

***North
American
Environmental
Law and Policy***



COMMISSION DE
COOPÉRATION ENVIRONNEMENTALE
COMISIÓN PARA LA
COOPERACIÓN AMBIENTAL
COMMISSION FOR
ENVIRONMENTAL COOPERATION

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North American Environmental Law and Policy

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PROFILE

In North America, we share vital natural resources including air, oceans and rivers, mountains and forests. Together, these natural resources are the basis of a rich network of ecosystems that sustain our livelihoods and well-being. If they are to continue being a source of future life and prosperity, these resources must be protected. Protecting the North American environment is a responsibility shared by Canada, Mexico and the United States.

The Commission for Environmental Cooperation (CEC) is an international organization whose members are Canada, Mexico and the United States. The CEC was created under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts and to promote the effective enforcement of environmental law. The Agreement complements the environmental provisions established in the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the highest-level environmental authorities from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of fifteen citizens, five from each of the three countries, and advises the Council on any matter within the scope of the agreement.

MISSION

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States.

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FOREWORD

This two-volume compendium contains work undertaken over the past three years by the Commission for Environmental Cooperation (CEC) in the areas of environmental law and policy. Most of the contributions have not previously appeared in print or else have heretofore been available only in electronic form.

The CEC's work in environmental law and policy is best understood by reference to the particular goals and objectives of the relevant provisions of the North American Agreement on Environmental Cooperation (NAAEC), the environmental side accord to the North American Free Trade Agreement (NAFTA). For example, the contribution, "Transboundary Environmental Impact Assessment in North America," was prepared as a background paper for intergovernmental discussions to implement Article 10(7) of NAAEC, which commits the parties to consider a process for conducting such assessments. "Voluntary Compliance Initiatives in North America" responds to multiple articles of NAAEC, including the obligation imposed by Article 5 to enforce environmental laws effectively.

Briefly considering examples from the wide range of CEC-engendered cooperative activities provides a useful framework for viewing the spectrum of the Commission's environmental legal work. At one end are projects exploring the views and positions of the three NAFTA countries or that simply provide information on policy and practice regarding a specific issue. By stimulating an informed and open dialogue, the CEC enables the Parties and the public to develop a fuller appreciation of a particular environmental policy, approach, or practice. For instance, the program, "Dialogue on Environmental Law," exemplifies a CEC project designed to stimulate debate by exchanging information on the most recent trends and developments in North American environmental law. Similar public information and educational purposes are served by making environmental laws and regulations in each country available on-line at no cost through the CEC Comparative Law Database. Other activities seek to identify common positions in the

hopes of proposing joint or coordinated action. As examples, the CEC has sponsored training and capacity-building programs for the enforcement branches of the NAFTA countries to reduce illegal trade in wildlife, improve the tracking of transboundary shipments of hazardous waste, and set up an information-sharing network to stem the illegal trafficking in chlorofluorocarbons.

At the opposite end of the spectrum, the Parties may also seek to formalize agreements or actions as binding legal instruments, or "formal regimes." As an example of these formal regimes, the Parties agreed at the 1997 CEC Council meeting in Pittsburgh to conclude a binding international instrument in 1998 on transboundary environmental impact assessment. Other Council resolutions mandating a broad variety of study areas in the program of work approach this level of legal formality.¹

The fact that the CEC has undertaken a wide range of activities and projects is indicative of the rapid maturation of the organization which, in the course of its growth, has accelerated and deepened the level of cooperation on environmental matters of concern throughout the region.

The work contained in this compendium reflects the considerable efforts of the contributing authors, government working group members, as well as program staff of the CEC Secretariat who, introduced alphabetically, were Beatriz Bugeda, Head, Mexico Office; Linda Duncan, Head, Law and Enforcement Cooperation; and Marc Paquin, Council Secretary and Program Manager, Special Legal Projects and Procedures. The materials in these two volumes were prepared under the direction of CEC Director, Greg Block. Special mention is also in order for the advice and counsel of the CEC Special Legal Advisors: Professor Alastair Lucas and Bryan Williams,² the latter now replaced by Professor Lorne Giroux (Canada); Lic. Carlos Bernal and Lic. Loretta Ortiz Ahlf (Mexico); and Professors Edith Brown Weiss and Stephen McCaffrey (United States).

Victor Lichtinger
CEC Executive Director

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1. Examples include regional action plans developed under the Sound Management of Chemicals project and Council resolution 97-04 on the Pollutant Release and Transfer Registers.
 2. Bryan Williams was appointed to the Court of Appeal of British Columbia in 1995.

PREFACE

In the span of a few decades, North American environmental law has evolved into a rich and textured tapestry of law and policy – distinguished by its considerable scope and complexity, enriched by the diversity of its state and provincial practice. Environmental law in each of the countries of North America retains its unique national and local features, rooted in our individual civil and common law traditions. Yet one can observe that the regional convergence of environmental policies is accelerating, impelled by a better scientific understanding of our ecological interdependencies and an increasing number of international environmental instruments. Regional environmental policies are also drawn together by more uniform and extensive rules of liberalized trade. As economic and institutional integration bring once distant systems into closer contact, region-wide currents and trends in environmental law and policy ripple through North America with increasing frequency.

Environmental law and policy play a prominent role in the North American Agreement for Environmental Cooperation (NAAEC), the environmental side accord to the North American Free Trade Agreement (NAFTA), and the Commission for Environmental Cooperation (CEC), the body created by NAAEC.¹ Given the importance of effective environmental governance in the region, and considering the opportunities for public participation afforded by NAAEC, the CEC constitutes a unique regional forum to stimulate discussion on the regional implications of emerging trends and developments. Indeed, to further the NAAEC objective of strengthening cooperation in the region,² the CEC

1. Article 1 lists among the objectives of NAAEC: (f) to strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices; (g) to enhance compliance with, and enforcement of, environmental laws and regulations; and (h) to promote transparency and public participation in the development of environmental laws, regulations, and policies.

The NAAEC includes a number of provisions addressing both procedural and substantive matters relevant to environmental law. See, e.g., Article 2:7. Collectively, these provisions constitute a solid foundation upon which to build an equitable and participatory environmental legal regime.

2. See NAAEC Article 1(f), quoted in fn. 1, above.

must do all it can to understand the impact and effect of significant changes in environmental law throughout North America.

In practice, the administration of environmental law is a dynamic and fluid process – sensitive to social, political, and economic influences, and resistant to precise and verifiable performance-measuring devices. Because of the complexities inherent in policy evaluation, a reliable methodology for assessing the impacts of laws has thus far proved elusive. While the consequences of some developments in environmental law may be readily apparent,³ most policy shifts are subtle and complex. Analyzing such shifts may demand an interdisciplinary and highly contextual examination of incremental change.

Even the straightforward NAAEC commitments “to maintain high levels of environmental protection” and “to effectively enforce environmental laws” pose formidable analytical challenges to those monitoring the progress of the NAFTA Parties.⁴ Progress or backsliding on these commitments is difficult to measure. The rules, standards, and regulations comprising environmental law are seldom cleanly abrogated, but are typically amended or displaced by other legislation. Budgetary or resource constraints, departmental policies and operational guidelines may dramatically affect the implementation of laws. Consequently, the impact of new legislation or shifting regulatory strategies is often subject to competing and conflicting interpretations.

Similarly, assessing the enforcement of law is not simply a matter of computing fines or quantifying facility inspections, although this information may constitute an important part of the larger picture. And in enforcement and other areas, the challenge of making currently gathered data compatible remains formidable.

In many cases, improved metrics for conducting trend analysis or performance assessments on a regional scale are under development (compliance indicators), or are in their infancy (media-specific environmental indicators). Nevertheless, the CEC will be called upon in the future to provide high-quality baseline data as the tools we employ to measure the performance of our policies and practices are adapted and refined. In the meantime, our existing analytical tools can be employed to explore a number of relatively clear regional legal trends or policy developments.

3. Examples might include severe budget reductions, enforceable bans on specific practices or goods, or the implementation of legislation with clearly identified environmental outcomes and benchmarks.

4. See NAAEC Articles 3 and 5.

Compiling Baseline Information

In order to facilitate the identification of trends or developments in North American environmental law and policy, the CEC has compiled current, objective, and accurate information to establish a baseline against which future changes can be detected and evaluated. Many of the materials included in this volume represent a systematic attempt to acquire baseline information on law and practice in this burgeoning field.

The CEC is also obtaining and disseminating to the public baseline information in many areas outside the work included in this publication.⁵ Collectively, these efforts are making the CEC a clearinghouse for regional environmental information. Obtaining baseline information on environmental law and practice in North America will establish a starting point from which to assess a small but important part of the dynamic economic, social, and institutional interaction of the NAFTA partners.

Identification of Trends and Developments

In practice, there are many ways in which the CEC may take cognizance of an emerging North American trend. First, the CEC may design a specific project to identify and explore developments in this area. In 1996, the CEC carried out one such project, "Dialogue on Environmental Law." The project culminated in a meeting in Austin, Texas, attended by a variety of stakeholders, including representatives from environmental nongovernmental organizations, industry, academia and senior governmental officials.⁶ The views expressed at the meeting provided valuable input to the CEC on the preparation of the program of work for the following year. The results of the project also underscored the need for the development of compliance indicators, an initiative currently under consideration by the Working Group on Environmental Enforcement and Compliance Cooperation.

5. The CEC electronic homepage is located at <http://www.cec.org> and a complete list of publications can be found there. For example, the CEC maintains an on-line trilingual summary of environmental laws and an inventory of transboundary environmental agreements. NAAEC mandates the CEC to publish continental pollution release and transfer data, and the CEC North American state of the environment report. Other publications include an overview of the status of reciprocal access to courts in the region, a study on the transboundary management of freshwater water resources, and a wide variety of air and biodiversity reports.

6. Of particular interest is the paper, "Institutional Management of the Environment," included in the compendium, *New Directions in North American Environmental Reform*, prepared as a background document for the Austin meetings. A summary of proceedings is also available upon request from the Secretariat of the CEC.

Second, the public may bring important trends or developments to the attention of the Council, the CEC Secretariat, or the Joint Public Advisory Committee (JPAC) by utilizing one or more of the existing mechanisms for public participation. Also, experts and the public-at-large may channel comments through existing working groups, advisory bodies, or project teams. Current work on the transboundary environmental implications of electricity restructuring in North America was triggered in large part by public presentations at meetings related to the NAFTA Effects project and CEC work on the long-range transport of atmospheric pollutants.

Third, NAAEC Article 20 provides a mechanism for NAFTA governments to request information from each other concerning proposed or actual environmental measures. To date, the Parties have furnished information on recent legal and policy developments in the CEC Annual Report and through working groups and project teams.

Fourth, the CEC may become aware of an important legal trend or development in the course of implementing a project not directly related to environmental law or policy. Exploring strategies for enhancing the protection of migratory songbirds, compiling the North American pollutant release inventory, or developing regional action plans for the elimination of DDT are examples of activities undertaken in other projects which may reveal important trends affecting the environmental legal regimes of the three NAFTA countries.

Evaluating the Impacts of Trends or Developments

In some cases, the CEC itself will undertake an evaluation of the impact of an important development in environmental law or policy. On other occasions, outside groups or individuals may initiate evaluative processes. As an example of the former, the Council recently directed the Enforcement Cooperation Working Group to evaluate the impact of ISO 14000 and other environmental management system initiatives on departmental enforcement strategies. In the NAFTA Effects project, the CEC is currently examining how NAFTA may shape institutional and legal reforms in North American electricity markets and what will be the environmental issues attendant to such changes.

While the CEC is careful to recognize the uniquely local cultural, political, and institutional factors which may distinguish specific developments and trends in North America, there remains great value in seeking out the elements common to the region. At the "Dialogue" workshop in Austin, for example, a number of commentators identified

the devolution or decentralization of environmental regulatory authority from federal to local bodies as a trend worthy of attention. Discussion of the topic revealed that while the reasons for considering decentralization in each country varied substantially, fundamental issues relating to the mechanics and consequences of devolution were strikingly similar.⁷

For many other issues, discussion about the implications of regional trends in environmental law will take place outside the CEC, in the growing number of North American public and private venues for holding debate. It is our hope that the information presented in this compendium will help nourish this important, indeed vital, dialogue.

Greg Block
Director, Environmental Law and Policy
Secretariat - Commission for Environmental Cooperation

7. Issues mentioned by participants included, among others, consideration of resource and know-how efficiencies, diffused accountability, devolution without adequate funding for subnational bodies, retaining national minimum standards to discourage intrastate standard-lowering, the loss of a national conservation ethic, and risk of local constituency imbalance.

OFFICIAL DOCUMENTS

NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION (NAAEC)

The North American Agreement on Environmental Cooperation (NAAEC), signed by Canada, Mexico and the United States, came into force on January 1st, 1994 at the same time as the North American Free Trade Agreement (NAFTA). The NAAEC builds upon and complements NAFTA's environmental provisions. It creates a North American framework whereby goals related to trade and the environment can be pursued in an open and cooperative way.

In broad terms, the NAAEC sets out to protect, conserve and improve the environment for present and future generations. How? The Parties to the NAAEC set out the following objectives:

- to protect the environment through increased cooperation;
- to promote sustainable development based on mutually supportive environmental and economic policies;
- to support the environmental goals of NAFTA and avoid creating trade distortions or new trade barriers;
- to strengthen cooperation on the development of environmental laws and enhance their enforcement; and
- to promote transparency and public participation.

In signing the NAAEC, the governments of Canada, Mexico and the United States committed themselves to a core set of actions, including:

- reporting on the state of the environment;

- striving for improvement of environmental laws and regulations;
- effective enforcement of environmental law; and
- publication and promotion of information.

The NAAEC established the Commission for Environmental Cooperation (CEC), comprised of a Council of Ministers, a Secretariat and a Joint Public Advisory Committee (JPAC). The Council of Ministers is the CEC governing body, composed of the environment ministers of each country. The Secretariat provides technical, administrative and operational support to the Council, as well as to committees and groups established by the Council. The Secretariat also implements the CEC annual work program. The JPAC, composed of five members from each country representing a wide cross-section of interests, advises the Council on any matter within the scope of the NAAEC, including the annual program and budget of the Commission.

NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

**BETWEEN
THE GOVERNMENT OF CANADA,
THE GOVERNMENT OF THE UNITED MEXICAN STATES
AND
THE GOVERNMENT OF THE UNITED STATES OF AMERICA**

PREAMBLE

The Government of Canada, the Government of the United Mexican States and the Government of the United States of America:

CONVINCED of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations;

REAFFIRMING the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies and their responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction;

RECOGNIZING the interrelationship of their environments;

ACKNOWLEDGING the growing economic and social links between them, including the North American Free Trade Agreement (NAFTA);

RECONFIRMING the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection;

EMPHASIZING the importance of public participation in conserving, protecting and enhancing the environment;

NOTING the existence of differences in their respective natural endowments, climatic and geographical conditions, and economic, technological and infrastructural capabilities;

REAFFIRMING the *Stockholm Declaration on the Human Environment* of 1972 and the *Rio Declaration on Environment and Development* of 1992;

RECALLING their tradition of environmental cooperation and expressing their desire to support and build on international environmental agreements and existing policies and laws, in order to promote cooperation between them; and

CONVINCED of the benefits to be derived from a framework, including a Commission, to facilitate effective cooperation on the conservation, protection and enhancement of the environment in their territories;

HAVE AGREED AS FOLLOWS:

PART ONE OBJECTIVES

Article 1: Objectives

The objectives of this Agreement are to:

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

- (d) support the environmental goals and objectives of the NAFTA;
- (e) avoid creating trade distortions or new trade barriers;
- (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- (g) enhance compliance with, and enforcement of, environmental laws and regulations;
- (h) promote transparency and public participation in the development of environmental laws, regulations and policies;
- (i) promote economically efficient and effective environmental measures; and
- (j) promote pollution prevention policies and practices.

PART TWO OBLIGATIONS

Article 2: General Commitments

1. Each Party shall, with respect to its territory:
 - (a) periodically prepare and make publicly available reports on the state of the environment;
 - (b) develop and review environmental emergency preparedness measures;
 - (c) promote education in environmental matters, including environmental law;
 - (d) further scientific research and technology development in respect of environmental matters;
 - (e) assess, as appropriate, environmental impacts; and
 - (f) promote the use of economic instruments for the efficient achievement of environmental goals.

2. Each Party shall consider implementing in its law any recommendation developed by the Council under Article 10(5)(b).

3. Each Party shall consider prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory. When a Party adopts a measure prohibiting or severely restricting the use of a pesticide or toxic substance in its territory, it shall notify the other Parties of the measure, either directly or through an appropriate international organization.

Article 3: Levels of Protection

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.

Article 4: Publication

1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.

2. To the extent possible, each Party shall:

- (a) publish in advance any such measure that it proposes to adopt; and
- (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.

Article 5: Government Enforcement Action

1. 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 governmental action, subject to Article 37, such as:

- (a) appointing and training inspectors;

- (b) monitoring compliance and investigating suspected violations, including through on-site inspections;
- (c) seeking assurances of voluntary compliance and compliance agreements;
- (d) publicly releasing non-compliance information;
- (e) issuing bulletins or other periodic statements on enforcement procedures;
- (f) promoting environmental audits;
- (g) requiring record keeping and reporting;
- (h) providing or encouraging mediation and arbitration services;
- (i) using licenses, permits or authorizations;
- (j) initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations;
- (k) providing for search, seizure or detention; or
- (l) issuing administrative orders, including orders of a preventative, curative or emergency nature.

2. Each party shall ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws and regulations.

3. Sanctions and remedies provided for a violation of a Party's environmental laws and regulations shall, as appropriate:

- (a) take into consideration the nature and gravity of the violation, any economic benefit derived from the violation by the violator, the economic condition of the violator, and other relevant factors; and
- (b) include compliance agreements, fines, imprisonment, injunctions, the closure of facilities, and the cost of containing or cleaning up pollution.

Article 6: Private Access to Remedies

1. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law.
2. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations.
3. Private access to remedies shall include rights, in accordance with the Party's law, such as:
 - (a) to sue another person under that Party's jurisdiction for damages;
 - (b) to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations;
 - (c) to request the competent authorities to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm; or
 - (d) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person under that Party's jurisdiction contrary to that Party's environmental laws and regulations or from tortious conduct.

Article 7: Procedural Guarantees

1. Each Party shall ensure that its administrative, quasi-judicial and judicial proceedings referred to in Articles 5(2) and 6(2) are fair, open and equitable, and to this end shall provide that such proceedings:
 - (a) comply with due process of law;
 - (b) are open to the public, except where the administration of justice otherwise requires;

(c) entitle the parties to the proceedings to support or defend their respective positions and to present information or evidence; and

(d) are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

2. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

(a) in writing and preferably state the reasons on which the decisions are based;

(b) made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and

(c) based on information or evidence in respect of which the parties were offered the opportunity to be heard.

3. Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.

4. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

PART THREE

COMMISSION FOR ENVIRONMENTAL COOPERATION

Article 8: The Commission

1. The Parties hereby establish the Commission for Environmental Cooperation.

2. The Commission shall comprise a Council, a Secretariat and a Joint Public Advisory Committee.

SECTION A
THE COUNCIL

Article 9: Council Structure and Procedures

1. The Council shall comprise cabinet-level or equivalent representatives of the Parties, or their designees.
2. The Council shall establish its rules and procedures.
3. The Council shall convene:
 - (a) at least once a year in regular session; and
 - (b) in special session at the request of any Party.

Regular sessions shall be chaired successively by each Party.

4. The Council shall hold public meetings in the course of all regular sessions. Other meetings held in the course of regular or special sessions shall be public where the Council so decides.
5. The Council may:
 - (a) establish, and assign responsibilities to, *ad hoc* or standing committees, working groups or expert groups;
 - (b) seek the advice of non-governmental organizations or persons, including independent experts; and
 - (c) take such other action in the exercise of its functions as the Parties may agree.
6. All decisions and recommendations of the Council shall be taken by consensus, except as the Council may otherwise decide or as otherwise provided in this Agreement.
7. All decisions and recommendations of the Council shall be made public, except as the Council may otherwise decide or as otherwise provided in this Agreement.

Article 10: Council Functions

1. The Council shall be the governing body of the Commission and shall:

- (a) serve as a forum for the discussion of environmental matters within the scope of this Agreement;
- (b) oversee the implementation and develop recommendations on the further elaboration of this Agreement and, to this end, the Council shall, within four years after the date of entry into force of this Agreement, review its operation and effectiveness in the light of experience;
- (c) oversee the Secretariat;
- (d) address questions and differences that may arise between the Parties regarding the interpretation or application of this Agreement;
- (e) approve the annual program and budget of the Commission; and
- (f) promote and facilitate cooperation between the Parties with respect to environmental matters.

2. The Council may consider, and develop recommendations regarding:

- (a) comparability of techniques and methodologies for data gathering and analysis, data management and electronic data communications on matters covered by this Agreement;
- (b) pollution prevention techniques and strategies;
- (c) approaches and common indicators for reporting on the state of the environment;
- (d) the use of economic instruments for the pursuit of domestic and internationally agreed environmental objectives;
- (e) scientific research and technology development in respect of environmental matters;

- (f) promotion of public awareness regarding the environment;
- (g) transboundary and border environmental issues, such as the long-range transport of air and marine pollutants;
- (h) exotic species that may be harmful;
- (i) the conservation and protection of wild flora and fauna and their habitat, and specially protected natural areas;
- (j) the protection of endangered and threatened species;
- (k) environmental emergency preparedness and response activities;
- (l) environmental matters as they relate to economic development;
- (m) the environmental implications of goods throughout their life cycles;
- (n) human resource training and development in the environmental field;
- (o) the exchange of environmental scientists and officials;
- (p) approaches to environmental compliance and enforcement;
- (q) ecologically sensitive national accounts;
- (r) eco-labelling; and
- (s) other matters as it may decide.

3. The Council shall strengthen cooperation on the development and continuing improvement of environmental laws and regulations, including by:

- (a) promoting the exchange of information on criteria and methodologies used in establishing domestic environmental standards; and

- (b) without reducing levels of environmental protection, establishing a process for developing recommendations on greater compatibility of environmental technical regulations, standards and conformity assessment procedures in a manner consistent with the NAFTA.

4. The Council shall encourage:

- (a) effective enforcement by each Party of its environmental laws and regulations;
- (b) compliance with those laws and regulations; and
- (c) technical cooperation between the Parties.

5. The Council shall promote and, as appropriate, develop recommendations regarding:

- (a) public access to information concerning the environment that is held by public authorities of each Party, including information on hazardous materials and activities in its communities, and opportunity to participate in decision-making processes related to such public access; and
- (b) appropriate limits for specific pollutants, taking into account differences in ecosystems.

6. The Council shall cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA by:

- (a) acting as a point of inquiry and receipt for comments from non-governmental organizations and persons concerning those goals and objectives;
- (b) providing assistance in consultations under Article 1114 of the NAFTA where a Party considers that another Party is waiving or derogating from, or offering to waive or otherwise derogate from, an environmental measure as an encouragement to establish, acquire, expand or retain an investment of an investor, with a view to avoiding any such encouragement;
- (c) contributing to the prevention or resolution of environment-related trade disputes by:

- (i) seeking to avoid disputes between the Parties,
 - (ii) making recommendations to the Free Trade Commission with respect to the avoidance of such disputes, and
 - (iii) identifying experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies;
- (d) considering on an ongoing basis the environmental effects of the NAFTA; and
- (e) otherwise assisting the Free Trade Commission in environment-related matters.

7. Recognizing the significant bilateral nature of many transboundary environmental issues, the Council shall, with a view to agreement between the Parties pursuant to this Article within three years on obligations, consider and develop recommendations with respect to:

- (a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties;
- (b) notification, provision of relevant information and consultation between Parties with respect to such projects; and
- (c) mitigation of the potential adverse effects of such projects.

8. The Council shall encourage the establishment by each Party of appropriate administrative procedures pursuant to its environmental laws to permit another Party to seek the reduction, elimination or mitigation of transboundary pollution on a reciprocal basis.

9. The Council shall consider and, as appropriate, develop recommendations on the provision by a Party, on a reciprocal basis, of access to and rights and remedies before its courts and administrative agencies for persons in another Party's territory who have suffered or are likely to suffer damage or injury caused by pollution originating in its territory as if the damage or injury were suffered in its territory.

SECTION B
THE SECRETARIAT

Article 11: Secretariat Structure and Procedures

1. The Secretariat shall be headed by an Executive Director, who shall be chosen by the Council for a three-year term, which may be renewed by the Council for one additional three-year term. The position of Executive Director shall rotate consecutively between nationals of each Party. The Council may remove the Executive Director solely for cause.

2. The Executive Director shall appoint and supervise the staff of the Secretariat, regulate their powers and duties and fix their remuneration in accordance with general standards to be established by the Council. The general standards shall provide that:

- (a) staff shall be appointed and retained, and their conditions of employment shall be determined, strictly on the basis of efficiency, competence and integrity;
- (b) in appointing staff, the Executive Director shall take into account lists of candidates prepared by the Parties and by the Joint Public Advisory Committee;
- (c) due regard shall be paid to the importance of recruiting an equitable proportion of the professional staff from among the nationals of each Party; and
- (d) the Executive Director shall inform the Council of all appointments.

3. The Council may decide, by a two-thirds vote, to reject any appointment that does not meet the general standards. Any such decision shall be made and held in confidence.

4. In the performance of their duties, the Executive Director and the staff shall not seek or receive instructions from any government or any other authority external to the Council. Each Party shall respect the international character of the responsibilities of the Executive Director and the staff and shall not seek to influence them in the discharge of their responsibilities.

5. The Secretariat shall provide technical, administrative and operational support to the Council and to committees and groups established by the Council, and such other support as the Council may direct.

6. The Executive Director shall submit for the approval of the Council the annual program and budget of the Commission, including provision for proposed cooperative activities and for the Secretariat to respond to contingencies.

7. The Secretariat shall, as appropriate, provide the Parties and the public information on where they may receive technical advice and expertise with respect to environmental matters.

8. The Secretariat shall safeguard:

- (a) from disclosure information it receives that could identify a non-governmental organization or person making a submission if the person or organization so requests or the Secretariat otherwise considers it appropriate; and
- (b) from public disclosure any information it receives from any non-governmental organization or person where the information is designated by that non-governmental organization or person as confidential or proprietary.

Article 12: Annual Report of the Commission

1. The Secretariat shall prepare an annual report of the Commission in accordance with instructions from the Council. The Secretariat shall submit a draft of the report for review by the Council. The final report shall be released publicly.

2. The report shall cover:

- (a) activities and expenses of the Commission during the previous year;
- (b) the approved program and budget of the Commission for the subsequent year;
- (c) the actions taken by each Party in connection with its obligations under this Agreement, including data on the Party's environmental enforcement activities;

- (d) relevant views and information submitted by non-governmental organizations and persons, including summary data regarding submissions, and any other relevant information the Council deems appropriate;
- (e) recommendations made on any matter within the scope of this Agreement; and
- (f) any other matter that the Council instructs the Secretariat to include.

3. The report shall periodically address the state of the environment in the territories of the Parties.

Article 13: Secretariat Reports

1. The Secretariat may prepare a report for the Council on any matter within the scope of the annual program. Should the Secretariat wish to prepare a report on any other environmental matter related to the cooperative functions of this Agreement, it shall notify the Council and may proceed unless, within 30 days of such notification, the Council objects by a two-thirds vote to the preparation of the report. Such other environmental matters shall not include issues related to whether a Party has failed to enforce its environmental laws and regulations. Where the Secretariat does not have specific expertise in the matter under review, it shall obtain the assistance of one or more independent experts of recognized experience in the matter to assist in the preparation of the report.

2. In preparing such a report, the Secretariat may draw upon any relevant technical, scientific or other information, including information:

- (a) that is publicly available;
- (b) submitted by interested non-governmental organizations and persons;
- (c) submitted by the Joint Public Advisory Committee;
- (d) furnished by a Party;
- (e) gathered through public consultations, such as conferences, seminars and symposia; or

- (f) developed by the Secretariat, or by independent experts engaged pursuant to paragraph 1.

3. The Secretariat shall submit its report to the Council, which shall make it publicly available, normally within 60 days following its submission, unless the Council otherwise decides.

Article 14: Submissions on Enforcement Matters

1. The Secretariat may consider a submission from any non-governmental 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;
- (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.

2. Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;

- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.

Where the Secretariat makes such a request, it shall forward to the Party a copy of the submission and any supporting information provided with the submission.

3. The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:

- (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and
- (b) of any other information that the Party wishes to submit, such as
 - i) whether the matter was previously the subject of a judicial or administrative proceeding, and
 - ii) whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.

Article 15: Factual Record

1. If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

2. The Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so.

3. The preparation of a factual record by the Secretariat pursuant to this Article shall be without prejudice to any further steps that may be taken with respect to any submission.

4. In preparing a factual record, the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information:

- (a) that is publicly available;
- (b) submitted by interested non-governmental organizations or persons;
- (c) submitted by the Joint Public Advisory Committee; or
- (d) developed by the Secretariat or by independent experts.

5. The Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter.

6. The Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council.

7. The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission.

SECTION C ADVISORY COMMITTEES

Article 16: Joint Public Advisory Committee

1. The Joint Public Advisory Committee shall comprise 15 members, unless the Council otherwise decides. Each Party or, if the Party so decides, its National Advisory Committee convened under Article 17, shall appoint an equal number of members.

2. The Council shall establish the rules of procedure for the Joint Public Advisory Committee, which shall choose its own chair.

3. The Joint Public Advisory Committee shall convene at least once a year at the time of the regular session of the Council and at such other times as the Council, or the Committee's chair with the consent of a majority of its members, may decide.

4. The Joint Public Advisory Committee may provide advice to the Council on any matter within the scope of this Agreement, including on any documents provided to it under paragraph 6, and on the implementation and further elaboration of this Agreement, and may perform such other functions as the Council may direct.

5. The Joint Public Advisory Committee may provide relevant technical, scientific or other information to the Secretariat, including for purposes of developing a factual record under Article 15. The Secretariat shall forward to the Council copies of any such information.

6. The Secretariat shall provide to the Joint Public Advisory Committee at the time they are submitted to the Council copies of the proposed annual program and budget of the Commission, the draft annual report, and any report the Secretariat prepares pursuant to Article 13.

7. The Council may, by a two-thirds vote, make a factual record available to the Joint Public Advisory Committee.

Article 17: National Advisory Committees

Each Party may convene a national advisory committee, comprising members of its public, including representatives of non-governmental organizations and persons, to advise it on the implementation and further elaboration of this Agreement.

Article 18: Governmental Committees

Each Party may convene a governmental committee, which may comprise or include representatives of federal and state or provincial governments, to advise it on the implementation and further elaboration of this Agreement.

SECTION D

OFFICIAL LANGUAGES

Article 19: Official Languages

The official languages of the Commission shall be English, French and Spanish. All annual reports under Article 12, reports submitted to the Council under Article 13, factual records submitted to the Council

under Article 15(6) and panel reports under Part Five shall be available in each official language at the time they are made public. The Council shall establish rules and procedures regarding interpretation and translation.

PART FOUR COOPERATION AND PROVISION OF INFORMATION

Article 20: Cooperation

1. The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to resolve any matter that might affect its operation.
2. To the maximum extent possible, each Party shall notify any other Party with an interest in the matter of any proposed or actual environmental measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party's interests under this Agreement.
3. On request of any other Party, a Party shall promptly provide information and respond to questions pertaining to any such actual or proposed environmental measure, whether or not that other Party has been previously notified of that measure.
4. Any Party may notify any other Party of, and provide to that Party, any credible information regarding possible violations of its environmental law, specific and sufficient to allow the other Party to inquire into the matter. The notified Party shall take appropriate steps in accordance with its law to so inquire and to respond to the other Party.

Article 21: Provision of Information

1. On request of the Council or the Secretariat, each Party shall, in accordance with its law, provide such information as the Council or the Secretariat may require, including:
 - (a) promptly making available any information in its possession required for the preparation of a report or factual record, including compliance and enforcement data; and

(b) taking all reasonable steps to make available any other such information requested.

2. If a Party considers that a request for information from the Secretariat is excessive or otherwise unduly burdensome, it may so notify the Council. The Secretariat shall revise the scope of its request to comply with any limitations established by the Council by a two-thirds vote.

3. If a Party does not make available information requested by the Secretariat, as may be limited pursuant to paragraph 2, it shall promptly advise the Secretariat of its reasons in writing.

PART FIVE

CONSULTATION AND RESOLUTION OF DISPUTES

Article 22: Consultations

1. Any Party may request in writing consultations with any other Party regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law.

2. The requesting Party shall deliver the request to the other Parties and to the Secretariat.

3. Unless the Council otherwise provides in its rules and procedures established under Article 9(2), a third Party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on delivery of written notice to the other Parties and to the Secretariat.

4. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter through consultations under this Article.

Article 23: Initiation of Procedures

1. If the consulting Parties fail to resolve the matter pursuant to Article 22 within 60 days of delivery of a request for consultations, or such other period as the consulting Parties may agree, any such Party may request in writing a special session of the Council.

2. The requesting Party shall state in the request the matter complained of and shall deliver the request to the other Parties and to the Secretariat.

3. Unless it decides otherwise, the Council shall convene within 20 days of delivery of the request and shall endeavor to resolve the dispute promptly.

4. The Council may:

- (a) call on such technical advisers or create such working groups or expert groups as it deems necessary,
- (b) have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or
- (c) make recommendations,

as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute. Any such recommendations shall be made public if the Council, by a two-thirds vote, so decides.

