

Secretariat of the Commission for Environmental Cooperation
Notification by the Secretariat pursuant to Article 24.28
of the United States-Mexico- Canada Agreement

Submitters: MOCE Yax Cuxtal, A.C. *et al.*
Part: United Mexican States
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Submission reviewed: 21 October 2022
Date of determination: 17 April 2023
Number of submissions: SEM-22-002 (*Tren Maya*)

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Executive summary

On 21 July 2022, Moce Yax Cuxtal A.C. and other organizations and individuals (“Submitters”), filed a submission with the Secretariat of the Commission for Environmental Cooperation (“Secretariat”) alleging that Mexico (“the Party”) is failing to effectively enforce its environmental law with respect to the construction of Section 5 South of the “Tren Maya” project in the municipalities of Solidaridad and Tulum, Quintana Roo, Mexico.

In submission SEM-22-002 (*Tren Maya*), the Submitters assert that the evaluation and authorization process for Section 5 South of the Tren Maya did not strictly comply with federal environmental regulations. The Submitters state that construction of the project will have an adverse effect on the region because it is being developed in a karst area characterized by the presence of a large number of fractures, faults, and cenotes; enclosed depressions; rapid water infiltration; an abundance of caves and caverns; and the absence of surface streams. The Submitters assert that Section 5 South of the Tren Maya will damage the region’s ecosystem, particularly the Sac Actun-Dos Ojos underwater system, and refer to a lack of effective enforcement of the Mexican Constitution and various federal laws regarding environmental impact assessment (EIA), forest land use change, wildlife protection, and protection of water quality.

On 1 December 2022, after reviewing the submission and the supporting documentation filed by the Submitters, the Secretariat determined that submission SEM-22-002 was admissible and requested a response from the Party. On 11 January 2022, the Secretariat received a response from the Party informing the existence of pending judicial or administrative proceedings and providing information on the environmental impact and forest land use authorization process for the project.

When considering the Party’s notification of pending judicial and administrative proceedings, the Secretariat had in mind that is only authorized to apply this exceptional form of termination after considering several factors. Upon review, the Secretariat found that none of the proceedings were initiated by and are being pursued by the Party; that there is no information to conclude whether the proceedings are being pursued in a timely fashion; that the matters of the proceedings do not specifically coincide with the same issues raised in the submission and the environmental law in question, and that it is not apparent that the mentioned proceedings would have the potential to resolve the issues raised by the Submitters.

A significant consideration is that the amparo lawsuits notified by the Party exclusively address constitutional matters and not the effective enforcement of federal laws which is a central question raised in the submission. Regarding the complaints notified by the Party, it was only reported that these were filed, but the response does not provide information on related enforcement actions regarding work and activities in Section 5 South of the Tren Maya.

For these reasons, the Secretariat considers that the cited proceedings do not terminate the submission and thus their existence do not hinder the Secretariat’s consideration of whether preparation of a factual record is warranted.

After considering the submission in light of the Party’s response, the Secretariat concludes that central issues raised in the submission relative to the alleged failure to enforce environmental laws remain open and warrant the preparation of a factual record, including: (i) the preventive nature of the project’s environmental impact assessment procedure; (ii) the alleged lack of soil

mechanics and geophysical studies; (iii) the change in land use of forest land; (iv) the alleged fragmentation of the environmental impact assessment of the Tren Maya project; and (v) the implementation of the citizen complaint procedure with respect to the project.

The Secretariat sets out its reasoning below and notifies the Council and the Environment Committee pursuant to Article 24.28(1) of the USMCA/CUSMA.

I. INTRODUCTION

1. On July 1, 2020, the United States-Mexico-Canada Agreement (USMCA/CUSMA) and the Agreement on Environmental Cooperation (ECA) entered into force. After this 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/CUSMA Articles 24.27 and 24.28. The Secretariat of the Commission for Environmental Cooperation (CEC or “the Commission”)¹ remains responsible for implementing the SEM process, as stipulated in the ECA.²
2. The SEM process allows any person of a Party—i.e., an individual or entity established under the laws of Canada, the United States or Mexico—to file a submission alleging that a Party is failing to effectively enforce its environmental laws.³ The CEC Secretariat (“the Secretariat”) initially reviews submissions based on the criteria and requirements set out in USMCA/CUSMA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements, it then determines, pursuant to USMCA/CUSMA Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party’s response, the Secretariat then determines whether the matter warrants preparation of a factual record and, if so, informs the CEC Council and the Environment Committee,⁴ providing its reasons under Article 24.28(1); otherwise, it terminates review of the submission.⁵
3. On 21 July 2022, a group formed by the organizations Moce Yax Cuxtal, A.C., Grupo Gema del Mayab, A.C., Red de Formadores Socio Ambientales, Sélvame del Tren, Cenotes Urbanos, Jaguar Wild Center, A.C. and 18 individuals in their personal capacity (collectively, “the Submitters”)⁶ filed a submission with the CEC Secretariat, pursuant to Article 24.27(1) of the USMCA/CUSMA, alleging that the Party is failing to effectively enforce its environmental laws

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

² Pursuant to Article 2(3) of the Agreement on Environmental Cooperation between the governments of the United Mexican States, the United States of America and Canada (“Environmental Cooperation Agreement” or “ECA”), the CEC “shall continue to operate under the modalities in effect as of the date of entry into force of this Agreement.”

³ The United States-Mexico-Canada Agreement (USMCA/CUSMA) provides that a submission may be filed by “any person of a Party,” understood - in accordance with the general definitions in Article 1.5 - as “a national [an individual with nationality or permanent resident status] or an enterprise [any private, public or social entity or organization established or incorporated under applicable law] of a Party.”

⁴ Established under Article 24.26(2) of the USMCA, the Environment Committee’s role is to oversee the enforcement of Chapter 24.

⁵ For more details regarding the various phases of the environmental enforcement submissions process (SEM process), the public registry of submissions, and the findings and factual records prepared by the Secretariat, please refer to the CEC website at: <www.cec.org/peticiones>.

⁶ The Secretariat determined that not all of the organizations that submitted the submission qualified as Submitters as it only had information on the legal status of Moce Yax Cuxtal, A.C., Grupo Gema del Mayab, A.C. and Jaguar Wild Center, A.C., *see* note 10 below.

with respect to the construction of Section 5 South of the Tren Maya project in the municipalities of Solidaridad and Tulum, Quintana Roo (“the Project”).⁷

4. On 22 August 2022, the Secretariat determined that submission SEM-22-002 (*Tren Maya*) did not satisfy all of the admissibility requirements set forth in Article 24.27 of the USMCA/CUSMA and notified the Submitters in its determination in accordance with Articles 24.27(2) and (3).⁸ On 21 October 2022, the Secretariat received a revised submission with the information the Secretariat requested by in its determination.⁹
5. On 1 December 2022, the Secretariat determined that submission SEM-22-002 (*Tren Maya*) satisfied the admissibility requirements listed in Article 24.27(2) of the USMCA/CUSMA and merited a response from the Government of Mexico, pursuant to Article 24.27(3) regarding effective enforcement of the following regulatory instruments:¹⁰
 - a. Article 4, fifth and sixth paragraphs of the Political Constitution of the United Mexican States (the “**Constitution**” or CPEUM);
 - b. Articles 5(III), (VIII), (XI); 15(XII); 28(I), (VII); 34, 162, 170, 189, 192, 193 and 194 of the General Act on Ecological Balance and Environmental Protection (**LGEEPA**);
 - c. Articles 93, 97, 154 and 155(VII), (XII) of the General Act on Sustainable Forest Development (**LGDFS**);
 - d. Articles 5(I), 58: paragraph a) and 107 of the General Wildlife Act (**LGVS**);
 - e. Articles 7 *bis*(I); 14 *bis* 5(I), (IX), (XX) of the National Waters Act (**LAN**); and
 - f. Article 418(I), (III) of the Federal Criminal Code (**CPF**).
6. On 30 January 2023, the Secretariat received the response from the Government of Mexico (“the Party”).¹¹ In it, the Party provides information regarding the environmental impact assessment procedure and the change in land use for the Project. In addition, it reports the existence of pending administrative and judicial proceedings related to the effective enforcement of Articles 4, fifth and sixth paragraphs of the Constitution; 5(III), (VIII) and (XI), 162, 170, 189, 192, 193 and 194 of the LGEEPA; 154 and 155(VII) and (XII) of the LGDFS; 107 of the LGVS; and 418(I) and (III) of the CPF. Due to the existence of pending proceedings related to the enforcement of constitutional provisions, and in accordance with USMCA/CUSMA Article 24.27(4)(a), the Party requests the Secretariat terminate the submission.
7. In accordance with Article 24.28(1) of the USMCA/CUSMA, the CEC Secretariat has examined whether the submission SEM-22-002 (*Tren Maya*), in light of the response, warrants the preparation of a factual record.

