

**Reasons for Council instructions regarding submission
SEM-21-002 (*Vaquita Porpoise*)**

Consistent with its commitment to transparency and in its capacity as the governing body of the Commission for Environmental Cooperation (CEC), with responsibility for overseeing the processing of submissions on enforcement matters (SEM), taking into account the decision of the CEC Council (“the Council”) to present the reasoning behind its decision regarding the preparation of a factual record in relation to submission SEM-21-002 (*Vaquita Porpoise*) and to publish it in the CEC’s public registry of submissions, in accordance with the procedures set out in Articles 24.27 and 24.28 of the *United States-Mexico-Canada Agreement* (USMCA) and Article 2.3 of the *Agreement on Environmental Cooperation* (ECA), in force as of 1 July 2020. The Council hereby makes public its reasons for instructing the Secretariat to prepare a factual record in relation to submission SEM-21-002 (*Vaquita Porpoise*).

1. Secretariat notification pursuant to USMCA Article 24.28(1)

In its notification of 1 April 2022 pursuant to USMCA Article 24.28(1), the Secretariat informed the Council that the preparation of a factual record was warranted in regard to the effective enforcement of the following legal provisions:

- Article 55 of the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS) and 56 of the LGVS Regulation;
- 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 (1975 Totoaba Fishing Ban)*;
- the *Order temporarily suspending commercial fishing by means of gillnets and longlines operated on small craft in the Northern Gulf of California (2015 Gillnets Order)*;
- 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 sites, and mandating the use of monitoring systems by such craft (2017 Gillnets Order)*, and
- 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 for such craft (2020 Gillnets Order)*.

2. Council Instructions to the Secretariat

By means of Council Resolution 24-02, attached hereto, the Council unanimously instructed the Secretariat to prepare a factual record with respect to the following legal provisions:

- A. Article 55 of the LGVS, in relation to measures put into place to effectively enforce this Article in the context of illegal traffic of Totoaba;

- B. Article 56 of the LGVS Regulation, in relation to measures put in place to effectively enforce this article in the context of illegal traffic in Totoaba;
- C. The 1975 Totoaba Fishing Ban, in relation to measures taken to effectively enforce the ban.
- D. The 2020 Gillnets Order, in relation to measures taken to effectively enforce the Order.

In accordance with the provisions of ECA article 2.3 and with the intention of contributing to transparency and access to information, the Council sets forth the reasons that motivated the instructions of its members.

3. Explanation of the Council's reasoning

The Council instructed the Secretariat to prepare a factual record through Council Resolution 24-02 based on the analysis in the Secretariat's Notification dated 1 April 2022 and discussions between the Parties.

Additionally, Mexico offers further reasons for the instructions.

A. LGVS Article 55 and Article 56 of the LGVS Regulation

Mexico takes note of the Submitters' assertions of failure to effectively enforce LGVS Article 55 and Article 56 of the LGVS Regulation as well as the Secretariat's recommendation to prepare a factual record in order to provide information to assess the magnitude of the problem of illegal trafficking of totoaba, as well as Mexico's efforts in the implementation of such strategies and the effectiveness of the measures undertaken to effectively control illegal trafficking of totoaba, within the framework of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and, taking into account the text of these legal provisions, which are given below.

LGVS Article 55:

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.

Article 56 of the LGVS Regulation:

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.

In this regard, Mexico notes that in relation to the above provisions, the totoaba is listed in Appendix I of CITES and that trade in such species is governed by CITES Article III, paragraph 2 which stipulates that the export of any specimen of a species included in Appendix I requires the prior grant and presentation of an export permit, which may only be granted when the scientific and management authorities of the state have advised that this will not be detrimental to the species, that it was not obtained in contravention of the applicable laws, and that the existence of the import permit has been verified. Where live specimens are exported, it must be verified that these have been prepared and shipped so as to minimize the risk of injury or damage to the health of the specimen.

The Government of Mexico, acting by the General Wildlife Branch (*Dirección General de Vida Silvestre*—DGVS) as the administrative authority for CITES, for compliance with the obligations set out in LGVS Article 55 and Article 56 of the LGVS Regulation, and in accordance with the stipulations of CITES III, has implemented the administrative procedure titled “Approval, permit, or certificate for import, export, or re-export of specimens, parts, and derivatives of wildlife.”

In relation to this procedure, Mexico notes that it is authorized for species raised in captivity through management units (*unidad de manejo*—UMA) or premises or facilities managing wildlife (*predio o instalación que maneja vida silvestre*—PIMVS) in confinement, outside of their natural habitat, in accordance with NOM-169-SEMARNAT-2018, which establishes the specifications for the marking of specimens, parts, and derivatives of totoaba derived from sustainable production in an UMA or a PIMVS. With this procedure, it is possible to trace these products from the UMA or PIMVS to the final vendor, in conformity with CITES Resolution Conf. 12.10 (Rev. CoP15).

Likewise, Mexico notes its statements referring to the absence or lack of complaints filed by any supervisory body, ministerial authority, or the CITES Secretariat or Conference of the Parties against the procedure to import, export, or re-export procedure involving totoaba and it further takes into consideration that the matters relating to control of trafficking in totoaba are regulated by Article 420 paragraph IV of the Federal Criminal Code (*Código Penal Federal*), these being illicit activities whose perpetrators are liable to imprisonment, and that this legal provision was not mentioned by the Submitters.