5. Where the Council decides that a matter is more properly covered by another agreement or arrangement to which the consulting Parties are party, it shall refer the matter to those Parties for appropriate action in accordance with such other agreement or arrangement.

Article 24: Request for an Arbitral Panel

1. If the matter has not been resolved within 60 days after the Council has convened pursuant to Article 23, the Council shall, on the written request of any consulting Party and by a two-thirds vote, convene an arbitral panel to consider the matter where the alleged persistent pattern of failure by the Party complained against to effectively enforce its environmental law relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services:

- (a) traded between the territories of the Parties; or
- (b) that compete, in the territory of the Party complained against, with goods or services produced or provided by persons of another Party.

2. A third Party that considers it has a substantial interest in the matter shall be entitled to join as a complaining Party on delivery of written notice of its intention to participate to the disputing Parties and the Secretariat. The notice shall be delivered at the earliest possible time, and in any event no later than seven days after the date of the vote of the Council to convene a panel.

3. Unless otherwise agreed by the disputing Parties, the panel shall be established and perform its functions in a manner consistent with the provisions of this Part.

Article 25: Roster

1. The Council shall establish and maintain a roster of up to 45 individuals who are willing and able to serve as panelists. The roster members shall be appointed by consensus for terms of three years, and may be reappointed.

2. Roster members shall:

- (a) have expertise or experience in environmental law or its enforcement, or in the resolution of disputes arising under international agreements, or other relevant scientific, technical or professional expertise or experience;
- (b) be chosen strictly on the basis of objectivity, reliability and sound judgment;
- (c) be independent of, and not be affiliated with or take instructions from, any Party, the Secretariat or the Joint Public Advisory Committee; and
- (d) comply with a code of conduct to be established by the Council.

Article 26: Qualifications of Panelists

1. All panelists shall meet the qualifications set out in Article 25(2).

2. Individuals may not serve as panelists for a dispute in which:

- (a) they have participated pursuant to Article 23(4); or

- (b) they have, or a person or organization with which they are affiliated has, an interest, as set out in the code of conduct established under Article 25(2)(d).

Article 27: Panel Selection

1. Where there are two disputing Parties, the following procedures shall apply:

- (a) The panel shall comprise five members.
- (b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days after the Council votes to convene the panel. If the disputing Parties are unable to agree on the chair within this period, the disputing Party chosen by lot shall select within five days a chair who is not a citizen of that Party.
- (c) Within 15 days of selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party.
- (d) If a disputing Party fails to select its panelists within such period, such panelists shall be selected by lot from among the roster members who are citizens of the other disputing Party.

2. Where there are more than two disputing Parties, the following procedures shall apply:

- (a) The panel shall comprise five members.
- (b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days after the Council votes to convene the panel. If the disputing Parties are unable to agree on the chair within this period, the Party or Parties on the side of the dispute chosen by lot shall select within 10 days a chair who is not a citizen of such Party or Parties.
- (c) Within 30 days of selection of the chair, the Party complained against shall select two panelists, one of whom is a citizen of a complaining Party, and the other of whom is a citizen of another complaining Party. The complaining Parties shall se-

lect two panelists who are citizens of the Party complained against.

- (d) If any disputing Party fails to select a panelist within such a period, such panelist shall be selected by lot in accordance with the citizenship criteria of subparagraph (c).

3. Panelists shall normally be selected from the roster. Any disputing Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by a disputing Party within 30 days after the individual has been proposed.

4. If a disputing Party believes that a panelist is in violation of the code of conduct, the disputing Parties shall consult and, if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with this Article.

Article 28: Rules of Procedure

1. The Council shall establish Model Rules of Procedure. The procedures shall provide:

- (a) a right to at least one hearing before the panel;
- (b) the opportunity to make initial and rebuttal written submissions; and
- (c) that no panel may disclose which panelists are associated with majority or minority opinions.

2. Unless the disputing Parties otherwise agree, panels convened under this Part shall be established and conduct their proceedings in accordance with the Model Rules of Procedure.

3. Unless the disputing Parties otherwise agree within 20 days after the Council votes to convene the panel, the terms of reference shall be:

“To examine, in light of the relevant provisions of the Agreement, including those contained in Part Five, whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, and to make findings, determinations and recommendations in accordance with Article 31(2).”

Article 29: Third Party Participation

A party that is not a disputing Party, on delivery of a written notice to the disputing Parties and to the Secretariat, shall be entitled to attend all hearings, to make written and oral submissions to the panel and to receive written submissions of the disputing Parties.

Article 30: Role of Experts

On request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree.

Article 31: Initial Report

1. Unless the disputing Parties otherwise agree, the panel shall base its report on the submissions and arguments of the Parties and on any information before it pursuant to Article 30.
2. Unless the disputing Parties otherwise agree, the panel shall, within 180 days after the last panelist is selected, present to the disputing Parties an initial report containing:
 - (a) findings of fact;
 - (b) its determination as to whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, or any other determination requested in the terms of reference; and
 - (c) in the event the panel makes an affirmative determination under subparagraph (b), its recommendations, if any, for the resolution of the dispute, which normally shall be that the Party complained against adopt and implement an action plan sufficient to remedy the pattern of non-enforcement.
3. Panelists may furnish separate opinions on matters not unanimously agreed.
4. A disputing party may submit written comments to the panel on its initial report within 30 days of presentation of the report.

5. In such an event, and after considering such written comments, the panel, on its own initiative or on the request of any disputing Party, may:

- (a) request the views of any participating Party;
- (b) reconsider its report; and
- (c) make any further examination that it considers appropriate.

Article 32: Final Report

1. The panel shall present to the disputing Parties a final report, including any separate opinions on matters not unanimously agreed, within 60 days of presentation of the initial report, unless the disputing Parties otherwise agree.

2. The disputing Parties shall transmit to the Council the final report of the panel, as well as any written views that a disputing Party desires to be appended, on a confidential basis within 15 days after it is presented to them.

3. The final report of the panel shall be published five days after it is transmitted to the Council.

Article 33: Implementation of Final Report

If, in its final report, a panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, the disputing Parties may agree on a mutually satisfactory action plan, which normally shall conform with the determinations and recommendations of the panel. The disputing Parties shall promptly notify the Secretariat and the Council of any agreed resolution of the dispute.

Article 34: Review of Implementation

1. If, in its final report, a panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, and:

- (a) the disputing Parties have not agreed on an action plan under Article 33 within 60 days of the date of the final report, or

- (b) the disputing Parties cannot agree on whether the Party complained against is fully implementing
 - (i) an action plan agreed under Article 33,
 - (ii) an action plan deemed to have been established by a panel under paragraph 2, or
 - (iii) an action plan approved or established by a panel under paragraph 4,

any disputing Party may request that the panel be reconvened. The requesting Party shall deliver the request in writing to the other Parties and to the Secretariat. The Council shall reconvene the panel on delivery of the request to the Secretariat.

2. No Party may make a request under paragraph 1(a) earlier than 60 days, or later than 120 days, after the date of the final report. If the disputing Parties have not agreed to an action plan and if no request was made under paragraph 1(a), the last action plan, if any, submitted by the Party complained against to the complaining Party or Parties within 60 days of the date of the final report, or such other period as the disputing Parties may agree, shall be deemed to have been established by the panel 120 days after the date of the final report.

3. A request under paragraph 1(b) may be made no earlier than 180 days after an action plan has been:

- (a) agreed under Article 33;
- (b) deemed to have been established by a panel under paragraph 2; or
- (c) approved or established by a panel under paragraph 4;

and only during the term of any such action plan.

4. Where a panel has been reconvened under paragraph 1(a), it:

- (a) shall determine whether any action plan proposed by the Party complained against is sufficient to remedy the pattern of non-enforcement and

- (i) if so, shall approve the plan, or
- (ii) if not, shall establish such a plan consistent with the law of the Party complained against, and
- (b) may, where warranted, impose a monetary enforcement assessment in accordance with Annex 34,

within 90 days after the panel has been reconvened or such other period as the disputing Parties may agree.

5. Where a panel has been reconvened under paragraph 1(b), it shall determine either that:

- (a) the Party complained against is fully implementing the action plan, in which case the panel may not impose a monetary enforcement assessment, or
- (b) the Party complained against is not fully implementing the action plan, in which case the panel shall impose a monetary enforcement assessment in accordance with Annex 34,

within 60 days after it has been reconvened or such other period as the disputing Parties may agree.

6. A panel reconvened under this Article shall provide that the Party complained against shall fully implement any action plan referred to in paragraph 4(a)(ii) or 5(b), and pay any monetary enforcement assessment imposed under paragraph 4(b) or 5(b), and any such provision shall be final.

Article 35: Further Proceeding

A complaining Party may, at any time beginning 180 days after a panel determination under Article 34(5)(b), request in writing that a panel be reconvened to determine whether the Party complained against is fully implementing the action plan. On delivery of the request to the other Parties and the Secretariat, the Council shall reconvene the panel. The panel shall make the determination within 60 days after it has been reconvened or such other period as the disputing Parties may agree.

Article 36: Suspension of Benefits

1. Subject to Annex 36A, where a Party fails to pay a monetary enforcement assessment within 180 days after it is imposed by a panel:

- (a) under Article 34(4)(b), or
- (b) under Article 34(5)(b), except where benefits may be suspended under paragraph 2(a),

any complaining Party or Parties may suspend, in accordance with Annex 36B, the application to the Party complained against of NAFTA benefits in an amount no greater than that sufficient to collect the monetary enforcement assessment.

2. Subject to Annex 36A, where a panel has made a determination under Article 34(5)(b) and the panel:

- (a) has previously imposed a monetary enforcement assessment under Article 34(4)(b) or established an action plan under Article 34(4)(a)(ii); or
- (b) has subsequently determined under Article 35 that a Party is not fully implementing an action plan;

the complaining Party or Parties may, in accordance with Annex 36B, suspend annually the application to the Party complained against of NAFTA benefits in an amount no greater than the monetary enforcement assessment imposed by the panel under Article 34(5)(b).

3. Where more than one complaining Party suspends benefits under paragraph 1 or 2, the combined suspension shall be no greater than the amount of the monetary enforcement assessment.

4. Where a Party has suspended benefits under paragraph 1 or 2, the Council shall, on the delivery of a written request by the Party complained against to the other Parties and the Secretariat, reconvene the panel to determine whether the monetary enforcement assessment has been paid or collected, or whether the Party complained against is fully implementing the action plan, as the case may be. The panel shall submit its report within 45 days after it has been reconvened. If the panel determines that the assessment has been paid or collected, or that the Party complained against is fully implementing the action plan, the suspension of benefits under paragraph 1 or 2, as the case may be, shall be terminated.

5. On the written request of the Party complained against, delivered to the other Parties and the Secretariat, the Council shall reconvene the panel to determine whether the suspension of benefits by the complaining Party or Parties pursuant to paragraph 1 or 2 is manifestly excessive. Within 45 days of the request, the panel shall present a report to the disputing Parties containing its determination.

PART SIX

GENERAL PROVISIONS

Article 37: Enforcement Principle

Nothing in this Agreement shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party.

Article 38: Private Rights

No Party may provide for a right of action under its law against any other Party on the ground that another Party has acted in a manner inconsistent with this Agreement.

Article 39: Protection of Information

1. Nothing in this Agreement shall be construed to require a Party to make available or allow access to information:

- (a) the disclosure of which would impede its environmental law enforcement; or
- (b) that is protected from disclosure by its law governing business or proprietary information, personal privacy or the confidentiality of governmental decision making.

2. If a Party provides confidential or proprietary information to another Party, the Council, the Secretariat or the Joint Public Advisory Committee, the recipient shall treat the information on the same basis as the Party providing the information.

3. Confidential or proprietary information provided by a Party to a panel under this Agreement shall be treated in accordance with the rules of procedure established under Article 28.

Article 40: Relation to Other Environmental Agreements

Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which such Parties are party.

Article 41: Extent of Obligations

Annex 41 applies to the Parties specified in that Annex.

Article 42: National Security

Nothing in this Agreement shall be construed:

- (a) to require any Party to make available or provide access to information the disclosure of which it determines to be contrary to its essential security interests; or
- (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests relating to
 - (i) arms, ammunition and implements of war, or
 - (ii) the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices.

Article 43: Funding of the Commission

Each Party shall contribute an equal share of the annual budget of the Commission, subject to the availability of appropriated funds in accordance with the Party's legal procedures. No Party shall be obligated to pay more than any other Party in respect of an annual budget.

Article 44: Privileges and Immunities

The Executive Director and staff of the Secretariat shall enjoy in the territory of each Party such privileges and immunities as are necessary for the exercise of their functions.

Article 45: Definitions

1. For purposes of this Agreement:

A Party has not failed to “**effectively enforce its environmental law**” or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

- (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities;

“**non-governmental organization**” means any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government;

“**persistent pattern**” means a sustained or recurring course of action or inaction beginning after the date of entry into force of this Agreement;

“**province**” means a province of Canada, and includes the Yukon Territory and the Northwest Territories and their successors; and

“**territory**” means for a Party the territory of that Party as set out in Annex 45.

2. For purposes of Article 14(l) 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.

3. For purposes of Article 14(3), “**judicial or administrative proceeding**” means:

- (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and
- (b) an international dispute resolution proceeding to which the Party is party.

PART SEVEN

FINAL PROVISIONS

Article 46: Annexes

The Annexes to this Agreement constitute an integral part of the Agreement.

Article 47: Entry into Force

This Agreement shall enter into force on January 1, 1994, immediately after entry into force of the NAFTA, on an exchange of written notifications certifying the completion of necessary legal procedures.

Article 48: Amendments

1. The Parties may agree on any modification of or addition to this Agreement.
2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement.

Article 49: Accession

Any country or group of countries may accede to this Agreement subject to such terms and conditions as may be agreed between such country or countries and the Council and following approval in accordance with the applicable legal procedures of each country.

Article 50: Withdrawal

A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.

Article 51: Authentic Texts

The English, French, and Spanish texts of this Agreement are equally authentic.

IN WITNESS WHEREOF, the undersigned, being duly authorized by the respective Governments, have signed this Agreement.

ANNEX 34

MONETARY ENFORCEMENT ASSESSMENTS

- 1.** For the first year after the date of entry into force of this Agreement, any monetary enforcement assessment shall be no greater than 20 million dollars (U.S.) or its equivalent in the currency of the Party complained against. Thereafter, any monetary enforcement assessment shall be no greater than .007 percent of total trade in goods between the Parties during the most recent year for which data are available.
- 2.** In determining the amount of the assessment, the panel shall take into account:
 - (a) the pervasiveness and duration of the Party's persistent pattern of failure to effectively enforce its environmental law;
 - (b) the level of enforcement that could reasonably be expected of a Party given its resource constraints;
 - (c) the reasons, if any, provided by the Party for not fully implementing an action plan;
 - (d) efforts made by the Party to begin remedying the pattern of non-enforcement after the final report of the panel; and
 - (e) any other relevant factors.
- 3.** All monetary enforcement assessments shall be paid in the currency of the Party complained against into a fund established in the name of the Commission by the Council and shall be expended at the direction of the Council to improve or enhance the environment or environmental law enforcement in the Party complained against, consistent with its law.

ANNEX 36A
CANADIAN DOMESTIC ENFORCEMENT
AND COLLECTION

1. For the purposes of this Annex, “**panel determination**” means:
 - (a) a determination by a panel under Article 34(4)(b) or 5(b) that provides that Canada shall pay a monetary enforcement assessment; and
 - (b) a determination by a panel under Article 34(5)(b) that provides that Canada shall fully implement an action plan where the panel:
 - (i) has previously established an action plan under Article 34(4)(a)(ii) or imposed a monetary enforcement assessment under Article 34(4)(b); or
 - (ii) has subsequently determined under Article 35 that Canada is not fully implementing an action plan.

2. Canada shall adopt and maintain procedures that provide that:
 - (a) subject to subparagraph (b), the Commission, at the request of a complaining Party, may in its own name file in a court of competent jurisdiction a certified copy of a panel determination;
 - (b) the Commission may file in court a panel determination that is a panel determination described in paragraph 1(a) only if Canada has failed to comply with the determination within 180 days of when the determination was made;
 - (c) when filed, the panel determination, for purposes of enforcement, shall become an order of the court;
 - (d) the Commission may take proceedings for enforcement of a panel determination that is made an order of the court, in that court, against the person against whom the panel determination is addressed in accordance with paragraph 6 of Annex 41;

- (e) proceedings to enforce a panel determination that has been made an order of the court shall be conducted by way of summary proceedings;
- (f) in proceedings to enforce a panel determination that is a panel determination described in paragraph 1(b) and that has been made an order of the court, the court shall promptly refer any question of fact or any question of interpretation of the panel determination to the panel that made the panel determination, and the decision of the panel shall be binding on the court;
- (g) a panel determination that has been made an order of the court shall not be subject to domestic review or appeal; and
- (h) an order made by the court in proceedings to enforce a panel determination that has been made an order of the court shall not be subject to review or appeal.

3. Where Canada is the Party complained against, the procedures adopted and maintained by Canada under this Annex shall apply and the procedures set out in Article 36 shall not apply.

4. Any change by Canada to the procedures adopted and maintained by Canada under this Annex that have the effect of undermining the provisions of this Annex shall be considered a breach of this Agreement.

ANNEX 36B**SUSPENSION OF BENEFITS**

1. Where a complaining Party suspends NAFTA tariff benefits in accordance with this Agreement, the Party may increase the rates of duty on originating goods of the Party complained against to levels not to exceed the lesser of:

- (a) the rate that was applicable to those goods immediately prior to the date of entry into force of the NAFTA, and
- (b) the Most-Favored-Nation rate applicable to those goods on the date the Party suspends such benefits,

and such increase may be applied only for such time as is necessary to collect, through such increase, the monetary enforcement assessment.

2. In considering what tariff or other benefits to suspend pursuant to Article 36(1) or (2):

- (a) a complaining Party shall first seek to suspend benefits in the same sector or sectors as that in respect of which there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law; and
- (b) a complaining Party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.

ANNEX 41

EXTENT OF OBLIGATIONS

1. On the date of signature of this Agreement, or of the exchange of written notifications under Article 47, Canada shall set out in a declaration a list of any provinces for which Canada is to be bound in respect of matters within their jurisdiction. The declaration shall be effective on delivery to the other Parties, and shall carry no implication as to the internal distribution of powers within Canada. Canada shall notify the other Parties six months in advance of any modification to its declaration.
2. When considering whether to instruct the Secretariat to prepare a factual record pursuant to Article 15, the Council shall take into account whether the submission was made by a non-governmental organization or enterprise incorporated or otherwise organized under the laws of a province included in the declaration made under paragraph 1.
3. Canada may not request consultations under Article 22 or a Council meeting under Article 23 or request the establishment of a panel or join as a complaining Party under Article 24 against another Party at the instance, or primarily for the benefit, of any government of a province not included in the declaration made under paragraph 1.
4. Canada may not request a Council meeting under Article 23, or request the establishment of a panel or join as a complaining Party under Article 24 concerning whether there has been a persistent pattern of failure by another Party to effectively enforce its environmental law, unless Canada states in writing that the matter would be under federal jurisdiction if it were to arise within the territory of Canada, or:
 - (a) Canada states in writing that the matter would be under provincial jurisdiction if it were to arise within the territory of Canada; and
 - (b) the provinces included in the declaration account for at least 55 percent of Canada's Gross Domestic Product (GDP) for the most recent year in which data are available, and
 - (c) where the matter concerns a specific industry or sector, at least 55 percent of total Canadian production in that industry or sector is accounted for by the provinces included in the declaration for the most recent year in which data are available.

5. No other Party may request a Council meeting under Article 23 or request the establishment of a panel or join as a complaining Party under Article 24 concerning whether there has been a persistent failure to effectively enforce an environmental law of a province unless that province is included in the declaration made under paragraph 1 and the requirements of subparagraphs 4(b) and (c) have been met.

6. Canada shall, no later than the date on which an arbitral panel is convened pursuant to Article 24 respecting a matter within the scope of paragraph 5 of this Annex, notify in writing the complaining Parties and the Secretariat of whether any monetary enforcement assessment or action plan imposed by a panel under Article 34(4) or 34(5) against Canada shall be addressed to Her Majesty in right of Canada or Her Majesty in right of the province concerned.

7. Canada shall use its best efforts to make this Agreement applicable to as many of its provinces as possible.

8. Two years after the date of entry into force of this Agreement, the Council shall review the operation of this Annex and, in particular, shall consider whether the Parties should amend the thresholds established in paragraph 4.

ANNEX 45
COUNTRY-SPECIFIC DEFINITIONS

For purposes of this Agreement:

“territory” means:

- (a) with respect to Canada, the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources;
- (b) with respect to Mexico,
 - (i) the states of the Federation and the Federal District,
 - (ii) the islands, including the reefs and keys, in adjacent seas,
 - (iii) the islands of Guadalupe and Revillagigedo situated in the Pacific Ocean,
 - (iv) the continental shelf and the submarine shelf of such islands, keys and reefs,
 - (v) the waters of the territorial seas, in accordance with international law, and its interior maritime waters,
 - (vi) the space located above the national territory, in accordance with international law, and
 - (vii) any areas beyond the territorial seas of Mexico within which, in accordance with international law, including the *United Nations Convention on the Law of the Sea*, and its domestic law, Mexico may exercise rights with respect to the seabed and subsoil and their natural resources; and
- (c) with respect to the United States,
 - (i) the customs territory of the United States, which includes the 50 states, the District of Columbia and Puerto Rico,

- (ii) the foreign trade zones located in the United States and Puerto Rico, and
- (iii) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources.

GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NAAEC

Under Article 14 of the NAAEC, the Secretariat of the Commission for Environmental Cooperation (CEC) may consider a submission from any non-governmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. Where the Secretariat determines that the criteria in Article 14(1) are met, it then decides whether the submission merits requesting a response from the concerned Party in accordance with Article 14(2). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance with Article 15. The Council may then instruct the Secretariat to prepare a factual record on the submission. The final factual record is made publicly available upon a 2/3 vote of the Council.

In order to provide additional guidance on submissions under Articles 14 and 15 of the NAAEC, the CEC developed the following *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*.

GUIDELINES FOR SUBMISSIONS ON ENFORCEMENT MATTERS UNDER ARTICLES 14 AND 15 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

1. What is a submission on enforcement matters?

1.1 A “submission on enforcement matters” (“submission”) is a documented assertion that a Party to the North American Agreement on Environmental Cooperation (“Agreement”) is failing to effectively enforce its environmental law. The relevant Articles of the Agreement are annexed to these guidelines.

2. Who can make submissions on enforcement matters?

2.1 Any non-governmental organization or person established or residing in the territory of a Party to the Agreement may make a submission on enforcement matters for consideration by the Secretariat of the Commission for Environmental Cooperation (“Secretariat”). The term “non-governmental organization” is defined in Article 45(1) of the Agreement.

2.2 The submission must clearly identify the person(s) or organization(s) making the submission (“Submitter(s)”).

3. How are they to be submitted?

3.1 A written copy of the submission must be received by the Secretariat at the following address:

Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montréal (Québec)
Canada H2Y 1N9

3.2 Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions.

3.3 Submissions should not exceed 15 pages of typed, letter-sized paper, excluding supporting information. Submissions will not be accepted by fax or any other electronic means. Where possible, a copy of the submission on computer diskette should also be provided.

3.4 Submissions must include the complete mailing address of the Submitter.

3.5 The Secretariat will promptly acknowledge the receipt of any correspondence or written document(s) relating to the initiation of the submission process.

3.6 Any correspondence or written document(s) will be considered a submission by the Secretariat if it contains the supporting information necessary to enable the Secretariat, at the proper time, to assess the submission based on the criteria listed in Article 14(1) of the Agreement.

3.7 Formal notifications by the Secretariat to a Submitter will be made in writing and sent by any reliable means of notification which provides a record of the notification having been sent and received.

3.8 The Secretariat will inform the Council of the initiation and progress of all submissions.

3.9 The Secretariat will inform the Submitter of the progress of its submission, as provided for in these guidelines.

3.10 The Secretariat may at any time notify the Submitter of any minor errors of form in the submission in order for the Submitter to rectify them.

3.11 The Secretariat will make its best efforts to take all actions necessary to process a submission in a timely manner.

4. What should be included in a submission?

4.1 The Secretariat may only consider a submission on enforcement matters if that submission meets the criteria set forth in Article 14(1) of the Agreement, as specified in these guidelines.

INITIAL CONSIDERATION OF A SUBMISSION
BY THE SECRETARIAT

5. What criteria must a submission address?

5.1 The submission must assert that a Party is failing to effectively enforce its environmental law and should focus on any acts or omissions of the Party asserted to demonstrate such failure. For purposes of determining if a submission meets the criteria of Article 14(1) of the Agreement, the term “environmental law” is defined in Article 45(2) of the Agreement.

5.2 The Submitter must identify the applicable statute or regulation, or provision thereof, as defined in Article 45(2) of the Agreement. In the case of the General Ecological Equilibrium and Environmental Protection Law of Mexico, the Submitter must identify the applicable chapter or provision of the Law.

5.3 Submissions must contain a succinct account of the facts on which such an assertion is based and must provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based.

5.4 A submission must appear to be aimed at promoting enforcement rather than at harassing industry. In making that determination, the Secretariat will consider such factors as whether or not:

- (a) the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission.
- (b) the submission appears frivolous.

5.5 The submission must indicate that the matter has been communicated in writing to the relevant authorities of the Party in question and indicate the Party’s response, if any. The Submitter must include, with the submission, copies of any relevant correspondence with the relevant authorities. The relevant authorities are the agencies of the government responsible under the law of the Party for the enforcement of the environmental law in question.

6. What if the submission does not meet these criteria?

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

6.2 After receipt of such notification from the Secretariat, the Submitter will have 30 days to provide the Secretariat with a submission that conforms to the criteria of Article 14(1) of the Agreement and to the requirements set out in these guidelines.

6.3 If the Secretariat again determines that the Submitter has not met the criteria of Article 14(1) of the Agreement or the requirements set out in these guidelines, the Secretariat will promptly inform the Submitter of its reason(s), and inform the Submitter that the process is terminated with respect to that submission.

DETERMINING WHETHER A SUBMISSION ON ENFORCEMENT MATTERS WARRANTS PREPARATION OF A FACTUAL RECORD**7. When is a response from the Party to the submission merited?**

7.1 Where the Secretariat determines that the submission meets the criteria set out in Article 14(1) of the Agreement, the Secretariat will determine whether the submission merits requesting a response from the Party concerned.

7.2 As set forth in Article 14(2) of the Agreement, the Secretariat will, in making that determination, be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the Agreement;
- (c) private remedies available under the Party's law have been pursued; and

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

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

- (a) the alleged harm is due to the asserted failure to effectively enforce environmental law; and
- (b) the alleged harm relates to the protection of the environment or the prevention of danger to human life or health (but not directly related to worker safety or health), as stated in Article 45(2) of the Agreement.

7.4 In considering whether a response from the Party concerned should be requested when the submission is drawn exclusively from mass media reports, the Secretariat will determine if other sources of information relevant to the assertion in the submission were reasonably available to the Submitter.

8. What if it is determined that no response from the Party is merited?

8.1 Where the Secretariat determines that no response from the Party is merited, the Secretariat will notify the Submitter of the reason(s). The Secretariat may consider new or supplemental information from the Submitter within 30 days following receipt by the Submitter of such notification. If no new or supplemental information is received by the Secretariat within this time period, or if the Secretariat determines that no response from the Party is merited in light of the new or supplemental information provided by the Submitter, the process will be terminated with respect to that submission, and the Secretariat will so notify the Submitter.

9. How is a response from the Party requested?

9.1 Where the Secretariat determines that a submission merits a response from the Party concerned, the Secretariat will forward to the Party a copy of the submission and any supporting information provided by the Submitter. The Secretariat will translate the submission and supporting information into the official language(s) of the Party from which a response is requested, unless that Party directs otherwise.

9.2 The Party will advise the Secretariat within 30 days, or in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request for a response:

- (a) whether the matter is the subject of a pending judicial or administrative proceeding, and
- (b) of any other information that the Party wishes to submit, such as
 - i) whether the matter was previously the subject of a judicial or administrative proceeding, and
 - ii) whether private remedies in connection with the matter are available to the Submitter, and whether such remedies have been pursued.

9.3 The Party may include in its response whether environmental policies have been defined or actions have been taken in connection with the matter in question.

9.4 If the Party informs the Secretariat that the matter raised in the submission is the subject of a pending judicial or administrative proceeding, as defined in Article 45(3) of the Agreement, the Secretariat will proceed no further with the submission, and will notify the Submitter of its reason(s) and that the submission process is terminated.

9.5 Upon receipt of a response from the Party or following the expiration of the response period, the Secretariat may begin its consideration of whether it will inform the Council that the submission warrants developing a factual record.

9.6 If the Secretariat considers that the submission, in light of any response provided by the Party, does not warrant developing a factual record, the Secretariat will notify the Submitter of its reason(s) and that the submission process is terminated.

10. How is a decision on whether or not to prepare a factual record taken?

10.1 If the Secretariat considers that the submission, in light of any response provided by the Party or after the response period has expired, warrants developing a factual record, the Secretariat will so inform the

Council and provide the Council with its reason(s), a copy of the submission, the supporting information provided with the submission, and any other relevant information, to the extent these have not already been provided to the Council.

10.2 The Secretariat may consolidate two or more submissions that relate to the same facts and the same asserted failure to effectively enforce an environmental law. In other situations where two or more submissions relate essentially to the same facts and enforcement matter and the Secretariat considers that it would be more efficient or cost-effective to consolidate them, it may so propose to the Council.

10.3 The Secretariat will prepare a factual record if the Council, by a two-thirds vote, instructs it to do so. If the Council votes to instruct the Secretariat not to prepare a factual record, the Secretariat will so inform the Submitter and will inform the Submitter that the submission process is terminated. Unless the Council decides otherwise, any such decision will be noted in the registry and in the public file described in these guidelines.

11. How is a factual record prepared?

11.1 In preparing draft and final factual records, the Secretariat will consider any information furnished by a Party. The Secretariat may consider any relevant technical, scientific or other information:

- (a) that is publicly available;
- (b) submitted by interested non-governmental organizations or persons;
- (c) submitted by the Joint Public Advisory Committee (JPAC); or
- (d) developed by the Secretariat or by independent experts.

11.2 If the JPAC provides relevant technical, scientific or other information to the Secretariat relating to the development of a factual record, the Secretariat will forward copies of the information to the Council.

11.3 All contributors to the factual record process are encouraged to submit only relevant information, reducing wherever possible the volume of material submitted.

11.4 The Secretariat will submit the draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days. The Secretariat will then prepare the final factual record for the Council, incorporating any such comments as appropriate.

12. What is included in a factual record?

12.1 Draft and final factual records prepared by the Secretariat will contain:

- (a) a summary of the submission that initiated the process;
- (b) a summary of the response, if any, provided by the concerned Party;
- (c) a summary of any other relevant factual information; and
- (d) the facts presented by the Secretariat with respect to the matters raised in the submission.

12.2 The final factual record will incorporate, as appropriate, the comments of any Party.

13. Will the final factual record be made public?

13.1 After receiving the final factual record, the Council may decide, by a two-thirds vote, to make it public. If it so decides, the final factual record will be made public as soon as it is available in the three official languages of the Commission and a copy will be provided to the Submitter. This should normally be within 60 days of the submission of the final factual record to the Council.

13.2 If the Council decides not to make a factual record available to the public, the Secretariat will inform the Submitter that the factual record will not be made public.

13.3 Independent of any Council decision with respect to the public availability of a factual record, the Council may, by a two-thirds vote, make a factual record available to the JPAC for their information in accordance with Article 16(7) of the Agreement and the JPAC Rules of Procedure.

14. Can a submission under consideration be withdrawn?

14.1 If a Submitter informs the Secretariat in writing that it no longer wishes to have the submission process continue with respect to its submission, the Secretariat will proceed no further with the submission and so inform the Council. If two or more submitters have made a joint submission, all of the Submitters must inform the Secretariat in writing that they no longer wish to have the submission process continue, before the submission may be withdrawn.

14.2 Where the Secretariat has been instructed by the Council to prepare a factual record on a submission, the withdrawal of the submission will be communicated to the Council, and the preparation of the factual record will proceed no further, pending guidance from the Council.

15. How will information on the status of submissions and factual records be made publicly available?

15.1 The Secretariat will establish a registry to provide summary information so that any interested non-governmental organization or person, as well as the JPAC, may follow the status of any given submission during the submission process envisaged under Articles 14 and 15 of the Agreement. The registry will be accessible to the public. The Secretariat will provide periodically a copy of the registry to the Council. Subject to the confidentiality provisions of the Agreement and of these guidelines, the registry will include the following information unless decided otherwise by the Council:

- (a) a list of all the submissions including:
 - i) the name of the Submitter and the name of the Party addressed in each submission;
 - ii) a summary of the matter addressed in the submission that initiated the process, including a brief description of the asserted failure(s) to effectively enforce environmental law;
 - iii) the name and citation of the environmental law in question;
- (b) a summary of the response provided by the Party, if any;

- (c) a summary of the notifications to the Submitter, including notification that:
 - i) a given submission does not meet the criteria set forth in Article 14(1) of the Agreement;
 - ii) a response is requested from the Party concerned;
 - iii) the Secretariat has determined that no response from the Party concerned is merited;
 - iv) the Council has instructed the Secretariat not to prepare a factual record;
 - v) the final factual record has been provided to the Council;
 - vi) the Council has decided not to make the factual record available to the public;
- (d) the Council's decision on the preparation of a factual record; and
- (e) the Council's decision regarding whether the factual record will be made publicly available.