⁷ SEM-22-002 (*Tren Maya*), Submission Pursuant to Article 24.27(1) of the USMCA (21 July 2022), in: <<http://bit.ly/3TJvV6z>> [“Submission”].

⁸ SEM-22-002 (*Tren Maya*), Determination Pursuant to Articles 24.27(2) and (3) (22 Aug. 2022), at: <<https://bit.ly/408QEVk>>.

⁹ SEM-22-002 (*Tren Maya*), Revised Submission Pursuant to Article 24.27(1) of the USMCA (21 Oct. 2022), p. 2, at: <<https://bit.ly/3JF5xt1>>.

¹⁰ SEM-22-002 (*Tren Maya*), Determination Pursuant to Articles 24.27(2) and (3) (1 Dec. 2022), at: <<https://bit.ly/3mPQe7J>>.

¹¹ SEM-22-002 (*Tren Maya*), Article 24.27(4) Response (30 Jan. 2022), at: <<https://bit.ly/3JF5DAT>> [“Response”].

8. Upon review, the Secretariat found that none of the proceedings notified by the Party were initiated by and are being pursued by the Party; that there is no information to conclude whether the proceedings are being pursued in a timely fashion; that the matters of the proceedings do not specifically coincide with the same issues raised in the submission, and that it is not apparent that the mentioned proceedings would have the potential to resolve the issues raised by the Submitters. More specifically, the amparo lawsuits notified by the Party exclusively address constitutional matters and not the effective enforcement of federal laws cited by the Submitters. Regarding the complaints notified by the Party, it was only reported that these were filed, but the response does not provide information on related enforcement actions regarding work and activities in Section 5 South of the Tren Maya.
9. In conclusion, after examining the submission in light of the response, the Secretariat concludes that central questions raised by the submission remain open and warrant the preparation of a factual record with respect to the effective enforcement of environmental law related to: (i) the precautionary nature of the environmental impact assessment procedure for the Project; (ii) the alleged lack of soil mechanics and geophysical studies; (iii) the change in land use of forest land; (iv) the alleged fragmentation of the environmental impact assessment of the Tren Maya project; and (v) the implementation of the citizen complaint procedure with respect to the Project.
10. Furthermore, the Secretariat is mindful that Article 2(3) of the ECA authorizes it to retain policies, guidelines, procedures, determinations, and decisions implemented during the term of the NAAEC, to the extent that such modalities are consistent with the USMCA/CUSMA and the ECA.¹² The Secretariat sets forth its reasons for this recommendation below.

II. ANALYSIS

A. Notification of pending legal proceedings

11. The transparency and credibility of the SEM process require a thorough and independent examination of the Party's response to a notification regarding the existence of pending judicial and administrative proceedings. The USMCA/CUSMA does not establish that the mere notification of a pending proceeding warrants termination of a submission. Rather, it entrusts the Secretariat to carry out an analysis of whether information submitted by the Party related to pending judicial or administrative proceedings authorize terminating a submission.¹³ This function of the Secretariat is corroborated by the history of submissions and the practice throughout the implementation of the SEM process since its inception in 1994 with respect to

¹² SEM-97-001 (BC Hydro), Notification under Article 15(1) (27 April 1998), fn 9, available at: <https://bit.ly/3Gj5MHY> [BC Hydro Notification];

At a minimum, references to previous determinations will assist in ensuring that the Secretariat consistently applies the provisions of the NAAEC. Such a contextual approach to a treaty is suggested by general canons of statutory interpretation as well as Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

¹³ SEM-01-001 (*Cytrar II*), Article 14(3) Determination (13 June 2001), p. 5; available at: <https://bit.ly/3nNzzSR> (“Only in the specific case where the matter that is the subject to a submission is the subject of a pending proceeding is the Secretariat authorized to proceed no further with its consideration of a submission without analyzing the subject matter of the submission...”)

submissions that, for the most part, have received a favorable vote from the Council to prepare a factual record.¹⁴

12. The Secretariat has already clarified on previous occasions that it is not a court; that its determinations “are not binding on the Parties or submitters, and Factual Records are not rulings or judicial opinions on an asserted failure of effective enforcement of environmental law.” Factual Records provide relevant information related to the effective enforcement of the environmental law in question without providing a conclusion or recommendation. For this reason, the Secretariat would like to stress that Factual Records cannot “‘interfere’ with ongoing domestic proceedings, in the same way that conflicting court judgments could.”¹⁵
13. The threshold for considering whether pending judicial or administrative proceedings exist, and in which cases should be dismissed, should be construed narrowly. A broad interpretation would suggest an automatic termination of a submission based on the mere assertion of the existence of a pending proceeding. Such approach could undermine the credibility of the SEM process overall.
14. The Secretariat works to ensure a degree of predictability and fairness in implementing the SEM process.¹⁶ This is largely reflected in its ability to independently carry out its analysis of a Party response, dismissing a submission when the Party is actively invested in enforcing the environmental laws in question.
15. The fact that the Secretariat can determine whether pending proceedings reported by a Party require the termination of a submission is based on the principle that “[a] treaty cannot advance its express object and purpose if it is not effective.”¹⁷ Accordingly, it is necessary to implement the SEM process under the umbrella of institutional effectiveness, interpreting the provisions of the USMCA/CUSMA in a constructive manner to achieve its objectives.¹⁸

¹⁴ SEM-96-003 (*Oldman River I*); SEM-97-001 (*BC Hydro*); SEM-98-004 (*BC Mining*); SEM-00-004 (*BC Logging*); SEM-00-006 (*Tarahumara*); SEM-01-001 (*Cytrar II*); SEM-02-003 (*Pulp and paper*); SEM-03-003 (*Lake Chapala II*); SEM-04-002 (*Environmental pollution in Hermosillo*); SEM-04-005 (*Coal-fired Power Plants*); SEM-05-003 (*Environmental pollution in Hermosillo II*); SEM-06-003 and SEM-06-004, cumulative (*Ex Hacienda El Hospital II* and *Ex Hacienda El Hospital III*); SEM-06-005 (*Species at risk*); SEM-06-006 (*Los Remedios National Park*); SEM-07-005 (*Drilling waste in Cunduacán*); SEM-07-001 (*Minera San Xavier*); SEM-09-003 (*Los Remedios National Park II*); SEM-09-002 (*Wetlands in Manzanillo*); SEM-11-002 (*Sumidero Canyon II*), SEM-10-002 (*Alberta Tailings Ponds*); SEM-12-001 (*BC Salmon Farms*); SEM-13-001 (*Tourism Development in the Gulf of California*); SEM-19-002 (*City Park Project*); SEM-22-001 (*Pollution in Playa Hermosa*) SEM-21-003 (*North Atlantic right whale*).

¹⁵ SEM-07-001 (*Minera San Xavier*) Article 15(1) Determination (15 July 2009), §44 <<https://bit.ly/3ZF4rCg>> [“San Xavier Determination”]. See also discussion of *lis pendens* at §40-43.

¹⁶ San Xavier Determination, §33 (“The above notwithstanding, the Secretariat must attempt to ensure a modicum of predictability and thus fairness in its practice with regard to Articles 14 and 15....”).

¹⁷ See, e.g., A. M. Slaughter and A. Wiersema, *The Scope of the Secretariat’s Powers with Respect to the North American Agreement on Environmental Cooperation’s Citizen Submissions Procedure under General Principles of International Law*, “Environmental Law and Policy in North America” series, vol. 27, Commission for Environmental Cooperation, Montreal, 2010; available at: <<http://www.cec.org/publications/background-paper-and-secretariat-determinations-sept-2008-august-2010>>.

¹⁸ SEM-07-005 (*Drilling Waste in Cunduacán*) Determination pursuant to Article 14(3) (8 April 2009) §23-2, available at: <https://bit.ly/07-005_14-3en>.

