
Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation

Submitter(s):	<i>Instituto de Derecho Ambiental, A.C. et al</i>
Concerned Party:	United Mexican States
Date received:	9 January 1998
Date of the determination:	13 September 1999
Submission I.D.:	SEM-98-001

I. PROCEDURAL HISTORY

On 9 January, 1998, the Institute for Environmental Law (*Instituto de Derecho Ambiental, A.C.*) together with some of the citizens affected by the explosions of 22 April 1992 in the Reforma sector of the City of Guadalajara, Jalisco, Mexico (the Submitters), filed a submission with the Secretariat of the Commission for Environmental Cooperation (Secretariat) under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC or Agreement). The Secretariat now reviews the submission pursuant to Article 14(1) of the NAAEC.

II. SUMMARY OF SUBMISSION

The Submitters allege that Mexico has failed to effectively enforce its environmental law with regard to the explosions of 22 April 1992 in the Reforma sector of the City of Guadalajara, Jalisco, Mexico. The Submitters indicate that the incident occurred as the result of the presence of hydrocarbons and other highly explosive substances in the underground sewer of the Reforma sector of Guadalajara. According to some official reports cited by the Submitters, the explosions killed 204 people, injured 1,460 people and destroyed or caused major damage to 1,148 buildings, approximately.¹

The Federal Attorney General's Office (*Procuraduría General de la República*) initiated criminal proceedings against nine allegedly responsible individuals for manslaughter, injuries

¹ The Submitters question the accuracy of the official data and point out certain inconsistencies. Page 3 of the submission.

caused by negligence, damage to property, damage to streets and communications, inappropriate exercise of authority as a public servant and the one provided for in the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*- LGEEPA).² The submission asserts that there have been violations of the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos*) with respect to Articles 14, 16, 19, 20 and 21; of Articles 182 to 188 of the LGEEPA; of Articles 6 to 11 and 18 of the Federal Criminal Code (*Código Penal Federal*); of Articles 1, 2, 4, 10, 41, 134, 135, 136, 138, 141, 144, 146, 292, 298, 299 of the Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*); and of Articles 5 (1)(j)(l), 6 and 7 of the NAAEC.

While the Submitters make a number of assertions, their primary argument under Article 14 of the NAAEC, and the one we focus on in the analysis below, is that the Federal Attorney General's Office and the Federal Judiciary of Mexico (*Poder Judicial de la Federación*) failed to effectively enforce the LGEEPA by issuing a stay of proceedings with the force of *res judicata* in the criminal case arising from the aforementioned explosions, because they believe that such procedural action impeded any further investigation of the incident. The Submitters' other arguments, notably that justice has been denied because no investigation was ever conducted regarding environmental control, use of hazardous substances, release of said substances into the sewer system, and prevention measures and maintenance in those facilities, are not supported by references to particular environmental laws that presumably obligated the government to undertake such activities and for that reason we do not review them here.

III. ANALYSIS

Under Article 14(1) of the NAAEC, the Secretariat may

“...consider a submission from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;

² Page 6 of the submission.

- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party."

The threshold requirement that the submission "assert(s) that a Party is failing to effectively enforce its environmental law" is of special relevance in determining whether this submission meets the criteria for the Secretariat to review it. This document addresses this preliminary issue as the basis for the Secretariat's determination. The analysis then refers to the allegations by the Submitters with regard to Articles 5, 6 and 7 of the NAAEC.

1) Environmental law

This section is an analysis of the legal provisions that the Submitters allege Mexico has failed to enforce effectively, grouped under the following headings: allegations related to criminal procedure and allegations related to environmental crimes. For the purpose of this analysis, the starting point should be the definition provided in the Agreement itself. In Article 45(2), the NAAEC defines "environmental law" as the legal provisions of a Party the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health.³ The legal provisions cited in a submission must meet this definition in order for the Secretariat to review them within the process established by Article 14 of the Agreement.

³ "For purposes of Article 14(1) and Part Five:

- (a) **"environmental law"** means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:
 - (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
 - (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
 - (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas

in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
- (b) For greater certainty, the term "environmental law" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
- (c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part".

a) *Allegations Related to Criminal Procedure*

As mentioned above, the definition of “environmental law” in the Agreement requires that the primary purpose of the provisions regarding which a failure to effectively enforce is alleged must be the protection of the environment or the prevention of a danger to human life or health from environmental pollutants or hazardous substances. A simple reading of Articles 14, 16, 19, 20 and 21 of the Mexican Constitution; Articles 6 to 11 and 18 of the Federal Criminal Code; and Articles 1, 2, 4, 10, 41, 134, 135, 136, 138, 141, 144, 146, 292, 298, 299 of the Federal Code of Criminal Procedure, clearly shows that their primary purpose is to establish due process requirements and to regulate criminal procedure.⁴ Thus, the Secretariat is not authorized to review the allegations of the Submitters of a failure to effectively enforce such provisions. Because they are not environmental law under Article 45(2) of the Agreement, these legal provisions are beyond the scope of the submission process under Article 14 of the NAAEC.⁵

b) *Allegations related to environmental crimes*

Unlike the foregoing, it is clear that provisions specifying environmental crimes are, by virtue of their primary purpose, “environmental law” under the definition in Article 45(2) of the NAAEC. These provisions sanction violations of mandatory prevention and control measures that may harm human life or health and the environment.⁶