15.2 Any summary will contain information sufficient to enable interested non-governmental organizations or persons or the JPAC to provide relevant information to the Secretariat for the development of a factual record.

16. Does the public have access to documents relating to individual submissions?

16.1 The Secretariat will maintain a file on each submission at its headquarters in a manner suitable for public access, inspection and photocopying. A reasonable cost may be requested for photocopying. Photocopies may also be obtained by mail at a reasonable cost to the public. Subject to confidentiality provisions of the Agreement and of these guidelines, the file will contain:

- (a) the submission and supporting information, including any documentary evidence on which the submission may be based;

- (b) any response by a Party, developed under article 14(2) of the Agreement;
- (c) any notifications made to the Submitter by the Secretariat; and
- (d) the final factual record, where the Council has decided to make it publicly available pursuant to Article 15(7) of the Agreement and, any other information considered by the Secretariat under Article 15(4) of the Agreement.

16.2 These documents will be placed in the public file in a timely manner.

16.3 When a submission received by the Secretariat names an individual or entity, the Party concerned may notify that individual or entity of the existence of that submission.

17. How will privacy and confidentiality be safeguarded?

17.1 In accordance with Article 11(8)(a) of the Agreement, the Secretariat will safeguard from disclosure any information it receives that could identify a Submitter if the Submitter so requests, or the Secretariat otherwise considers it appropriate. In accordance with Article 11(8)(b) of the Agreement, the Secretariat will safeguard from disclosure to the public any information received from a non-governmental organization or person where the information is designated by that non-governmental organization or person as confidential or proprietary. The Parties will have access to this confidential or proprietary information, except information that could identify the Submitter pursuant to Article 11(8)(a) of the Agreement.

17.2 The Secretariat will safeguard from disclosure any information provided by the Council or a Party and designated as confidential.

17.3 Given the fact that confidential or proprietary information provided by a Party, a non-governmental organization or a person may substantially contribute to the opinion of the Secretariat that a factual record is not warranted, contributors are encouraged to furnish a summary of such information or a general explanation of why the information is considered confidential or proprietary.

17.4 If a Party provides information relating to a submission on enforcement matters to the Secretariat, the Council, the JPAC or another Party, that is confidential or proprietary, the recipient will treat the information on the same basis as the Party providing the information.

18. What is the relationship between these guidelines and the Agreement?

18.1 These guidelines are not intended to modify the Agreement. If there is a conflict between any provision of these guidelines and any provision of the Agreement, the provision of the Agreement will prevail to the extent of the inconsistency.

19. When will these guidelines be reviewed?

19.1 The Council will initiate a review process of the operation of these guidelines no later than 18 months following their adoption.

**CEC SECRETARIAT
SUBMISSION DOCUMENTS**

ARTICLE 14 DETERMINATIONS

Under Article 14 of the NAAEC, the Secretariat of the Commission for Environmental Cooperation (CEC) may consider a submission from any non-governmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law.

The Secretariat first determines for each submission whether it meets the criteria set out in Article 14(1). For any submission that meets the criteria established in Article 14(1), the Secretariat then determines whether the submission merits requesting a response from the concerned Party in accordance with Article 14(2).

Based on sections 6.1, 8.1 and 10.1 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, reasons are provided in the Secretariat determinations only in those cases where the Secretariat has determined not to consider the submission or when the Secretariat informs the Council that it considers that the submission warrants developing a factual record.

Following are the Secretariat's reasoned determinations under Articles 14(1), 14(2) and 15(1), up to August 1997.*

* Note that some determinations are not in English: determinations are rendered in the language of the submission, and not all have been translated. The registry and the Secretariat's determinations are up to date as of 1 November 1997.

REGISTRY OF SUBMISSIONS ON ENFORCEMENT MATTERS

Submission ID Number	Submitters	Date Submission Filed
SEM-95-001	Biodiversity Legal Foundation et al.	30 June 1995
SEM-95-002	Sierra Club et al.	30 August 1995
SEM-96-001	Comité para la Protección de los Recursos Naturales, A.C. et al.	18 January 1996
SEM-96-002	Mr. Aage Tottrup, P. Eng	20 March 1996
SEM-96-003	The Friends of the Oldman River	9 September 1996
SEM-96-004	The Southwest Center for Biological Diversity et al.	14 November 1996
SEM-97-001	B.C. Aboriginal Fisheries Commission et al.	2 April 1997
SEM-97-002	Comité pro Limpieza del Río Magdalena	15 March 1997
SEM-97-003	Centre québécois du droit de l'environnement (CQDE)	9 April 1997
SEM-97-004	Canadian Environmental Defence Fund	26 May 1997
SEM-97-005	Animal Alliance of Canada et al.	21 July 1997

BIODIVERSITY LEGAL FOUNDATION

Submission ID:	SEM-95-001
Submitter(s)	Biodiversity Legal Foundation, Consejo Asesor Sierra Madre, Forest Guardians, Greater Gila Biodiversity Project and the Southwest Center for Biological Diversity
Party	United States of America
Summary of the matter addressed in the submission	Submitters allege that provisions of the “Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995” (“Rescissions Act”) have resulted in a failure to effectively enforce selected provisions of the Endangered Species Act. Specifically, submitters allege that the Rescissions Act prohibits the Fish and Wildlife Service from making “final determinations” for species or critical habitat designations for the remainder of Fiscal Year 1995. Submitters further allege that the Rescissions Act rescinds \$1.5 million from the budget allocated to the listing program and prohibits the Fish and Wildlife Service from compensating for the loss from other programs.
Name and citation of the environmental law in question	<input type="checkbox"/> Endangered Species Act, 16 U.S.C. 1631-1544
Summary of the response provided by the party	N/A

Summary of the notifications to the submitter(s)	<ul style="list-style-type: none"> <input type="checkbox"/> Acknowledgment of receipt of submission (10 July 1995). <input type="checkbox"/> Secretariat's Determination that submission meets Article 14(1)(a-f) criteria (19 July 1995). <input type="checkbox"/> Secretariat's Article 14(2) Determination informing submitters that the Secretariat will not request a response from the Party and will no longer consider the submission provided no supplemental information is received within thirty days (21 September 1995). <input type="checkbox"/> Secretariat's Determination that the new or supplemental information provided by Submitters does not merit a review of the Secretariat's previous determination in this matter (11 December 1995).
Council's decision on the preparation of a factual record	N/A
Council's decision on the public release of the factual record	N/A
Status of the process	Process terminated.
Full text (of electronically available documents)	<ul style="list-style-type: none"> <input type="checkbox"/> Submission (30 June 1995) <input type="checkbox"/> Acknowledgment of receipt of submission (10 July 1995) <input type="checkbox"/> Secretariat's Determination under Article 14(1) (19 July 1995) <input type="checkbox"/> Secretariat's Determination under Article 14(2) (21 September 1995) <input type="checkbox"/> Secretariat's Determination pursuant to the filing of new or supplemental information (11 December 1995)

21 September, 1995

BY CERTIFIED MAIL

Earthlaw
C/O Jay Tutchton
University of Denver,
Foote Hall
7150 Montview Blvd.
Denver, CO 80220
U.S.A.

Submitter(s):

Biodiversity Legal Foundation
Consejo Asesor Sierra Madre
Forest Guardians
Greater Gila Biodiversity Project
Southwest Center for Biological Diversity

Party:

United States of America

Submission I.D. # SEM-95-001

Dear Mr. Tutchton:

The Secretariat has concluded its review of your submission under the criteria established in Article 14:2(a-d) of the *North American Agreement on Environmental Cooperation* ("the Agreement").

I- SUMMARY OF SUBMISSION

The Submitters have requested that the Secretariat "... determine that the United States is failing to effectively enforce its *Endangered Species Act of 1973* ('ESA')". (Biodiversity Submission at p. 2). The Submitters' request

arises out of language from the “*Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995*” (“the *Rescissions Act*”), signed into law on April 10, 1995 (Public Law 104-6). A portion of the *Rescissions Act*, known as the “Hutchison Amendment”, rescinds \$1,500,000(US) from the amounts available in Fiscal Year 1995 for making determinations as to whether a species should be declared “threatened” or “endangered” and whether a habitat should be designated as “critical habitat” under the *Endangered Species Act* of 1973 (16 U.S.C. 1531-1544). The *Rescissions Act* also prohibits the U.S. Fish and Wildlife Service from compensating for the loss of funds from other programs and precludes the application of funds appropriated under that heading for making a final determination that a species is “threatened” or “endangered” or that habitat constitutes “critical habitat” under the ESA.

The Submitters complain that without repealing, modifying or otherwise amending the ESA, the *Rescissions Act* has nonetheless halted the listing process thereby depriving these organizations of their ability to protect endangered species. Consequently, the submission asserts that both the U.S. Fish and Wildlife Service and the Submitters are currently unable to enforce certain aspects of Section 4 of the ESA.

II- ARTICLE 14

Article 14 of the Agreement empowers the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law. If the submission conforms to the criteria established in Article 14:1 and 14:2, the Secretariat may request a response from the NAFTA party named in the submission. In light of any government response, the Secretariat may recommend to the Council that a factual record be prepared. The Council, comprised of the environmental ministers (or their equivalent) of Canada, Mexico and the U.S., may then instruct the Secretariat to prepare a factual record on the submission.¹ Final factual records are made public upon a 2/3 vote of the Council.

III- PROCEDURAL HISTORY

On July 5, 1995, the Submitters requested the Secretariat to consider this matter under Article 14 of the Agreement. On July 19, the Secretariat

1. At present, the contents of a factual record are set-forth in the *Draft Procedures for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*. Copies of the *Draft Procedures* are available on request from the CEC Secretariat in Montreal, Canada.

notified the Submitters that their submission satisfied the screening criteria established in Article 14:1 of the Agreement. The Secretariat now reviews the submission under Article 14:2 of the Agreement in order to determine whether or not to request a response from the government of the United States of America.

IV- ANALYSIS

A. *The Endangered Species Act*

The ESA was enacted in 1973 to conserve endangered species and the ecosystems upon which they depend. A species must be listed as “threatened” or “endangered” under Section 4 of the ESA before that species and its habitat are extended protection under the law. As the Submitters point out, any interested person can initiate the ESA listing process by submitting a petition to the United States Secretary of the Interior. Under current law, interested persons can also take legal action to ensure that the Secretary of the Interior designates “critical habitat” for endangered species as required by the statute. The ESA in Section 9 lists prohibited acts. Violation of the provisions of the ESA may lead to enforcement actions and civil or criminal penalties assessed pursuant to Section 11.

B. *Articles 14 and 15 of the Agreement*

Article 14:2 states:

Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the Agreement;
- (c) private remedies available under the Party’s law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.

In evaluating the submission under Article 14:2, the Secretariat is confronted with the fact, acknowledged by the Submitters, that the alleged failure to enforce environmental law results from competing legislative mandates, and not from other action or inaction taken by agencies or officials. Indeed, under U.S. law the Department of Interior is legally precluded from implementing the provisions of the ESA specified in the *Rescissions Act*.² Consequently, the submission impels the Secretariat to consider whether a “*failure to effectively enforce*” under Article 14 may result from the enactment of a law which suspends the implementation of certain provisions of another statute.

Cast in the language of 14:2(b), the Secretariat must evaluate whether the goals of the Agreement will be advanced by considering this matter under Articles 14 and 15. For the reasons set out below, the Secretariat is persuaded that Articles 14 and 15 do not address the facts raised in the submission.

Article 14:1 allows the Secretariat to consider a submission asserting that “... a Party is failing to effectively enforce its environmental law...” On its face, there is little to support the notion in Article 14:1 that the word *Party* is restricted to include only the executive functions of agencies or departments, or that the term should mean anything other than “government” in a broader sense, including its separate branches. However Articles 14 and 15 read in conjunction with other provisions of the Agreement strongly suggest that a failure to enforce environmental law applies to the administrative agencies or officials charged with implementing laws and regulations.

Article 45(1) provides some guidance on the question raised above by specifying categories of conduct which do *not* constitute a failure to effectively enforce environmental law. That article reads:

A Party has not failed to ‘effectively enforce its environmental law’ or to comply with Article 5:1 in a particular case where the action or inaction in question by agencies or officials of that Party...

The quoted passage ascribes action or inaction to “*agencies or officials of that Party.*” This suggests, at least in the context of what is not a failure to enforce, that Articles 14 and 15 primarily envisage administrative breakdowns (failures) resulting from acts or omissions of an agency or official charged with implementing environmental laws.

2. See Anti-Deficiency Act, 31 U.S.C. 1341 et seq.

The focus on agency or departmental action or inaction is reinforced in Article 5:1 of the Agreement. Article 5:1 includes a non-exhaustive list of governmental actions appropriate to effectively enforce environmental law. Examples listed in Article 5:1 in the U.S. may arise from statutes or regulations enacted by the legislature and signed into law by the President. Yet the obligation to exercise the prescribed enforcement response rests with the department or agency charged with that responsibility. In the present submission, the Department of the Interior has not “failed” to discharge its duty to enforce certain provisions of the ESA since the Department is legally precluded from taking such action.

Article 14 provides further guidance on the nature of the failure to enforce environmental law. While not conclusive, the provisions of Article 14 are most logically triggered when a failure to enforce is brought about by administrative shortcomings rather than legislative mandates. For example, Article 14:2 states that the Secretariat shall consider whether private remedies were pursued prior to filing a submission. The Submitters assert that no private remedy is available to challenge a Rescissions Act which impacts on the implementation of another law³ (Biodiversity Submission at p. 12). The absence of a legal remedy further underscores the difficulties associated with evaluating legislative actions under Article 14.⁴ Here, the Submitters have lodged a submission immediately after the U.S. has spoken through the voice of its elected representatives. Article 14 was not intended to create an alternate forum for legislative debate.

Article 14:3(a) also supports the proposition that Articles 14 and 15 of the Agreement were intended to address failures by enforcement agencies or departments, and not inaction mandated by law. Article 14:3(a) directs the Secretariat to take no further action on a submission where the matter is the subject of a pending judicial or administrative proceeding. Article 45 defines “*judicial or administrative proceeding*” as “*a domestic judicial, quasi-judicial or administrative action pursued by the Party...*” In the present submission, the *Rescissions Act* curtails the listing of new species during Fiscal Year 1995, thereby eliminating the possibility of any enforcement actions with regard to such species. Accordingly, the Department of Interior is foreclosed from bringing an enforcement action on a provision of the ESA which the Department itself is prevented by law from implementing. Interpreting Article 14 as the Submitters propose would render Article 14:3(a) inapplicable in many circumstances.

3. The result may differ where a law impinges upon a constitutionally guaranteed right.

4. There may be circumstances where no legal remedy exists to redress a matter that falls squarely within the ambit of Article 14 submissions.

C. Article 3

Article 3 of the Agreement recognizes “...the right of each Party to establish its own levels of domestic environmental protection ... and to adopt or modify accordingly its environmental laws and regulations...” The Parties further commit to maintaining high levels of environmental protection. While the Submitters emphasize that the ESA has not been repealed or modified, it is clear that the *Rescissions Act*, which has the force and effect of law, operates to restrict full implementation of the ESA. In effect, the application of the *Rescissions Act* has suspended for a stipulated period of time the implementation of certain provisions of the ESA. Insofar as Articles 14 and 15 are concerned, the Secretariat defers to a Party’s explicit right to modify its laws.

V- CONCLUSION

The enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of environmental laws and statutes on the books. This is true even if pre-existing law is not amended or rescinded and the new legislation is limited in time. The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one. While the Submitters may contend that such legislative action amounts to a breach of the obligation to maintain high levels of protection, Articles 14 and 15 do not repose in the Secretariat the power to explore aspects of the Agreement not arising from a failure to enforce environmental law.

For the foregoing reasons, the Secretariat will not request a response from the government of the United States of America. Accordingly, in the absence of new or supplemental information provided within 30 days of receipt of this notice, the Secretariat concludes its consideration of this matter.⁵

Victor Lichtinger
Executive Director

5. *Draft Procedures* at 8.1.

Commission for Environmental Cooperation - Secretariat

**Determination pursuant to Articles 14 & 15 of the
North American Agreement on Environmental Cooperation**

Submission I.D.: SEM-95-001

Submitter(s):

Biodiversity Legal Foundation; Consejo Asesor Sierra Madre; Forest Guardians; Greater Gila Biodiversity Project; Southwest Center for Biological Diversity

Concerned Party:

United States of America

I- PROCEDURAL HISTORY

On July 5, 1995, the Submitters requested the Secretariat to consider submission SEM-95-001 under Article 14 of the Agreement. On July 19, the Secretariat notified the Submitters that their submission satisfied the screening criteria established in Article 14:1 of the Agreement. On September 21, 1995, the Secretariat notified the Submitters that it would not request a response from the government of the United States of America and that accordingly, in the absence of new or supplemental information provided within 30 days of receipt of said notice, the Secretariat had concluded its consideration of the matter. In a letter dated October 17, 1995 the Submitters offered a response to the Secretariat's determination in accordance with section 8.1 of the Draft Guidelines for Submissions on Enforcement Matters ("Guidelines"). The Secretariat now reviews the response to determine whether a response from the concerned Party is merited in light of the new or supplemental information provided by the Submitters, in accordance with section 8.1 of the Guidelines.

II- ANALYSIS

In a letter dated October 17, 1995, the Submitters respond to the Secretariat's determination not to request a response from the concerned Party. The Submitters' letter does not provide new or supplemental information sufficient to merit a review of the Secretariat's previous determination in this matter. No new facts are advanced which bear on the alleged failure to enforce environmental law.

III- CONCLUSION

For the foregoing reasons, the Secretariat determines that no response from the Party is merited in light of the new or supplemental information provided by the Submitters, and hereby notifies the Submitters that the submission process is terminated with respect to submission SEM-95-001.

Dated this 11th day of December, 1995.

Commission for Environmental Cooperation - Secretariat

per: Victor Lichtinger
Executive Director

SIERRA CLUB

Submission ID:	SEM-95-002
Submitter(s)	Sierra Club, Alaska Center for the Environment, Ancient Forest Rescue, Friends of the Earth, Headwaters, Hells Canyon Preservation Council, Idaho Conservation League, Inland Empire Public Lands Council, Institute for Fisheries Resources, Klamath Forest Alliance, National Audubon Society, Natural Resources Defense Council, Northcoast Environmental Center, Northwest Ecosystem Alliance, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen's Associations, Pacific Rivers Council, Pilchuck Audubon Society, Portland Audubon Society, Seattle Audubon Society, Southern Rockies Ecosystem Project, Western Ancient Forest Campaign, The Wilderness Society, Earthlife Canada Foundation operating as BC Wild, Environmental Resource Centre of Alberta, Centro Mexicano de Derecho Ambiental, Grupo de Los Cien, and Red Mexicana de Acción Frente al Libre Comercio
Party	United States of America
Summary of the matter addressed in the submission	Submitters allege that provisions of the "Fiscal Year 1995 Supplemental Appropriations, Disaster Assistance and Rescissions Act" ("Rescissions Act") result in a failure to effectively enforce all applicable Federal environmental laws by eliminating private remedies for salvage timber sales. Specifically submitters allege that the rider in Rescissions Act § 2001(a)(3) provides that salvage timber sales shall not be subject to administrative review and that the sales shall be deemed to satisfy all federal environmental and natural resource laws.

Name and citation of the environmental law in question	<input type="checkbox"/> All federal environmental laws.
Summary of the response provided by the party	N/A
Summary of the notifications to the submitter(s)	<input type="checkbox"/> Acknowledgment of receipt of submission (31 August 1995). <input type="checkbox"/> Secretariat's Determination that submission does not meet Article 14(1)(a-f) criteria and that the Secretariat will not request a response from the Party pursuant to Article 14(2) and will no longer consider the submission provided no supplemental information is received within thirty days (8 December 1995).
Council's decision on the preparation of a factual record	N/A
Council's decision on the public release of the factual record	N/A
Status of the process	Process terminated.
Full text (of electronically available documents)	<input type="checkbox"/> Submission (30 August 1995) <input type="checkbox"/> Acknowledgment of receipt of submission (31 August 1995) <input type="checkbox"/> Secretariat's Determination under Articles 14(1) and 14(2) (8 December 1995)

Commission for Environmental Cooperation - Secretariat

Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation

Submission I.D.: SEM-95-002

Submitter(s):

Sierra Club, Alaska Center for the Environment, Ancient Forest Rescue, Friends of the Earth, Headwaters, Hells Canyon Preservation Council, Idaho Conservation League, Inland Empire Public Lands Council, Institute for Fisheries Resources, Klamath Forest Alliance, National Audubon Society, Natural Resources Defense Council, Northcoast Environmental Center, Northwest Ecosystem Alliance, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen's Associations, Pacific Rivers Council, Pilchuck Audubon Society, Portland Audubon Society, Seattle Audubon Society, Southern Rockies Ecosystem Project, Western Ancient Forest Campaign, The Wilderness Society, Earthlife Canada Foundation *operating as* BC Wild, Environmental Resource Centre of Alberta, Centro Mexicano de Derecho Ambiental, Grupo de Los Cien, and Red Mexicana de Accion Frente al Libre Comercio

Concerned Party:

United States of America

I- SUMMARY OF THE SUBMISSION

On August 30, 1995, the Submitters filed with the Secretariat of the Commission for Environmental Cooperation ("Secretariat") a submission on enforcement matters pursuant to Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement").

The submission alleges that the *Fiscal Year 1995 Supplemental Appropriations, Disaster Assistance and Rescissions Act* (“*Rescissions Act*”), Pub. L. No. 104-19 (109 Stat. 194), passed by the U.S. Congress and signed into law by the President of the United States on July 27, 1995, contains a rider (“*Logging Rider*”) suspending the enforcement of U.S. environmental laws for a “massive” logging program on U.S. public lands.

The submission further alleges that U.S. environmental laws governing logging remain on the books and even remain applicable to logging on these federal forests. The rider, however, “...erects what may be insurmountable obstacles to citizen enforcement of these environmental laws for the expansive logging mandated or permitted by the rider.” Submission at p. 1.

According to the Submitters, the Logging Rider “suspends enforcement of most U.S. environmental laws with respect to logging for so-called “salvage” purposes and also for non-salvage logging in the Western Ancient Forests.” Submission at p. 2. Specifically, the Submitters allege that the Logging Rider “effectively suspends enforcement of environmental laws for two logging programs: (1) logging in the old-growth forest under Option 9 – the plan adopted by federal agencies to balance timber harvest against protecting old-growth dependent species like the northern spotted owl, salmon, and other aquatic species; and (2) so-called salvage logging.” Submission at p. 2.

The Submitters contend that for both logging programs, the Logging Rider provides that any environmental analysis produced, and any procedures followed by federal agencies for such timber sales “*shall be deemed to satisfy the requirements*” of several specifically listed laws and “[a]ll other applicable federal environmental and natural resource laws.” Submission at p. 2. The Submitters then conclude that “[a]ccordingly, the logging rider provides that such timber sales are specifically not subject to challenge for violations of such laws. Submission at p. 2.

II- ARTICLE 14

Article 14 of the Agreement allows the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat may consider any submission that meets the criteria set out in Article 14:1. Where the Secretariat determines that the Article 14:1 criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission. In light of any response provided by that Party, the Secretariat may

recommend to the Council that a factual record be prepared. The Council, comprised of the environment ministers (or their equivalent) of Canada, Mexico and the U.S., may then instruct the Secretariat to prepare a factual record on the submission.¹ Final factual records are made publicly available upon a 2/3 vote of the Council.

III- PROCEDURAL HISTORY

On August 30, 1995, the Submitters filed with the Secretariat submission No. SEM-95-002 under Article 14 of the NAAEC. The Secretariat now reviews the submission to determine whether the submission satisfies the screening criteria established in Articles 14:1 and 14:2.

IV- ANALYSIS

Environmental law

Article 14:1 empowers the Secretariat to consider alleged failures to enforce “environmental law” as that term is defined in Article 45:2(a) of the Agreement. Article 45 excludes from the definition of “environmental law” statutes, regulations or provisions thereof, “...the primary purpose of which is managing the commercial harvest or exploitation ... of natural resources”. The Article continues by explaining that the “primary purpose” of a particular statute or regulatory provision 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.

Submitters allege a general failure to enforce the environmental statutes referenced in the Logging Rider, including the Endangered Species Act and the National Environmental Policy Act. Also, the Submitters underscore the loss of administrative and judicial review procedures regarded as important enforcement tools available to citizens prior to the enactment of the Logging Rider. While the submission refers to “environmental laws”, it focuses almost exclusively on the language and effect of the Logging Rider.

Although the Logging Rider clearly addresses the harvesting of natural resources (timber), the Secretariat reads the submission as alleging a

1. The contents of a factual record are set-forth in the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*. The *Guidelines* can be obtained through the CEC's home page on the Internet at the following address: <http://www.cec.org>. Copies of the *Guidelines* are also available on request from the CEC Secretariat in Montreal, Canada.

failure to enforce the environmental laws enumerated in the Logging Rider, some of which clearly meet the definitional requirements established in Article 45. Accordingly, the Secretariat next considers both whether a “failure to effectively enforce” has been alleged under Article 14:1, and whether the submission merits a response under Article 14:2 of the Agreement.

Failure to effectively enforce

The Logging Rider provides expedited procedures for the complex, multi-phase process involved in timber sales; vests discretion in the Secretary of Agriculture and Interior to consider certain environmental effects; limits or eliminates administrative and judicial review of specified decisions and agency action; and stipulates that certain documents and procedures required by the Logging Rider shall be deemed to satisfy the requirements of enumerated environmental laws along with all other applicable Federal environmental and natural resource laws.

The Submitters contend that by enacting the Logging Rider, the United States is failing to effectively enforce its environmental law. The Submitters also emphasize that “[s]uspending citizen enforcement of federal environmental laws constitutes a failure to effectively enforce such laws” and that “[b]y eliminating the most effective (and often only) judicial remedies for violations of environmental laws, the logging rider violates Articles 5(2) and 6(3)(b), (d).” Submission at p. 10-11.

The submission focuses on a later-enacted law that impacts on the implementation of an existing environmental law without directly amending or repealing it. The Secretariat considers that the enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of laws and statutes on the books. This is true even if pre-existing law is not amended or rescinded and the new legislation is limited in time. The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one.

Accordingly, the Secretariat cannot find any dereliction of a duty or other “failure” as contemplated by Article 14. Rather, the new law will be read side-by-side with pre-existing environmental law. Where the new law explicitly exempts, modifies or waives provisions of an earlier law, the later-enacted law will prevail².

2. The Secretariat also considers that “failures” to enforce are best construed to apply to the actions or omissions of the agencies and officials charged with enforcing

As mentioned above, the submission focuses on the enactment of a law impacting on the implementation of existing environmental laws, including the “suspension” of citizen enforcement through additional limitations on administrative and judicial review. Yet, the enactment of a law does not, without more, provide facts upon which to charge a failure to enforce. Essentially, the submission is prospective in nature, alleging anticipated but unrealized enforcement consequences. For example, the Submitters allege that “[t]he logging rider precludes them from effectively using administrative appeals and the courts to facilitate or compel compliance with U.S. environmental laws. As a result, many environmental violations *will be left* unredressed and a great deal of on-the-ground environmental harm *will occur*.”³ Submission at p. 14.

The absence of specific facts and of a concrete situation or event(s) also complicates the determination of which environmental law the Party is failing to effectively enforce. In the absence of a factual basis supporting the assertion that the United States is failing to effectively enforce, the Secretariat is not provided with sufficient information to allow it to review the submission.⁴ NAAEC at Article 14:1a.

Developing a Factual Record

An alternative but related consideration for declining to consider further this matter stems from examining the potential outcome of the Articles 14 and 15 process in this particular submission – the development of a factual record – and how that process might promote the goals of NAAEC.

A factual record may assist the public and Parties in assessing the effectiveness of specified enforcement practices. This is especially true, though perhaps not exclusively so, in matters where the facts are inchoate, disputed or where the facts simply have not been put before the public. To the extent possible, the record will center on those facts which

environmental law, and not to the House of Representatives, Senate and President of the United States acting collectively by enacting legislation.

3. Despite the “suspension” of administrative and judicial review, the relevant agency, department or official may still vigorously enforce the environmental laws in question.
4. Had specific facts been alleged, the Secretariat’s determination of this matter might have been the same due to the sufficiency clause contained in the Logging Rider. Sufficiency clauses are not without precedent in appropriations bills. *See e.g.*: Pub. L. 101-121 (103 Stat. 701) at s. 1351(b)(6)(A) and, Pub. L. 100-446 (102 Stat. 1774) at s. 321. The Secretariat is aware of no successful challenges to the constitutionality of the Logging Rider under consideration. To the contrary, courts appear to give full effect to the language of the Rider. *See e.g. Northwest Forest Resources Council v. Glickman*, DC Oregon [No. 95-6244-HO, 9/13/95].

appear more or less likely to indicate that an alleged "failure" to enforce took place. Depending on the circumstances, the information may focus on particular actions, omissions or events casting light on the alleged "failure". The preparation of a factual record may also at times include consideration of the impacts and effects of an alleged failure to enforce where developing such information would assist in determining whether a failure to enforce actually occurred, or would otherwise promote the objectives of the Agreement.⁵

In the present matter, developing facts pertaining directly to the alleged failure to enforce environmental law could do little more than restate the language of the Logging Rider, since presumably the failure is manifest in the words of the legislation. Instead, the development of a factual record in the pending matter would necessarily consider the *actual and potential impacts and effects* of a new law. Essentially, the Secretariat would then record facts relating to the implementation of that new law.

That evaluation, however, is an intrinsic function of the legislative process. In this regard, the Secretariat is reluctant to recommend to Council that the Commission for Environmental Cooperation become a secondary forum for legislative debate of one of its Parties. Indeed, the elected representatives of both Houses of Congress, the President of the United States, and an important representation of the mass media have recently considered to some degree the possible impacts of the Logging Rider.⁶ The reprise of this debate almost immediately following the enactment of the law would contribute marginally, if at all, to the overall goals of the Agreement.

VI- CONCLUSION

For the foregoing reasons, the Secretariat will take no further action in connection with submission No. SEM-95-002. Accordingly, in the ab-

5. For example, in a submission alleging failure to enforce laws prohibiting the discharge of pollutants to a body of water, assessing the aquatic health of receiving waters or the level of specific contaminants in such waters may shed light on the nature of the discharges under consideration.

6. See e.g.: U.S. Newswire, May 18, 1995, "Green Group Leaders Praise President Clinton's Plan to Veto Anti-Environmental Rescissions Bill"; The New York Times, May 21, 1995, "A Presidential Contract"; International Herald Tribune, May 22, 1995, "Clinton Can Start to Fight"; The Christian Science Monitor, July 11, 1995, "Murrelets Are Just Sounding the Alarm Bell"; The Santa Fe New Mexican, July 25, 1995, "Bill Could Increase Logging 20 Percent"; Greenwire, August 11, 1995, "Salvage Logging: Enviro File Suit Contesting Rider Sale", BNA National Environment Daily, August 14, 1995, "Suit Filed by Coalition against Logging 'Green' Timber under Rescissions Bill Rider".

sence of new or supplemental information provided within 30 days of receipt of this notice, the Secretariat concludes its consideration of this matter.⁷ The Secretariat will consider separately the Submitters' request for the preparation of an Article 13 report on the matter.

Dated this 8th day of December, 1995.

Commission for Environmental Cooperation - Secretariat

per : Victor Lichtinger
Executive Director

7. *Guidelines* at 8.1.