16. In sum, the Secretariat is only authorized to apply this exceptional form of termination of a submission after examining whether the preparation of a Factual Record could *duplicate efforts or cause interference* in a judicial or administrative area by considering: (i) whether the proceeding in question was initiated by and is being pursued by the Party; (ii) whether the proceeding is timely and in accordance with the Party's law; and (iii) whether it deals with the same subject matter, including the same environmental law cited by the submitters. In addition, in applying this exceptional form of termination, the Secretariat considers (iv) whether there is "a reasonable expectation that the 'pending judicial or administrative proceeding' invoked by the Party will address and potentially resolve the matters raised in the submission."¹⁹;
17. To provide maximum transparency in its analysis, the Secretariat considers these factors in determining the existence of a pending proceeding notified under the USMCA/CUSMA. The analysis of each of the four factors is presented below.

i) Whether the proceedings in question are being pursued by the Party

18. The Secretariat first considers whether the proceedings reported by a Party are being pursued by the Party²⁰ and then evaluates other factors to determine the existence of pending proceedings.²¹
19. In this regard, the proceedings reported by the Party are not actions initiated by the environmental authorities, but rather are appeals filed by private parties under the Amparo Law²² or citizen complaints filed under the LGEEPA.²³
20. The amparo lawsuits and the citizen complaints are not acts of the Party seeking to implement enforcement measures in connection with the environmental impact assessment, the protection of ecosystems, the change in land use of forest lands or the effective implementation of the citizen complaint mechanism in connection with the Project. In the proceedings reported by the Party, the plaintiffs seek to activate the institutional apparatus to address the environmental impacts resulting from the authorization and construction of the Project.
21. The threshold for determining whether there is a pending administrative proceeding materializes when a government is *actively* pursuing measures provided by law in relation to the same matter

¹⁹ SEM-01-001 (*Cytrar II*), Article 15(1) Notification (29 July 2002), p. 5-6, available at: <https://bit.ly/01-001_NOTen> ["Cytrar II Notification"].

²⁰ San Xavier Determination, §36 ("The proceedings notified by the Mexico in this matter were initiated by *the Submitter and not Mexico*. They therefore, in part, fall outside the definition of pending proceedings in Article 45(3)(a).") (emphasis in original). See NAAEC Article 45(3)(a).

²¹ SEM-96-003 (*Oldman River I*) Article 15(1) Determination (2 April 1997), p. 3, available at: <<https://bit.ly/3nN9bbQ>> [Oldman River I Determination] ("The pending Federal Court case called to the attention of the Secretariat by Canada is not an action *pursued by the Party* within the meaning of Article 45(3)(a).") (emphasis in original). Id. at p. 4 ("Since the current matter before the Canadian court was initiated and is being pursued by a private entity, and not a 'Party' as that term appears to be employed in Article 45(3)(a), the Secretariat may consider other factors in its review of the Submission at this stage.").

²² Law of Amparo, Regulations for Articles 103 and 107 of the Political Constitution of the United Mexican States, Official Gazette of the Federation (DOF), 2 April 2013, available at: <<https://bit.ly/3JvSg5U>>.

²³ General Act on Ecological Balance and Environmental Protection, *Official Gazette of the Federation*, 28 January 1988, at: <<https://bit.ly/3ZFXZfb>> [LGEEPA].

raised by the submitters. In such a case, the Secretariat is, in effect, required to terminate the processing of the submission.²⁴

22. The Secretariat finds that, according to the Party's response, the proceedings reported in the response are not being pursued by the Party and, therefore, the Secretariat finds that terminating submission SEM-22-002 is not warranted.

ii) Whether the proceedings are being pursued in a timely fashion and in accordance with law

23. According to the information provided by the Party, various amparo proceedings are being pursued in accordance with the Amparo Law and the deadlines set forth in the law.

24. [REDACTED]

25. In light of the information in the response, it can be determined that the amparo proceedings are being pursued in accordance with applicable law. However, the Party has not provided information that indicates to the Secretariat that these proceedings are actually and currently being pursued in a timely manner, [REDACTED]

26. With respect to citizen complaints, the information provided by the Party indicates that these complaints were filed and had been forwarded to the Office of the Deputy Attorney General for Natural Resources of the Federal Attorney General's Office for Environmental Protection (*Procuraduría Federal de Protección al Ambiente—Profepa*).²⁶

27. Although the filing and pursuit are in accordance with applicable law, there is no information in the response regarding measures taken to carry out any inspection actions and therefore it is not possible to conclude that these complaints are being pursued in a timely fashion.

iii) Whether the same matter and environmental law(s) are the subject of pending proceedings

28. The Secretariat has also determined that when analyzing pending proceedings, it should assess possible duplication of effort or interference with pending litigation by analyzing whether the proceedings involve the same matter as the allegations raised in the submission/by the

²⁴ Oldman River I Determination ("where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination...").

²⁵ Response, Annex MX-017; [REDACTED]

²⁶ Response, § 58.

submitters.²⁷ Under those circumstances, the Secretariat should examine whether the proceedings involve the same matter as the allegations raised by the submitter(s),²⁸ and narrowly construe the “matter” pending resolution.²⁹ The Secretariat has determined that citizen complaints constitute pending proceedings for the purposes of the SEM process only when they result in the filing of administrative proceedings.³⁰

29. The [REDACTED] amparo proceedings filed by various individuals.³¹ The amparo action is considered to be a set of procedural instruments with the objective to enforce the human rights recognized by the Constitution and the international treaties to which the Party is a signatory when these rights are violated by authorities and, under certain circumstances, by individuals. In other words, the amparo action allows individuals “to defend themselves against... acts by public authorities that violate their human rights.”³²
30. The following amparo lawsuits do not address the same issues raised by the Submitters and, therefore, they are not analyzed further since they address the following *challenged acts*.³³

²⁷ SEM-00-004 (*BC Logging*) Article 15(1) Notification, p. 17, available at: <<https://bit.ly/00-004NOTen>> [BC Logging Notification]:

In previous determinations, the Secretariat considered the rationale underlying Article 14(3) and identified two reasons for excluding matters that fall within Article 45(3)(a) – a need to avoid duplication of effort and a need to refrain from interfering with pending litigation. The Secretariat has noted in the past that these considerations can also be relevant for a Party's proceedings that fall outside Article 45(3)(a) but nonetheless relate to the same subject matter as is raised in a submission.

²⁸ BC Hydro Notification, p. 2 (“the ‘judicial or administrative proceeding’ must address the same ‘matter’ as the Submission.”); SEM-98-004 (*BC Mining*), Notification pursuant to Article 15(1), p. 15, available at: <<https://bit.ly/3ZGm3gZ>> (“Further, such a proceeding must concern the same subject matter as the allegations raised in the submission.”); BC Logging Notification, p.16 (“Only those proceedings ... concerning the same subject matter as the allegations raised in the submission should preclude the Secretariat from proceeding further...”). See also: SEM-12-001 (*BC Salmon Farms*), Notice to Submitters and Council on Court Proceedings Served by Canada (7 May 2014), available at: <https://bit.ly/12-001_14-3DETen> §18 regarding the location of salmon farms cited in the submission and in a court appeal; and §4 regarding that the court proceedings concern aquaculture licenses and not regulations on the deposition of substances in water.

²⁹ Cytrar II Notification, p. 7 (“The Secretariat has previously construed provisions of the [NAAEC] narrowly when a broader reading could defeat the objectives of the [NAAEC] by too liberally allowing Article 14(3)(a) to cut off further review.”).

³⁰ SEM-15-001 (*Primavera Forest*) Notification under Article 15(1) (November 4, 2016) §25, available at: <<https://bit.ly/3nR3ZDv>>:

...processing of the public complaints filed in connection with the project has resulted in four environmental impact- and forest-related administrative proceeding. The Secretariat considers that, in any case, Mexico has implemented the citizen complaint mechanism provided for in Articles 189 of the LGEEPA and 107 of the LGVS and has made available to individuals the exercise of such instrument.

³¹

[REDACTED]

³² Supreme Court of Justice of the Nation, “The Law of Amparo in plain language: Why is it important for the protection of our rights?,” June 2014, p. 11, available at: <<https://bit.ly/3J7aQzL>> (only available in Spanish).

³³ The *challenged act* “is the imperative conduct, positive or omissive, of a national, federal, local or municipal state authority, allegedly in violation of individual guarantees or of the distribution of powers

Table 1. Challenged acts that do not coincide with the submission.³⁴

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

31. The following proceedings cited by the Party address, to some extent, the similar issues raised in the submission:

Table 2. Challenged acts that (partially) coincide with the submission.³⁵

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

established between the Federation and the States of the Republic, which the plaintiff opposes.” In: Calvo Blanco, J. “Challenged Act” *Mexican Legal Encyclopedia Online* <<http://bit.ly/3GgBLbV>>.

³⁴ MX-015 and MX-017.

³⁵ Id.

[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

32. The submission includes assertions regarding the preventive nature of the environmental impact assessment procedure;³⁶ the alleged fragmentation of the environmental impact assessment of the Tren Maya megaproject³⁷ and the alleged failure to conduct soil mechanics and geophysical studies,³⁸ and the lack of enforcement actions by Profepa. The *challenged acts* in the amparo suits reported by the Party and listed in Table 2 are of a constitutional nature: the Secretariat notes that these proceedings deal exclusively with the application of constitutional provisions and not the federal laws cited in the submission. In this sense, it is not evident that there is any overlap between the Petitioners' assertions and the *challenged acts* in the amparo lawsuits, except in the case of the alleged violation of the human right to a healthy environment and to water.
33. Regarding the citizen complaints filed in relation to the Project, the Party indicates that there are 37 complaints filed on 7 March 2022 and another 6 complaints filed on 16 August 2022.³⁹ The complaints are included in file No. PFPA/5.3/SC.28.2/00011-20 initiated by Profepa.⁴⁰ The Party also reports that on 17 March and 23 August 2022, the complaints were forwarded to Profepa's

³⁶ Submission, p. 11 (“The *PREVIOUS-PREVENTIVE* nature of the environmental impact assessment must be rescued and put forward as an indispensable element that will make it possible to provide an effective and efficient instrument of environmental public policy.”) (emphasis in original).