⁴ For example, Article 14 of the Mexican Constitution provides that “No law shall be applied retroactively against any person. No-one may be deprived of life, liberty or property, goods or rights except through due process before previously established courts of law...” (free translation)

⁵ The Submitters also allege that there is a correlation between the procedural provisions they cite and Articles 5, 6 and 7 of the NAAEC. Notwithstanding the clear intention of the NAAEC to promote strengthening of government measures for enforcement, procedural guarantees and access to legal remedies, the Secretariat considers that the definition of “environmental law” for the purposes of Article 14 of the NAAEC only includes procedural provisions, when their primary purpose is environmental in nature. That is not the case here.

⁶ For example, Article 415 of the Federal Criminal Code states that “A prison term of three months to six years and a fine of the equivalent of one thousand to twenty thousand days of the current general minimum daily wage in the Federal District shall be imposed upon whoever: I Without authorization of the competent federal authorities or in violation of the terms under which it was granted, undertakes any activity with hazardous materials or wastes that causes or may cause harm to public health, natural resources, fauna, flora or ecosystems...” (free translation)

We point out at the outset that there is some uncertainty concerning whether any environmental law applies to the 1992 incident and the enforcement of that incident. There is also some uncertainty as to which environmental law applies, if one does. The reason for this uncertainty is that Articles 183 to 187 of the LGEEPA that covered environmental crimes at the time of the explosions, and that are cited by the Submitters, were revoked on 13 December 1996.⁷ Based on Article 117 of the Federal Criminal Code, which provides that the law suppressing a type of offense extinguishes the right of action, it could be alleged that prosecution for these offenses is no longer possible. From the opposite view, it could be argued that the type of offense has not been suppressed because the environmental crimes were incorporated into the Federal Criminal Code in Articles 414 to 423 simultaneously to their being suppressed from the LGEEPA. However, the constitutional principle that prohibits the retroactive application of a law against any person would seem to prevent the application of criminal provisions established in 1996 to events that took place in 1992. As a final point, it could be argued that there is no legislative intention to cease penalizing such conducts as crimes, but rather it is clear that society maintains its interest in sanctioning them, so what would be unconstitutional is to prevent prosecution of the crimes previously covered by the LGEEPA, by retroactively applying the revocation Decree against the interest of society.

In short, as regards the scope of the Article 14 process, the Secretariat considers that the provisions cited by the Submitters related to criminal procedure are not environmental law for the purpose of Article 14 of the NAAEC. As for the environmental crimes cited by the Submitters, their content meets the definition of environmental law. However, because we believe that the submission should be dismissed on other grounds, we do not discuss further the issue of the applicability of the revoked Articles 183 to 187 of the LGEEPA, but simply note that there is an unresolved question concerning the identity of the environmental law that covers the incident that is the subject of the submission.

We now turn to the key substantive assertion of the submission and explain why we are not persuaded that this assertion merits continued consideration under Article 14 of the NAAEC. The submission argues that a failure to effectively enforce environmental law took place in early 1994, when a stay of proceedings was issued and confirmed with regard to the prosecutions related to the 1992 explosions. The Submitters argue that staying the criminal proceedings with the force of *res judicata*, barred any further investigation of the incident, as well as the identification and punishment of whoever was responsible for the incident; in other words, that the effective enforcement of environmental law with regard to the incident of 1992 was thereby impeded.

The fact that the explosion itself occurred in 1992 raises a temporal issue. Pursuant to both Article 14 of the NAAEC, and the *Vienna Convention on the Law of Treaties*, the process of reviewing submissions on effective enforcement of environmental law shall not be applied retroactively. Article 28 of the 1969 Vienna Convention on the Law of Treaties stipulates that

⁷ The second transitory Article of the Reform Decree published on December 13, 1996 in the Official Gazette of the Federation (*Diario Oficial de la Federación*) states that “Articles 183 to 187 of the General Law on Ecological Equilibrium and Environmental Protection, Article 58 of the Forestry Law, and Articles 30 and 31 of the Federal Hunting Law are hereby revoked.” (free translation)

“unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that party”.