COMITÉ PARA LA PROTECCIÓN DE LOS RECURSOS NATURALES

Submission ID:	SEM-96-001
Submitter(s)	Comité para la Protección de los Recursos Naturales, A.C.; Grupo de los Cien Internacional, A.C.; Centro Mexicano de Derecho Ambiental, A.C.
Party	United Mexican States
Summary of the matter addressed in the submission	<p>The Submitters allege that the appropriate authorities failed to effectively enforce environmental laws during the evaluation process of the project “Construction and Operation of a Public Harbor Terminal for Tourist Cruises on the Island of Cozumel, State of Quintana Roo” (<i>Construcción y operación de una terminal portuaria, de uso público para cruceros turísticos en la Isla Cozumel, Estado de Quintana Roo</i>).</p> <p>The Submitters allege that during the evaluation process of the above-mentioned project, the competent authorities failed to effectively enforce the following environmental laws: General Law of Ecological Equilibrium and Environmental Protection (<i>Ley General del Equilibrio Ecológico y la Protección al Ambiente</i>); Regulation on Environmental Impact (<i>Reglamento en Materia de Impacto Ambiental</i>); Instructions to prepare and present a general declaration of Environmental Impact (<i>Instructivo para desarrollar y presentar la Manifestación de Impacto Ambiental en la Modalidad General</i>). The Submitters also describe other legal requirements that in their opinion were not effectively enforced. These are: the Decree published in the Official Gazette of the Federation establishing the Declaration of a “Protection Zone for the Marine Fauna and Flora of the Western Coast of the Island of Cozumel in the State of Quintana Roo” (<i>Decreto publicado en el Diario Oficial de la Federación que</i></p>

	<p><i>estableció la Declaratoria de “Zona de refugio para la flora y fauna marinas de la costa occidental de la Isla Cozumel, Estado de Quintana Roo”</i> of 11 June 1980; the Declaratory Decree of Uses, Functions and Reserves of the Municipality of Cozumel (<i>Decreto de Declaratoria de Usos, Destinos y Reservas del Municipio de Cozumel</i>) of 9 March 1987; and the Law on Harbors (<i>Ley de Puertos</i>).</p> <p>More specifically, the Submitters allege that the above-mentioned project was initiated without a declaration of environmental impacts covering all the works included in the project, contrary to the Concession Title awarded by the Secretariat of Communications and Transportation (Título de Concesión otorgado por las Secretaría de Comunicaciones y Transportes) for the construction and operation of the project. In addition, the Submitters argue that the project is located within the limits of a protected natural area known as the “Zona de refugio para la protección de la flora y la fauna marinas de la costa occidental de la Isla Cozumel” protected under a special legal regime. The Submitters further allege that the situation is serious and represents an immediate danger for the survival and development of both the Paradise Reef “<i>Arrecife Paraíso</i>” and the Caribbean Barrier Reef (<i>Cadena Arrecifal del Gran Caribe</i>).</p>
<p>Name and citation of the environmental law in question</p>	<ul style="list-style-type: none"> <input type="checkbox"/> <i>Ley General del Equilibrio Ecológico y la Protección al Ambiente</i> (LGEEPA) <input type="checkbox"/> <i>Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Impacto Ambiental</i> <input type="checkbox"/> <i>Instructivo para desarrollar y presentar la Manifestación de Impacto Ambiental en la Modalidad General</i> <input type="checkbox"/> Decree published on 11 June 1980 in the <i>Diario Oficial de la Federación</i>, which declares the “Zona de refugio para la protección de la flora y fauna marinas de la costa occidental de la Isla Cozumel, Estado de Quintana Roo” <input type="checkbox"/> <i>Decreto de Declaratoria de Usos, Destinos y Reservas del Municipio de Cozumel, Q. Roo publicado en el Periódico Oficial del Estado de Quintana Roo</i> of 19 March 1987 <input type="checkbox"/> <i>Ley de Puertos</i>

<p>Summary of the response provided by the party</p>	<p>In its response, the Mexican Government asserts that the application of the North American Agreement on Environmental Cooperation (NAAEC) cannot be retroactive, and argues that the submission exceeds CEC's jurisdiction. The response also states that the submission is inadmissible under Article 14 of the NAAEC as, in its view, the submitters did not certify their legal capacity, did not specify the damages they suffered and did not exhaust all remedies available under Mexican Law.</p> <p>The Government of Mexico also states in its response that there is an inconsistency between the issues raised in the submission and NAAEC's goals as, in its opinion, the submitters failed to "establish a necessary relation between the alleged environmental damage to the flora and fauna of Paraiso's reef and the alleged violations of environmental law" [translation].</p> <p>The Government of Mexico's response also disputes many factual assertions in the submission regarding the alleged failure to effectively enforce its environmental law.</p>
<p>Summary of the notifications to the submitter(s)</p>	<ul style="list-style-type: none"> <input type="checkbox"/> Secretariat's acknowledgement of receipt of the submission (18 January 1996) <input type="checkbox"/> Secretariat's Determination under Article 14(1) (6 February 1996) <input type="checkbox"/> Secretariat's Determination under Article 14(2) (8 February 1996) <input type="checkbox"/> Secretariat's Notification to Council (7 June 1996) <input type="checkbox"/> Secretariat's Notification to the Submitters that the Final Factual Record has been provided to the Council on 25 July 1997 (29 July 1997) <input type="checkbox"/> Final Factual Record (24 October 1997)
<p>Council's decision on the preparation of a factual record</p>	<p>Council instructed Secretariat to develop a factual record on 2 August 1996.</p>
<p>Council's decision on the public release of the factual record</p>	<p>On 24 October 1997, the Council instructed the CEC Secretariat to release to the public the final factual record.</p>

Status of the process	On 24 October 1997, the Council instructed the Secretariat to release to the public the Final Factual Record. The process is therefore terminated.
Full text (of electronically available documents)	<ul style="list-style-type: none"> <li data-bbox="619 622 1197 678">□ Submission (17 January 1996), available only in Spanish <li data-bbox="619 689 1197 745">□ Secretariat's Determination under Article 14(1) (6 February 1996) <li data-bbox="619 757 1197 813">□ Secretariat's Determination under Article 14(2) (8 February 1996) <li data-bbox="619 824 1197 880">□ Response from the Government of Mexico (20 March 1996) <li data-bbox="619 891 1197 947">□ Secretariat's Notification to Council (Article 15(1)) (7 June 1996) <li data-bbox="619 958 1197 1014">□ Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo (24 October 1997)

Commission for Environmental Cooperation - Secretariat

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

Submission I.D.: SEM-96-001

Submitter(s):

Comité para la Protección de los Recursos Naturales, A.C.;
Grupo de los Cien Internacional, A.C.;
Centro Mexicano de Derecho Ambiental, A.C.

Concerned Party:

United Mexican States

I- PROCEDURAL HISTORY

On January 18, 1996, three non-governmental organizations, the Comité para la Protección de los Recursos Naturales A.C., el Grupo de los Cien Internacional A.C., and el Centro Mexicano de Derecho Ambiental A.C., presented the Secretariat with a submission under Article 14 of the NAAEC. On February 8, 1996, after reviewing the submission under Article 14(1) and 14(2), the Secretariat requested a response from Mexico. On March 27, 1996, the Government of Mexico presented its response to the submission.

II- SUMMARY OF SUBMISSION

Submitters allege that Mexican environmental authorities are failing to effectively enforce environmental law by not requiring the presentation of an Environmental Impact Assessment ("EIA") in connection with the

construction and operation of a port terminal and related works located in Cozumel, Quintana Roo.

Submitters contend that the project contravenes the language and intent of Article 28 of the 1988 *Ley General de Equilibrio Ecológico y Protección Ambiental* (General Law of Ecological Balance and Environmental Protection, hereinafter “Ecology Law”) which provides in relevant part:

“Performance of public or private works or activities which may cause ecological imbalance or exceed the limits and conditions provided for in the technical ecological standards and regulations issued by the Federal Government to protect the environment must be subject to a prior authorization from the Federal Government through [SEMARNAP] or the state and local agencies, in accordance with the distribution of authority described herein, as well as in compliance with all requirements imposed on them once the environmental impact which might arise is evaluated, without prejudice to other authorizations that must be given by the relevant authorities.”

“When evaluation of environmental impact for execution of works or activities that have as their purpose use of natural resources is at issue, [SEMARNAP] shall require the interested parties to include on the corresponding environmental impact statement a description of the possible effects of said works or activities on the ecosystem involved, considering the conjunction of elements which form it and not only the resources which are to be used.”

Submitters further assert that the concessionaire failed to comply with subpart (e) of Condition Five contained in the Port Terminal Concession issued by the Secretary of Communication and Transportation (“SCT”) on July 22, 1993. Condition Five reads in relevant part:

“Within a period of no longer than three months from the date this concession is awarded, [concessionaire] must present to the Secretary the Executive Project for undertaking the works, containing the following information: (e) the departmentally-reviewed environmental impact assessment (“dictamen”) respecting the construction and operation of the terminal.”

Finally, the Submitters note that Article 2, Part IV of the *Ley de Puertos* (“Law of Ports”) governing the concession, defines the terminal as: “the facilities established in or outside of a port, consisting of works, installations and surfaces, including off-shore, which allow for the integral operation of the port in accordance with its intended uses.”

Submitters conclude by asserting that Mexican environmental authorities have required the concessionaire only to submit an EIA for

the construction of the pier at Cozumel, rather than requiring an EIA comprising the totality of related on-shore port terminal facilities, including a passenger building, access road and parking lot.

III- SUMMARY OF RESPONSE

The Government of Mexico (“Mexico”) responds by raising issues concerning the decision made by the Secretariat to accept the submission and to request a response from Mexico in addition to refuting Submitters’ contentions.

Mexico notes that the matters raised in the submission are based on acts which took place prior to the NAAEC entering into force, pre-dating the establishment of the CEC. Moreover, Mexico points out that the language of Article 14(1) limits the scope of inquiry to allegations that a Party “is failing” to effectively enforce its environmental law. Accordingly, Mexico considers the matters raised by the submitters as beyond the scope of Article 14 in addition to being retroactive in character.

Mexico argues that the submitters failed to provide reliable evidence demonstrating the character of the organizations they purport to represent, nor did submitters furnish documentation respecting their legal character and by-laws. Mexico further contends that the submitters have not met the criteria established in Article 14:2(a) of the NAAEC by failing to demonstrate that their organizations have suffered direct harm as a consequence of the acts alleged in the submission. Finally, Mexico asserts the submitters have not exhausted remedies available under Mexican law, and that the submission does not further the objectives of the NAAEC.

In considering the allegations raised in the submission, Mexico affirms that the on-shore activities represent distinct projects which need not be evaluated contemporaneously with the construction of the pier, and that the construction and operation of the pier meets all applicable EIA requirements (pp. 14-16 of the Response from the Government of Mexico (“Response”). Mexico reports that the authorities reviewed in August of 1990 an EIA denominated *Muelle de Cruceros en Cozumel, Quintana Roo* (“Cruise Ship Pier, Cozumel, Quintana Roo”). Additionally, Mexico notes that the SCT “...*only has authorized the initiation of works relating to the pier, and that the other works referenced in the Concession will be reviewed by environmental authorities upon authorization by the SCT.*” (Response at p. 14).

Mexico further asserts that the Concession is not integral, or multi-activity based, in character and that the environmental authorities will review the EIAs for any additional works only after these works are authorized by SCT. (Response at p. 15).

Mexico also responds that the requirement for the approval of an EIA in the Concession for the port terminal is “...*subject to various conditions established in the same Concession, and that some of these conditions are conditions precedent to the EIA requirement, as in the case of condition One.*” (Response at p. 16). In other words, Mexico asserts that Condition Five is subject to the prior fulfillment of Condition One of the concession, and that Condition One has not yet been fulfilled.

In regard to Article 28 of the Ecology Law, Mexico questions the relevance of the second paragraph of Article 28, since the works at the site do not consider the “*use of natural resources*”, as those terms are employed in the law. Mexico further notes that the reference to “*natural resources*” in the second paragraph of Article 28 refers to “...*those works or activities which utilize animals, forest resources, aquifers or the subsurface as necessary raw materials, or which propose to directly extract such resources*”. (Response at p. 13).

IV- SECRETARIAT OBSERVATIONS

A. Jurisdiction and Scope of Article 14

Article 47 of the NAAEC indicates the Parties intended the agreement to take effect on January 1, 1994. The Secretariat is unable to discern any intentions, express or implied, conferring retroactive effect on the operation of Article 14 of the NAAEC.

Notwithstanding the above, events or acts concluded prior to January 1, 1994, may create conditions or situations which give rise to current enforcement obligations. It follows that certain aspects of these conditions or situations may be relevant when considering an allegation of a present, continuing failure to enforce environmental law.

The Vienna Convention on the Law of Treaties provides in section 28 that “unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind the 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” (United Nations, *Treaty Series*, vol. 1155, p. 331).

Documents provided by the submitters and the government of Mexico make reference to acts and events occurring both before and after the execution of the NAAEC in 1994. The materials provided regarding actions taken after January 1, 1994, may help to identify relevant facts and clarify whether a present failure to enforce environmental law has occurred.

In light of the possibility that a present duty to enforce may originate from, in the language of the Vienna Convention, a situation which has *not* ceased to exist, the Secretariat does not view the further study of this matter as constituting retroactive application of the NAAEC, nor would such study contravene the language of Article 14 of the NAAEC.

B. Article 14(1) and 14(2)

Article 14(1) of the NAAEC establishes threshold requirements for consideration of a submission by the Secretariat. Article 14(2) sets forth criteria to guide the Secretariat in determining whether the submission merits requesting a response from the Party.

The Secretariat concluded that the submitters complied with the requirements of Article 14(1) which include: 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; 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.

In deciding whether to request a response by the Party, the Secretariat was guided by whether: (a) the submission alleged harm to the person or organization making the submission; (b) the submission, alone or in combination with other submissions, raised matters whose further study in this process would advance the goals of the Agreement; (c) private remedies available under the Party's law had been pursued; and (d) the submission was drawn exclusively from mass media reports.

In considering harm, the Secretariat notes the importance and character of the resource in question – a portion of the magnificent

Paradise corral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC.

For similar reasons, the Secretariat considers that under the circumstances the submitters attempted to pursue local remedies, primarily by availing themselves of the “denuncia popular” administrative procedure.

The Secretariat also considered that, despite the complexity of the issues raised in the submission, the further study of this matter would substantially promote the objectives of the NAAEC, specifically Article 1 (a, d, f, and g).

V- RECOMMENDATION TO COUNCIL

In accordance with Article 15(1), and considering the possibility of a present failure to effectively enforce environmental law, the Secretariat recommends to Council that a Factual Record be prepared. The preparation of a Factual Record would shed light on both submitters’ allegations of non-enforcement and the government of Mexico’s important contentions in this matter.

A Factual Record would consider all of the information relevant to the issue of whether the Mexican environmental authorities’ conduct in not requiring the submission of an EIA on the totality of works contemplated in the Cozumel Port Terminal project may constitute a failure to enforce existing law. For the most part, these considerations turn on facts relating to the definition of a “port terminal” under the Law of Ports (“Ley de Puertos”) and the relevance of this issue to the matter under consideration, the extent to which the project or projects have been “authorized”, and the facts relative to the documentation generated after January 1, 1994.

Given the concerns discussed above, the Secretariat does not advocate the examination of acts or conduct which occurred prior to the entering into force of the NAAEC for the purposes of evaluating any alleged failures to enforce law at that time, including for example the EIA prepared in 1990 for the Cozumel pier.

Finally, the Secretariat considers that the preparation of a Factual Record in this matter will promote the objectives stated in Article 1(g) and 1(f) of the NAAEC, which include “enhanc[ing] compliance with, and enforcement of , environmental laws and regulations” and “strengthen[ing] cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices”.

Montreal, on this 7th day of June 1996

Commission for Environmental Cooperation - Secretariat

per: Victor Lichtinger
Executive Director

AAGE TOTTRUP

Submission ID:	SEM-96-002
Submitter(s)	Aage Tottrup, P. Eng.
Party	Canada
Summary of the matter addressed in the submission	The Submitter asserts that the governments of Canada and Alberta have failed to effectively enforce their environmental laws resulting in the pollution of specified wetland areas which impacts on the habitat of fish and migratory birds.
Name and citation of the environmental law in question	<input type="checkbox"/> <i>Fisheries Act</i> , R.C.S., c. F-14, a. 35, 36 and 38; <input type="checkbox"/> <i>Department of Environment Act</i> , R.S.A. 1980, c. D-19, a. 7, 16 and 17; <input type="checkbox"/> <i>Clean Water Act</i> , R.S.A. 1980, c. C-13, a. 3, 4 and 17; <input type="checkbox"/> <i>Environmental Protection and Enhancement Act</i> , S.A. 1992, c. E-13.3, as modified by part 4, divisions 1 and 2, and part 10; <input type="checkbox"/> <i>Waste Water and Storm Drainage Regulation, Alberta Regulation 199/93</i> as modified by Alta. Reg. 249/93.
Summary of the response provided by the party	N/A
Summary of the notifications to the submitter(s)	<input type="checkbox"/> Acknowledgment of receipt of the submission (28 March 1996). <input type="checkbox"/> Article 14(1) Determination (17 April 1996) <input type="checkbox"/> Article 14(2) Determination (28 May 1996)

Council's decision on the preparation of a factual record	N/A
Council's decision on the public release of the factual record	N/A
Status of the process	On 28 May 1996, the Secretariat advised the Submitter that the submission did not merit requesting a response from the Government of Canada. The process is therefore terminated.
Full text (of electronically available documents)	<input type="checkbox"/> Submission (20 March 1996) <input type="checkbox"/> Acknowledgment of receipt of the submission (28 March 1996) <input type="checkbox"/> Article 14(1) Determination (17 April 1996) <input type="checkbox"/> Article 14(2) Determination (28 May 1996)

Commission for Environmental Cooperation - Secretariat

Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation

Submission I.D.: SEM-96-002

Submitter(s):

Mr. Aage Tottrup, P. Eng.

Concerned Party:

Canada

I- SUMMARY OF THE SUBMISSION

On March 20, 1996, the Submitter filed with the Secretariat of the Commission for Environmental Cooperation ("Secretariat") a submission on enforcement matters pursuant to Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement").

The submission alleges that the Governments of Canada and Alberta have failed to effectively enforce their environmental law resulting in the pollution of specified wetland areas impacting on the habitat of fish and migratory birds.

II- ARTICLE 14

Article 14 of the Agreement allows the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environ-

mental law. The Secretariat may consider any submission that meets the criteria set out in Article 14(1). Where the Secretariat determines that the Article 14(1) criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission (Article 14(2)). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared. The Council, comprised of the environment ministers (or their equivalent) of Canada, Mexico and the U.S., may then instruct the Secretariat to prepare a factual record on the submission. Final factual records are made publicly available upon a $\frac{2}{3}$ vote of the Council.

III- PROCEDURAL HISTORY

On March 20, 1996, the Submitter filed with the Secretariat submission SEM-96-002 under Article 14 of the NAAEC. On April 17, 1996, the Secretariat determined that the submission met the criteria of Article 14(1). The Secretariat now reviews the submission to determine whether the submission merits requesting a response from the Government of Canada, in accordance with Article 14(2).

IV- ANALYSIS

The submission and Schedule "F" to the submission indicate that the Submitter has initiated a judicial proceeding against Her Majesty the Queen in Right of Alberta and several other defendants based on the same facts as those alleged in the submission (Court of Queen's Bench of Alberta, Judicial District of Edmonton, no. 9503 14035).

The outcome of that pending judicial proceeding is likely to impact directly on the issues raised in the submission and, should the Submitter prevail, may resolve most or all of these issues. Accordingly, in accordance with Article 14(2), the Secretariat will not proceed any further with the submission at this time. The Submitter may wish in the future to request the Secretariat to re-consider the submission following the resolution of the matter currently before the Queen's Bench.

Montreal, this 28th day of May 1996.

Commission for Environmental Cooperation - Secretariat

per: Victor Lichtinger
Executive Director

THE FRIENDS OF THE OLDMAN RIVER

Submission ID:	SEM-96-003
Submitter(s)	The Friends of the Oldman River
Party	Canada
Summary of the matter addressed in the submission	<p>The Submitter alleges that “[t]he Government of Canada is failing to apply, comply with and enforce the habitat protection sections of the Fisheries Act and with CEAA (Canadian Environmental Assessment Act). In particular the Government of Canada is failing to apply, comply with and enforce Sections 35, 37 and 40 of the Fisheries Act, Section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the Law List Regulations made pursuant to paragraphs 59(f) and (g) of CEAA.” According to the Submitter the Department of Fisheries released a Directive (Directive on the Issuance of Subsection 35(2) Authorizations) which creates “a decision-making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision making tool.” The Submitter further alleges that “[t]here are very few prosecutions under the habitat provisions of the Fisheries Act and the prosecutions that do occur are very unevenly distributed across the country. In fact there has been a <i>de facto</i> abdication of legal responsibilities by the Government of Canada to the inland provinces. And the provinces have not done a good job of ensuring compliance with or enforcing the Fisheries Act.” According to the Submitter, “228 projects were reviewed by the Department of Fisheries and Oceans in the Central and Arctic Region (the Prairie Provinces, Ontario and the Northwest Territories), as of 21 June 1996. For these projects, 78 Letters of advice were issued. The other 150 projects listed were handled by providing advice to provincial or territorial agencies or to the permitting agency.”</p>

Name and citation of the environmental law in question	<input type="checkbox"/> <i>Fisheries Act</i> , R.S.C. 1985, c. F-14, ss. 35, 37 and 40 <input type="checkbox"/> <i>Canadian Environmental Assessment Act</i> , S.C. 1992, c. 37, s. 5(1)(d); 59(f)(g), Schedule 1, Part 1 <input type="checkbox"/> <i>Law List Regulations</i> , Item 6, SOR/94-636
Summary of the response provided by the party	<p>In its response, the Canadian government indicates that the matter raised in the submission is the subject of a pending judicial or administrative proceeding before the Federal Court of Canada.</p> <p>It specifies that on November 7, the Friends of the West Country Association filed an Originating Notice of Motion in the Trial Division of the Federal Court of Canada in Alberta, <i>The Friends of the West Country Association v. The Minister of Fisheries and Oceans and the Attorney General of Canada</i> (Federal Court case No. T2457-96). It also states that at issue in both the submission to the NAAEC and the case before the Federal Court are the application and interaction of sections 35, 37 and 40 of the <i>Fisheries Act</i> and of the <i>Canadian Environmental Assessment Act</i>.</p> <p>The Government of Canada also states that as referred to in Article 14(3), private remedies in connection with the matter raised in the submission are available and are being pursued in the Federal Court action.</p>
Summary of the notifications to the submitter(s)	<input type="checkbox"/> Acknowledgment of receipt of the submission (20 September 1996) <input type="checkbox"/> Article 14(1) Determination (1 October 1996) <input type="checkbox"/> Acknowledgment of receipt of the amended submission (15 October 1996) <input type="checkbox"/> Second Article 14(1) Determination (18 October 1996) <input type="checkbox"/> Secretariat's request for a response from Canada (8 November 1996) <input type="checkbox"/> Article 14(3) advice from the Party that it will be responding within 60 days (23 December 1996) <input type="checkbox"/> Response from Canada (10 January 1997) <input type="checkbox"/> Article 15(1) Determination (2 April 1997)

Council's decision on the preparation of a factual record	N/A
Council's decision on the public release of the factual record	N/A
Status of the process	On 2 April 1997, the Secretariat notified the Submitter that the Submission did not warrant developing a factual record. The process is therefore terminated.
Full text (of electronically available documents)	<input type="checkbox"/> Submission (9 September 1996) and annexes 1, 2 and 3 <input type="checkbox"/> Article 14(1) Determination (1 October 1996) <input type="checkbox"/> Revised Submission (8 October 1996) and annexes 1, 2, 3 and 4 <input type="checkbox"/> Article 14(1) Determination (18 October 1996) <input type="checkbox"/> Article 14(2) Determination (8 November 1996) <input type="checkbox"/> Response from Canada (10 January 1997) <input type="checkbox"/> Article 15(1) Determination (2 April 1997)

18 October 1996

BY FAX AND REGISTERED MAIL

Mrs. Martha Kostuch
The Friends of the Oldman River
Box 1288
Rocky Mountain House
Alberta T0M 1T0

Fax: (403) 845-5377

**Re: Submission on enforcement matters under Articles 14 and 15 of
the North American Agreement on Environmental Cooperation**

Submitter(s): The Friends of the Oldman River
Party: Canada
Date: October 8, 1996
Submission No.: SEM-96-003

Dear Ms. Kostuch:

Please find below the Secretariat Article 14(1) Determination in connection with your amended submission on enforcement matters dated October 8, 1996 and filed pursuant to the previous Secretariat Article 14(1) Determination of October 1, 1996.

In evaluating the submission under Article 14(1), the Secretariat considered whether the primary purpose of the relevant provisions of the *Fisheries Act* and the *Canadian Environmental Assessment Act* is "the protection of the environment" and not primarily "managing the commercial harvest exploitation, or subsistence or aboriginal harvesting, of natural resources."

The Friends of the Oldman River
18 October 1996

The Secretariat viewed the primary purpose of the above-mentioned provisions as falling within the purview of the areas listed under the subsections of Article 45(2)(a), namely: (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 and (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.

In other respects your amended submission satisfies the initial screening criteria under Article 14(1)(a-f) of the North American Agreement on Environmental Cooperation. Accordingly, your submission will now be reviewed under Article 14(2) to determine whether the submission merits requesting a response from the Government of Canada.

We will keep you informed of the status of your submission.

Yours truly,

Commission for Environmental Cooperation - Secretariat

per: Greg Block
Director

c.c. Mr. H. Anthony Clarke, Environment Canada
Mr. William Nitze, U.S. EPA
Mr. José Luis Samaniego, SEMARNAP

Commission for Environmental Cooperation - Secretariat

Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation

Submission ID: SEM-96-003

Submitter(s) : The Friends of the Old Man River

Concerned Party: Canada

I- PROCEDURAL HISTORY

On 9 September 1997, the Submitter filed with the Secretariat submission SEM-96-003 ("Submission") under Article 14 of the North American Agreement on Environmental Cooperation ("the Agreement"). On 1 October 1996, the Secretariat determined that the submission did not meet the criteria of Article 14(1). On 8 October 1996, the Submitter filed an amended submission satisfying the criteria of Article 14(1). The Secretariat then reviewed the submission under Article 14(2) and requested a response from the Government of Canada on 8 November 1996. On 13 December 1996, the Government of Canada advised the Secretariat that it would respond to the submission within 60 days of the receipt of the submission. On 13 January 1997, the Government of Canada filed its response with the Secretariat.

In accordance with Article 15(1) of the Agreement, the Secretariat now reviews the Submission, in light of the response provided by the Government of Canada, to determine whether a factual record is warranted.

II- NAAEC ARTICLES 14 AND 15

Article 14 of the Agreement allows the Secretariat to consider a submission from any non-governmental organization or person asserting that

a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat may consider any submission that meets the criteria set out in Article 14(1). Where the Secretariat determines that the Article 14(1) criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission (Article 14(2)). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared in accordance with Article 15(1). The Council, comprised of the Minister of the Environment (or their equivalent) of Canada, Mexico and the United States, may then instruct the Secretariat to prepare a factual record on the submission (Article 15(2)). Final factual records are made publicly available upon a 2/3 vote of the Council (Article 15(7)).

III- SUMMARY OF THE SUBMISSION

The Submitter alleges that “[t]he Government of Canada is failing to apply, comply with and enforce the habitat protection sections of the *Fisheries Act* and with CEAA [*Canadian Environmental Assessment Act*]. In particular the Government of Canada is failing to apply, comply with and enforce Sections 35, 37 and 40 of the *Fisheries Act*, Section 5(1)(d) of CEAA and Schedule 1 Part 1 Item 6 of the Law List Regulations made pursuant to paragraphs 59(f) and (g) of CEAA.” [Submission at p. 1].

According to the Submitter the Department of Fisheries and Oceans released a Directive (*Directive on the issuance of subsection 35(2) authorizations*, May 25, 1995) that creates “a decision making process which frustrates the intention of Parliament and usurps the role of CEAA as a planning and decision making tool.” [Submission at p. 2]. The Submitter further alleges that “[t]here are very few prosecutions under the habitat provisions of the *Fisheries Act* and the prosecutions that do occur are very unevenly distributed across the country.” [Submission at p. 3].

IV- SUMMARY OF THE RESPONSE

In its response, the Government of Canada states:

“Pursuant to Article 14(3) of the Agreement, I [Minister of the Environment] advise the Secretariat that the matter raised in this submission is the subject of a pending judicial or administrative proceeding before the Federal Court of Canada.

On November 7 [1996], the Friends of the West Country Association filed an Originating Notice of Motion in the Trial Division of the Federal Court of Canada in Alberta, *The Friends of the West Country Association v. The*

Minister of Fisheries and Oceans and the Attorney General of Canada (Federal Court case No. T2457-96), I enclose the supporting documentation. At issue in both the submission to the NAAEC and the case before the Federal Court are the application and interaction of sections 35, 37 and 40 of the *Fisheries Act* and of the *Canadian Environmental Assessment Act*.

Moreover, as referred to in Article 14(3), private remedies in connection with the matter raised in the above-mentioned submission are available and are being pursued in the Federal Court action.”

V- SUMMARY OF RELATED JUDICIAL PROCEEDINGS

The Friends of the West Country has initiated a judicial proceeding against the Minister of Fisheries and Oceans and the Attorney General of Canada (*The Friends of the West Country Association v. The Minister of Fisheries and Oceans and the Attorney General of Canada*, Federal Court case No. T2457-96). The Federal Court case involves the issuance of “letters of advice” to Sunpine Forest Products Ltd. (“Sunpine”) regarding Sunpine’s proposal to construct and operate a mainline road and associated bridges.

The Applicant in its Originating Notice of Motion seeks to characterize the “letters of advice” furnished to Sunpine by the Minister of Fisheries and Oceans as “authorizations” under section 35(2) of the *Fisheries Act*, as “orders” under section 37(2) of the *Fisheries Act* or as invalid, without legal force or effect. The Applicant further seeks declarations requiring the Department of Fisheries and Oceans to comply fully with both the *Fisheries Act* and the *Canadian Environmental Assessment Act* and prohibiting the Minister or his delegates from issuing “letters of advice” in substitution for “authorizations” under section 35(2) of the *Fisheries Act*.

In its submission to the Secretariat, the Submitter makes specific reference to the Sunpine Proposal as an example of an allegedly wider departmental practice. Drawing this distinction, the Submitter states: “[t]his submission is related to the general failure of the Government of Canada to apply, comply with and enforce the *Fisheries Act* and the *Canadian Environmental Assessment Act* and not this particular case [the Sunpine Proposal] which is provided only as an example.” [Submission at p. 3].

VI- ANALYSIS

The Secretariat first considers whether Article 14(3)(a) compels the Secretariat to terminate review of the submission because the matter is currently pending before a Canadian court of law. Article 14(3) applies

when the Secretariat has requested a response from a government following the initial review of a Submission. The Article provides that the Party “shall advise” the Secretariat within a prescribed time period “whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further”.

Article 45(3)(a) defines a “judicial or administrative proceeding” for the purposes of Article 14(3) to mean:

a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order;

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). The term “Party” is employed consistently throughout the North American Agreement on Environmental Cooperation to refer to a government signatory to the Agreement. *See e.g.* – Arts. 1(a), 2-8, 10-12, 48(1) and 50. Articles 14 and 15 clearly ascribe this meaning to “Party” as well. *See, e.g.* Arts. 14(1), 14(2)(c), 14(3) and 15(1).

By limiting the ambit of “judicial or administrative proceedings” to those actions pursued by governments, the provision appears to contemplate the peremptory nature of directed efforts undertaken by a government in a timely manner to secure compliance with environmental law. In other words, where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination of the allegations of non-enforcement. The examples listed in Article 45(3)(a) support this approach, since the kinds of actions enumerated are taken almost exclusively by the official government bodies charged with enforcing or implementing the law.

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.

Notwithstanding the determination that Article 14(3) does not compel the Secretariat to terminate the submission process, the Secretariat nonetheless regards the pending judicial action as pertinent to our decision

whether to recommend the development of a factual record. For the reasons discussed below, the Secretariat considers as relevant to its determination both the similarity of the issues which are the subject of the Submission and pending judicial action, and the impact that the remedy sought in a court of law may have on the enforcement-related matters under consideration in this Submission. We regard these considerations as implicit in the guidance criteria set forth in Article 14(2) and in the information a Party can call to the attention of the Secretariat and Parties in Article 14(3).

The matters raised in the submission bear a close resemblance to the issues currently before the Federal Court of Canada in the “Friends of the West Country Association” case cited by Canada. Paragraphs 1-6 of the Originating Notice of Motion seek relief for the specific instance of alleged non-compliance relating to the Sunpine Proposal. These paragraphs address the fact specific example provided by the Submitter to illustrate the allegedly widespread practice of issuing “letters of advice.”

Paragraphs 7 and 8 of the Originating Notice of Motion are of a more general nature:

7. Declaring that the Department of Fisheries and Oceans’ policy, as set out in the “Directive on the Issuance of Section 35(2) Authorizations,” of issuing “letters of advice” in substitution for “authorizations” under section 35(2) of the *Fisheries Act* is unlawful and *ultra vires*;

8. Prohibiting the Minister or his delegates from issuing “letters of advice” in substitution for “authorizations” under section 35(2) of the *Fisheries Act*.

A decision by the Federal Court declaring the policy of issuing “letters of advice” unlawful or *ultra vires* and/or prohibiting the Minister or his delegates from issuing “letters of advice” would effectively curtail the practice giving rise to the alleged failure to effectively enforce the *Fisheries Act* and CEEA. Additionally, a decision rendered in favor of the Applicant under Paragraphs 7 and 8 of the Originating Notice of Motion would no longer require a group or individual objecting to the departmental practice of issuing “letters of advice” to seek separate relief in each instance and in each venue where such letters are issued or take effect.

Although it is possible that the Federal Court may not rule on the arguments advanced under these paragraphs, the similarity of issues presented in both the submission and the lawsuit at this stage creates a risk that the preparation of a factual record may duplicate important aspects of the judicial action.

In addition to the possibility of duplication, the preparation of a factual record at this time presents a substantial risk of interfering with the pending litigation. Civil litigation is a complex undertaking governed by an immensely refined body of rules, procedures and practices. The Secretariat is reluctant to embark on a process which may unwittingly intrude on one or more of the litigants' strategic considerations. These considerations may pertain, for example, to planning and preparation regarding the undertaking of discovery, or the development and presentation of evidence and legal theories.

In this instance, similar legal issues are before both the Federal Court and the Secretariat. The central issues addressed in the Submission could be rendered moot should the Federal Court rule in favor of the Applicant regarding the contentions they raise in paragraphs 7 and 8 of the Originating Notice of Motion. Both of these considerations weigh in favor of allowing the domestic proceeding to advance without risking duplication or interference by considering parallel issues under the Agreement.

Accordingly, the Secretariat considers that the submission does not warrant developing a factual record. The *Guidelines for Submissions on Enforcement Matters* do not empower the Secretariat to suspend submissions pending the resolution of judicial proceedings. However, the Submitter may wish in the future to file a new submission following a decision, dismissal or other resolution of paragraphs 7 and 8 of the Originating Notice of Motion currently before the Federal Court of Canada.