³⁷ Id. at p. 12 (“...the entire megaproject should have been evaluated in a comprehensive manner in order to identify and assess the significant, cumulative, synergistic, direct, indirect and residual impacts...”) (emphasis in original).

³⁸ Id. at p. 13 In reference to “the risk of subsidence of the Tren Maya, for not considering the fragility of the karst soil of the Yucatan Peninsula,” as a possible environmental impact and also the lack of studies to analyze and evaluate it. (emphasis in original).

³⁹ Response, § 56-57.

⁴⁰ Id. at § 56.

Office of the Deputy Attorney General for Natural Resources “so that they could be considered in the inspection actions to be conducted.”⁴¹ The Party reports that it is implementing the “Tren Maya Inspection Program in the areas of Environmental Impact, Forestry, Wildlife, and Sources of Pollution.”⁴²

34. Neither the response, nor its annexes provide information to determine whether the citizen complaints in question refer to all sections of the Tren Maya or only to Section 5 South. The response does not indicate the status of the citizen complaint proceedings; whether administrative proceedings have been implemented as a result, or whether urgent enforcement measures have been imposed. Regarding the referenced inspection program, the response indicates that visits have been made to sections 1, 2, 3 and 4 of the megaproject, but does not indicate whether there were inspection visits or any similar measures implemented with respect to Section 5.⁴³ According to the Party, the complaints are “to be considered in the inspection actions” in sections 1, 2, 3 and 4 of the megaproject.
35. In light of the foregoing, the Secretariat finds that the risk of undue interference is minimal. It is not evident how a Factual Record could in any way interfere with the amparo proceedings reported by the Party since its preparation would not unduly interfere with the review of constitutional issues by the judiciary. Nor is it evident that a Factual Record could interfere with the citizen complaints that have been filed since, to date, they have not given rise to any administrative proceedings.

Environmental law in question.

36. With respect to the environmental law in question, the Secretariat requested a response from the Party on the following provisions cited in the submission:
- a. Article 4, fifth and sixth paragraphs of the Constitution;
 - b. Articles 5(III), (VIII), (XI); 15(XII); 28(I), (VII); 34, 162, 170, 189, 192, 193 and 194 of the LGEEPA;
 - c. Articles 93, 97, 154 and 155(VII), (XII) of the LGDFS;
 - d. Articles 5(I); 58: paragraph a) and 107 of the LGVS;
 - e. Articles 7 *bis*(I); 14 *bis* 5(I), (IX), (XX) of the LAN; and
 - f. Article 418(I), (III) of the CPF.

37. In this regard, the Party reports the following in its response:

In view of the above, the Secretariat is informed that the issues related to the application of Articles 4, fifth and sixth paragraphs of the CPEUM; 5 sections III, VIII and XI, 162, 170, 189, 192, 193 and 194 of the LGEEPA; 154 and 155 sections VII and XII of the LGDFS, 107 of the LGVS; and 418: sections I and III of the CPF, are the subject of various administrative proceedings and lawsuits pending resolution...

38. The Secretariat notes that the following provisions are not listed in the notification of pending proceedings presented by the Party: Articles 15(XII); 28(I) and (VII), and 34 of the **LGEEPA**;

⁴¹ Id. at § 58.

⁴² Id. at § 59.

⁴³ Id.

93 and 97 of the **LGDFS**; 5(I) and 58: paragraph a) of the **LGVS**, and 7 *bis*(I) and 14 *bis* 5(I), (IX) and (XX) of the **LAN**.

39. Accordingly, the Secretariat will not continue its analysis regarding Article 4, fifth and sixth paragraphs of the Constitution and Article 15(XII) of the LGEEPA which contains the right of every person to enjoy an environment adequate for their development, health and wellbeing, given that they are the subject of pending proceedings. Regarding the assertions around the effective enforcement of Articles 5(III) and (VIII) of the LGEEPA and 418(I) and (III) of the CPF, the Secretariat did not find sufficient information in the submission or the response to continue with its analysis.
40. Regarding the provisions of Article 5(XI) of the LGEEPA, the Secretariat has determined to continue with its analysis, since the protection and preservation of national waters, biodiversity, fauna and natural resources is not included in the 43 citizen complaints reported by Party.
41. As stated in paragraphs 33 and 34 of this notification, the Secretariat determines to continue with its analysis of Articles 162, 170, 189, 192, 193 and 194 of the **LGEEPA** since the existence of 43 citizen complaints reported by the Party do not constitute an administrative proceeding. Likewise, the Secretariat continues with its analysis of Articles 28(I) and (VII), and 34 of the **LGEEPA**; 93 and 97 of the **LGDFS**; 5(I) and 58: paragraph a) of the **LGVS**, and Articles 7 *bis*(I) and 14 *bis* 5(I), (IX) and (XX) of the **LAN** since there are no pending enforcement actions reported by the Party.

iv) Whether the proceedings have the potential to resolve the matters raised in the submission.

42. In examining a notification of pending judicial or administrative proceedings, the Secretariat considers whether the proceedings have the potential to resolve the matters raised in the submission.⁴⁴ Recently, the Secretariat considered whether the implementation of alternative dispute resolution could address concerns raised by the submitters;⁴⁵ and whether the implementation of environmental damage studies as part of administrative proceedings by Profepa could address concerns raised by the submitters.⁴⁶ Likewise, the Secretariat has determined that the mere existence of a citizen complaint submitted to the competent authority does not qualify as a pending proceeding in accordance with USMCA/CUSMA Article 24.27(4)(a) since it does not necessarily give rise to an administrative proceeding with a potential for imposing sanctions.⁴⁷

⁴⁴ Cytrar II Notification, p. 8 (“For Article 14(3)(a) to apply so as to terminate a submission, there must be a reasonable expectation that the ‘pending judicial or administrative proceeding’ invoked by the Party will address and potentially resolve the matters raised in the submission.”). *See also* SEM-21-003 (*North Atlantic right whale*), Notification in accordance with USMCA Article 24.28(1) (3 June 2022) §27 <<https://bit.ly/3nR2SEd>>; SEM-13-001 (*Tourism Development in the Gulf of California*), Article 15(1) Notification (16 May 2014) §22 <<https://bit.ly/3zGZldX>>.

⁴⁵ SEM-22-001 (*Pollution in Playa Hermosa*) Determination accordance with USMCA Article 24.28(1) (4 Nov. 2022) §41-42.

⁴⁶ *Id.* at §32 (considering that the completion and subsequent implementation of an environmental damage study by Profepa, with the purpose of assessing the environmental impacts and damages caused by the unauthorized work and activities, as well as the corrective measures to be implemented, could potentially resolve the Submitters’ assertion).

⁴⁷ *Id.* at §45.

43.



the amparo proceedings are unlikely to resolve the Submitters' concerns regarding the precautionary nature of the environmental impact assessment procedure; the alleged fragmentation of the impact assessment of the Tren Maya project; the lack of consideration of environmental impacts; the lack of sufficient studies; the change in land use; access to environmental information; and the lack of enforcement actions by Profepa.

44. As for the citizen complaints that the Party reports in its response, the Secretariat finds that the mere existence of the complaints, without corresponding administrative proceedings to impose sanctions, is unlikely to address the concerns expressed by the Submitters.
45. In summary: none of the proceedings notified by the Party are being pursued by the Party; the amparo lawsuits primarily address constitutional issues and not enforcement of the federal laws cited in the submission; there are no administrative proceedings stemming from the citizen complaints, and in those cases where the matters raised in the submission coincide with the reported pending proceedings, these proceedings do not have the potential resolve the matters raised in the submission.
46. In light of the foregoing, the Secretariat continues its analysis to determine whether there are central questions that remain open that warrant the preparation of a Factual Record.