The Secretariat interprets Article 14 of the NAAEC as requiring that the failure to effectively enforce environmental law argued in a submission take place while the Agreement is in force. It is not required that the events referred to by the Submitters in their allegations occurred after 1st January 1994, when the NAAEC entered into force. However, if they took place before, there needs to have been a failure to effectively enforce environmental law after 1st January 1994 in order to be considered in the review of a submission. The Submitters claim that this is the case here -- that when the Agreement entered into force, the authorities had the power and the responsibility to prosecute environmental crimes related to the explosions of 22 April 1992. Although the Secretariat is not governed by the principle of *stare decisis* in making its determinations, it should be mentioned that in previous determinations it has stated “...the possibility that a present duty to enforce may originate from, in the language of the Vienna Convention, a situation which has *not* ceased to exist...”⁸

It is important to highlight the precise nature of the Submitters' assertion here. The Submitters' assertion, at least as we understand it, is that the dismissal of the case against the nine charged individuals operated as *res judicata* legally to prevent the Party from further investigating the incident or from bringing charges against other culpable parties. Based on our understanding of Mexican law, this assertion is incorrect. It is our understanding that the only legal effect of *res judicata* in this case was to terminate that particular criminal proceeding and to prevent a new trial of the same individuals for the same offenses. The termination of the proceeding did not have the legal effect of barring further investigation of the facts, nor did it impede initiating new proceedings against others presumably responsible. Thus, following dismissal of the case the Party retained the ability to investigate the incident and pursue legal action against other allegedly culpable parties. As a result, the assertion that the dismissal of this criminal proceeding in itself constitutes a failure to enforce does not merit further consideration under Article 14 of NAAEC because it did not prevent enforcement action in the way the Submitters apparently believe it did.

We note that we do not address in this Determination two apparently related questions. First, there is the issue of whether the dismissal is potentially a failure to enforce with respect to the nine individuals initially charged. The Submitters do not raise this issue as far as can tell and we do not address it. Similarly, the Submitters do not raise and we do not address the issue of whether failing to prosecute other individuals constitutes a failure to enforce.

⁸ From SEM-96-001, Recommendation of the Secretariat to Council for the development of a Factual Record in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 7 June 1997. See also SEM-97-001, Notification of the Secretariat to Council of the reasons why it considers the development of a factual record is merited in accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation, 27 April 1998.

2) *Allegations related to the NAAEC*

The Submitters also cite Articles 5 (1)(j)(l), 6 and 7 of the NAAEC, related respectively to government action for the enforcement of environmental laws and regulations, private access to remedies and procedural guarantees. The Secretariat's view is that, as a general matter, to the extent that these articles create obligations on the part of the Parties (Canada, Mexico and the United States)⁹ the remedy provided under the Agreement for a Party's purported failure to fulfill its obligations lies with the other Parties. Article 14 of the NAAEC provides the exclusive process for nongovernmental organizations and individuals relating to allegations that a Party is not effectively enforcing its environmental laws. Only if an individual or nongovernmental organization could seek enforcement of Articles 5(1)(j)(l), 6 and 7 of the NAAEC under the domestic legal regime of a Party would these provisions be potentially susceptible to a submission under Article 14 of the Agreement. Because the Submitters do not indicate that they have sought enforcement of Articles 5(1)(j)(l), 6 and 7 of the NAAEC under the domestic legal regime of the Party or communicated that matter to the Party, we cannot conclude that the allegations that those provisions are not being enforced effectively satisfy the criteria under Article 14(1) of the Agreement.

In short, the Secretariat considers that the allegations that Articles 5(1)(j)(l), 6 and 7 of the NAAEC have not been enforced effectively, do not satisfy the criteria under Article 14(1) of the Agreement.

⁹ For example, the first paragraph of Article 5 of the NAAEC states that “With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate government action, subject to Article 37...”

IV. SECRETARIAT DETERMINATION

The Secretariat has reviewed the Submission in accordance with Article 14(1) of the NAAEC, and considers that it does not meet the criteria established therein because, among other considerations, the submission fails to connect the incident with a violation of applicable environmental law. For the reasons set out above, the Secretariat cannot conclude with certainty that the failures indicated by the Submitters in this submission are failures to effectively enforce applicable Mexican environmental law incurred by the Party during the legal force of the Agreement.

Pursuant to Section 6.1 of the Guidelines, the Secretariat notifies the Submitters that it will not further review the submission. However, in accordance with Section 6.2 of the Guidelines, the Submitters have 30 days from the receipt of this determination to provide the Secretariat with a submission that meets the criteria of Article 14(1) of the NAAEC.

Secretariat of the Commission for Environmental Cooperation

(Original in Spanish signed)

per: David L. Markell

Head, Submissions on Enforcement Matters Unit

cc. Ms. Janine Ferretti, CEC Executive Director