Montreal, this 2nd day of April 1997.

Commission for Environmental Cooperation - Secretariat

per: Victor Lichtinger
Executive Director

**THE SOUTHWEST CENTER
FOR BIOLOGICAL DIVERSITY**

Submission ID:	SEM-96-004
Submitter(s)	The Southwest Center for Biological Diversity and Dr. Robin Silver
Party	United States of America
Summary of the matter addressed in the submission	<p>The Submitters allege that the United States of America is failing to effectively enforce its environmental law, namely the National Environmental Policy Act (NEPA), with respect to the United States Army's operation of Fort Huachuca, Arizona. According to the Submitters, the Army has significantly increased the number of people assigned to Fort Huachuca and this expansion also resulted in a corresponding increase in off-base population. The Submitters allege that as the population continues to increase, the water demand upon the limited water resources of the Upper San Pedro basin will increase and that increased pumping from the aquifer that sustains the river threatens to dewater the San Pedro and destroy the unique ecosystem that is dependent upon it. The Submitters further allege that "in 1992, the Army prepared an environmental analysis of impacts of expanding Fort Huachuca. In that document, the Army split off the required analysis of current and future impacts on a cumulative basis, promising to include the cumulative analysis in a separate Master Plan (Environmental Impact Statement)". The Submitters allege that the analysis was never prepared. The Submitters also state that on 7 July 1994, they brought a claim under NEPA in the United States District Court of Arizona to compel the Army to complete the required cumulative impact analysis. The judge assigned to the case found that the claim was barred by the statute of limitations under the Defense Base Closure and Realignment Act of 1990. The Submitters further note that this procedural ruling</p>

	barred the Submitters from compelling the Army to complete the NEPA analysis by a court order, even though the Court agreed that the Army's analysis was insufficient.
Name and citation of the environmental law in question	<input type="checkbox"/> National Environmental Policy Act (NEPA), 42 U.S.C. ss. 4321-4370d
Summary of the response provided by the party	The Party alleges that "In this case, the Secretariat should not request authorization to prepare a factual record regarding the assertions in the Submission for the following reasons. First, the United States is not failing to effectively enforce its environmental laws as contemplated by Article 14(1) of the NAAEC because the Submitters' assertions relate to actions that were complete before the Agreement's entry into force or relate to proposed federal actions that are not ripe for challenge under United States law. Second, the Submitters' suggestion that there is an ongoing failure to enforce the requirements of NEPA misstates applicable law. Third, the Submitters failed to pursue private remedies under United States law in a timely manner, and when they did pursue remedies, they abandoned them as moot. Fourth, the development of a factual record could adversely affect the pending judicial appeal by the Southwest Center for Biological Diversity and others of the dismissal of a suit brought under the Endangered Species Act ("ESA") which arises from the facts that are the subject of the Submission. Finally, the Submission suggests that the Submitters do not have a complete understanding of the activities at Fort Huachuca related to population and groundwater use."
Summary of the notifications to the submitter(s)	<input type="checkbox"/> Acknowledgement of receipt of the submission (27 November 1996) <input type="checkbox"/> Article 14(1) Determination (16 December 1996) <input type="checkbox"/> Article 14(2) Determination (22 January 1997) <input type="checkbox"/> Response from the United States (3 March 1997)

Council's decision on the preparation of a factual record	N/A
Council's decision on the public release of the factual record	N/A
Status of the process	On 5 June 1997, the Submitters withdrew their submission in accordance with Section 14.1 of the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC. The process is therefore terminated.
Full text (of electronically available documents)	<ul style="list-style-type: none"> <input type="checkbox"/> Submission (14 November 1996) <input type="checkbox"/> Article 14(1) Determination (16 December 1996) <input type="checkbox"/> Article 14(2) Determination (22 January 1997) <input type="checkbox"/> Response from the Government of the United States of America (3 March 1997) <input type="checkbox"/> Notice to Council concerning withdrawal of the Submission (6 June 1997)

**B.C. ABORIGINAL
FISHERIES COMMISSION**

Submission ID:	SEM-97-001
Submitter(s)	B.C. Aboriginal Fisheries Commission, British Columbia Wildlife Federation, Trail Wildlife Association, Steelhead Society, Trout Unlimited (Spokane Chapter), Sierra Club (U.S.), Pacific Coast Federation of Fishermen's Association, Institute for Fisheries Resources
Party	Canada
Summary of the matter addressed in the submission	The Submitters allege that the Canadian Government is failing to "enforce s. 35(1) of the Fisheries Act, and to utilize its powers pursuant to s. 119.06 of the National Energy Board Act, to ensure the protection of fish and fish habitat in British Columbia's rivers from ongoing and repeated environmental damage caused by hydroelectric dams." According to the Submitters, "the Department of Fisheries and Oceans ("DFO") has only laid two isolated charges pursuant to sections 35(1) and 40(1) against Hydro since 1990, despite clear and well documented evidence that Hydro's operations have damaged fish habitat on numerous occasions." According to the Submitters, Hydro's operations "are being exempted from the application of Canadian environmental laws by the Federal Government's failure to enforce the Fisheries Act" and such "exemption gives Hydro an unfair competitive advantage over U.S. hydropower producers". The Submitters further allege that the National Energy Board "recently refused to examine the environmental impacts of the production of electricity for exportation, despite receiving evidence of those impacts from the B.C. Wildlife Federation" and thereby "invalidly refused to exercise its mandatory statutory jurisdiction to examine the environmental impacts of the production of power for export."

Name and citation of the environmental law in question	<input type="checkbox"/> <i>Fisheries Act</i> , R.S.C. 1985, c. F-14, s. 35(1) <input type="checkbox"/> <i>National Energy Board Act</i> , R.S.C. 1985, c. N-7, s. 119.06
Summary of the response provided by the party	<p>Canada supports the NAAEC process for submissions on enforcement matters, and considers Articles 14 and 15 to be among the most important provisions of the treaty.</p> <p>Canada submits that it is enforcing its environmental laws, and is in full compliance with its obligations under the NAAEC. Therefore, Canada submits that, in this instance, the development of a factual record is unwarranted as:</p> <ul style="list-style-type: none"> • the assertions concerning the enforcement of the Fisheries Act are the subject of pending judicial or administrative proceedings within the meaning of Article 14(3)(a); • Canada is fully enforcing the environmental provisions of the Fisheries Act, and the National Energy Board (NEB) has properly exercised its power under the National Energy Board Act; • the provisions of the NAAEC cannot be applied retroactively to assertions of a failure to effectively enforce environmental laws prior to the coming into force of the NAAEC on January 1, 1994. Furthermore, the Fisheries Act cannot be applied retroactively; and • the development of a factual record would not further the objectives of the NAAEC given the detailed information provided in this response.
Summary of the notifications to the submitter(s)	<input type="checkbox"/> Acknowledgement of receipt of the submission (3 April 1997) <input type="checkbox"/> Article 14(1) Determination (1 May 1997) <input type="checkbox"/> Article 14(2) Determination (15 May 1997) <input type="checkbox"/> Response from Canada (21 July 1997)
Council's decision on the preparation of a factual record	N/A

Council's decision on the public release of the factual record	N/A
Status of the process	The Secretariat is now reviewing the submission in light of the response filed by Canada.
Full text (of electronically available documents)	<input type="checkbox"/> Submission (April 1997) and Appendix A <input type="checkbox"/> Article 14(1) Determination (1 May 1997) <input type="checkbox"/> Article 14(2) Determination (15 May 1997) <input type="checkbox"/> Response from Canada (21 July 1997)

COMITÉ PRO LIMPIEZA DEL RÍO MAGDALENA

Submission ID:	SEM-97-002
Submitter(s)	Comité Pro Limpieza del Río Magdalena
Party	United Mexican States
Summary of the matter addressed in the submission	The Submitters allege that wastewater originating in the municipalities of Imuris, Magdalena de Kino, and Santa Ana, located in the Mexican state of Sonora, is being discharged into the Magdalena River without prior treatment. According to the Submitters, the above contravenes Mexican environmental legislation governing the disposal of wastewater.
Name and citation of the environmental law in question	<input type="checkbox"/> Ley 217 del Equilibrio Ecológico y la Protección al Ambiente para el Estado de Sonora <input type="checkbox"/> Ley número 38 de las aguas del Estado de Sonora <input type="checkbox"/> Ley número 109 de salud para el Estado de Sonora <input type="checkbox"/> Ley General del Equilibrio Ecológico y la Protección al Ambiente
Summary of the response provided by the party	N/A
Summary of the notifications to the submitter(s)	<input type="checkbox"/> Acknowledgment of receipt (23 April 1997) <input type="checkbox"/> Request for additional information (2 July 1997) <input type="checkbox"/> Additional information from Submitters (18 July 1997) <input type="checkbox"/> Acknowledgment of receipt (18 September 1997) <input type="checkbox"/> Secretariat's Determination under Article 14(1) (6 October 1997)

Council's decision on the preparation of a factual record	N/A
Council's decision on the public release of the factual record	N/A
Status of the process	The Secretariat is reviewing the Submission in accordance with Article 14(2).
Full text (of electronically available documents)	<ul style="list-style-type: none"><input type="checkbox"/> Submission (5 March 1997)<input type="checkbox"/> Request for additional information (2 July 1997)<input type="checkbox"/> Additional information from Submitters (18 July 1997)<input type="checkbox"/> Secretariat's Determination under Article 14(1) (6 October 1997)

**CENTRE QUÉBÉCOIS DU DROIT
DE L'ENVIRONNEMENT (CQDE)**

Submission ID:	SEM-97-003
Submitter(s)	<p>Centre québécois du droit de l'environnement (CQDE) Centre de recherche et d'intervention environnemen- tale du Grand-Portage (CRIE) Comité de citoyens «À bon port» (Assomption) Comité de citoyens de Grande-Piles (Mauricie) Comité de citoyens de Saint-André de Kamouraska (Bas Saint-Laurent) Comité de citoyens de Sainte-Luce (Bas Saint-Laurent) Comité de citoyens de St-Roch-de-Mékinac (Mauricie) Comité de citoyens de Shipton propre (Estrie) Comité de protection de la santé et de l'environnement de Gaspé (CPSEG) Comité de protection Panmassawipi (Estrie) Comité de santé publique et de l'environnement (Cos- apue) Comité de qualité de vie de Saint-Jean-de-Dieu (Bas Saint-Laurent) Les Ami-e-s de la terre de Québec Mouvement Vert Mauricie (MVM) Regroupement écologique de Val d'Or et de ses envi- rons (REVE) Réseau québécois des groupes écologistes (RQGE) Union québécoise pour la conservation de la nature (UQCN) Union Saint-Laurent Grands Lacs (Canada-États-Unis)</p>
Party	Canada

<p>Summary of the matter addressed in the submission</p>	<p>The Submitters allege “the occurrence of failure to enforce several environmental standards related to agriculture on the territory of the Province of Quebec. Specifically, that the Quebec Government has failed, for many years, to enforce certain environmental protection standards regarding agricultural pollution originating from animal production facilities, mainly from hog farms”.</p>
<p>Name and citation of the environmental law in question</p>	<p>Laws of the Province of Quebec:</p> <ul style="list-style-type: none"> □ Sections 19(1), 20, 22, and 122.1 of the <i>Environment Quality Act</i>, L.R.Q., c. Q-2; □ Sections 3-4, and divisions IV, V, VI and VII of the <i>Regulation respecting the prevention of water pollution in livestock operations</i>, R.R.Q. 1981, c. Q-2, r. 18.
<p>Summary of the response provided by the party</p>	<p>Canada supports the process of submissions on enforcement matters under Articles 14 and 15 of the NAAEC. It considers that these are essential provisions of the Agreement. Canada refutes allegations to the effect that there has been a failure to effectively enforce its environmental laws in the agricultural sector contrary to the provisions of the NAAEC. It furthermore considers that preparing a factual record is not justified for the following reasons:</p> <ul style="list-style-type: none"> □ Canada, particularly Quebec, effectively enforces the Environmental Quality Act and the Regulation respecting the prevention of water pollution in livestock operations; □ all the environmental measures put forward in the agricultural sector meet the objectives and obligations contained in the NAAEC, particularly Articles 2, 4 and 5; □ the government of Quebec has just adopted new regulations with respect to agricultural pollution and new measures to improve the enforcement of the Environmental Quality Act. In this context, it is not appropriate to prepare a factual record since the initiative is part of the process to improve the Act and the regulations in accordance with Article 3 of the Agreement; □ preparing a factual record would not produce any new information nor would it shed any new light in view of the elements and details provided in this response.

Summary of the notifications to the submitter(s)	<input type="checkbox"/> Acknowledgement of receipt of the submission (15 April 1997) <input type="checkbox"/> Article 14(1) Determination (8 May 1997) <input type="checkbox"/> Article 14(2) Determination (9 July 1997) <input type="checkbox"/> Response from Canada (9 September 1997)
Council's decision on the preparation of a factual record	N/A
Council's decision on the public release of the factual record	N/A
Status of the process	The Secretariat is reviewing the Submission in light of the response filed by Canada.
Full text (of electronically available documents)	<input type="checkbox"/> Submission (9 April 1997) <input type="checkbox"/> Article 14(1) Determination (8 May 1997) <input type="checkbox"/> Article 14(2) Determination (9 July 1997) <input type="checkbox"/> Response from Canada (9 September 1997)

CANADIAN ENVIRONMENTAL DEFENCE FUND

Submission ID:	SEM-97-004
Submitter(s)	Canadian Environmental Defence Fund
Party	Canada
Summary of the matter addressed in the submission	The submitter alleges that the Canadian government has failed to enforce its law requiring environmental assessment of federal initiatives, policies and programs. In particular, the Canadian government failed to conduct an environmental assessment of The Atlantic Groundfish Strategy (TAGS), as required under Canadian law. By its failure to do so, it is alleged the Canadian government has jeopardized the future of Canada's East Coast fisheries.
Name and citation of the environmental law in question	<input type="checkbox"/> Environmental Assessment and Review Process Guidelines Order (EARPGO)
Summary of the response provided by the party	N/A
Summary of the notifications to the submitter(s)	<input type="checkbox"/> Acknowledgement of receipt of the Submission (29 May 1997) <input type="checkbox"/> Secretariat's Determination under Article 14(1) (25 August 1997)
Council's decision on the preparation of a factual record	N/A

Council's decision on the public release of the factual record	N/A
Status of the process	On 25 August 1997, the Secretariat notified the Submitter that the Submission did not meet the criteria of Article 14(1) of the Agreement. The process is therefore terminated.
Full text (of electronically available documents)	<input type="checkbox"/> Submission (26 May 1997) <input type="checkbox"/> Secretariat's Determination under Article 14(1) (25 August 1997)

Commission for Environmental Cooperation - Secretariat

Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation

Submission ID: SEM-97-004

Submitter(s): Canadian Environmental Defence Fund

Concerned Party: Canada

I- PROCEDURAL HISTORY

On 26 May 1997, the Submitter filed with the Secretariat a submission on enforcement matters¹ ("Submission") under Article 14 of the North American Agreement on Environmental Cooperation ("Agreement").

The Secretariat reviews below the Submission in accordance with Article 14(1) of the Agreement.

II- NAAEC ARTICLES 14 AND 15

Article 14 of the Agreement allows the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat may consider any submission that meets the criteria set out in Article 14(1). Where the Secretariat determines that the Article 14(1) criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission (Article 14(2)). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be

1. Submission No. SEM-97-004.

prepared in accordance with Article 15(1). The Council, comprised of the Ministers of the Environment (or their equivalent) of Canada, Mexico and the United States, may then instruct the Secretariat to prepare a factual record on the submission (Article 15(2)). Final factual records are made publicly available upon a 2/3 vote of the Council (Article 15(7)).

III- SUMMARY OF THE SUBMISSION

The Submitter alleges:

that the Canadian government has failed to enforce its law requiring environmental assessment of federal initiatives, policies and programs. In particular, the Canadian government failed to conduct an environmental assessment of The Atlantic Groundfish Strategy (TAGS), as required under Canadian law. By its failure to do so, it is alleged the Canadian government has jeopardized the future of Canada's east coast fisheries (Submission at p. 1).

According to the Submitter, the Canadian government introduced TAGS in May 1994 (Submission at p. 8).

The Submitter further alleges that:

At the time of TAGS, federal law for environment assessment was set out in EARPGO [*Environmental Assessment and Review Process Guidelines Order*]. Therefore, TAGS was subject to EARPGO's requirements. There was no discretion to legally avoid an environmental assessment (Submission at p. 3).

The Submitter continues:

Instead of following binding law, the federal government claims it assessed TAGS according to a vague, non-binding cabinet policy [*Federal Environmental Assessment Process for Proposals (EAPP) (...)*]. This policy sets out a different environmental assessment process than the EARPGO, making no provision, for example, for independent public review of policies or programs. The government purports to have complied with this policy through carrying out a cursory evaluation of TAGS and its potential environmental effects. However, at the time of this assessment and the introduction of TAGS, EARPGO was in force. Therefore, its mandatory provisions override the discretionary provisions of the cabinet policy (Submission at p. 4).

The Submitter is therefore “seeking a declaration by the Commission [for] Environmental Cooperation (CEC) that Canada did not apply EARPGO to the TAGS cabinet decision” (Submission at p. 3).

The Submitter concludes:

For the effective, environmentally and socially sound management of Canada’s fisheries, and to guarantee that the fishery will become a sustainable long-term resource, the Canadian government must conduct a comprehensive environmental assessment of fisheries policies (Submission at p. 10).

IV- ANALYSIS

A. Interpretation

Article 14(1) of the NAAEC establishes the initial criteria for processing a submission. The introduction of Article 14(1) reads: “the Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law”.

Article 14(1) requires that a submission (i) be filed by a non-governmental organization or person asserting that (ii) a Party to the Agreement (iii) *is failing* to effectively enforce (iv) its environmental law. The italicized language imposes a temporal constraint on the filing of a submission.

In assessing whether or not a submission relates to a failure to effectively enforce environmental law, the Secretariat must evaluate the nature of the alleged failure and its temporal context.

B. Application

In this instance, the Submitter alleges that the Government of Canada failed to effectively enforce its environmental law when TAGS was introduced without an environmental assessment under the EARPGO.

The environmental assessment process is a tool to ensure that timely and accurate information on potential environmental impacts of proposed projects is available prior to any irrevocable decision being taken.² The scope of EARPGO, as defined in section 3, is clearly to that effect:

2. “The purpose of environmental impact assessments is to ensure that environmental considerations are built in the decision-making process at an early stage. (...) envi-

The Process shall be a self assessment process under which the initiating department shall, *as early in the planning process as possible and before irrevocable decisions are taken*, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

Likewise, the Submitter envisages the purpose of environmental assessment (EA) as:

... essentially a tool of precaution. EA attempts to predict effects so as to prevent significant or unacceptable events from occurring.” (Submission at. p. 9)

Under the circumstances, the submission does not appear to have raised the issue of non-enforcement in a timely manner in light of the temporal requirement of Article 14(1) established by the use of the words “is failing”. The significant delay between the time of the alleged failure to enforce and the filing of the submission contravenes the purpose and intent of Article 14(1) in light of the circumstances described hereafter.

The submission refers to an action, inaction or decision which has already been completely acted upon over three years ago, with nothing about the decision left open or unfinished. The submission, filed three years after the decision on, and the entry into force of, the government’s strategy, provides no indication that the Party’s failure is continuing or recent. The Secretariat is not aware of any reason that would have prevented the Submitter from filing its submission at the time it became aware of the government’s alleged failure to enforce.

In addition, the law has been superseded and is no longer in force. The Submitter has not demonstrated that the transitional provisions of the new legislation expressly preserved the enforcement of the former law for specific proposed projects nor that TAGS belong in such a category.

Finally, nothing in the submission indicates that the submitters have been diligently pursuing local remedies between the time of the government’s adoption and implementation of TAGS and the date the submission was filed.

ronmental assessment legislation exists to ensure that major undertakings are planned for and carried out in an environmentally responsible manner” (in *Miller Thompson’s Environmental Law Dictionary*, Carswell, Toronto, 1995, at pp. E-51–E-52).

For these reasons, the Secretariat determines that the submission does not meet the temporal requirement contained in the introductory paragraph of Article 14(1), i.e. – that the Party *is failing* to effectively enforce its environmental law. Accordingly, the Secretariat will not further consider the submission.

In accordance with Section 6.2 of the *Guidelines on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (“Guidelines”), the Submitter has 30 days from the receipt of this determination to provide the Secretariat with a submission that conforms to the criteria of Article 14(1) of the Agreement and to the requirements set out in the Guidelines.

Montreal, this 11th day of August 1997.

Commission for Environmental Cooperation - Secretariat

per: Victor Lichtinger
Executive Director

ANIMAL ALLIANCE OF CANADA

Submission ID:	SEM-97-005
Submitter(s)	Animal Alliance of Canada Council of Canadians Greenpeace Canada
Party	Canada
Summary of the matter addressed in the submission	The Submitters allege that “Canada is failing to enforce its regulation ratifying the Convention on Biological Diversity signed at the Rio Earth Summit on June 11, 1992 and subsequently ratified pursuant to an Order-in-Council on December 4, 1992.” According to the Submitters, “under Canadian Law, that Ratification Instrument is legally binding ‘regulation’.” In particular, the Submitters allege that “Canada has failed to fulfill the requirements of Article 8(k) of the Biodiversity Convention, which stipulates that each country must ‘develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations’.” The Submitters further allege that “in ratifying the Biodiversity Convention by regulation, Canada made a legal commitment to be bound by and to perform the requirements of the Convention.” The Submitters add that “by failing to fulfill the requirements of Article 8(k) of the Convention, which requires legislation to protect endangered species, Canada is failing to enforce the regulation ratifying the Convention; i.e. it is ‘failing to enforce an environmental law’.”
Name and citation of the environmental law in question	□ P.C. (Privy Council) 1992-1204, 4 June 1992, authorizing specified officials to sign and bring into force the 1992 United Nations Convention on Biological Diversity.

Summary of the response provided by the party	N/A
Summary of the notifications to the submitter(s)	<input type="checkbox"/> Acknowledgement of receipt of the Submission (24 July 1997)
Council's decision on the preparation of a factual record	N/A
Council's decision on the public release of the factual record	N/A
Status of the process	The Secretariat is reviewing the Submission in accordance with Article 14(1).
Full text (of electronically available documents)	<input type="checkbox"/> Submission (21 July 1997)

ARTICLE 15 FINAL FACTUAL RECORD

Under Article 15 of the NAAEC, the Secretariat of the Commission for Environmental Cooperation (CEC) may recommend to the Council that a factual record be developed if the Secretariat considers that a submission filed pursuant to Article 14, in the light of any response provided by the concerned Party, so warrants.

If the Council instructs the Secretariat to prepare a factual record, the Secretariat does so. In preparing a factual record the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information that is:

- publicly available;
- submitted by interested non-governmental organizations or persons;
- submitted by the Joint Public Advisory Committee; or
- developed by the Secretariat or by independent experts.

After receiving the final factual record, the Council may decide, by a two-thirds vote, to make it public.

Following is the only final factual record prepared by the Secretariat as of 1 November 1997.

Final Factual Record of the Cruise Ship Pier Project in Cozumel, Quintana Roo

Prepared in Accordance with Article 15 of the North American Agreement on Environmental Cooperation

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LIST OF ACRONYMS

CEC	Commission for Environmental Cooperation
Cinvestav-IPN	<i>Centro de Investigación y de Estudios Avanzados del Instituto Politécnico Nacional</i> (Research and Advanced Studies Center of the National Polytechnic Institute)
CONSORTIUM H	<i>Consorcio de Desarrollos y Promociones Inmobiliarias "H," S.A. de C.V.</i> (Consortium for Real Estate Development and Promotion H, S.A. de C.V.)
DOF	<i>Diario Oficial de la Federación</i> (Official Gazette of the Federation)
DUDR	<i>Declaratoria de Usos, Destinos y Reservas del Municipio de Cozumel, Quintana Roo</i> (Decree of the Declaration of Uses and Reserves, Municipality of Cozumel, Quintana Roo)
DZR	<i>Decreto por el que se declara zona de refugio para la protección de la flora y fauna marinas a la costa occidental de la Isla Cozumel, Quintana Roo.</i> (Refuge Zone Decree, for the protection of marine flora and fauna of the western coast of Cozumel, Quintana Roo)
EIS	Environmental Impact Statement
EIS-90	<i>Manifiestación de Impacto Ambiental en la Modalidad General para la Construcción de un Muelle para Cruceros en Cozumel, Quintana Roo, elaborada por Consorcio de Desarrollos y Promociones Inmobiliarias "H," S.A. de C.V., agosto de 1990.</i> (General Environmental Impact Statement for the construction of a Cruise Ship Pier in Cozumel, Quintana Roo, presented by Consortium H in August 1990)
EIS-96	<i>Manifiestación de Impacto Ambiental, Modalidad General, del Proyecto "Puerta Maya" en Cozumel, Quintana Roo, presentada por el Consorcio de Desarrollos y Promociones Inmobiliarias "H," S.A. de C.V. el 14 de mayo de 1996.</i> (General Environmental Impact Statement for the Puerta Maya Project in Cozumel, Quintana Roo, presented by Consortium H in May 1996)
Fonatur	<i>Fondo Nacional de Fomento al Turismo</i> (National Fund for the Promotion of Tourism)

INE	<i>Instituto Nacional de Ecología</i> (National Institute of Ecology)
IPN	<i>Instituto Politécnico Nacional</i> (National Polytechnic Institute of Engineering)
JPAC	Joint Public Advisory Committee
LGEEPA	<i>Ley General del Equilibrio Ecológico y la Protección al Ambiente</i> (General Law of Ecological Equilibrium and Environmental Protection)
NAAEC	North American Agreement on Environmental Cooperation
NGOs	Nongovernmental Organizations
NOM	<i>Norma Oficial Mexicana</i> (Official Mexican Standards)
Profepa	<i>Procuraduría Federal de Protección al Ambiente</i> (Federal Attorney General Office for Environmental Protection)
Pumex	<i>Puertos Mexicanos</i> (Mexican Port Authority)
RIA	<i>Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Impacto Ambiental</i> (Regulation concerning Environmental Impact, under LGEEPA)
SCT	Ministry of Communications and Transportation
Sedesol	<i>Secretaría de Desarrollo Social</i> (Ministry of Social Development)
Sedue	<i>Secretaría de Desarrollo Urbano y Ecología</i> (Ministry of Urban Development and Ecology)
Semarnap	<i>Secretaría de Medio Ambiente, Recursos Naturales y Pesca</i> (Ministry of Environment, Natural Resources and Fisheries)

INTRODUCTION

On January 18, 1996, three nongovernmental organizations (NGOs), the Committee for the Protection of Natural Resources A.C., the International Group of One Hundred A.C. and the Mexican Center for Environmental Law A.C. (Submitters), presented a submission to the Secretariat of the Commission for Environmental Cooperation (CEC), alleging a “failure on the part of Mexican authorities to enforce their environmental law effectively with regard to the totality of the works of the port terminal project in Playa Paraíso, Cozumel, Quintana Roo,” pursuant to Article 14 of the North American Agreement on Environmental Cooperation (NAAEC).¹

Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to enforce effectively its environmental law. Where the Secretariat determines that the Article 14(1) criteria are met it shall decide whether the submission merits requesting a response from the concerned Party in accordance with Article 14(2). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance with Article 15. The Council may then instruct the Secretariat to prepare a factual record on the submission. The final factual record is made publicly available upon a two-thirds vote of the Council.

The CEC Secretariat reviewed the submission in accordance with subsections 1 and 2 of Article 14 of the NAAEC, and on February 8, 1996, requested a response from the Government of Mexico. This response was provided by the Mexican authorities on March 27, 1996. On June 7, 1996, the Secretariat informed the Council of its reasons for determining that the submission warranted developing a factual record. On August 2, 1996, unanimously and in accordance with Resolution No. 96-08, the Council instructed the Secretariat to prepare a factual record pursuant

1. The full text of the submission as well as of the response from the Government of Mexico and the notice to Council from the Secretariat on the development of the factual record is available in the registry of submissions on the effective enforcement of environmental law on the CEC's web page on the Internet: <http://www.cec.org>.

to Article 15 of the NAAEC and the "Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC" (Guidelines).

The Council directed the Secretariat in developing a factual record to "consider whether the Party concerned has failed to enforce effectively its environmental law since the NAAEC's enactment on January 1, 1994." It further directed that "in considering such an alleged failure to enforce effectively, relevant facts prior to January 1, 1994, may be included in the factual record."

Article 15 of the NAAEC and the Guidelines, specify that: "in preparing a [draft] factual record, [as well as a final factual record], the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific, or other information that is (a) publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee (JPAC); or (d) developed by the Secretariat or by independent experts."

In accordance with the NAAEC and the Guidelines, the Secretariat notified the JPAC of the instructions received from the Council for the development of a factual record, and requested that any relevant information for the development of a record be sent to the CEC Secretariat. The Secretariat also sent the Council's instructions in writing to all persons and NGOs that had expressed an interest in the subject matter of the submission, requesting that any relevant information be sent to the Secretariat. Copies of the letters sent by the Secretariat are attached as Annex I.

During the first stage of the development of the factual record, the Secretariat gathered, analyzed and catalogued information obtained during the process. During the second stage, the Secretariat characterized this information by selecting and identifying information relevant to the development of the record. During the third stage, the Secretariat drafted this document in accordance with Section 12 of the Guidelines, which states that "draft and final factual records prepared by the Secretariat will contain (a) a summary of the submission that initiated the process; (b) a summary of the responses, if any, provided by the concerned Party; (c) a summary of any other relevant factual information; and (d) the facts presented by the Secretariat with respect to the matters raised in the submission. The Draft Factual Record was presented to the Council on April 23, 1997, in accordance with Article 15.5(2) of the NAAEC. Finally, by July 1, 1997, the members of the Council had presented their comments on the Draft Factual Record.

The Secretariat submits to the Council the following FINAL FACTUAL RECORD OF THE CRUISE SHIP PIER PROJECT IN COZUMEL, QUINTANA ROO.

I. SUMMARY OF THE SUBMISSION

A. Scope and Magnitude of the Project

According to the Submitters, the “Cruise Ship Pier Project in Cozumel, Quintana Roo” forms an indivisible part of a larger-scale project which the Submitters refer to as the “Port Terminal Project,” comprising, in addition to the pier, a passenger terminal building, a means of access from the terminal to the cruise ship pier, a parking lot, and a public access road leading to the Chan-Kanaab highway.

The Submitters assert that the totality of the works comprising the “Port Terminal Project” was public knowledge, and therefore within the knowledge of the environmental authorities, before work commenced on the pier. The Submitters further allege that the environmental authorities were aware of the entire “Port Terminal Project,” in any event by no later than the Ministry of Communications and Transportation (SCT) granted the Concession to the Consortium for Real Estate Development and Promotion H, S.A. de C.V. (“Consortium H”) on July 22, 1993. The Submitters note that Condition One of the Concession indicated the character of these works.² Further, the Submitters maintain that, from the time of the entry into force of the Law of Ports (July 19, 1993),³ which defines the term “terminal,” the nature of the works comprising the “Port Terminal Project” were of public knowledge.

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2. The first condition of the *Concession which the Federal Government, through the Ministry of Communications and Transportation (SCT), granted to the Consortium for Real Estate Development and Promotion H, S.A. de C.V.* (hereinafter Consortium H) states: “Purpose of the concession – The ‘Ministry’ grants to ‘Consortium H’ a concession for the use and development of an area of 51,465.297 square meters within the federal maritime zone of the Port of Cozumel, Quintana Roo, to build, operate, and develop a public Port Terminal pier for tourist cruise ships. ‘Consortium H’ undertakes to build, as part of the Port Terminal, within an area of 15,439.314 square meters of the land referred to in Antecedent IV, which is presently owned by the Government of the State of Quintana Roo, and within 4,707.747 square meters of the maritime federal zone, a passenger terminal building, a means of access from the terminal to the pier, a parking lot, and a public access road to the Chan-Kanaab highway, as set out in a plan to be approved by the ‘Ministry.’”
 3. The Law of Ports defines a terminal in Section IV of Article 2 as “a unit inside or outside a Port, comprising works, installations, and surface areas, including a water zone, which permits the relevant port operation to be fully performed.”

The Submitters also claim that as of the date the Submitters filed the submission, January 18, 1996, the authorities issued “a resolution as to the acceptability of the project based on the environmental impact report for the ‘Pier Project,’ and two resolutions stemming from two preliminary reports, the first concerning the ‘Concrete Plant Project,’ and the second, the ‘Land Works Project.’” This, the Submitters claim, is contrary to Article 28⁴ of the General Law for Ecological Equilibrium and Environmental Protection (LGEEPA), the LGEEPA’s regulation concerning Environmental Impact (RIA), and the terms of the Concession. If these projects are undertaken in accordance with these authorizations, no environmental impact report will be prepared for the totality of the “Port Terminal Project.”

Based on the above, the Submitters allege that “the environmental authorities are failing to enforce environmental law effectively (LGEEPA, Article 28), by authorizing the construction of the pier (which represents only part of the entire project), without evaluating as a whole the construction and operation of all of the works that constitute the Port Terminal.”