B. Regarding the assertions in the submission SEM-22-002

47. The Secretariat considers whether, in light of the Party's response, a Factual Record is warranted regarding the alleged lack of effective enforcement of environmental laws related to (i) the precautionary nature of the environmental impact assessment procedure; (ii) fragmentation in the environmental impact assessment of the Tren Maya project; (iii) the lack of environmental studies accompanying the environmental impact statement; (v) the change in land use; (vi) access to environmental information on the Project; and (vii) the lack of enforcement actions by Profepa.

i) The preventive nature of the environmental impact assessment procedure

48. The Submitters assert that the environmental impact assessment procedure ("EIA procedure") is preventive in nature and that this aspect is not observed in the Project's implementation. The Submitters assert that construction work on the Section 5 South of Tren Maya started without an environmental impact assessment having been completed. In particular, they assert that studies were not performed to determine the environmental viability of the Project, located in an area considered to be highly environmentally fragile.⁴⁸ The Submitters further contend that the agreement that instructed federal authorities to authorize projects considered to be in the public interest and related to national security ("National Security Agreement")⁴⁹ is contrary to provisions of the Constitution and international human rights treaties signed by the Party, as it

⁴⁸ Submission, p. 3.

⁴⁹ Agreement instructing the agencies and entities of the Federal Public Administration to complete the actions indicated, in relation to the projects and work of the Government of Mexico considered to be of public interest and national security, as well as strategic priorities for national development., Official Gazette of the Federation, 22 November 2021, available at: <<http://bit.ly/3maVqmJ>> ["National Security Agreement"].

restricts access to information, citizen participation, legal certainty and predictability in addition to being in violation of the principles of prevention, precaution, progressive human rights, and non-regression.⁵⁰

49. In its response, The Party reports that the National Tourism Promotion Fund (*Fondo Nacional de Fomento al Turismo*—Fonatur or “the Promoter”) requested the provisional environmental impact authorization for the Project from the Ministry of Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat). The environmental authority granted said provisional authorization on 7 December 2021 in accordance with the National Security Agreement⁵¹ and established that an environmental impact assessment (EIA) had to be submitted for evaluation no later than 12 months after the issuance of the provisional authorization.⁵² On 17 May 2022 the Promoter submitted an EIA in its regional modality (scope) with which General Directorate of Environmental Impact and Risk (*Dirección General de Impacto y Riesgo Ambiental*—DGIRA) of Semarnat initiated the corresponding process.⁵³ On 20 June 2022 the DGIRA issued the environmental impact authorization for the Project (*autorización en materia de impacto ambiental*—AIA) through which the work and activities of Section 5 South of Tren Maya are conditionally authorized.⁵⁴
50. With respect to the assertions regarding the constitutionality of the National Security Agreement and associated compliance with international obligations, the Secretariat has decided not to consider these assertions in its analysis as they are currently subject of various amparo proceedings reported by the Party. Issues related to the violation of human rights (information, citizen participation, legal certainty and predictability) and respect for the principles of prevention, precaution, progressivity of human rights are also the subject of amparo proceedings.
51. Without commenting on constitutional issues, the Secretariat addresses the assertions regarding the use of the EIA procedure as a preventive instrument provided for in the LGEEPA, and its implementation through the authorization of the project (first provisionally and then formalized in the AIA on 20 June 2022).
52. The environmental law cited in the submission establishes that Semarnat has the authority to address matters under federal jurisdiction, such as the management of protected natural areas and the protection of national waters, biodiversity, flora and fauna.⁵⁵ It also contains the preventive approach of the EIA procedure, that is, to perform the corresponding evaluation before beginning work and activities that may cause ecological imbalance or affect ecosystems, and to establish conditions to avoid or minimize effects on the environment resulting from, among other things,

⁵⁰ Submission, p. 6.

⁵¹ Response, Annex MX-006: Official Document No. SGPA/DGIRA/DG-05891 (December 7, 2021).

⁵² Response, § 11.

⁵³ Response, Annex MX-008: National Council of Science and Technology, Highly Specialized Professional Services Unit, Environmental Impact Statement, regional modality (undated).

⁵⁴ DGIRA, Authorization of Environmental Impact of the “Tren Maya Section 5 South of Tren Maya” Project, oficio no. SGPA/DGIRA/DG-03703-22, General Directorate of Environmental Impact and Risk, Ministry of Environment and Natural Resources (20 June 2022); included as Annex MX-009 to the Party’s Response and available at: <<https://bit.ly/3JrKYPq>> [AIA].

⁵⁵ LGEEPA, Article 5: Sections III, VIII and IX.

general transportation routes and projects that require changes in the use of land in forested areas and rainforests.⁵⁶

53. When consulting the AIA, it is clear, for example, that the Project's execution was not conditioned on submitting various studies and plans. Although a period of three months from the issuance of the AIA was granted to prepare various plans and studies that are specified as conditions of the authorization, for example, soil conservation and reforestation;⁵⁷ prevention, mitigation, environmental contingencies and conservation of the karst landscape;⁵⁸ flora and fauna management;⁵⁹ water quality monitoring;⁶⁰ geohydrological and geological study;⁶¹ geophysical studies;⁶² bird monitoring,⁶³ the execution of the Project was already underway. There is no information in the response on how these projects were implemented and whether such studies were available prior to the start of work on section 5 South of Tren Maya or how they were implemented, if at all. In addition, the technical opinions of the specialized areas echo the need to complete studies prior to the construction phase, activities that in practice are implemented as part of the environmental impact assessment of a project (see §63-65).
54. The Party response does not provide information on the Project's construction start date and the status of its progress; the status of the implementation of preventive and corrective measures, or the implementation of the plans specified in the provisional authorization and the definitive authorization. To illustrate this situation, it should be noted that a provisional authorization was issued on 7 December 2021, six days after the request, while the AIA conditions were issued up until 20 June 2022. However, the response does not state what measures were implemented to ensure, at least to some extent, the preventive nature of the EIA procedure.
55. In sum, the Party response does not provide information on the environmental planning efforts for the Project, nor does it directly address the assertions about the Project's environmental viability, leaving open central questions as to whether there was an appropriate adherence to applicable environmental law in the process leading up to the issuance of the Project's AIA.
56. A factual record may provide information on the preventive approach of the EIA procedure and its effective implementation throughout execution of the Section 5 South of the Tren Maya. Factual relevant information may include reports and accounts showing the implementation of measures (or lack thereof) applicable to the Project and specified in the provisional authorization and the AIA.
57. In view of all of the above, the Secretariat recommends the preparation of a Factual Record regarding the effective enforcement of Articles 5: Sections III, VIII and IX, and 28: Sections I and VII of the LGEEPA.

⁵⁶ Id. at Article 28: Sections I and VII.

⁵⁷ AIA, condition 5(b), p. 416.

⁵⁸ Id. at condition 5(d), p. 419.

⁵⁹ Id. at condition 5(e), p. 420.

⁶⁰ Id. at condition 7, p. 423.

⁶¹ Id. at condition 9, p. 424.

⁶² Id. at condition 10, p. 425.

⁶³ Id. at condition 11, p. 425.

ii) The lack of studies accompanying the environmental impact assessment

58. The Submitters contend that sufficient geophysical studies were not presented on soil mechanics and to adequately assess the totality of the environmental impacts resulting from the Project, and more specifically the risk of subsidence due to the fragility of the karst soil in the Yucatan Peninsula.⁶⁴ The Submitters provide evidence of previous studies to demonstrate the presence of a large number of fractures and faults along Section 5 South of Tren Maya that they assert creates a high level of fragility in the area in question.⁶⁵
59. In its response, the Party points out that the provisional authorization issued by the DGIRA provided for “preliminary feasibility studies and projects, including soil mechanics, topography, hydrological studies, site preparation, including the enforcement of programs for the rescue and relocation of flora and fauna, the field layout of the railroad axis, clearing, clearing, clearing, filling and leveling, among others.”⁶⁶
60. After analyzing the Party’s response, the Secretariat believes that there is not sufficient information on the existence of the appropriate environmental studies to evaluate the totality of the Project’s impacts under existing environmental laws. In any case, consulting the AIA confirms the assertion regarding the lack of studies prior to execution of construction work. For example, the authorization issued for the Project establishes conditions such as the development of geohydrological and geological studies to identify collapse zones;⁶⁷ a karst hazard assessment study,⁶⁸ and a program for prevention and mitigation of risks and potential ecological damage caused to the karst landscape, cenotes, caves, and caverns.⁶⁹ The foregoing, even though there was no access to the referenced studies, is consistent in principle with the assertion regarding the lack of environmental studies prior to the start of construction.
61. A brief analysis of the EIA reveals that further soil mechanics studies are needed to determine the suitability of the soil. For example, it is emphasized that the roofs of the caverns are very close to the surface⁷⁰ leads to the recommendation that to the weight of the loads be calculated prior to the start of construction.⁷¹ The EIA concludes:

...98.5 % of the surface [of the Regional Environmental Systems] is occupied by Leptosols soils and given that the route of the Tren Maya Section 5 South passes almost entirely through this type of soils, it implies a high complexity for its completion, since the Leptosols soils of the SAR due to their origin in limestone rocks present the phenomenon of karsticity that causes the subsoil rocks, such as gypsum, limestone and dolomites, to be dissolved by rainwater, causing the formation of caves, cenotes, sinkholes and shafts. When carrying out any type of construction, it is important to complete preliminary soil mechanics studies to determine if the location is suitable for the planned use.⁷²

⁶⁴ Submission, p. 13.