B. 1975 Totoaba Fishing Ban

Mexico takes into consideration the Submitters’ assertions with respect to the effective enforcement of the 1975 Totoaba Fishing Ban, as well as the Secretariat’s recommendation to prepare a factual record in order to document the information relevant to Mexico’s efforts to ensure the effective compliance with said Ban, the control of illegal trafficking in totoaba in the Upper Gulf of California, compensation mechanisms for fishermen, and the raising of totoaba in captivity, in addition to providing information regarding other legal and environmental policy instruments to prevent and penalize illegal fishing of totoaba.

In this regard, in relation to the lack of information on the efforts made by Mexico to ensure effective compliance with the 1975 Totoaba Fishing Ban, Mexico has informed that, in order to comply with the obligation to ensure the maximum security in the reproduction and growth of the fishing generations, it has issued several legal instruments complementary to said Ban, fully evidencing its effort and commitment, through the implementation of multiple actions, both legal and technical, to protect the totoaba, among other species in the region, also complying with the Guidelines agreed at COP19, the SC75 Recommendations and with the Determinations of the Report of the Visit-Mission, as well as the indications specified by CITES.

Regarding these aspects, Mexico states that upon reviewing the 1975 Totoaba Fishing Ban, issues related to the matter of illegal trafficking are not governed by this instrument but by Article 420 paragraph IV of the Federal Criminal Code; along similar lines, it notes that the compensation mechanisms for fishermen and the raising of totoaba in captivity are also not governed by the abovementioned Ban.

Likewise, Mexico states that the contents of the citizen complaint filed by the Submitters as a means of demonstrating that they pursued the legal remedies available to them under Mexican law, as required by USMCA Article 24.27(3)(c), bears no relationship to the purposes of the 1975 Totoaba Fishing Ban.

C. 2020 Gillnets Order

Mexico took into account the Submitters' assertions concerning failure to effectively enforce the 2020 Gillnets Order, as well as the Secretariat's recommendation to prepare a factual record, in order to consider the effectiveness of the measures taken, the progress of pending measures and the respective assessments.

Regarding the issues pointed out by the Secretariat, Mexico has specified that both the **2015 Gillnets Order** and the **2017 Gillnets Order** are not enforceable, since they were abrogated at the time the Submission SEM-21-002 was filed, in addition to reporting on the effectiveness of the measures of the **2020 Gillnets Order** that have a positive effect on the reduction of illegal totoaba fishing activities, given the decrease of illegal vessels in the Zero Tolerance Zone.

As evidence of the above, the following are the letters to Semar from the non-governmental organization Sea Shepherd Conservation Society giving evidence of its considerable work in the Upper Gulf of California to reduce the number of boats in the Zero Tolerance Area and, in contrast, Mexico observes that the Secretariat, in its notification reasoning, presents no evidence whatsoever in regard to mortality of vaquita specimens during the period of implementation of the 2020 Gillnets Order.

Likewise, the Government of Mexico submitted information in its Party Response through annexes MX-008, MX-009, MX-010, MX-011, MX-012, MX-017, MX-018, MX-019, MX-020 and MX-021, which provide an exhaustive account of the actions in terms of inspection, monitoring, removal of gillnets and filing of criminal actions, implemented by the Secretariat of

Agriculture and Rural Development (*Secretaría de Agricultura y Desarrollo Rural*, Sader), the Secretariat of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*, Semarnat) and the Navy (*Secretaría de Marina*, Semar) in order to protect the Vaquita marina and totoaba species.

Mexico notes that for the protection of the vaquita porpoise and the totoaba required by the Secretariat, the authority and coordination actions between Semarnat, Sader, Semar, the Federal Attorney's Office for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*, Profepa), as well as other public and private agencies involved in the effective enforcement of the environmental law in question, are detailed in the 2020 Gillnets Order, as well as in the Zero Tolerance Zone Enforcement Plan, the Triggering Factors Agreement, the Guidelines of the Intragovernmental Group on Sustainability in the Upper Gulf of California and the Collaborative Group on the Enforcement of the 2020 Gillnets Order, which are available to the Submitters and the general public through the Official Gazette of the Federation (*Diario Oficial de la Federación*).

Moreover, Mexico notes that there has been a failure during this process to effectively apply the criteria of USMCA Article 24.27(3)(a) and (c), which stipulate that prior to requesting a response from a Party, the Secretariat must determine whether the submission alleges harm to the person making the submission and whether the private remedies available to the Submitters under Mexican law have been pursued.

Likewise, Mexico considers USMCA Article 24.4(2), which stipulates that the Parties recognize that as regards the enforcement of environmental law, a Party is compliant with Article 24.4(1) where a course of action reflects a reasonable exercise of its discretion in regard to investigatory, prosecutorial, regulatory, and compliance matters, among other measures adopted with a view to administrative efficiency, which give evidence of the efforts of the Mexican authorities to protect the vaquita and the totoaba.

However, Mexico agrees with the Secretariat's recommendation that a factual record would provide information related to the role played by the various government agencies and the development of governance frameworks to eradicate the illegal trade of totoaba and promote the effective protection of the vaquita porpoise.