The Submitters conclude that “to accept the discretionary judgment of the authorities allowing the separation of individual works and their environmental impacts, fails to comply effectively with Article 28 of the LGEEPA, since Consortium H would not have to present a comprehensive EIS [Environmental Impact Statement] regarding all works that make up the “Port Terminal Project” (at least since the granting of the Concession in 1993).” According to the Submitters, “this discretionary decision undercuts the purpose of the environmental impact evaluation procedure by creating uncertainty with respect to the subject matter of the evaluation (*i.e.*, allowing any proponent to present ‘partial’ reports with respect to a single project). The decision further

4. Article 28 of the LGEEPA states that “Construction of public or private activities that may cause ecological imbalances or which exceed the limits and conditions set out in ecological/technical regulations and norms issued by the Federation to protect the environment, must receive prior authorization from the Federal Government, through the Ministry or federal or municipal entities, in conformity with the powers set out in this Law, and must be contingent as well on compliance with any requirements that may be imposed on them once their environmental impact has been evaluated, without prejudice to other authorizations which may be granted to these authorities.” In addition, the second paragraph of Article 28 states: “When the environmental impact of works or activities whose object is to exploit natural resources is evaluated, the Ministry shall require the concerned parties to include in the corresponding environmental impact report a description of the possible effects these works or activities may have on the relevant ecosystems, considering their elements as a whole, and not only the resources subject to development.”

promotes inefficiency by preventing an adequate evaluation of the environmental impacts produced by the project and by failing to envisage the possible scenarios required for the evaluation of the project, thereby failing to prevent and avoid the real impacts that could be produced in each case.”

1. Related Projects/Cumulative Impacts

In addition, the Submitters maintain that the project, which they refer to as “Port Terminal,” is “related to an adjacent ‘Real Estate Tourist Development Project,’ as described in Antecedent VIII of the Concession” granted by the SCT.⁵

Submitters claim that “the Environmental Impact Statement presented by Consortium H in August 1990 (EIS-90), was incomplete, and should have taken account of the projects directly related to the work or proposed activity, in order to evaluate the cumulative environmental impact that these projects together will have.”

B. Authorizations and Extensions

According to the Submitters, the environmental authority failed to apply environmental law effectively by allowing work to start on the “Port Terminal Project.” The Submitters allege that “when they presented their submission [on January 18, 1996], Consortium H had begun work on the “Port Terminal Project” without an environmental impact report addressing all the works included in the project, in breach of subsection e) of the Fifth Condition of the Port Terminal Concession.” This sub-section provides that “within a period of no more than three months from the date of the granting of this Concession (July 22, 1993), Consortium H must present to the Ministry a plan for completing the works. This will contain the following information (...) e) Report on the environmental impact of the construction and operation of the Terminal.”

5. Antecedent VIII, entitled “Real Estate Tourist Development,” states that “on February 26, 1993, *Inmobiliaria La Sol, S.A. de C.V.* entered into a preliminary agreement with *Nacional Financiera, S.N.C.*, as trustee for the Federal Government for the National Fund for the Promotion of Tourism (Fonatur) trust, through which the latter promised to create a trust to which *the Fund* would contribute a property of 430,352.04 square meters, for which *Inmobiliaria La Sol S.A. de C.V.* would act as trustee, and which would become a real estate tourist development, whose characteristics would be determined in a preliminary contract.”

The Submitters claim that, “when the third extension (of the environmental impact authorization) was granted in 1994, the authority should have considered the fact that, when the Law of Ports was enacted, and the Concession granted, both in 1993, the subject of the evaluation had changed, and so too had the environmental impacts that would be produced.” According to the Submitters, “this means that the evaluation of the subject of the concession should have been made in a comprehensive manner, without implying the retroactive application of the Law of Ports.”

C. Location of the Project

The Submitters claim that the project is located “within a protected natural area [established by the Refuge Zone Decree (DZR), published in the Official Gazette of the Federation on July 11, 1980, and] known as the ‘Refuge for the protection of marine flora and fauna of the western coast of Cozumel,’ an area subject to special legal protection.”

In the Submission, it is further alleged that, “with the enactment of the LGEEPA in 1988, the area protecting flora and fauna to which the DZR refers should be considered a protected natural area, whose specific purpose is to insure the rational use of ecosystems and their elements. Consequently, and in accordance with Articles 38, 54, and 83 of the LGEEPA, the Federation, the states and municipalities are required to: a) establish protective measures to insure ‘ecosystem preservation and restoration, especially with regard to those ecosystems that are most representative and those that are subject to deterioration or degradation’ (Article 38 LGEEPA); b) permit only (...) activities related to the preservation, repopulation, propagation, acclimatization, protection, and investigation of resident species, as well ‘...the use of natural resources (...) identified by studies, which will be governed by ecological/technical and land use norms established in the statement or in subsequent resolutions’ (Article 54 LGEEPA); and c) apply effectively Article 83 of the LGEEPA, which provides that ‘the use of natural resources in areas which serve as habitats for wild species of flora and fauna, whether threatened or in danger of extinction, must be carried out so as not to alter the conditions necessary for the subsistence, development, and evolution of these species.’”

D. Land Use

The Submitters claim that “the environmental impact authorization set out in Resolution 410-3088 (which constitutes the environmental authorization for the project) fails to apply effectively Articles 13 of the

RIA⁶ and of the DZR by not considering the connection of the project with the land use permitted by that declaration.” They also claim that, in accordance with the DZR, “it is arguable that the land on which the Project will be constructed and will operate does not lie within a zone designated for ‘port use’ on the Island of Cozumel. Rather, this zone is designated for high-density tourist use, and therefore prohibits any use for port purposes.”

E. Species Rescue Program

The Submitters maintain that “by establishing a ‘Species Rescue Program’ through Condition 24 of Resolution 410-3088, and by authorizing the operation of this program through Document DGNA-10809, dated November 25, 1994, Sedue (Ministry of Urban Development and Ecology) and INE (National Institute of Ecology) violated Article 2 of the DZR, which expressly prohibits any collection of marine flora and fauna that does not serve investigative purposes, and failed to apply effectively Articles 38, 44, 45 (subparagraph VII), 54, and 83 of the LGEEPA.”

II. SUMMARY OF THE RESPONSE PROVIDED BY THE ENVIRONMENTAL AUTHORITIES OF THE GOVERNMENT OF MEXICO

A. Retroactive Application of the NAAEC and Inadmissibility of Submission

The response from the Government of Mexico raises issues concerning the decision made by the Secretariat to accept the submission and to request a response from the Mexican Party.

The Government of Mexico notes that the acts on which the submission was based took place prior to the NAAEC entering into force, pre-dating the creation and establishment of the CEC. The Government of Mexico considers that in the case at issue the NAAEC is being applied retroactively, and also regards the submission as inadmissible under Article 14.

6. Article 13 of the RIA states that “the Ministry may request from the concerned party additional information to supplement the content of the environmental impact report, if this content does not provide sufficient detail to permit a proper evaluation. If necessary, the Ministry may further request the technical elements which served as a basis for determining the environmental impacts of the relevant work or activity, as well as the preventive measures and proposed mitigation. The Ministry will evaluate the environmental impact report when it is modified to meet the requirements of the regulation and its content is reviewed in accordance with the applicable instructions.”

The Government of Mexico argues that the submitters failed to provide reliable evidence demonstrating the character of the organizations they say they represent, since they did not supply any information regarding the incorporation particulars of the civil associations they purport to represent nor did they provide the by-laws of such associations. The Government of Mexico further contends that the provisions of Article 14(2)(a) of the NAAEC are being contravened, for the submitters have failed to demonstrate that the facts alleged constitute a direct transgression of the rights of the civil associations they purport to represent. It asserts that it may not be construed from the documentation presented by the submitters that the authority might have issued any resolution affecting their rights. The Government of Mexico asserts that the submitters did not exhaust the remedies available under the Mexican legislation and that, only one of them, the *Comité para la Protección de los Recursos Naturales, A.C.*, availed itself of the popular complaint recourse, which does not in itself constitute an administrative recourse. Finally, the Mexican environmental authorities have pointed out that there is a lack of consistency between the issues raised in the submission and the objectives of the NAAEC, since the submitters failed to establish the necessary relationship between the alleged ecological damage to the flora and fauna of the Paraíso Reef and the also alleged violations to environmental laws.

B. Scope and Magnitude of the Project

The Government of Mexico maintains in its response that “the premises of Submitters’ arguments are so seriously flawed as to distort the true nature of the matters at issue:

- [The Submitters] consider that environmental authorities should have undertaken an assessment of the environmental impact statement, which is referred to as ‘integral,’ regarding the Concession granted by the SCT, as it appears from the second paragraph of Item III.4 of the submission.
- [The Submitters] believe that the project that is being carried out offshore in ocean waters is the same as that which could in the future be authorized onshore, as is the case for the port terminal and, on the other hand, they assert that there are onshore works which have already been authorized without the corresponding environmental impact statement having been previously filed, which is incorrect as made clear hereinafter.

- [The Submitters] consider as 'onshore works' the installation of a concrete manufacturing facility which they unduly refer to as 'concrete manufacturing plant project.'"

The Government of Mexico maintains that "the port terminal comprises distinct projects; the project which involves the construction and operation of the pier complies with environmental impact requirements pursuant to the Environmental Impact Statement for the 'Cruise Ship Pier in Cozumel, Quintana Roo' project, presented in August 1990 [EIS-90]."

The Government of Mexico argues that "the authority in charge of evaluating the effects of the work for strictly environmental purposes, did not regard the Concession as contemplating a comprehensive or global project." When it reviewed the report [EIS-90], Mexico asserts, "it was only possible to evaluate the environmental impact of the works planned and authorized by the SCT. In 1990, the only such work was the construction of the pier, which was itself amenable to evaluation. From that year on, the environmental authority warned that the environmental impacts of any works constructed on land would also have to be evaluated as soon as these were authorized by the SCT." The environmental authorities add that "this warning shows that the Mexican environmental authority, at no time, attempted to elude their responsibility, nor did they avoid complying with the provisions of the applicable laws; on the contrary, it was always intended to subject any environmental effects likely to be generated by the Consortium H project to stringent controls. It is worth mentioning that in 1993 – three years after the EIS-90 – the SCT granted a Concession to Consortium H for the construction of a terminal in accordance with Articles 11, 16 (section IV), 20, 21, 22, 23, 36 and the Sixth Interim Article of the Law of Ports in force. From the time of its granting the Concession implied a non-specific permission to undertake onshore works bordering upon the pier; however, as of today [March 27, 1997] the SCT has not granted any specific authorization to undertake any referred-to works and, in any event, prior to their commencement such works will have to get an environmental impact assessment which as of today [March 27, 1997] has not been forthcoming. The Concession granted by the SCT is only a general authorization which is subject to conditions (amongst which there are environmentally related conditions); it is not an unrestricted authorization to undertake the works, since the involved Ministry only takes into account those aspects related to maritime communications when granting it, while the responsibility for evaluating the environmental effects of the Concession falls upon the environmental authority."

In regard to the onshore works, the Mexican Government also claims that “since construction has not begun, the Submitters’ position is specious – they purport to demand an environmental impact report for works that have not yet been authorized.”

With regard to Article 28 of the LGEEPA, the Government of Mexico claims that the Article contains two conditions, and that “in the present matter, considering the type of works to be undertaken through the Concession, the condition provided in the first paragraph of Article 28 of the Environmental Law was met, since these works do not constitute use of natural resources as described in the second paragraph of this Article.”⁷ The Government also claims that “the second paragraph of Article 28 of the Environmental Law, referring to the use of natural resources, mentions only works or activities that use as primary raw material animal species, forest resources, aquifers, or subsoil, or uses that require the direct exploitation of these resources.” In other words, Mexico asserts that its “conduct complied literally with Article 28 since the Concession’s purpose is not the use of natural resources. Thus, the second paragraph of Article 28 does not apply.” In closing, the Mexican authorities refer to Article 28 of the LGEEPA and point out that: “the works authorized to [Consortium H], through the Concession granted by the SCT, essentially encompass the construction, operation and exploitation of a cruise ship pier in the port terminal and, therefore, the said works do not constitute an exploitation of natural resources in the terms referred to, since, even though they are physical works located at sea, they do not imply the exploitation of the ocean either as a raw material or as a resource per se given that the Concession does not allow the corporation to carry on either extracting activities or those related to the direct exploitation of marine resources. In the case at issue, the use that might be made of ocean waters relates to the role these play as general waterways and, in any event, the activities to be undertaken are regulated under the specific regime of maritime communications.”

1. *Related Projects/Cumulative Impacts*

Mexico responds to the Submitters’ claims regarding the relation of the “Pier Project” to a real estate development by claiming that “there is no real estate development as suggested by the Submitters, and that

7. The second paragraph of Article 28 states that “when an evaluation of the environmental impact of works or activities that are designed to develop natural resources is involved, the Ministry shall request the interested parties to include in the corresponding environmental impact report a description of the possible consequences of these works or activities on the relevant ecosystem, considering the ecosystem as a whole, and not only the resources to be developed.”

the onshore works referred to by the Submitters constitute only complementary elements of the pier described in the 1993 Concession.”

C. Authorizations and Extensions

The Government states that, “when it drafted its response to the Submission (on March 27, 1996), the SCT had only authorized work to be started on the Pier Project Works,” and that “the remaining works which, in accordance with the Concession, could in the future be authorized by the SCT, do not, to date (March 27, 1996), have an environmental impact report, since the Ministry has not yet authorized such works.”

The Mexican Government maintains that the Concession granted for the construction, operation, and development of the port terminal “remained subject to various conditions established in the enabling agreement, and that these conditions include some that are clearly subject to a condition precedent; for example, the First Condition.”⁸ Thus, “the time frame for presenting the environmental impact report for the work on land [established by sub-paragraph e) of the Fifth Condition of the Concession] has not yet expired, since, as the Concession provides, the proceeding in question is subject to a condition precedent with regard to the activities permitted by the Concession.”

The Government of Mexico claims that “it is inaccurate to state that, when the environmental authority issued the third extension of the authorization of the EIS-90, it should have considered that the subject of the evaluation had been modified, since the subject of the evaluation of the EIS-90, the project, ‘Pier for Cruise Ships in Cozumel, Quintana Roo,’ has not changed. The authority evaluated the pier project in 1990 when the environmental impact report was approved. On April 13, 1994, the date on which the third extension was granted, the environmental authority continued to refer to the authorization of the pier project.” The Government’s response indicates that the authority’s actions “have been, and continue to be, consistent, because the authority in charge of evaluating the effects of the work for strictly environmental purposes could not have accorded to the EIS-90 the scope of a global or comprehensive project, since, when it reviewed the report in 1990, it was only able to evaluate the environmental impact of the works planned and authorized up to that point.”

8. The third paragraph of the First Condition of the Concession states: “Consortium H undertakes to acquire the land mentioned in Antecedent IV and to donate this land to the Federal Government, within six months from the date of the granting of the title. This period will be extended if, through no fault of Consortium H, there is a delay in the state procedures for perfecting title.”

D. Location of the Project

The Government of Mexico alleges that “the pier construction project has nothing to do with the subject matter” of the Decree that declared a Refuge Zone for the protection of marine flora and fauna of the Western Coast of the island of Cozumel, since this Decree “was published in the Official Gazette of the Federation on June 11, 1980, based on findings by the now defunct Fisheries Department detecting a marked diminution in marine fauna and flora,” due to commercial and underwater/sport fishing “and therefore proposed to prohibit these activities.”

E. Land Use

With respect to the Submitters' claims regarding the project's compliance with existing land use norms, the Government of Mexico states in its response that: “the authority's acts do not contravene the legal authorities cited, the Directive,⁹ or the Refuge Zone Decree, since the Plan for the Uses and Reserves of Cozumel, Quintana Roo (island), demonstrates that the project's land development falls within lot three, a lot designated for high-density tourist use.”

According to the Mexican Government, both the Concession and the environmental authorization “comply with land use norms, provided that the construction of the pier for tourist cruise ships is carried out in an area specifically designated for tourist use. In addition, Consortium H timely requested from the Municipal Council of Cozumel, Quintana Roo, a construction permit for this pier. This was granted by the Municipal Council, in strict compliance with norms governing the function and jurisdiction of the municipal authority.”

For the Government of Mexico, it is clear that “with regard to this matter, the Federal, State and Municipal authorities did not violate environmental law specifically those norms contained in Title I, Chapter V, of the Environmental Law, and Articles 10 and 16 of its Regulation. Rather, they complied strictly with these; although there is no doubt that these legal norms refer to human settlements and land use, there is also no doubt that the Municipal Council of Cozumel, Quintana Roo, authorized the construction of the pier for cruise ships in compliance with the General Law of Human Settlements and the relevant Municipal Plans and Programs. Moreover, within the Development Plan of this Muni-

9. Instructions for developing and presenting a General Environmental Impact Statement referred to in Articles 9 and 10 of the RIA.

pality, the zone in which construction is being carried out is designated for 'High-Density Tourism.'"

Furthermore, the environmental authorities assert that "the Federal Government has never breached Article 13 of the Regulation, nor its corresponding Directive, and much less the Refuge Zone Decree's prohibition on large- or small-scale commercial fishing, underwater or sport fishing, or fishing for any type of marine flora or fauna, except fishing for scientific investigation. As can be noted, no provision of this decree refers to land use."

F. Species Rescue Program

The Mexican environmental authorities state that "the Species Rescue Program imposed as Condition 24 on Consortium H is intended primarily to preserve the Paraíso coral reef, and therefore does not in any way contravene the Refuge Zone Decree. The term 'rescue' in the title of the program must obviously be understood as synonymous with the protection and safeguarding of marine species. It should be made clear that the construction of the pier could have, according to the evaluation made in the EIS-90, some negative effects on isolated coral patches outside the Paraíso coral reef. For this reason, it was decided to require the company to develop a protection program that would permit the relocation and replanting of corals in a favorable habitat, in order to mitigate any possible harm to these marine species."

The authorities also note that "to serve as relocation sites, sites within the Paraíso coral reef with favorable characteristics for the replanted coral species were chosen. For these reasons, this program cannot be held to violate the Refuge Zone Decree. Indeed, the project does not cause any damage whatsoever to the coral reef, since the sea bed below the site designated for the construction of the pier is composed of sand terraces without reefs, as shown on page 18 of the technical report on the construction project and the operation of the cruise ship pier in Cozumel, Quintana Roo, prepared by Cinvestav-IPN."¹⁰

For these reasons, the Mexican Government concludes that "it is not true that the authority, through the species rescue program, has undertaken fishing or fish collection activities; but rather relocated these species in order to protect them."

10. Reference to the *Technical Report on the Construction and Operation of the Cruise Ship Pier in Cozumel, Quintana Roo*, a project produced by Cinvestav-IPN, Mérida Unit, July 1994.

III. SUMMARY OF ALL OTHER RELEVANT FACTUAL INFORMATION

All the relevant factual information gathered by the Secretariat for the development of this factual record is presented in section IV below. All this information is also presented in chronological order in Annex II. All the documents that contain the relevant factual information are available for consultation in the office of the CEC Secretariat in the city of Montreal.

IV. FACTS PRESENTED BY THE SECRETARIAT WITH RESPECT TO THE MATTERS RAISED IN THE SUBMISSION

This section of the document contains facts that date as much from before the NAAEC entered into force as afterwards. Facts that predate the NAAEC are included only as background and context for those that took place after January 1, 1994. Their inclusion in this document conforms to Council resolution No. 96-08 which stipulates: "In examining allegations of a failure to effectively enforce law, the Secretariat will be able to include facts that predate the 1st of January 1994 in the factual record."¹¹

A. Scope and Magnitude of the Project

The scope and magnitude of the "Cruise Ship Pier Project in Cozumel, Quintana Roo" represents a central element of the different views expressed by the Submitters and the Government of Mexico. The Mexican civil associations argue that the project is of larger magnitude than claimed by the company and evaluated by the environmental authorities. In its response to the submission, the Mexican authorities assert that the "Cruise Ship Pier Project in Cozumel, Quintana Roo" is a single and independent project that stands apart from the onshore development which, with the SCT's permission, may be constructed by Consortium H.

1. "Pier" and "Port Terminal" Terminology

In its reply, the Mexican Government maintains that "in evaluating the environmental impact report (EIS-90) in 1990, the environmental authorities considered the term 'pier' by reference to its existing uses,

11. The text of Council resolution No. 96-08 is available in the database of correspondence on the effective enforcement of environmental law on the CEC's web page on the Internet: <http://www.cec.org>.

and to the invitation for bids issued by the SCT in 1989 for the construction of 'piers for tourist cruise ships, tourist marinas, shelter ports, piers and specialized cargo installations.'" In other words, according to the Mexican authorities, at the time of the invitation for bids and of the EIS, the term "pier" was "used with reference to works carried out directly at sea, whose only purpose was to ensure that vessels could moor."

For this reason, the environmental authority claims that "there is some confusion over the terms 'pier' and 'port terminal.'" In addition, Mexico points out that "the term 'pier' was only formally integrated into Mexican law in 1993, when the official standard for maritime terminology (NOM-SCT-4-002-1993) was promulgated." This defines pier as "a work extending out to sea that may be used within a port to facilitate the loading or discharge of cargo and passengers, and which may serve as an installation for the mooring of ships." Mexico also notes that the term "Terminal," on the other hand, was only introduced on July 19, 1993, when the Law of Ports was enacted. This defines a terminal as "a unit inside or outside a port, comprising works, installations, and surface areas, including a water zone, which permits the relevant port operations to be fully performed."

The Mexican Government concludes in its response that "the confusion [over the terms of pier and terminal] arises precisely because the Concession granted to Consortium H was issued after the enactment of the Law of Ports, and therefore, in strict compliance with this law, the term 'terminal' was used, despite the fact that the invitation to bid issued in 1989, prior to the enactment of this law, referred to the term 'pier' by reference to the uses in effect at that time."

2. *Project Description in Accordance with Mexican Environmental Law*

Part II of Article 10 of the RIA, in force since June 8, 1988, establishes the minimum information which a General EIS must contain with respect to the description of a project.¹²

12. This information, according to Part II of Article 10 of the RIA, must include a "description of the work or planned activity, starting with the selection of the site for the work and the development of the activity; the surface area required; the construction project; the erection and operation of the installations to be developed; the type of activity; the anticipated volume of production; necessary investments; the type and quantity of natural resources to be developed at the construction stage and during performance of the work or development of the activity; a waste management program, both during the construction and installation phases as well as during the operation or development of the activity; and a program for abandoning the works or ceasing activity."

The directives¹³ for developing and presenting General Environmental Impact Statements (to which Articles 9 and 10 of the RIA refer) establish that, in the description of the work or projected activity, "the proponent must present general information about this work or activity in order to produce a general description. Additionally, the proponent should provide specific information about each stage in order to obtain the necessary elements for evaluating the impact (positive or negative) of the work or activity."

In the section on "Related Projects," the directive states that the proponent "must explain if other projects will be required in the development of the work or activity."

In the section entitled "Future Growth Policies," the directive states that the proponent must "explain in general terms the strategy to be adopted by the company, indicating the extensions, future works, or activities that are planned for the area."

a) *Relevant facts prior to the entering into force of the NAAEC*

1. The "Instructions for the Concession for Piers for Tourist Cruise Ships and Specialized Cargo Terminals" published by the Mexican Port Authority (Pumex) in September of 1989 and employed by Consortium H to participate in the bidding contest set up by the SCT (on September 4, 1989) for the construction of piers for tourist cruise ships, contain the following definition:

"Piers for tourist cruise ships are defined as a grouping of maritime and land installations intended for the mooring of vessels and for the provision of passenger services to tourist cruise ships." The Instructions further state that "the following are integral parts of tourist cruise ship piers: a) installations necessary for the berthing and mooring of cruise ships; b) land areas designated for construction and installations necessary to attend to cruise ship passengers and for locating services to ensure their comfort; c) parking areas for public and private vehicles used to transport passengers."¹⁴

2. The Environmental Impact Statement in the General Modality for the construction of a Cruise Ship Pier in Cozumel, Quintana Roo,

13. Instructions for developing and presenting a General Environmental Impact Statement to which Articles 9 and 10 of the RIA refer.

14. Instruction for the *Concession of Piers for Tourist Cruise Ships and Specialized Cargo Terminals* published by the Mexican Port Authority (Pumex) in September, 1989.

presented by Consortium H in August 1990 (EIS-90),¹⁵ to which Resolution 410-3088 (the environmental authorization) refers, contains the following description of the project:

The planned pier consists of a footbridge 257.2 meters long and 16 meters wide, supported by prefabricated reinforced concrete elements, allowing access to a two-berth pier 324 meters long, with exterior depths of 12 meters and interior depths of 10 meters, capable of respectively accommodating vessels of up to 320 meters and 260 meters. The pier consists of a platform 160 meters long and two mooring piers, linked by a footbridge supported by equally spaced reinforced concrete elements made from prefabricated materials. The pier will have a covered footbridge to protect passengers from the sun and rain, which can connect directly with the entry and exit doors of the vessel. The pier will offer drinking water, electric power, lighting, telephone, garbage collection, and fire fighting services.

In the "Related Projects" section of EIS-90, Consortium H states that:

In order to complement the cruise ship pier project, it is planned to reorganize the service presently offered to vessels by modifying the terminal installations currently operated by the Port Services of Cozumel, including relocating the Ferry Terminal and the related services necessary to attend to tourists' needs efficiently.

In the "future Growth Policies" section of EIS-90, Consortium H states that:

According to market studies, it is estimated that by 2010, eight vessels per day will arrive in Cozumel; this implies that the four vessels without pier space will have to be serviced by tenders, thus resulting in inconvenience for elderly tourists, who may be unwilling to disembark without fixed installations. It is estimated that part of this traffic could be channeled toward installations to be developed on the mainland.

3. On November 29, 1990, the General Directorate of Urban Development of Sedue issued a technical opinion¹⁶ stating that, "in accordance with the Declaration of Uses and Reserves of the municipality of Cozumel, the proposed project lies in two zones: a) a maritime zone designated as a marine ecological reserve (it will thus be the responsibil-

15. *General Environmental Impact Statement for the Construction of a Cruise Ship Pier in Cozumel, Quintana Roo*, prepared by Consortium H, August 1990.

16. Document No. 3100000-1905 to the Director General of Ecological Norms and Regulation, signed by the Director General of Urban Development of the Sedue, November 29, 1990.

ity of the Subministry of Ecology to outline the feasibility of constructing marine installations); [...] and (b) property on dry land which, although this is not noted in the EIS, should contain passenger terminal services that adequately resolve consolidation problems [...].” The opinion recommends that all information regarding installations on land be identified.

3. *Related Projects/Cumulative Impacts*

The Submitters maintain that the “Cruise Ship Pier Project in Cozumel, Quintana Roo” is related to a real estate development not identified by the company in the EIS-90. The Submitters claim that this omission prevented the authorities from evaluating the cumulative environmental impacts of the project.

The environmental authorities state that “there is no real estate development as suggested by the Submitters, and that the onshore works referred to by the Submitters constitute only complementary elements of the pier described in the 1993 Concession.”

a) Relevant facts prior to the entering into force of the NAAEC

1. On August 10, 1990, in a Pumex document signed by the Minister of Communications and Transport, the SCT approved a request to Consortium H to build and operate a passenger terminal and cruise ship pier.¹⁷ The document states that “the project is complemented by a 43.3 hectares real estate and tourist development.”

2. In the “Related Projects” section of the EIS-90,¹⁸ Consortium H states that: “in order to complement the cruise ship pier project, it is planned to reorganize the service presently offered to vessels by modifying the terminal installations currently operated by the Port Services of Cozumel, including relocating the Ferry Terminal and the related services necessary to attend to tourists’ needs efficiently.”

3. On July 8, 1992, Consortium H requested the support of the President of the Republic¹⁹ to obtain the Concession Contract from the

17. Authorization for Port Infrastructure Investment signed by the Executive Director of the Pumex Planning Department and approved by the SCT Secretary on August 10, 1990.

18. *General Environmental Impact Statement for the Construction of a Cruise Ship Pier in Cozumel, Quintana Roo*, prepared by Consortium H, August 1990.

19. Letter of the Director General of Consortium H to the President of Mexico, July 8, 1992.

SCT, stating that “on July 1, 1990 Fonatur informed us that our real estate project adjacent to the new cruise ship pier had been authorized.”

4. On May 24, 1993, Consortium H again stated to the SCT that the pier was only part of the Puerta Maya project, and described the first stages of this project.²⁰ The company committed to building the “port area” installations (terminal building, parking, warehouses and green areas, sanitary services, etc.), and referenced a document²¹ “in which the HASA Group of Spain will build ‘turnkey’ the first stage of the Puerta Maya project, which consists of the Port area, Village, Concessioned Federal Zone infrastructure, and the new cruise ship pier.”

b) Relevant facts subsequent to the entering into force of the NAAEC

1. Various videotapes in which representatives of Consortium H refer to the scope of the Puerta Maya project were obtained. In a 1994 Televisa newscast,²² the Director of Projects and Construction of Consortium H declared that “The first stage [of the Puerta Maya project] consists of construction of the cruise ship pier, a means of access to it and its port area, a maritime federal zone on land, with infrastructure, and a village, which includes services such as shops, restaurants, bars, a hotel zone, etc. The second stage includes a golf club, with villas, and a clubhouse; a third stage includes a high-rise luxury hotel; and the fourth stage includes a world-class spa.”

The President of Consortium H mentioned in another interview with a Televisa reporter that “the Puerta Maya project” not only “deals with cruise ships,” but “plans to construct hotel and condominiums, in order to attract tourism unrelated to cruise ships.” He said in the same interview that “we will build condominiums and hotels,” which will be occupied “thanks to the Puerta Maya project.”²³

2. On February 16, 1995, Consortium H presented to the INE a “Master Plan describing the number and type of tourist service installations that the Federal Tourist Development Project [Puerta Maya] will offer and provide.” This document states that the EIS and the additional information related to “this Project” authorizes only “what is set out in the first and second conditions” (of the environmental authorization),

20. Letter from Consortium H to the Head of General Coordination of SCT Port Authorities, May 24, 1993.

21. The Secretariat has not obtained this document.

22. Minute 30:30 of tape #1.

23. Minutes 1:20:50 and 1:26:20, respectively, of tape #1.

and requests that the environmental authority indicate if a Preliminary Report²⁴ is the appropriate procedure for authorizing “the construction of buildings of any type or infrastructure on dry land supporting the Pier.”²⁵

3. On May 23, 1995, the INE replied to Consortium H, stating that, for the “construction of any type of support infrastructure on dry land for the Cruise Ship Pier in Cozumel, it would be necessary to present an Environmental Impact Statement, rather than a Preliminary Report.”²⁶

4. On May 14, 1996, Consortium H presented an Environmental Impact Statement, for the “Puerta Maya” Project (EIS-96) in Cozumel, Quintana Roo.²⁷ The company declared that it submitted the Environmental Impact Statement “...in order to comply with [the INE document] D.O.O. DGNA-2137, of May 23, 1995”; this document consisted of the General Environmental Impact Statement for the “Real Estate Development project called ‘Puerta Maya,’” which includes “the construction and operation of a terminal, a port area designed to provide the services for which this concession was granted, and the infrastructure necessary for tourism.”

The section on related projects of EIS-96²⁸ states that “the principal project related to the development of this project is the construction and operation of the ‘Cruise Ship Pier in Cozumel, Quintana Roo,’ presently under construction, and situated 350 meters South of the existing ‘Tourist Pier.’”

24. The “Preliminary Report,” according to article 7 of the RIA, is the document that must be presented “[w]hen any person that intends to carry out work or activity requiring prior authorization pursuant to article 5 of the Regulation [RIA], deems that the environmental impact of the work or activity will not cause ecological imbalance, or exceed the limits and conditions set forth in the technical ecological norms and regulations issued by the Federation for the protection of the environment,...prior to beginning such work or activity concerned. After analyzing the report, [Semarnap] shall inform the party as to whether or not the presentation of a environmental impact statement is required, and of the form in which it must be formulated, and shall inform them of current technical ecological norms applicable to the work or activity concerned.”

25. Letter from Consortium H to the Director General of Management and Environmental Impact of the INE, February 16, 1995.

26. Document No. 2137 of the General Directorate of Environmental Norms, May 23, 1995. The document makes no mention of the “Federal Tourist Development,” whose “Master Plan” was submitted by the company on February 16, 1995.

27. Letter from Consortium H to the General Directorate of Environmental Norms, May 14, 1996, with receipt acknowledged by the environmental authority on May 17, 1996.

28. *Environmental Impact Statement for the “Puerta Maya” project in Cozumel, Quintana Roo*, presented by Consortium H on May 14, 1996.