⁶⁵ Id. at p. 3.

⁶⁶ Response, § 10.

⁶⁷ AIA, condition 9, p. 424.

⁶⁸ Id. at condition 16, p. 434.

⁶⁹ Id. at condition 10, p. 425.

⁷⁰ EIA, chapter IV, p. 91.

⁷¹ Id. at p. 97.

⁷² Id. at p. 120.

62. The EIA also underscores the need for a monitoring system to determine the possible effects of the alteration of the subterranean flow, the hydrological continuity and interconnectivity of the system and points out that:

The alteration of the subterranean flow will be most affected during the construction process, at the time when the superstructure is installed, which necessarily requires the use of piles in areas with karst. The direct effect will be reflected in the reduction of the hydraulic section, in the case of subterranean rivers, which is expected to be mitigated with the recommendation to not alter a maximum of 40% of the hydraulic section, it will not be permitted for any reason to build a hydraulic barrier that affects the subterranean flow.⁷³

63. The technical opinion of the General Wildlife Directorate (*Dirección General de Vida Silvestre—DGVS*) of Semarnat on the environmental viability of Section 5 South of Tren Maya, included in the change in land use authorization, states that its execution will involve the removal of 4,131,900 m² of medium evergreen forest, which the EIA lists as a *critical adverse impact*.⁷⁴ It implies “the modification of a well-preserved habitat that serves about 741 species of wildlife, 208 of which are in some category of risk”⁷⁵ which the EIA lists as a *severe adverse impact*.⁷⁶ The DGVS urges the Promoter to conduct species search activities to reduce the impact of the work.
64. In its analysis of the EIA, the National Commission of Natural Protected Areas (*Comisión Nacional de Áreas Naturales Protegidas—Conanp*) pointed out that the area has one of the most important eogenetic karst cave and aquifer systems in the world, and stressed that the execution of the Project poses severe risks to the karst system,⁷⁷ listed in the EIA as a *severe adverse impact*.⁷⁸ Conanp emphasized that the Promoter would carry out “the necessary studies to determine the presence of cavities, sinkholes and caverns associated with this phenomenon [karst], to develop the most appropriate geotechnical solution with the least impact on the integrity of the [P]roject.”⁷⁹
65. After a preliminary review of documents appended to the response, the Secretariat notes the technical opinion of the National Commission for Knowledge and Use of Biodiversity (*Comisión Nacional para el Conocimiento y Uso de la Biodiversidad—Conabio*) included in the change in land use authorization:

It is foreseen that, in the future, the effects may go beyond the obvious loss of habitat, alteration, simplification and fragmentation, barrier effect and risk of fauna being run over. The complexity of the medium evergreen forest makes its regeneration difficult, even with restoration actions; and the fragility of the karst soil makes the consequences for the biological and human communities unpredictable, which could be *irreparable*. In this regard,

⁷³ Id. at p. 58-59.

⁷⁴ Id. at 35.

⁷⁵ DGVS, Technical Opinion of the General Wildlife Directorate, Official Document No. SPARN/DGVS/03501/22 (28 Oct. 2022), in: Change in Land Use Authorization, p. 43 [“DGVS Technical Opinion”].

⁷⁶ EIA, chapter 5, table 10, p. 35.

⁷⁷ Technical Opinion of the National Commission of Natural Protected Areas, Official Document No. FOO.9.DRPYyCM/UTCMR/252/2002 (8 June 2022), in: AIA, p. 255.

⁷⁸ EIA, chapter 5, table 10, p. 34.

⁷⁹ Technical Opinion of the National Commission of Natural Protected Areas, Official Document No. FOO.9.DRPYyCM/UTCMR/252/2002 (8 June 2022), in: AIA, p. 252.

it is advisable to consider that a feedback loop may occur in which the increase of the factors mentioned above may affect the tourist attractions of the region, which are precisely the landscapes of the region and its biodiversity.⁸⁰

66. Upon first review, —leading to the idea that more analysis is needed— the technical opinions of the DGVS, Conabio, and Conanp support the Submitters’ assertion regarding the alleged lack of studies prior to the start of construction of Section 5 South of Tren Maya. In this regard, the Party’s response does not provide information on the status of the studies and plans required by the AIA, nor does it clarify whether the conclusions of such studies led to any eventual modification of the Project. A Factual Record may provide relevant factual information on this matter.
67. A Factual Record may present information on the existence of various feasibility studies, including soil mechanics, topography, hydrological studies; flora and fauna studies and surveys; identification of collapse zones, risk mitigation and ecological damage to the karst landscape, among others. It may also provide information on the conservation, protection, and mitigation measures implemented by the Party for the potential effects of the execution of the Project.
68. In light of the foregoing, the Secretariat recommends the preparation of a Factual Record regarding the effective enforcement actions of Articles 5(III), (VIII), (XI); 15(XII); 28(I) and (VII) of the LGEEPA, and 5(I), 58: subsection a) of the LGVS, and 7 *bis*(I) and 14 *bis* 5(I), (IX) and (XX) of the LAN.

iii) The change in land use of forest land

69. The Petitioners state that the Project should have obtained prior change in land use authorization on forest land, which is only possible through the presentation of a technical justification study.⁸¹
70. In its response, the Party states that on 30 November 2021, the Promoter requested a provisional change in land use authorization for the project, which was issued by the General Directorate of Forestry and Soil Management of Semarnat on December 8th. The provisional authorization established the obligation to comply with applicable regulations and undertake environmental compensation,⁸² and included an illustrative list of prevention and mitigation measures that were proposed in the request.⁸³
71. Article 93 of the LGDFS states that:

The Ministry [Semarnat] may only authorize the change in land use of forest lands by exception, with the prior technical opinion of the members of the State Forestry Council in question and based on technical justification studies whose content will be established in the Regulations, which demonstrate that the biodiversity of the ecosystems that will be affected will be maintained, and that soil erosion, carbon storage capacity, deterioration of water

⁸⁰ Opinion of the National Commission for the Knowledge and Use of Biodiversity, Official Document No. SET/305/2022 (28 Oct. 2022), in: Change in Land Use Authorization, p. 46 (emphasis added) [“Conabio Technical Opinion”].

⁸¹ Submission, p. 6.

⁸² Response, § 31.

⁸³ Response, Annex MX-007: Semarnat, Undersecretary for Environmental Protection, General Directorate of Forestry and Soil Management, Official Document No. SGPA/DGGFS/712/2070/21 (8 December 2021).

quality or a decrease in water catchment will be mitigated in the areas affected by the removal of forest vegetation.

72. Article 97 of the LGDFS states that change in land use authorization may not be granted “in forest lands where the loss of forest cover was caused by fire, logging or clearing until 20 years have passed and the Secretariat [Semarnat] certifies that the affected forest vegetation has regenerated.”
73. The Party points out that the forest lands affected by the Project were evaluated through the Technical Justification Study for the Tren Maya Section V Phase I Cancun-Tulum, presented by the Promoter, and that a technical visit report was issued by the Semarnat representative office in Quintana Roo, as well as the opinions of the DGVS, Conabio, and the Ecological Management Directorate of the National Ecology Institute.⁸⁴ The Party also notes that the State Forestry Council issued a favorable opinion based on the information in the technical justification study.⁸⁵
74. With respect to the measures to comply with the requirement in Article 97 of the LGDFS, The Party points out that, in the case of the Project, the change in land use authorization was issued on land where the existing vegetation was catalogued as medium sub evergreen forest and secondary vegetation of medium sub evergreen forest, therefore the provision is not applicable.⁸⁶ However, it is not clear whether the works and activities of the Project (including the clearing works in forest lands where Section 5 South of Tren Maya will run) started before the corresponding change in land use authorization was issued.
75. When consulting the change in land use authorization, the Secretariat found that the DGVS technical opinion indicated that the technical study justifying the Project only sampled 0.84% of the affected area, which it considered “not very representative.” This opinion highlighted the representative bias of the wildlife sampling models; it indicated that the amphibian sampling was limited to certain areas, without considering that these species migrate to bodies of water that were not contemplated; severe impact on one of the species identified was observed;⁸⁷ the use of a single sampling technique without sufficient repetitions for reptiles; and it was noted that, with respect to birds, the technique used was insufficient to report the species present at the site and the need for maps with distribution patterns of endemic and resident bird species was underscored in order to establish mitigation measures.⁸⁸
76. For its part, Conabio stated that based on the results of the diversity analyses carried out in the Technical Justification Study, “it is not possible to affirm that the biodiversity in the ecosystems subject to land use change will be maintained,”⁸⁹ since such results are merely descriptive, but not useful to indicate changes in the future. Conabio states that the Promoter’s assertion that “...ecological continuity is not compromised,” is not sustainable and that it cannot “...be assured

⁸⁴ Response, § 38.

