums.

**d) Alleged violation of the Zero Tolerance Area (ZTA)**

85. On the establishment, surveillance, and enforcement of restrictions in the ZTA, the 2020 Gillnets Order provides that:

fishing activities of any type, with any type of craft, including sport fishing, is permanently and totally banned within the “Zero Tolerance Area.” No travel or navigation by any type of craft is permitted in this area, unless the vessel is authorized to do so in writing by the competent authority.<sup>162</sup>

86. Mexico contends that the Submitters arrive at an “erroneous interpretation” of the implementation triggers and the measures taken in the ZTA, Mexico argues their intent is to establish “critical thresholds above which specific predetermined measures are triggered.”<sup>163</sup>

87. The response does not state whether any authorizations exist for boat traffic within the ZTA;<sup>164</sup> it does not present information on “patrols and surveillance 24-hours a day, year-round using maritime, aerial, and satellite methods,” in the area<sup>165</sup> and it does not discuss the information submitted by the IUCN Cetacean Specialist Group (CSG) concerning the presence of smaller craft within the ZTA from October to December 2020.<sup>166</sup>

88. Although the response discusses how the 2020 Gillnets Order operates, it does not address its implementation as an enforcement tool of the environmental law in question. Mexico does not provide factual information gathered through inspection and surveillance in the ZTA that may constitute triggers and, as a result, may merit “predetermined enforcement actions.”<sup>167</sup> In sum, there is missing information making it impossible to assess the effectiveness of the measures taken, the status of the pending measures,<sup>168</sup> and the evaluations required by the 2020 Gillnets Order.

89. A factual record could provide information on the number and type of vessels detained; the number of vessels present each day; the implementation of actions to address recidivism factors; net recovery; ongoing monitoring and surveillance measures and the effectiveness of the measures implemented; and options, policies, and programs providing for the sustainable use of natural resources in the Upper Gulf of California for the benefit of all persons.

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<sup>162</sup> 2020 Gillnets Order, Article 13, emphasis added.

<sup>163</sup> Response at §86.

<sup>164</sup> 2020 Gillnets Order, Article 13.

<sup>165</sup> *Id.*

<sup>166</sup> Vaquita Update October-December 2020, op. cit.

<sup>167</sup> 2020 Gillnets Order, Article 17.

<sup>168</sup> 2020 Gillnets Order, transitory articles 5 and 6.

### III. NOTIFICATION

90. Having reviewed submission SEM-21-002 (*Vaquita Porpoise*) in the light of the response of the United Mexican States, the Secretariat finds that central issues remain unresolved in relation to the effective protection and conservation of the vaquita porpoise (*Phocoena sinus*) and the totoaba (*Cynoscion macdonaldi*) in the Upper Gulf of California and recommends the preparation of a factual record with regard to the effective enforcement of LGVS Article 55; Article 56 of the LGVS Regulation; the 1975 Totoaba Fishing Ban; the 2015 Gillnets Order; the 2017 Gillnets Order, and the 2020 Gillnets Order.
91. Pursuant to USMCA Article 24.28(1), the Secretariat hereby notifies the CEC Council and the Environment Committee created under USMCA Chapter 24 of its determination that in the interests of achieving the goals of Chapter 24 of the Agreement,<sup>169</sup> a factual record should be prepared with respect to submission SEM-21-002 (*Vaquita Porpoise*). In accordance with paragraph 19.4 of the Guidelines, “[t]he Council should vote on whether to instruct the Secretariat to prepare the factual record normally within 60 working days of receiving the Secretariat’s recommendation,” or by **5 July 2022**.
92. The Secretariat respectfully requests that the Council authorize the preparation of a factual record comprising relevant factual information, including information relating to actions and facts that occurred prior to the entry into force of the USMCA on 1 July 2020. Pursuant to USMCA Article 24.28(2), the Secretariat “shall prepare a factual record if at least two members of the Council instruct it to do so.”

Respectfully submitted for your consideration,

#### Secretariat of the Commission for Environmental Cooperation

*(original signed)*

Per: Richard Morgan  
Executive Director

cc: Miguel Ángel Zerón, alternate representative, Mexico  
Catherine Stewart, alternate representative, Canada  
Jane Nishida, alternate representative, United States  
Environment Committee contact points  
Paolo Solano, Director of Legal Affairs and Submissions on Enforcement Matters  
Submitters

Appendix: Environmental Law in Question

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<sup>169</sup> USMCA Article 24.2(2): “The objectives of this Chapter are to ... promote high levels of environmental protection and effective enforcement of environmental laws....”