With regard to the description and extension of the project, the company states:

At the center of the property, the Plan provides for a Port Area with a surface area of 15,000 sq. meters, of which 1,276 sq. meters may be built upon, with two reception areas on two piers on the quay at both ends of the property. These will be linked by a pedestrian walkway and a distribution area; access to the complex from the inter-city traffic site will be provided by a square and an internal vehicular circulation system, with parking for visitors. At the peripheries of the property will be located the mixed use areas, comprising a Tourist Use area of 25,000 square meters and a Commercial Use area of 20,000 square meters, including one to three story buildings to house guests in transit and shops of various types, as well as recreational, administrative, medical, and parking services.²⁹

B. Authorizations and Extensions

1. Authorizations

According to the Submitters, the environmental authority failed to apply effectively Mexican environmental law by authorizing work to start on the "Port Terminal Project." Submitters point out that the First Condition of the Concession which the company received from the SCT on July 22, 1993, required it to construct a port terminal that included, in addition to the pier, "a passenger terminal building, a means of access from the terminal to the tourist cruise ship pier, a parking lot, and a public access road to the Chan-Kanaab highway."³⁰

The Submitters also allege that the Law of Ports, enacted on July 19, 1993, and which governs the Concession,³¹ defines a port terminal as

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29. A complete list of the works which comprise the architectural program of the project "Puerta Maya" is included in the *Environmental Impact Statement for the "Puerta Maya" project in Cozumel, Quintana Roo*, presented by Consortium H on May 14, 1996.
 30. The First Condition of the Concession granted by the Federal Government, through the Ministry of Communications and Transportation, to Consortium H states: "Purpose of the concession - 'The Ministry' grants to 'Consortium H' a concession for the use and development of an area of 51,465.297 square meters of the maritime federal zone of the port of Cozumel, Quintana Roo, for the construction, operation, and development of a pier of the public port terminal for tourist cruise ships. Consortium H agrees to build, as part of the port terminal, in an area of 15,439.314 square meters of the land referred to by Antecedent IV, which is presently owned by the Government of the State of Quintana Roo, and 4,704.747 square meters of the land maritime federal zone, a terminal building for passengers, a means of access from the terminal to the cruise ship pier, a parking lot, and a public access road to the Chan-Kanaab highway, in accordance with a project to be approved by 'the Ministry.'"
 31. The Law of Ports in Section IV of Article 2.

“a unit established inside or outside a port, comprising works, installations and surface areas, including a water zone, which permits the relevant port operations to be fully performed.”

Consequently, the Submitters claim that the sum total of the works that make up the “Port Terminal Project” had been publicly known since July 1993, and must have been known by the environmental authority. They allege that the authorities “should not have authorized work to start³² [on August 12, 1994] without having evaluated as a whole the works which comprise the ‘port terminal’ project.”

The Submitters claim, moreover, that the authorization to start work on the “Cruise Ship Pier Project,” violated subparagraph (e) of the Fifth Condition of the Concession, since it provides that “no later than three months from the date of the granting of this Title [July 22, 1993], Consortium H must present the Ministry with an overall plan for the works. This plan must contain the following information: (...) e) Report on the environmental impact of the construction and operation of the Terminal.”

The response submitted by the Government of Mexico on March 27, 1996, states, first, that the onshore development of the port terminal [which dates back to the 1993 Concession] “has not been authorized.” Second, it points out that “to argue, as the Submitters do, that with the enactment of the Law of Ports [on July 19, 1993] the object of the environmental impact report of the EIS-90 had changed, (since the SCT authorized Consortium H to build a port terminal and not a pier), is to fail to take into account that the object of the environmental impact report of the EIS-90 is, and was, the construction of a pier.”

The Government claims in its reply that the Concession granted in 1993 by the SCT for the construction of a port terminal “logically embraces the construction of the pier and also includes the construction of specific land works, but that, with respect to these works, the concession makes their authorization contingent upon donating to the Federal Government the tracts of land occupied by the works (First Condition of the Concession),³³ and upon the approval of the relevant environmental impact report.”

32. Document No. 7853 of the General Directorate of Environmental Norms, notifying Consortium H that “construction on the project may commence,” August 12, 1994.

33. The third paragraph of the First Condition of the Concession states: “Consortium H undertakes to acquire the land mentioned in Antecedent IV and to donate this land to the Federal Government, within six months of the date of the granting of the title. This period will be extended if, through no fault of Consortium H, there is a delay in the state procedures for perfecting title.”

The Mexican Government also contends that “the environmental authorities have already assessed the effects of the pier construction; however, until now, they have not approved the undertaking of the onshore works which are connected to the 1993 Concession, because the Condition regarding the real estate property transfer herein above mentioned has not yet been fulfilled. It must be mentioned that the environmental authorities have already rejected a preliminary report submitted by the corporation, and made it clear to the promoters that they have to submit a general environmental impact statement and not only the said preliminary report, but that, it would also be necessary that they first fulfill the Condition requiring the donation of the lands, where the terminal is to be built, to the Federal Government.” It also alleges that “from the issues pointed out, it follows that the environmental authorities have acted according to law and that it would be absurd to pretend that they again assess the pier construction works, given that the 1993 Concession was granted for a port terminal. The construction of the pier has already been assessed and is under way. What the environmental authorities must do in the future, in order to comply with their duties, is to assess the environmental impact statement of onshore works, if, indeed, the corporation fulfills the Condition established in the respective Title, in order for construction to be allowed. It must be made clear, in any event, that the referenced onshore works are merely the elements that complement the pier under the terms of the 1993 Concession and in no way do they constitute a distinct real estate development as claimed by the submitters.”

In other words, the Mexican Government states that, until March 27, 1996, the onshore works of the port terminal had not been authorized or evaluated for environmental impacts, since such a review was subject to fulfillment of the First Condition of the Concession granted by the SCT.

With respect to the Fifth Condition of the Concession, the authorities state that “the period for presenting the environmental impact report for the onshore works [three months calculated from the granting of the Concession] has not yet expired” [as of March 27, 1996], and that this period will begin to run once the Company has complied with the First Condition of the Concession.

The Government responds that “the environmental authority’s duty in performing its function is to evaluate the environmental impact of the construction on land to determine whether the company has complied with the condition established in the relevant provision as a requirement for starting work.”

a) *Relevant facts prior to the entering into force of the NAAEC*

1. On August 10, 1990, SCT approved, in a Pumex document signed by the Minister of Communications and Transport, the Concession Application of Consortium H to construct and operate a passenger terminal and cruise ship pier.³⁴

2. On December 19, 1990, Sedue informed Consortium H that the project entitled "Cruise Ship Pier in Cozumel" had been authorized, subject to 64 conditions that the Corporation will have to fulfill prior to and during the construction and operation of the pier. Of these, 12 relate to aspects of a legal and administrative nature, one has to do with the pier site, 15 deal with the protection and conservation of marine species, 18 refer to building issues, 13 relate to the operation stage, four deal with waste management and one is of general applicability. Condition Number 19 provides that "the construction on dry land of any type of building or infrastructure for the pier is strictly prohibited, since the only construction authorized is that indicated in the first condition of this document, which was explicitly described in the Environmental Impact Statement. The quantity and type of installations needed for the pier to render its intended services were not mentioned in this document, and are thus not subject to this authorization."³⁵

3. On May 11, 1993, the Government of Quintana Roo wrote to Consortium H that "it approves the Puerta Maya tourist project," and that instructions have been forwarded to the Minister of Public Works and Urban Development of the State Government to grant the authorization immediately" to "the Puerta Maya Project in the Land/Maritime Federal Zone [...] so that construction may start as soon as possible."³⁶

34. Authorization for Port Infrastructure Investment, signed by the Executive Director of the Planning Committee of Pumex and approved by the Secretary of SCT, August 10, 1990.

35. Resolution 410-3088 of the General Directorate of Ecological Norms and Regulation of the Subministry of Ecology of Sedue, December 19, 1990.

36. Letter of the Government of the State of Quintana Roo to Consortium H, May 11, 1993. This communication responded to a letter sent by Consortium H, which confirmed the granting of a concession contract by Sedue on December 31, 1986, to *Inmobiliaria La Sol*. The letter adds that the company "complied with each and every requirement imposed by Sedue, now Sedesol, the Government of the State, and the Municipality of Cozumel; the Master Plan having been approved, with the only pending requirement for receiving the definitive permit being the authorization" of the Government of Quintana Roo. The Concession granted by the SCT to Consortium H in Antecedent VII indicates that "*Inmobiliaria La Sol*, which belongs to the same business group as Consortium H, obtained from Sedue on December 22, 1986, a concession title DZF-139/86 (file 53-21381), for the use and development of a surface area of 25,297.80 square meters of the maritime federal zone for exclusive use for recreation and multiple tourist services, in the location known as Playa Paraíso, in Cozumel, Quintana Roo."

4. On July 22, 1993, the SCT granted to Consortium H a Concession for the construction, operation, and development of a public port terminal for tourist cruise ships in Cozumel, Quintana Roo.³⁷ Condition One of the Concession states: "Purpose of the concession – The 'Ministry' grants to 'Consortium H' a concession for the use and development of an area of 51,465.297 square meters within the federal maritime zone of the Port of Cozumel, Quintana Roo, to build, operate, and develop a public Port Terminal pier for tourist cruise ships. 'Consortium H' undertakes to build, as part of the Port Terminal, within an area of 15,439.314 square meters of the land referred to in Antecedent IV, which is presently owned by the Government of the State of Quintana Roo, and within 4,707.747 square meters of the maritime federal zone, a passenger terminal building, a means of access from the terminal to the pier, a parking lot, and a public access road to the Chan-Kanaab highway, as set out in a plan to be approved by the Ministry."

5. Antecedent X of the Concession granted by the SCT to the company indicates that, "according to Provisional Article VI of the Law of Ports, 'Consortium H' has chosen that this concession be regulated, as to its granting, by the provisions of this law" [recently-enacted Law of Ports (1993)].³⁸

6. Antecedent VI of the Concession granted by SCT to the company on July 22, 1993,³⁹ states that on June 19, 1992, Sedue "issued a favorable report regarding the environmental impact of the construction and operation of the port terminal for tourist cruise ships to which this Concession refers," and adds that the Ministry of Social Development (Sedesol) ratified this report on May 26, 1993. On the other hand, the Fifth Condition of the same Concession establishes that "within a period of not more than three months from the date of the granting of this title, 'Consortium H' must present to the 'Ministry' a construction plan which should contain the following documents: [...] e) Report on the environmental impact of construction and operation of the terminal." On December 19, 1990, Sedue issued a favorable environmental impact

37. Concession granted by the Federal Government, through the Ministry of Communications and Transport, to Consortium H, July 22, 1993.

38. The Provisional Sixth Article of the Law of Ports establishes that "Physical or legal persons who have filed submissions under examination or who have fulfilled the prerequisites for obtaining the concession, permit, or authorization upon the enactment of this legislation may opt for their granting through the provisions of this law, or through the provisions of the laws of Maritime Commerce and Navigation and of General Means of Communication."

39. Concession granted by the Federal Government, through the Ministry of Communications and Transportation, to Consortium H, July 22, 1993.

resolution⁴⁰ for the "Cruise Ship Pier Project in Cozumel, Quintana Roo,"⁴¹ and the environmental authorization was extended on June 19, 1992. The Secretariat of the CEC has no information from which to determine whether a favorable environmental impact resolution exists regarding the construction and operation of the port terminal issued by Sedue on June 19, 1992, and ratified by Sedesol on May 26, 1993, to which Antecedent VI of the Concession of SCT refers.

7. On December 23, 1993, the SCT informed Consortium H that it could begin "work on the construction of the tourist cruise ship pier, subject to the prior authorization of the Ministry of Social Development." The document adds that construction of the works which are authorized "is subject to the provisions in the environmental authorization" issued by Sedue in 1990, and states that "before starting construction of the land terminal adjacent to the pier, the draft project must be presented for approval by this Ministry (SCT), pursuant to the First and Fifth conditions of the Concession."⁴²

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On August 12, 1994, INE informed Consortium H that "work on the [Cruise Ship Pier in Cozumel] Project may start."⁴³

2. On September 13, 1994, the sale of land by the Government of the State of Quintana Roo to Consortium H was concluded through formal delivery and acceptance of the land. The donation of the land to the Federal Government in order to comply with the First Condition of the Concession remained pending.⁴⁴

40. The environmental impact resolution is the document which, according to article 20 of the RIA, "[a]fter evaluating the environmental impact statement of the work or activity concerned, submitted in the appropriate form, the Department [Semarnap] shall formulate and [give notice of to] the interested parties, in which it may: I. [a]uthorize the work or activity to be carried out in the terms and conditions indicated in the corresponding statement; II. [a]uthorize the proposed work or activity to be carried out, on the condition that the project be modified or relocated, or III. [d]eny authorization."

41. Resolution 410-3088 of the General Directorate of Ecological Norms and Regulation of Sedue, 19 December 1990.

42. Document of the Concessions Directorate of the General Directorate of Ports and Merchant Marine of the SCT, December 23, 1993.

43. Document No. 7853 of the General Directorate of Environmental Norms, August 12, 1994. The document warns that the works may be initiated "only when they develop in strict compliance with the provisions of Resolution 410-3088, as well as its 16 technical requirements."

44. Delivery and Reception deed for the above land by the Governor of Quintana Roo; the General Secretary of Government; the Municipal President of Cozumel; and the President of Consortium H.

3. On December 16, 1996, Consortium H contacted the General Directorate for Port and Merchant Marine Affairs of SCT to respond to its document dated July 22, 1993, in which SCT set out the requirements and procedures to formalize the donation to the Federal Government of a portion of the land acquired from the Government of the State of Quintana Roo [September 13, 1994]. Consortium H stated that “it had all of the documents to enable it to enter into the appropriate donation contract,” and requested that SCT designate “the place and date when the donation should take place.”⁴⁵

4. On December 20, 1996, INE through the General Directorate of Ecological Regulation and Environmental Impact, “authorized the Consortium for Development and Real Estate Promotion H, S.A. de C.V., to construct and operate the works referred to in the second paragraph, First Condition, of the Concession. These consist of: 1. Port area (passenger terminal building); 2. open space (access from the Terminal to the tourist cruise ship pier); and 3. parking (parking and public access road).”⁴⁶ The authorization was subject to six terms and seventeen conditions.

5. In the same document dated December 20, 1996, the INE informed Consortium H that “it did not authorize the construction of works for Tourist-Commercial use, contained in an area of 47,178.80 square meters referred to in the Environmental Impact Statement” [EIS-96].⁴⁷

6. As of February 10, 1997, according to information presented by Consortium H, the first condition of the Concession granted by the SCT had not been fulfilled. Consequently, the donation of the land had not taken place, the last requirement for fulfilling this First Condition. According to the Mexican environmental authorities, this condition must be realized before the Fifth Condition, subparagraph e) is operative [the period of three months from the granting of the Concession to present the environmental impact report for the Port Terminal].

45. Letter of Consortium H to the Director General of Ports and Merchant Marine of the SCT, December 16, 1996.

46. Document No. 08168 of December 20, 1996, sent to Consortium H by the Director General of Ecological Regulation and Environmental Impact.

47. Document No. 08168 of December 20, 1996 sent to Consortium H by the Director General of Ecological Regulation and Environmental Impact.

2. *Extensions*

The Submitters claim that the various extensions granted by Sedue and INE to the environmental authorization of the "Cruise Ship Pier Project in Cozumel, Quintana Roo" violate "the general principle of law that a non-existent act cannot be validly extended, since both the third and the fourth extensions were granted after the expiration of the periods of the preceding extensions."

In response, the environmental authorities state that "with regard to the argument concerning the irregular character of the extensions, it should be pointed out that, even if these extensions were granted subsequent to the expiration of the relevant periods, Consortium H requested these extensions before the expiration of these periods." The delays were incurred "as a result of the time required by the authority to verify completely the subject matter to be evaluated. These administrative delays in any case only prejudiced Consortium H; these circumstances are, in no way whatsoever, likely to cause environmental harm and they do not imply a lack of diligence on the part of the authorities in carrying out their control duties aimed at the preservation and conservation of the environment. It would be inconsistent, from an environmental standpoint, if, as a result of the time allowed having elapsed, the authorities were to issue value judgments with no sound support; this is why the time extensions resulted from the need to ensure that the environmental legal provisions were duly complied with and to guarantee the preservation of the ecological balance."

The Government further responds that "if the authority did not offer immediate answers [to the extension requests], this was because it took all the time necessary to verify the fulfillment of the conditions during the development of the project." It also maintains that "the extensions referred to were subject to a condition precedent with regard to the authorization to begin work. Accordingly, and since the approval of the EIS-90 was granted conditionally, it was necessary, in the opinion of the authority, to verify that the requirements established in the conditions were satisfied by the company."

a) *Relevant facts prior to the entering into force of the NAAEC*

1. On November 12, 1991, Sedue granted an extension of one year, beginning on October 21, 1991, for the construction of the "Cruise Ship Pier Project in Cozumel."⁴⁸ The purpose of the extension application was

48. Document No. 410-02644, signed by the Director General of Ecological Norms and Regulation of Sedue, November 12, 1991.

to obtain an extension of the deadline set in the EIS-90 authorization until the Concession was issued.

2. On June 19, 1992, Sedue granted an extension of one year beginning on June 1, 1992, for the construction of the "Cruise Ship Pier Project in Cozumel."⁴⁹ The purpose of the extension application was to obtain an extension of the deadline set in the EIS-90 authorization until the Concession was issued.

3. On November 22, 1993, the General Directorate of Environmental Norms of Sedue informed Consortium H that "work on the project cannot commence," because "the environmental authorization has expired."⁵⁰ The document explains that "to date, the work commencement notification required by Condition 62 has not been received, and since the extension was granted for one year, the extension has now expired."

4. On December 3, 1993, Consortium H replied to the General Directorate of Environmental Norms that it "considered the favorable Environmental Impact Assessment to be fundamentally valid, since there had been no change in the circumstances under which it was issued, and that its expiration is only a temporal matter that can be wholly resolved through a request that we shall submit for your consideration when the SCT issues permission to begin work."⁵¹

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On January 4, 1994, Consortium H requested from the General Directorate of Environmental Norms an extension of 180 days in the environmental authorization issued on December 19, 1990, for the "Cruise Ship Pier Project in Cozumel."⁵² The corporation informed the environmental authorities that "on December 22, 1993, it received from the [SCT] an official notice bearing the reference OF.112.201.-2497/93, which allows us to start the construction works for the cruise ship pier." In its document, the corporation requested that "for the purpose of

49. Document No. 410-02208, signed by the Director General of Ecological Norms and Regulation of Sedue, June 19, 1992.

50. Document No. 010892 of the General Directorate of Environmental Norms to the President of the Administration Council of Consortium H, November 22, 1993.

51. Letter of Consortium H to the Director General of Environmental Norms, December 3, 1993.

52. Letter of Consortium H to the Director General of Environmental Norms, January 4, 1994.

fulfilling Condition Number 3 as provided under [Resolution] 410-3088 issued by this Branch on December 18, 1990, it be granted a 180-day extension in connection with authorization 410-02208 issued by the Branch under your responsibility.”

2. On March 7, 1994, the company renewed its request for an extension to the General Directorate of Environmental Norms, pointing out that if this body “thinks that the technical reasons and circumstances substantiating Resolution 410-3088 of December, 1990, are not valid, and consequently that the construction of the tourist cruise ship pier should not proceed where officially authorized, it should inform the company of this, justifying its reasons with reference to Article 16 of the Constitution.”⁵³

3. On April 13, 1994, the environmental authority informed Consortium H that a new extension was granted for the authorization, in view of the fact that the company had the authorization of the SCT to commence work and assuming that “the technical circumstances on which Resolution 410-3088 of December 19, 1990, were based had not changed.”⁵⁴ The transmittal does not mention the document sent by the General Directorate of Environmental Norms to the company on November 22, 1993, to notify the company that the department no longer had the authorization relating to Environmental Impact, since the one-year extension previously granted had lapsed.

4. On October 11, 1994, Consortium H requested a further one-year extension for the environmental authorization.⁵⁵ In this request, the company stated that it “has been complying with the terms established in the said official [Resolution] 410-3088, as it was exhorted to do under the last paragraph of the extension notice issued by this authority on April 13 of the current year.”

5. On December 16, 1994, the INE granted a new extension of the authorization for the Cruise Ship Pier for 365 calendar days from October 14, 1994.⁵⁶

53. Letter of Consortium H to the Director General of Environmental Norms, March 7, 1994.

54. Document 2741 of the General Directorate of Environmental Norms, signed by the Director of Environmental Impact and Risk, April 13, 1994.

55. Letter from Consortium H to the Director of Environmental Impact and Risk, October 11, 1994.

56. Document 11230, signed by the Director General of Environmental Norms of the INE, December 16, 1994.

6. On November 8, 1995, the environmental authority granted a new extension for the project authorization until October 14, 1996.⁵⁷ The purpose of the extension application was to continue carrying on the project works so as to be in a position to complete them and thus comply with the Concession. The environmental authorities exhorted the Corporation to “continue expediently abiding by the terms and the technical considerations established by this Institute [INE] for the project at issue.”

7. On July 2, 1996, Consortium H requested another extension of the authorization for a further 180 days, beginning October 15, 1996.⁵⁸ In its application, the Corporation requests an extension “in order for my client to be in a position to complete the works needed for the construction of the cruise ship pier in the Island of Cozumel, Quintana Roo, thereby complying with the Concession granted.”

3. *Extension to the environmental authorization of April 13, 1994*

The Submitters note that “in granting the third extension [of the authorization for the environmental impact report in April 1994], the authority must have considered the fact that, since 1993, with the enactment of the Law of Ports and the Concession, the object of the evaluation was no longer the same, nor were the environmental conditions and impacts which would be produced by the project.” According to the Submitters, “this means that evaluation of the subject of the concession should have been made in a comprehensive manner, without this resulting in the retroactive application of the Law of Ports.”

The Government of Mexico indicates in its reply that “it is inaccurate to state that when the environmental authority issued the third extension for the authorization of the EIS-90, the Directorate had to consider that the subject of the evaluation had been modified, since the subject of the evaluation of the EIS-90 (the Cruise Ship Pier Project in Cozumel), had not changed. In 1990, when the environmental impact report was authorized, the authority evaluated the pier project. On April 13, 1994, the date of the third extension, the environmental authority continued to refer to the same pier project authorization.”

57. Document 05029, signed by the Director General of Environmental Norms, November 8, 1995.

58. Letter of Consortium H to the Director of Environmental Impact and Risk, July 2, 1996.

The authority's actions, according to the Government response, "are and have been consistent, because, as has been established, for strictly environmental purposes, the authority in charge of evaluating the effects of the work could not have accorded EIS-90 the scope of a comprehensive or global project, since when it reviewed the relevant report in 1990, it could only evaluate the environmental impact of the works planned and authorized up to that point."

a) Relevant facts prior to the entering into force of the NAAEC

1. On August 10, 1990, SCT approved in a Pumex document signed by the Minister of Communications and Transport, the request that Consortium H be granted a concession to construct and operate a passenger terminal and cruise ship pier.⁵⁹

2. On July 19, 1993, the Law of Ports was published in the *Official Gazette of the Federation* and entered into force. This includes the new concept of "Terminal."⁶⁰

3. On July 22, 1993, SCT awarded to Consortium H a Concession to build, operate, and develop a public port terminal for cruise ships in the Port of Cozumel.⁶¹

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On April 13, 1994, the Director General of Environmental Norms granted an extension for environmental authorization, since Consortium

59. Authorization of Port Infrastructure Investment, signed by the Executive Director of the Pumex Planning Commission and approved by the SCT Secretary.

60. The Law of Ports defines a terminal in Section IV of Article 2 as "a unit inside or outside a Port, comprising works, installations and surface area, including a water zone, which permits the relevant port operation to be fully performed."

61. The first Condition of the Concession which the Federal Government, through the Ministry of Communications and Transportation (SCT), granted to the Consortium for Real Estate Development and Promotion H, S.A. de C.V. states: "Purpose of the concession - the 'Ministry' grants to 'Consortium H' a concession for the use and development of an area of 51,465.297 square meters in the federal maritime zone of the Port of Cozumel, Quintana Roo, to build, operate, and develop a public Port Terminal pier for tourist cruise ships. 'Consortium H' undertakes to build, as part of the Port Terminal, within an area of 15,439.314 square meters of the land referred to in Antecedent IV, which is presently owned by the Government of the State of Quintana Roo, and within 4,707.747 square meters of the maritime federal zone, a passenger terminal building, a means of access from the terminal to the pier, a parking lot, and a public access road to the Chan-Kanaab highway, as set out in a plan to be approved by 'the Ministry.'"

H had “an authorization to commence work on the pier issued by the SCT,” and “the technical circumstances” on which Resolution 410-3088 of December 19, 1990, was issued “have not yet changed.”⁶²

C. Location of the Project

Matters relating to the location of the “Cruise Ship Pier Project in Cozumel” are also significant considering the distinct views of the Submitters and the Mexican environmental authorities.

The Mexican civil associations argue in their submission that the project is situated “in an area subject to a special protective legal regime” decreed in June 1980 to be a “refuge for the protection of marine fauna and flora on the West Coast of Cozumel Island, Q. Roo” (DZR).

The Submitters also point out that “with the enactment of the LGEEPA in 1988, the flora and fauna protection area referred to by the DZR is considered a protected natural area, whose specific purpose is to insure the rational use of ecosystems and their elements, and that consequently, the Federation, the States, and the Municipalities are required to comply with Articles 38,⁶³ 54,⁶⁴ and 83⁶⁵ of the LGEEPA.”

The Mexican environmental authorities assert that the pier construction project has no relation to the subject matter of the DZR, since

62. Document 2741 to Consortium H from the Directorate of Environmental Impact and Risk, April 13, 1994.

63. Article 38 establishes that “the Federation, federative entities, and municipalities shall establish protective measures for natural areas, to insure the preservation and restoration of the ecosystems, especially those that are the most representative and those that are subject to deterioration and degradation.”

64. Article 54 establishes that “the protection areas for wild [terrestrial] and aquatic flora and fauna shall be established in accordance with the provisions of this Law, of the Federal Hunting and Federal Fishing Laws, and of other applicable laws, in locations that contain habitats whose equilibrium and preservation depend on the assistance, transformation, and development of wild [terrestrial] and aquatic flora and fauna species. In such areas, it is permissible to carry out activities related to the preservation, repopulation, propagation, acclimatization, refuge, and investigation of these species, as well as activities relating to education and diffusion of this subject matter. Likewise, the use of natural resources by communities that live there at the time of the issuance of the relevant declaration, or may in the future arise, according to studies undertaken, may be authorized. This use will be governed by ecological/technical norms and land use norms established in this declaration or in the resolutions modifying it.”

65. Article 83 establishes that “the development of natural resources in areas which are the habitat of wild species of flora or fauna, especially of endemic, threatened, or endangered species, must be undertaken so as not to alter the conditions necessary for the subsistence, development and evolution of these species.”

“the Refuge Zone Decree was published in the *Official Gazette of the Federation* on June 11, 1980, as a result of the detection by the now defunct Fisheries Department of a marked diminution in the flora and fauna of the Western Coast of the Island of Cozumel.” The reply of the Government states that “the sole purpose of the Decree is to prohibit commercial and sport/underwater fishing, since these activities affect the biological and ecological characteristics of the site.”

a) *Relevant facts prior to the entering into force of the NAAEC*

1. The West Coast of the Island of Cozumel, Quintana Roo, was declared a refuge zone for the protection of marine fauna and flora by a decree published on June 11, 1980, in the *Official Gazette of the Federation*. Article One states: “We hereby declare a refuge zone for the protection of marine flora and fauna on the West Coast of the Island of Cozumel, State of Quintana Roo. This zone extends from the high water mark and the isobar fifty meters out to sea, along the length of the island, starting at the customs pier and ending at the southernmost point, Punta Ce-Larain.”

Article Two states: “Commercial fishing, both large and small scale, sport/underwater fishing, or any other type of gathering of marine flora and fauna are prohibited in the zone referred to in the previous article, unless these activities serve scientific purposes.”⁶⁶

2. On May 11, 1990, the General Directorate of Ecological Norms and Regulation informed Consortium H that “the ‘Cruise Ship Pier Project in Cozumel’ cannot be authorized as submitted.” The document refers to a report issued on April 6, 1990, by the General Directorate of Ecological Conservation of Natural Resources, which states that the project “is situated within the Protected Natural Coral Reef area of Cozumel,” and adds that construction “will have negative impacts on various threatened coral species,” as a result of which “it is recommended that the project not be authorized.”⁶⁷

66. Decree declaring the west coast of the Island of Cozumel, Quintana Roo a refuge zone for the protection of marine flora and fauna, DOF July 11, 1980.

67. Document No. 412.2.4251 of the General Directorate of Ecological Conservation of Natural Resources, April 6, 1990. This document relied on the *Marine Environmental Feasibility Study in relation to the Cruise Ship Pier in Cozumel*, prepared by Hydrologic Associates U.S.A., November, 1989. On November 19, 1990, the General Directorate confirmed, responding to a question by the Association of Diving Operators of Cozumel, A.C., that “it is not appropriate to undertake this project.” Document presented to the Presidency of this Association on November 19, 1990.

3. On November 22, 1990, the General Directorate of Ecological Norms and Regulation sent to Consortium H a document⁶⁸ informing it that “on November 8, 1990, the revision of the document presented [referring to EIS-90] has commenced,” and that “a technical report has been requested from the General Directorate of Ecological Conservation of Natural Resources,⁶⁹ as well as an opinion from the General Directorate of Urban Development of this Ministry.”⁷⁰

4. On December 19, 1990, the General Directorate of Ecological Norms and Regulation authorized the “Cruise Ship Pier Project in Cozumel,” stating that, for this authorization it had requested the “opinions of the General Directorates of Urban Development and of Ecological Conservation of Natural Resources.” The authorization does not refer to the location of the project in a protected natural area.⁷¹

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On July 19, 1996 the Decree whereby the zone known as *Arrecifes de Cozumel*, located in front of the shore line of the Municipality of Cozumel, State of Quintana Roo, with a total area of 11,987.875 hectares, is declared a natural protected area with the character of a National Marine Park, is published in the *Official Gazette of the Federation*.⁷²

D. Land Use

The Submitters allege that the environmental impact authorization contained in Resolution 410-3088 “fails to apply effectively Article 13 of the RIA⁷³ and of the DZR [they apparently refer to the Decree of the

68. Document No. 410-2827 from the General Directorate of Ecological Norms and Regulations, November 22, 1990.

69. The document is not available.

70. On November 29, 1990, the General Directorate of Urban Development of Sedue issued a technical opinion that states that “in accordance with the Declaration of Uses and Reserves of the municipality of Cozumel, the proposed project occupies two zones: a) a maritime zone designated as a marine ecological reserve; this means that it is the responsibility of the Under Ministry of Ecology to determine the feasibility of the construction of marine installations [...]”

71. Resolution 410-3088 of the General Directorate of Ecological Norms and Regulation of the Subministry of Urban Development and Ecology of Sedue, December 19, 1990.

72. *Official Gazette of the Federation* (First Section) of July 19, 1996.

73. The third paragraph of Article 13 of the RIA establishes that “the Ministry shall evaluate the environmental impact report when it conforms to the regulation and its formulation complies with the corresponding instruction.” Section IV, entitled

“Declaration of Uses and Reserves of the Municipality of Cozumel” (DUDR) published in the *Official Gazette of the State of Quintana Roo* on March 9, 1987], by not considering the connection of the project with the land uses set out in this declaration.”

The Submitters further state that “the location where construction is planned, and where the project is to be operated from, is not within a zone designated for “port use” in the Island of Cozumel, but rather is designated for “high density tourist use,” and that any use for port purposes should therefore be considered “prohibited.”

In this respect, the Government of Mexico states in its reply that its conduct does not contravene the legal provisions cited, “since the ‘Declaration of Uses and Reserves of Cozumel, Quintana Roo’ (island) notes that the land development of the project (as well as the “Pier Project”) are located within the site of tract 3, which is designated for ‘high density’ tourist use.”

According to the Mexican government, both the SCT Concession as well as the authorization of the EIS-90 “comply with the provisions regulating land use and development, because the construction of the tourist cruise ship pier is being undertaken in an area specifically designated for this use, namely, tourism.”

In addition, the authorities state that “Consortium H requested in a timely fashion from the Cozumel Municipality, Quintana Roo, a construction permit for this pier, granted by this Municipality in strict compliance with the norms that govern the jurisdiction and operation of the municipal authority.”

The Government of Mexico concludes that “it never violated the provisions of Article 13 of the Regulation, nor the corresponding Directives; and certainly never violated the provisions of the Refuge Zone Decree,” since this latter document “does not refer in any of its provisions to land use.”

“Relationship with the norms and regulations on land use” of the Instructions for Development and Presentation of a General Environmental Impact Statement states that: “In this section the soliciting party must consult the Ministry of Urban Development, State or Federal, to verify that the use of the land corresponds to norms and regulations.”

a) *Relevant facts prior to the entering into force of the NAAEC*

1. The “Declaration of Uses and Reserves of the Municipality of Cozumel, Quintana Roo” (DUDR), published in the Official Gazette on March 9, 1987, provides with regard to “High-Density Tourist Use,” that prohibited uses include “building maritime installations that could affect coral reefs” and “placing more than 50 percent of the beach front under construction.” Permitted uses include “tourist hotel use, tourist residential use and ancillary commercial tourist use,” as well as “public beaches and ancillary installations.”⁷⁴

2. A *Marine Environmental Feasibility Study* presented in November, 1989, by *Inmobiliaria La Sol* (a company affiliated with Consortium H), states that the proposed pier “could be built at the extreme northwest corner of the island with less risk to the fragile coral reefs,” but adds that in this zone, “there are no adequate land installations to receive tourists.” In addition, “the island shelf is less broad and shallow, and would require a much larger pier, a new highway, and more environmental disruption.”⁷⁵

3. The EIS-90, presented by Consortium H for the “Cruise Ship Pier Project in Cozumel,” states that “potentially the most significant damage during construction [of the pier] would be to the neighboring coral reef communities. The most probable impact would be caused by drilling and dredging activities.” As a result, “these operations have been eliminated from the proposed construction system.” The document further points out that the possible impacts can be “reduced to a minimum, and even eliminated, if sediments and/or water clouding are controlled.” Among its conclusions, the document points out that “there is a zone, 400 meters to the south of the present pier, where there are no coral reef formations; the major impacts that could arise from the construction of a new pier are the production of sediments, which means that construction materials such as dredging, drilling, and explosives, which cause damage to coral reefs, must be avoided; the construction system for the proposed pier will minimize negative impacts, reducing them to a minimum so that they will not damage the coral reefs; it is possible to

74. “Declaration of Uses and Reserves of the Municipality of Cozumel, Quintana Roo,” *Official Gazette of the State of Quintana Roo*, March 9, 1987.