⁸⁵ Id. at § 39.

⁸⁶ Id. at § 40.

⁸⁷ This is the Yucatecan mushroom-tongued salamander (*Botiglossa yucatanana*), of which only one individual was identified. DGVS Technical Opinion, p. 41

⁸⁸ Id. at pp. 40-44.

⁸⁹ Conabio Technical Opinion, p. 44-47.

that this request for a change in land use complies with the provisions of Article 93 of the LGDFS....”⁹⁰ Conabio adds:

One of the most serious effects of the project, in addition to the change in land use for the construction of infrastructure, is the fragmentation of the habitat, which in the medium and long term will result in the loss of biodiversity due to the isolation of wildlife populations....

For many species, transportation routes exert an important barrier effect on interpopulation mobility...Although transportation routes are not an insurmountable barrier for big cats, they have proven to be a danger to the ability to maintain their populations....⁹¹

77. Conabio emphasized that:

A program focused only on reforestation may not recover the structure and complexity of the plant community, so an ecological restoration approach should be sought...Likewise, it is not possible to understand the extent of the soil conservation and reforestation program, as it is not very detailed...⁹²

78. A factual record may present information on the actions taken by The Party to ensure effective enforcement of Article 93 of the LGDFS. In particular, it may shed light on whether there was sufficient information to determine whether the execution of the Project would compromise ecological continuity, water quality or water availability, among other elements, as a result of the removal of forest vegetation.

79. In light of the foregoing, the Secretariat recommends the preparation of a Factual Record regarding the effective enforcement of Article 93 and 97 of the LGDFS, as well as Articles 7 *bis*: Section I and 14 *bis* 5: Sections I, IX and XX of the LAN, regarding the possible impact on water resources as a result of the change in land use of forest lands.

iv) The alleged fragmentation of environmental impact assessment

80. The Submitters assert that there is an “*undue division or fragmentation of the Tren Maya megaproject* for the evaluation;”⁹³ of its environmental impact. They point out that the Tren Maya covers five states of the country and that its sections (divisions or fragments) have an intrinsic and dependent relationship with each other; that in this case, it is especially important due to the presence of fragile ecosystems of high environmental value; they affirm that that these ecosystems serve as habitat and refuge for various species including the jaguar and the spider monkey; that it is necessary to carefully evaluate the impacts of the megaproject to protect the environment and biodiversity of the region.⁹⁴

81. In its response, the Party indicates that the evaluation by sections was based on the magnitude of the lengths and areas affected by each one of them, as well as the number of states and municipalities that the Tren Maya will cross through, and the size of each of the Regional Environmental Systems (*Sistemas Ambientales Regionales*—SAR) delineated for each section, as indicated below:⁹⁵

⁹⁰ Id.

⁹¹ Id.

⁹² Id. at p. 51.

⁹³ Submission, p. 11 (emphasis in original).

⁹⁴ Id. at pp. 11-12.

⁹⁵ Response, § 50.

Sections	Length (km)	Surface area (ha)	Number of states	Number of municipalities	SAR area
Phase I	638.81	2,668.26	4	25	13,817.96 km ²
Section 4	239.538	1,437.228	2	11	9,371.83 km ²
Section 5 North	43.575	292.320	1	3	1,685.38 km ²
Section 5 South	67.667	516.758	1	2	1,891.31 km ²
Section 6	255.50	1,505.04	1	4	1,271,269.08 ha
Section 7	255.36	1,163.65	2	3	11,393.67 km ²

Source: Response, p. 12.

82. The Tren Maya project is divided into 7 sections and has a total length of approximately 1,460 km; it will cross the states of Chiapas, Tabasco, Campeche, Yucatan, and Quintana Roo; and will have 18 stations.⁹⁶ The Party argues that submitting a single EIA for the entire Tren Maya project “would have led to a more general description and characterization that would have obscured important environmental processes and features that appear on a smaller scale....”⁹⁷ In any case, the Party argues that evaluating the work by section makes it possible to avoid methodological errors.⁹⁸ The Party argues that each section of the Tren Maya corresponds to a SAR that is “quite extensive...delineated for each case in order to identify and evaluate the potential cumulative impacts to be generated in the regional context.”⁹⁹
83. The Party states that the sections of the Tren Maya project were divided “based on environmental, technical, regulatory and anthropogenic criteria, according to the nature and dimensions of the project, as well as the influence of the potential environmental impacts to be generated” which guaranteed that works and activities were taken into account in each SAR.¹⁰⁰ However, it is not evident that the division of Tren Maya into sections was in accordance with the defined SARs through which the infrastructure crosses. At least, this could not be seen in the project justification in the documents provided by the Party in its response. In any case, the fragmentation of the environmental impact assessment of the Tren Maya by sections seems to respond to the need to authorize the construction works to guarantee its timely execution.¹⁰¹
84. The Secretariat notes that the fragmentation of the impact studies for the Tren Maya does not explain the fact that it will be developed in the large ecoregion of the warm-humid rainforest that extends across the five states. This approach fails to consider cumulative, synergistic, and

⁹⁶ Fonatur, “Information on the Tren Maya Project,” National Tourism Promotion Fund (*Fondo Nacional de Fomento al Turismo*) available at: <<http://bit.ly/3ZM7qsH>>.

⁹⁷ Response, § 51.

⁹⁸ Id. at § 52.

⁹⁹ Id. at § 54.

¹⁰⁰ Id.

¹⁰¹ *Cfr.* National Security Agreement, Second Article (“The agencies and entities of the Federal Public Administration are instructed to grant the provisional authorization...and thereby guarantee its timely execution, the expected social benefit and the exercise of the authorized budgets.”).

residual impacts on the biodiversity of the flora and fauna of the biological corridors present in this large ecoregion. By dividing the EIA into different sections, the assumption is made that each section is independent and that their effects will remain isolated, without affecting the SAR in neighboring sections.

85. Given that the Tren Maya is a single, continuous, and interconnected large project, there are common elements that are not shown in the project's corresponding environmental documentation (fragmented into sections). It is a single infrastructure that has no interruptions along the 1,460 km of tracks, which will cross biological corridors of interconnected habitats and species. For example, the EIA cites the jaguar, a species that ranges from eastern Yucatan to the coast of Quintana Roo and Chiapas and is present in a large part of the proposed sections of the Tren Maya. In this regard, the EIA recognizes that because of its distribution "from Mexico and throughout South America" and "due to its role as an apex predator," this feline has a significant effect on the ecosystem, controlling herbivore and mesopredator populations.¹⁰² The EIA states that:

This species has generally been used as a keystone, flag and/or umbrella species in different countries and geographic areas. In addition to its ecological importance, its populations are at risk of disappearing, which is why its conservation status is reported as endangered.¹⁰³

86. This illustrates the existence of components common to the entire area affected by the proposed infrastructure that were not considered in an holistic manner. While this is a complex task, it would have allowed for comprehensive planning regarding the impacts of the proposed infrastructure.
87. The Secretariat believes that the response offered by the Party does not comprehensively address the elements of central concern for the Submitters: that the Party has avoided producing a comprehensive examination of the environmental impacts of the Tren Maya project, fragmenting the project analysis into phases or sections that are evaluated separately, overlooking the magnitude of the cumulative impacts.¹⁰⁴ The effects of the Tren Maya are not limited to each SAR, but become relevant due to the magnitude and complexity of processes in the megaproject as a whole. A similar issue was analyzed by the Secretariat in the *Cozumel* submission, for which the Council instructed the Secretariat to prepare a Factual Record. The Secretariat recommend to consider:

All the information provided and the relevant information that leads to clarify and identify facts about whether the failure to date to require the Environmental Impact Assessment of all the works that make up the Port Terminal constitutes an omission in the effective enforcement of the environmental legislation by the Mexican authorities, considering, among other aspects,...the facts about whether all the works that make up the Terminal have been authorized....¹⁰⁵

88. A Factual Record would help the public to understand the implementation of the EIA process when a project is divided and executed in phases and would shed light on whether, in this particular case, the fragmentation did indeed allow a better assessment or whether, on the

¹⁰² EIA, chapter IV, p. 335.

¹⁰³ Id.

¹⁰⁴ Submission, pp. 11-12.

¹⁰⁵ SEM-96-001 (*Cozumel*), Article 15(1) Notification (7 June 1996), p. 4.

contrary, important elements are omitted in the consideration of the environmental impacts of Tren Maya.

89. Therefore, the Secretariat recommends the preparation of a Factual Record regarding the effective enforcement of Articles 5: Sections III, VIII and IX, and 28: Sections I and VII of the LGEEPA in relation to the alleged fragmentation of the environmental impact assessment of the Tren Maya project.

v) Access to environmental information

90. The Submitters assert that the information related to the environmental impact assessment procedure of the Project is not available to the public. They claim that the provisional environmental impact and change in land use authorizations “are not available to the public, so the public does not have access to their content.”¹⁰⁶ They make the same assertion regarding the AIA and contend that it is also “not available to the general public.”¹⁰⁷
91. It should be noted that the AIA for the Project is available on the Semarnat's consultation portal, with the code 23QR202222V0020, which is the identifier that was assigned to the Project when the corresponding EIA was filed.¹⁰⁸
92. In its response, the Party states that on 18 May 2022, the DGIRA published the EIA for the Project in a list of applications submitted to the EIA procedure in the *special* Ecological Gazette no. DGIRA/22/22 and on the Semarnat website.¹⁰⁹ Similarly, the Party states that on May 19th a person who had requested access to the EIA was informed that the EIA-R for the Project would be available for public consultation from 23 May to 17 June 2022 at the Semarnat offices in the state of Quintana Roo. Additionally, the beginning of the public consultation was announced through a publication in the Ecological Gazette¹¹⁰ and an excerpt of the Project was published in two newspapers of national circulation.
93. Article 34 of the LGEEPA establishes that once an EIA is received and the respective file is integrated, Semarnat must make it available to the public. The information in the response highlights that the EIA-R was publicly available for 20 working days at the local Semarnat offices in Quintana Roo.
94. The Secretariat believes that the Party's response addresses the concerns raised by the Submitters regarding effective enforcement of Article 34 of the LGEEPA, since the EIA was made available to the public; a public consultation process for the Project was conducted, and it was possible to consult the relevant AIA.
95. Regarding the lack of public access to the provisional environmental impact and change in land use authorizations referred to in the submission, it should be noted that these are instruments (the provisional authorizations) that are not regulated by the LGEEPA nor by its Regulation on

¹⁰⁶ Submission, p. 8.

¹⁰⁷ Id. at p. 10.

¹⁰⁸ Processing of the EIA-R for the project “Tren Maya Section 5 South,” code number 23QR202222V0020, available at: <<https://bit.ly/40a5wCl>>. Semarnat's portal to consult proceedings in process is available at: <<http://bit.ly/3nDP2EP>>.

¹⁰⁹ Response § 15.

¹¹⁰ Id. at § 16.

Environmental Impact Assessment (REIA). Therefore, it is not appropriate to consider the Submitters' assertion in relation to Article 34 of the LGEEPA in a factual record.

96. For the above reasons, the Secretariat determines not to recommend the preparation of a Factual Record regarding the effective enforcement of Article 34 of the LGEEPA.

vi) Alleged lack of Profepa enforcement actions

97. The Submitters assert that the Federal Attorney General's Office for Environmental Protection (Profepa) "has not exercised its constitutional and legal powers and obligations to inspect, order safety measures and, in due course, sanction and order the repair of the damages caused..."¹¹¹ They claim that on 28 February 2022, "inhabitants of the town of Playa del Carmen, municipality of Solidaridad, Quintana Roo, detected the execution of clearing works" and point out that despite the evidence of the facts, the authority has not completed the necessary steps to avoid irreparable damage.¹¹² The Submitters assert that the preparation of a factual record could clarify the environmental law enforcement process and facilitate citizen participation in environmental decision-making accountability.¹¹³
98. As noted in paragraph 33 above, the Party reports that 37 citizen complaints were filed on 7 March 2022 and another six were filed on 16 August 2022.¹¹⁴ The Party notes that these complaints are included in file No. PFPA/5.3/SC.28.2/00011-20 initiated by Profepa,¹¹⁵ and that on 17 March and 23 August of 2022, the complaints were sent to the Profepa's Office of the Deputy Attorney General for Natural Resources "so that they could be considered in the inspection actions to be conducted."¹¹⁶
99. The provisions of the LGEEPA cited in the submission establish the citizen complaint procedure through which any person or organization may file a complaint before the Profepa or local authorities regarding acts that cause ecological imbalance or damage to the environment; it provides for the performance of inspection and surveillance activities; it allows for the cooperation of the complainants with the Profepa, and the possibility that academic institutions may conduct studies and expert opinions that are the subject of the complaint. In addition, the environmental law cited in the submission allows the imposition of urgent enforcement measures for matters of environmental impact and change of use of forest land, and the filing of liability actions for harm to wildlife and its habitat.
100. The Party's response does not make it possible to determine whether administrative proceedings have been implemented as a result of the complaints, nor whether urgent enforcement measures have been imposed to date. According to the Party, it is implementing the "Tren Maya Inspection Program in the areas of Environmental Impact, Forestry, Wildlife, and Sources of Pollution"¹¹⁷ and the complaints would be taken into consideration in the inspection

¹¹¹ Submission, p. 4.

¹¹² Id. at p. 9.

¹¹³ Id. at p. 4.

¹¹⁴ Response, § 56-57.

¹¹⁵ Id. at § 56.

¹¹⁶ Id. at § 58.

¹¹⁷ Id. at § 59.

actions for sections 1, 2, 3 and 4 of the megaproject, but there is no information that points to enforcement actions with respect to the section corresponding to the Section 5 South.¹¹⁸

101. The effective implementation of the citizen complaint mechanism established in the LGEEPA is relevant because it allows any person to report acts that cause damage to the environment, which encourages citizen participation in the protection and conservation of the natural environment. In addition, this mechanism promotes transparency and accountability on the part of the authorities, since it obligates them to investigate the complaints received and to take measures to protect the environment and sanction the alleged offenders. In this regard, in its determination on the *Tarahumara* submission the Secretariat considered that “effective enforcement by the environmental authority of the citizen complaint procedure is fundamental to encourage and promote citizen participation in environmental protection.”¹¹⁹
102. A Factual Record could present information on the implementation of the citizen complaint mechanism as a mechanism to guarantee the protection and conservation of the environment with respect to the execution of the Project.
103. In conclusion, the Secretariat recommends the preparation of a factual record on the effective enforcement of Articles 162, 170, 189, 192, 193 and 194 of the LGEEPA, and 154 and 155: Sections VII and XII of the LGDFS and 107 of the LGVS.

III. NOTIFICATION

104. Having examined submission SEM-22-002 (*Tren Maya*) in light of the response from the United Mexican States, the Secretariat finds that there are open central questions regarding the environmental impact assessment process associated with the construction of Section 5 South of Tren Maya and the implementation of the citizen complaint mechanism in this context, and recommends the development of a Factual Record regarding the effective enforcement of the provisions listed below:
 - (i) Articles 5(III), (VIII), (XI); 28(I), (VII) of the LGEEPA on the preventive nature of the environmental impact assessment procedure of the Project;
 - (ii) Articles 5(III), (VIII), (XI); 15(XII); 28(I), (VII) of the LGEEPA, and 5(I), 58: Subsection a) of the LGVS, and Articles 7 *bis*(I); 14 *bis* 5(I), (IX), (XX) of the LAN regarding the alleged lack of environmental studies;
 - (iii) Articles 93 and 97 of the LGDFS and Articles 7 *bis*(I); 14 *bis* 5(I), (IX), (XX) of the LAN in relation to the change in land use of forest land;
 - (iv) Articles 5(III), (VIII), (XI); 28(I), (VII) of the LGEEPA regarding the alleged fragmentation of the environmental impact assessment of the Tren Maya project;
 - (v) Articles 162, 170, 189, 192, 193 and 194 of the LGEEPA, and 154 and 155(VII), (XII) of the LGDFS and 107 of the LGVS regarding the implementation of the citizen complaint procedure.

¹¹⁸ *Cfr.* Id.

¹¹⁹ SEM-00-006 (*Tarahumara*) Notification based on Article 15(1) (29 August 2002) p. 13, at: <https://bit.ly/ADV-00-006es>.

105. Pursuant to Article 24.28(1) of the USMCA/CUSMA, the Secretariat notifies the CEC Council and the USMCA/CUSMA Chapter 24 Environment Committee of its determination that, in furtherance of the objectives of Chapter 24 of the USMCA/CUSMA,¹²⁰ development of a factual record is warranted regarding submission SEM-22-002 (*Tren Maya*).
106. Pursuant to USMCA/CUSMA Article 24.28(2), the Secretariat “shall develop the factual record if directed to do so by at least two members of the Council.”

Respectfully submitted for your consideration,

Secretariat of the Commission for Environmental Cooperation
(*original signed*)

By: Jorge Daniel Taillant
Executive Director

ccp: Miguel Ángel Zerón, alternate representative of Mexico.
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Submitters

Annex: Environmental Laws in Question.

¹²⁰ USMCA, Article 24.2(2): “The objectives of this chapter are...to promote high levels of environmental protection and effective enforcement of environmental laws....”