75. *Marine Environmental Feasibility Study with reference to the Cruise Ship Pier in Cozumel*, prepared by Hydrologic Associates U.S.A., Section IV: “Alternatives to the Proposed Project,” November, 1989.

recover and restore an important number of organisms that make up the coral reef.”⁷⁶

4. In Section IV of EIS-90, entitled “relationship with norms and regulations on land use,” Consortium H points out, on the one hand, that “in relation to bodies of water, the coral reefs in the southwestern part of the island constitute an area decreed on June 11, 1980, as a ‘Refuge Zone for the protection of marine flora and fauna of the Western Coast of the Island of Cozumel, Quintana Roo’” and, on the other hand, that “the studies carried out show that the selected area is the most adequate, and that construction of the pier without considerable negative impact is feasible.” The document does not describe the relationship of the project with the norms and regulations on land use in accordance with the DUDR of Quintana Roo, published in the *Official Gazette* on March 9, 1987.

5. On November 29, 1990, the Director General of Urban Development sent to the Director General of Ecological Norms and Regulation of Sedue its technical opinion⁷⁷ with regard to the “Cruise Ship Pier Project in Cozumel.” The document states that, according to the DUDR, “the project is compatible with existing land use norms.”

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On July 18, 1994, Consortium H provided the INE⁷⁸ with technical opinions by the Research and Advanced Studies Center of the National Engineering Institute, Mérida Unit (Cinvestav-IPN), from Gustavo de la Cruz Aguero, M.Sc., Mauricio Garduño, M.Sc., and Dr. Eric Jordán.

76. The study states that, in order to quantify the possible environmental impacts of the project, “a screening method was used, which considers the most important in terms of size and importance, and ranks both on a scale from 1 to 10. The ranking for the supratide environment is (10,1); for the intertide, infratide, and coastal terrace environments, (10,1); for the coastal terrace, taking into consideration other impacts provided by the filtration and the relatively small quantities of concrete that could spill into the sea, (2,1); for the coral reef of the first terrace, (3,1); for the sand bank with calcareous algae, (2,1); for the coral reef at the second terraces (3,1); for the sand bank and the sponge and fish communities (2,1); for the cliff environment (3,1).” *General Environmental Impact Statement for the Construction of a Cruiser Pier in Cozumel, Quintana Roo*, August 1990.

77. Document No. 3100000-1905 from the Director General of Urban Development to the Director General of Ecological Norms and Regulation, November 29, 1990.

78. Letter from Consortium H to the President of INE, stating that the studies were commissioned “in response to the verbal request made” previously by this office, so that the experts “could issue technical reports” on the pier project, July 18, 1994.

The first three studies concluded that the cruise ship pier project, as it was described in 1990, would not have a negative environmental impact on the Paraíso coral reef, whereas the fourth came to a contrary conclusion.

2. The *Technical Opinion* of Cinvestav-IPN indicates that “north of [Deep South Paraíso Coral Reef] two groups of coral patches were discovered. One group is contiguous, (...), while the second group is immediately south of the Tourist Pier. As the authorization points out, the project pier is situated between these two groups of coral patches.” Thus, “the authorized location for the construction of the pier in Condition One, 350 meters from the Tourist Pier instead of the 400 meters originally proposed, constitutes a better alternative in terms of the ecological costs and the additional direct impacts involved.” Cinvestav-IPN considers that the “absence of coral reef development, a sea bed of low biological density, and the distance to the South Paraíso Coral Reef, are elements which favor this site,” even though it states that “there exists an additional ecological cost not determined in the EIS [presented by the company in 1990], namely the inevitable elimination of the coral patches [identified with] numbers 6, 7, and 8.” In any event, such patches “make up a small proportion of the sum of formations included in this study and remain in a state of minimal development.” To conclude, Cinvestav-IPN considers that “there is no basis for the claim that the construction of the project pier would damage the South Paraíso Coral Reef,” and adds that such a project is “ecologically feasible,” as long as the “relevant conditions and recommendations” are fulfilled.⁷⁹

3. Gustavo de la Cruz Agüero, M.Sc., pointed out in his *Technical Opinion* that “the selection of the site “is optimal and represents the lowest ecological burden for the area in question,” since “there is no coral reef growth in this site.” He also pointed out that “The Environmental Impact Statement (...) for the construction of a cruise ship pier in Cozumel, Quintana Roo, (...) are technically correct (...). In the Technical Opinion it is also stated that “the site chosen for the potential construction of the pier (...) is the best location within the area considered (...)” and that “(...) no technical or legal elements were found which may lead to the assumption that the potential construction and operation of the pier project will destroy the Paraíso South Reef thereby affecting natural resources and jeopardizing subsurface tourism activities, nor

79. *Technical Opinion on the Construction and Operation of a Cruise Ship Pier in Cozumel, Quintana Roo*, elaborated by the Cinvestav-IPN, July 1994.

was it found that as a result of it being located within a natural protected area, such project must not or could not be developed there.”⁸⁰

4. Mauricio Garduño Andrade, M.Sc., affirmed in his *Technical Opinion* that “the zone 350 meters from the present pier is an area with a low density of life (...),” and is “a zone that cannot rightfully be considered a coral reef.” Thus, “a pier can be built without causing irreparable harm to the coral reef [Paraíso].”⁸¹ The study also emphasizes that: “a field visit was performed in order to corroborate some of the statements made in the reports previously analyzed, and accurately assess the current conditions of the site where the pier is purportedly to be built. It was first and foremost verified that the zone which is located 350 meters from the current pier is an area with a low density of life. It is a sandy zone; the community is made of *Holimeda sp.* and *Udolsa sp.* algae. Colonies of corals belonging to the species *Manicina aerolata*, young and adult snails of the *Strombus gigas* species and other adult snails of the *Strombus sp.* species, and one specimen of a mollusk known as “cayo de hacha” (probably *Pinna carnea*) were observed. It may not be considered as a reef zone.” The study adds that “as far as the distance from the works to the Paraíso Reef is concerned, it was found that the pier is located approximately 300 meters from the beginning of the strip formed by the Paraíso Reef. Between this point and the pier there are 6 reef patches, the closest one being 50 meters away and the farthest one 160 meters away approximately. The area of these formations is between 100 and 200 square meters. It is obvious that these are the reef structures which are more likely to suffer some impact due to the pier construction. The aerial photograph shows very clearly their relative location in regard to the pier and their relative size in regard to the Paraíso Reef.” Finally, the study mentions that, “given the type of construction intended to be built, the generation of sediments will not be substantial enough to harm the reef. This is a commitment made by the corporation, as it appears from the Environmental Impact Statement [EIS-90] submitted to Sedesol. It would seem as though the distance from the pier to the reef is not significant enough for scuba diving activities to be jeopardized (...). Recently (May 1994), a cruise ship anchored in the Paraíso Reef. As a consequence a coral formation tip was split in two. It will probably be more prudent to have a pier built in order to prevent those accidents that imperil the integrity of the reef from occurring (...).”

80. *Technical Opinion on the Construction and Operation of a Cruise Ship Pier project in Cozumel, Quintana Roo*, prepared by Gustavo de la Cruz Agüero, M.Sc., July 1994.

81. *Opinion on the Construction of a Berthing Pier in Cozumel, Quintana Roo, Mexico*, by Mauricio Garduño Andrade, M.Sc., July 1994.

5. The *Professional Opinion* of Dr. Eric Jordán stated that “the area where the new pier is to be built corresponds to the northern part of the coral reef complex of Paraíso, where both temporary coral communities and well established coral reefs are mixed in with each other.” The location of the project “passes above the shallow Paraíso coral reef and comes very close to the coral reefs of group P of Deep Paraíso, and is a relatively short distance from the northern sector of the principal group of Deep Paraíso.” The study indicates that “in terms of the damage that may be caused to the coral community in the study area, the costs of the construction of the new pier are very high,” and recommends building it “in another location, in an area where no coral reefs exist.”⁸² The study explains that this recommendation is prompted not only by a concern over the effects of the direct impacts, but also by a concern over the use of nets to mitigate the indirect effects of the work caused by stirring up sediments.⁸³ The document claims that the use of nets to contain sediments is necessary in order to avoid negative effects on the coral community outside the direct impact area, but adds that these nets “can also cause serious damage if they are placed on, or near, areas with coral reefs.”⁸⁴ The study also states that if it were decided, for other reasons, to build the new pier at this location, it would be desirable to do two things: first, “with regard to six directly impacted areas, to transplant as many organisms as possible to favorable areas that are a distance from the effects of the pier’s construction.” Second, “in regard to indirectly

82. *Professional Opinion on the Possible Effects of the Construction and Operation of a New Pier for Tourist Cruise Ships in the Coral Reefs of Cozumel*, prepared by Dr. Eric Jordán Dahlgren, July 14, 1994.

83. Condition 23 of Resolution 410-3088 of the General Directorate of Ecological Norms and Regulation, dated December 19, 1990, states that “due to the sensitive nature of the reef zone, before construction is started, and for as long as construction continues, the company should install fine mesh nets over the construction area, using weights and floats to surround the project area, with the understanding that these weights will under no circumstances be anchored in nearby coral reefs. The mesh nets should be placed horizontally from the coast [...] and back to the coast, and vertically from the sea bed to 0.050 meters above the water surface at high tide.

84. The study describes three “principal problems caused by the use of nets in this type of environment, especially the use of nets able to retain fine sediments.” First, the net “must cover the entire width of the platform, blocking and altering water currents, as a sea wall might do. This will cause a wide variety of changes, particularly as far as the displacement and depositing of natural sediments is concerned.” Second, “in order to keep the net fixed in the appropriate position” during construction, “a massive anchoring system will have to be used, which will almost certainly cause serious damage to the marine environment.” Finally, the sediments deposited in the net “will be of considerable quantity, and will accumulate slowly. Thus, when the net is removed, these sediments will be exposed to normal water currents, and will be redistributed along the length and width of the platform, causing enormous direct impacts.”

impacted areas," to pump to the shore the sediments that have accumulated within nets, in order to avoid their redistribution once these nets are lifted.

6. On November 8, 1994, the Government of Quintana Roo requested INE in writing to "reconsider its authorization with regard to the site proposed by the company for the construction of the pier."⁸⁵ The document explains that "in accordance with the opinion of the technical staff" that participated in "a detailed inspection of the area in which construction is planned" the Paraiso coral reef "would be damaged seriously, both by construction activity and by operation of the pier."

7. On February 23, 1995, the INE responded to the Government of Quintana Roo that "due to a lack of arguments showing the existence of supervening environmental impacts not foreseen during the project evaluation procedure," the INE "lacks technical and legal grounds for any reconsideration of the resolution issued on December 19, 1990."⁸⁶

8. On March 29, 1995, Semarnap stated that "with the relocation of the project [ordered by the environmental authority in Condition 1 of the environmental authorization], the axis of the pier would remain further away from the group of coral patches in the extreme north of the Paraiso coral reef. This would allow a reduction in the impacts so that no more than 3 percent of the group is affected."⁸⁷

9. On May 14, 1996, in the EIS for the "Puerta Maya" project, Consortium H indicates that "the appropriate land use for its property and this project is one of 'High Density Tourist Use.'"⁸⁸

E. Species Rescue Program

The "Species Rescue Program" established by the environmental authority in Resolution 410-3088, through Condition 24, represents an-

85. Letter from the Governor of Quintana Roo to the Presidency of INE, November 8, 1994.

86. Document N.D.O.P. 0026 from the Presidency of INE to the Minister of the Environment and Territorial Management of the Government of the State of Quintana Roo, February 23, 1995.

87. Document No. 1719 of March 29, 1995, to the Ecological and Environmental Commission of the House of Representatives, in which it points out that "with the relocation of this project, the proximity of the axis of the pier to the northernmost group of coral reef patches suggests that less than 3 percent of the area of the patches" will be affected.

88. *General Environmental Impact Statement, of the "Puerta Maya" Project in Cozumel, Quintana Roo*, May 14, 1996.

other matter viewed differently by the Submitters and the Government. According to the Submitters, with the establishment of this Program, “Sedue and INE contravened the provisions of Article Two of the DZR,⁸⁹ which expressly prohibits the collection of any type of marine fauna and flora for purposes other than investigation, and also failed to apply effectively Articles 38,⁹⁰ 44,⁹¹ 45 (subparagraph VII),⁹² 54⁹³ and 83⁹⁴ of the LGEEPA.”

The environmental authorities respond in their reply that “the Species Rescue Program imposed as Condition 24 on Consortium H, has, as a fundamental objective, the preservation of the Paraiso coral reef, and thus does not contravene in any way the Refuge Zone Decree.”

According to the authorities, “the term ‘rescue,’ used in the title of the program, must obviously be understood as synonymous with the

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89. Article Two of the DZR states: “Large- or small-scale commercial fishing, sport/underwater fishing, or any other type of collection of marine flora and fauna are prohibited, unless carried out for scientific investigation purposes, in zones referred to by the previous article.”
 90. Article 38 establishes that: “The Federation, the federative entities, and the municipalities shall establish measures protecting the natural areas, in order that the preservation and restoration of ecosystems be ensured, especially those which are most representative and those which are subject to deterioration or degradation.”
 91. Article 44 establishes that: “In accordance with this and other applicable laws, the natural areas of the national territory referred to in this chapter, may be subject to protection as ecological reserves, for the purposes, effects, and manners that may be set out in these laws, subject to limitations which the appropriate authorities may impose so that only the necessary social and environmental uses and development take place in them.”
 92. Subparagraph VII of Article 45 states that: “The designation of protected natural areas has as its purpose: (...) VII. Protecting natural settings of culturally and nationally important zones, monuments, and sites of ecological, historical, and artistic importance.”
 93. Article 54 states that: “The protected areas for wild aquatic flora and fauna shall be set up in conformity with the provisions of this Law, the Federal Laws of Hunting and Federal Laws of Fishing, and all other applicable laws, in locations which contain habitats whose balance and preservation depend on the assistance, transformation, and development of aquatic flora and fauna species. In these areas, it will be permissible to undertake activities related to the preservation, repopulation, propagation, acclimatization, refuge, and investigation of these species, as well as matters related to education and diffusion of these subjects. The exploitation of natural resources may also be allowed for communities that live there at the moment of the issuance of the appropriate declaration, or that may arise according to studies. These must comply with technical/ecological norms and land uses that may be established in the same declaration or in the resolutions that modify it.”
 94. Article 83 states: “The development of natural resources in areas that serve as habitat of wild species of flora and fauna, especially endemic, threatened, or endangered ones, must be carried out so that the necessary conditions for the subsistence, development, and evolution of these species are not altered.”

protection and safeguarding of marine species.” The Government response states that “the construction of the pier, according to the evaluation of the EIS-90, could have some negative effects on isolated coral patches outside the Paraíso coral reef; consequently it was decided to require the company to develop a protection program that would permit the relocation and reimplantation of corals in a favorable habitat, with the objective of mitigating any possible damage to these marine species.”

The Government also points out that “the re-establishment activities have been made the responsibility of the [Cinvestav-IPN], one of the most prestigious national research centers, which reports that to date the program has evolved with positive results.” It mentions that “sites within the Paraíso coral reef with favorable characteristics for the reintroduced coral species were chosen as relocation sites.”

The environmental authorities allege that, for the above reasons, “this program cannot be considered to violate the Refuge Zone Decree. In fact, this project will cause no damage whatsoever to the coral reef, since the sea bed in the site authorized for the construction of the pier is composed of sand terraces without coral reef development, as is shown in Page 18 of the technical report on the construction and operation of the Cruise Ship Pier in Cozumel, Quintana Roo, prepared by [Cinvestav-IPN]” in July 1994.⁹⁵

The response of the Government states that “the authority, through the Species Rescue Program, has not undertaken fishing or collection of species. Rather, what was carried out was the relocation of these species in order to protect them.”

a) Relevant facts prior to the entering into force of the NAAEC

1. Article 36 of the RIA establishes that “Physical or legal entities that, for economic purposes, wish to undertake exploitation or use of natural resources, or repopulation, relocation, recuperation, transplanting, or sowing of wild [terrestrial] or aquatic flora and fauna species, in natural areas protected by the Federation, including those identified in Parts I through VII of the law, must obtain prior approval from the Environmental Ministry relating to environmental impact. Approval is required when, in compliance with the relevant declarations, it is the

95. Reference to the *Technical Report on the Construction and Operation of the Cruise Ship Pier in Cozumel, Quintana Roo*, a project produced by Cinvestav-IPN, Mérida Unit, July 1994.

responsibility of the Ministry to coordinate and to implement the conservation, administration, development, and oversight of the areas involved.”⁹⁶

2. Resolution 410-3088 of December 19, 1990 (environmental authorization) establishes in Condition 24 that “[Consortium H] must undertake at the site preparation stage, before the placing of the sediment mesh, a rescue of slow-moving and non-sessile benthic species for transportation to a subsequent destination in accordance with instructions from the General Directorate of Ecological Conservation of Natural Resources.” Furthermore, “it is strictly forbidden to maintain in captivity the rescued marine species.” It is also stated that “the company must present to the General Directorate of Ecological Conservation of Natural Resources of this Ministry for its authorization and coordination, before the initial stage of preparation, a species collection program, indicating capture and handling methods, and identifying the place to which the species will be relocated.”⁹⁷

b) Relevant facts subsequent to the entering into force of the NAAEC

1. On March 8, 1994, the Institute of Sea Sciences and Limnology, Puerto Morelos Station, indicates in a “technical opinion” that “in general” the methodology related to the collection of species is “correct,” but recommends that this program “not be restricted to non-sessile species.”⁹⁸

2. On August 12, 1994, the General Directorate of Environmental Norms⁹⁹ informed Consortium H that the project may commence, as long as it is carried out in strict compliance with the provisions of Resolution 410-3088 (environmental authorization), as well as the 16 technical considerations, including “the Species Rescue Program to be carried out by Cinvestav-IPN.”

96. Regulation of the General Law for Ecological Equilibrium and Environmental Protection in Matters of Environmental Impact, DOF, June 7, 1988.

97. Resolution 410-3088 from the General Directorate of Ecological Norms and Regulation of the Subministry of Sedue, December 19, 1990.

98. Letter to the CESC (Ecosystems Consultants S.C.) in response to the request to present a technical opinion on the project “Environmental Interactions of the Pier Construction Project and Puerta Maya Marine Terminal” and the “Program of Benthic Species Rescue for the Cruise Ship Pier Project” in Cozumel, Q.R., March 8, 1994.

99. Document No. 7853 of the General Directorate of Environmental Norms to Consortium H, August 12, 1994.

3. On September 28, 1994, Consortium H presented to the environmental authorities the "Species Rescue Program."¹⁰⁰

4. On November 25, 1994, the General Directorate of Environmental Norms approved the implementation of the "Species Rescue Program."¹⁰¹

5. On April 26, 1995, the Committee for the Protection of Natural Resources [one of the Submitters] presented a Public Complaint to Profepa against the transplantation of species belonging to the coral reef, claiming that these activities authorized by INE were carried out inadequately and with incompetent personnel, and attaching as evidence a video showing the mismanagement that took place.¹⁰²

6. On July 3, 1995, Profepa, Quintana Roo District, responded to the Public Complaint relating to the "Transplantation of corals in inadequate form and with incompetent personnel."¹⁰³

7. On January 12, 1996, Consortium H informed the Director General of Environmental Management and Impact that the Species Rescue Program concluded on October 15, 1995.¹⁰⁴

ACKNOWLEDGMENTS

The Secretariat would like to thank the government of Mexico and Consortium H, for the courtesy and conscientiousness with which they responded to the various requests for information, without which the preparation of the Factual Record would have been considerably more difficult. The Secretariat would also like to acknowledge and express our appreciation to all organizations and individuals furnishing information for the preparation of this Factual Record.

100. Letter from Consortium H directed to the Director of Environmental Impact and Risk, September 28, 1994.

101. Document No. 10809 of the General Directorate of Environmental Norms, November 25, 1994.

102. Popular Complaint from the Committee for the Protection of Natural Resources to Profepa, April 26, 1995.

103. Document PFFPA-D.E-PSQ-032/95, July 3, 1995.

104. Letter from Consortium H to the Director General of Management and Environmental Impact, January 12, 1996.

ANNEX I: MODEL LETTERS SENT BY THE SECRETARIAT

NAME
POSITION

This is to inform you that on August 2 of this year the Council of the Commission for Environmental Cooperation (CEC) instructed the Secretariat to prepare a Factual Record pursuant to the submission filed by three Mexican Nongovernmental Organizations pertaining to “the failure to effectively enforce environmental legislation by Mexican authorities in regard to the port terminal project in Playa Paraiso, Cozumel, Quintana Roo.”

In preparing the Factual Record, the Secretariat, in accordance with the provisions of Section 15.4 of the North American Agreement on Environmental Cooperation, “shall consider any information furnished by a Party, and may consider any relevant technical, scientific or other information that: a) is publicly available; b) submitted by interested nongovernmental organizations or persons; c) submitted by the Joint Public Advisory Committee; or d) developed by the Secretariat or by independent experts.”

Considering that the institution under your responsibility might have relevant information for the preparation of this Factual Record, the CEC Secretariat will be contacting you through Beatriz Bugada, chief of the Mexican Liaison Office, to whom you may also forward any information that might be relevant for the preparation of the said Record, to her office located on Av. Del Parque # 22, Col. Tlacopac, c.p. 01049, México D.F. Tel/fax: (525) 6.61.20.61.

I wish to thank you for the attention you will be giving to this matter and avail myself of this occasion to send you my warm regards,

Sincerely,

Victor Lichtinger
Executive Director

NAME
POSITION

As you already know, the Secretariat of the Commission for Environmental Cooperation (CEC), under instructions from its Council composed of the Secretaries and Ministers of the Environment of the United States, México and Canada, is preparing a Factual Record pursuant to the submission filed by three Mexican Nongovernmental Organizations pertaining to "the failure to effectively enforce environmental legislation by Mexican authorities in regard to the port terminal project in Playa Paraíso, Cozumel, Quintana Roo."

In accordance with the provisions of section 15.4 of the North American Agreement for Environmental Cooperation, the information to be considered by the Secretariat includes, among other sources, that which is "submitted by interested nongovernmental persons or organizations."

Given that you or your organization have explicitly stated your interest in the case under consideration, we are inviting you to submit to this Secretariat, as soon as possible, the information that you might have and that, in your opinion, should be included in the referred to Factual Record. We would be most thankful should you be kind enough to forward this information in writing to Beatriz Bugada, Chief of the Mexican Liaison Office, located on Av. Del Parque # 22, Col. Tlacopac, c.p. 01049, México D.F. Tel/fax: (525) 6.61.20.61.

I avail myself of this opportunity to send you my warm regards,

Sincerely,

Victor Lichtinger
Executive Director

MEMBER OF THE JPAC

As you already know, on August 2 of this year the Council of the Commission for Environmental Cooperation instructed the Secretariat to prepare a Factual Record pursuant to the submission filed by three Mexican Nongovernmental Organizations pertaining to “the failure to effectively enforce environmental legislation by Mexican authorities in regard to the port terminal project in Playa Paraiso, Cozumel, Quintana Roo.”

In preparing the Factual Record, the Secretariat must consider, *inter alia*, the information furnished by the Joint Public Advisory Committee, in accordance with the provisions of Section 15.4 (c).

I am therefore asking you to forward any information which might prove relevant for the preparation of the Record to Beatriz Bugada, to the Mexican Liaison Office located on Av. Del Parque # 22, Col. Tlacopac, c.p. 01049, México D.F. Tel/fax: (525) 6.61.20.61.

I wish to thank you for the attention you will be giving to this matter and avail myself of this occasion to send you my warm regards,

Sincerely,

Victor Lichtinger
Executive Director

ANNEX II: CHRONOLOGY OF EVENTS**1980**

On **June 11, 1980**, the Decree whereby the West Coast of Cozumel Island, Q. Roo, is declared a "refuge for the protection of marine fauna and flora" (DZR), is published in the *Official Gazette of the Federation*.

1987

On **March 9, 1987**, the Declaration of Uses and Reserves of the Municipality of Cozumel, Quintana Roo (DUDR) is published in the Official Gazette of the State.

1989

In **September of 1989**, the Mexican Port Authority (Pumex) publishes the Instructions for the Concession for Piers for Tourist Cruise Ships and Specialized Cargo Terminals, which correspond to the ones employed by *Consortio de Desarrollo y Promociones Inmobiliarias H* (Consortium H), to participate in the bidding contest set up by the Ministry of Communications and Transport (SCT), for the construction of piers for tourist cruise ships, on September 4, 1989.

In **November of 1989**, *Inmobiliaria La Sol* (a Company affiliated with Consortium H) presents to the environmental authorities a Marine Environmental Feasibility Study relating to the project "Cruise Ship Pier in Cozumel."

1990

On **April 6, 1990**, the General Directorate of Ecological Conservation of Natural Resources of the Ministry of Urban Development and Ecology (Sedue) issues the report which states that the project ("Cruise Ship Pier Project") "is situated within the Protected Natural Coral Reef Area of Cozumel" and adds that construction (of the Pier) "will have negative impacts on various threatened coral species," as a result of which "it is recommended that the project not be authorized."

On **May 11, 1990**, the General Directorate of Ecological Norms and Regulation of Sedue informs Consortium H that "the 'Cruise Ship Pier Project in Cozumel' cannot be authorized as submitted."

On **July 1, 1990**, Fonatur informs Consortium H that the real estate project adjacent to the new Cruise Ship Pier has been authorized.

On **August 10, 1990**, in a Pumex document signed by the Minister of Communications and Transport, the SCT approves a request by Consortium H to build and operate a passenger terminal and a Cruise Ship Pier. The document states that “the project is complemented by a 43.3 hectare real estate and tourist development.”

On **October 26, 1990**, Consortium H submits to the General Directorate of Ecological Norms and Regulation of Sedue the *General Environmental Impact Statement for the Construction of a Cruise Ship Pier Project in Cozumel, Quintana Roo* (EIS-90).

On **November 22, 1990**, the General Directorate of Ecological Norms and Regulation of Sedue sends to Consortium H a document informing it that “on November 8, 1990, the revision of the document presented [referring to EIS-90] has commenced,” and that “a technical report has been requested from the General Directorate of Ecological Conservation of Natural Resources, as well as an opinion from the General Directorate of Urban Development of this Ministry [Sedue].”

On **November 29, 1990**, the General Directorate of Urban Development of Sedue issues a technical opinion stating that “in accordance with the Declaration of Uses and Reserves of the Municipality of Cozumel, the proposed project lies in two zones: a) a maritime zone designated as a marine ecological reserve, it will thus be the responsibility of the Sub-Ministry of Ecology to outline the feasibility of constructing marine installations; [...] and b) property on dry land which, although this is not noted in the EIS [EIS-90], should contain passenger terminal services that adequately resolve consolidation problems in the area. The document states that according to the DUDR “the project is compatible with existing land use norms,” and “recommends that the information relating to land installations be identified.”

On **December 19, 1990**, the General Directorate of Ecological Norms and Regulation of Sedue authorizes the project entitled “Cruise Ship Pier in Cozumel, Quintana Roo,” subject to 64 conditions with which the Corporation will have to comply prior to and during the construction and operation of the pier.

1991

On **November 12, 1991**, Sedue grants an extension of one year, beginning on October 21, 1991, for the construction of the “Cruise Ship Pier Project in Cozumel.” The purpose of the extension request consisted in having the term for the EIS-90 authorization extended, awaiting the issuance of the Concession Title.

1992

On **June 19, 1992**, Sedue grants an extension of one year, beginning on June 1, 1992, for the construction of the "Cruise Ship Pier Project in Cozumel." The purpose of the extension request consisted in having the term for the EIS-90 authorization extended, awaiting the issuance of the Concession Title.

On **July 8, 1992**, Consortium H requests the support of the President of the Republic to obtain the Concession Contract from the SCT, and states that "on July 1, 1990 Fonatur informs us that our Real Estate Project adjacent to the new Cruise Ship Pier has been authorized."

1993

On **May 11, 1993**, the Government of the State of Quintana Roo writes to Consortium H that "it approves the Puerta Maya Tourist Project" and that instructions have been forwarded to the Ministry of Public Works and Urban Development of the State Government "to grant the authorization immediately" to "the Puerta Maya Project in the Land/Maritime Federal Zone" and "so that the construction may start as soon as possible."

On **May 24, 1993**, Consortium H again states to the SCT that the Pier is only part of the Puerta Maya Project, and describes the first stages of this project. The Company commits to building the "Port Area" installations (terminal building, parking, warehouses and green areas, sanitary services, etc.), and refers to a document "in which the HASA Group of Spain will build 'Turnkey' the first stage of the Puerta Maya Project, which consists of the Port Area, Village, Concessioned Federal Zone Infrastructure and the New Cruise Ship Pier."

On **July 19, 1993**, the Law of Ports is published in the *Official Gazette of the Federation* and enters into force. This includes the new concept of "Terminal."

On **July 22, 1993**, the SCT grants to Consortium H the Concession for the construction, operation and development of a Public Port Terminal for Tourist Cruise Ships in Cozumel, Quintana Roo.

On **November 22, 1993**, the General Directorate of Environmental Norms of Sedue informs Consortium H that "work on the project cannot commence" because this Company "does not have a valid Environmental Impact Authorization from the National Institute of Ecology." The document explains that "to date the work commence-

ment notification required by Condition 62 has not been received, and since the extension was granted for one year, the extension has now expired.”

On **December 3, 1993**, Consortium H replies to the General Directorate of Environmental Norms that it “considers the favorable Environmental Impact Assessment to be fundamentally valid, since there has been no change in the circumstances under which it was issued, and that its expiration is only a temporal matter that can be wholly resolved through a request that we shall submit for your consideration when the SCT issues permission to begin work.”

On **December 23, 1993**, the SCT informs Consortium H that it may “begin work on the construction of the Tourist Cruise Ship Pier, subject to the prior authorization of the Ministry of Social Development.” The document adds that the construction of the works which are authorized “is subject to the provisions in the Environmental Authorization” issued by Sedue in 1990, and states that “before starting construction of the land terminal adjacent to the pier, the draft project must be presented for approval by this Ministry [SCT], pursuant to the First and Fifth conditions of the Concession Title.”

1994

On **January 4, 1994**, Consortium H requests from the General Directorate of Environmental Norms an extension of 180 days in the environmental authorization issued on December 19, 1990 for the “Cruise Ship Pier Project in Cozumel.” The Company informs the environmental authorities that “on December 22, 1993 it received from the Ministry of Communications and Transport Resolution OF.112.201.-2497/93 that allows us to commence construction on the Tourist Cruise Ship Pier.” In the document, the Company points out that “with the intention of complying with Condition number 3 of the authorization granted by this General Directorate by Resolution 410.3088 dated December 19, 1990, we be granted an extension of 180 days in authorization 410-02208 issued by this General Directorate under your responsibility.”

On **March 7, 1994**, the Company renews its request for an extension to the General Directorate of Environmental Norms, pointing out that if this body “thinks that the technical reasons and circumstances substantiating Resolution 410-3088 of December 1990 are not valid, and consequently that the construction of the Tourist Cruise Ship Pier should not proceed where officially authorized, it should inform the Company of this, justifying its reasons with reference to Article 16 of the Constitution.”

On **March 8, 1994**, the Institute of Sea Sciences and Limnology, Puerto Morelos Station, indicates in a "technical" opinion that "in general" the methodology related to the collection of species "is correct," but recommends that this program "not be restricted to non-sessile species."

On **April 13, 1994**, the General Directorate of Environmental Norms grants an extension of the environmental authorization in view of the fact that Consortium H has "the authorization to commence work on the Pier issued by the SCT" and that "the technical circumstances on which" Resolution 410-3088 of December 19, 1990 "was based, have not changed."

On **July 18, 1994**, Consortium H provides the National Institute of Ecology (INE) with technical opinions by the Research and Advanced Studies Center of the National Engineering Institute, Mérida Unit (Cinvestav-IPN), from Gustavo de la Cruz Agüero, M.Sc., Mauricio Garduño, M.Sc. and Dr. Eric Jordán. The first three studies concluded that the Cruise Ship Pier Project, as it was described in 1990, would not have a negative environmental impact on the Paraíso Coral Reef, whereas the fourth came to a contrary conclusion.

On **August 12, 1994**, the INE informs Consortium H that "work on the project [Cruise Ship Pier in Cozumel] may commence," as long as it is carried out in strict compliance with the provisions of Resolution 410-3088 (environmental authorization), as well as with the 16 technical considerations, including "the Species Rescue Program to be carried out by Cinvestav-IPN."

On **September 13, 1994**, the sale of land by the Government of the State of Quintana Roo to Consortium H is concluded through formal delivery and acceptance of the land. The donation of the land to the Federal Government, in order to comply with the First Condition of the Concession Title, remains pending.

On **September 28, 1994**, Consortium H presents to the environmental authorities the "Species Rescue Program."

On **October 11, 1994**, Consortium H requests a further one-year extension for the environmental authorization. The Company asserts in this document that "it has been complying with the conditions established in Resolution 410-3088 [environmental authorization], as it was exhorted to do under the last paragraph of the extension Resolution issued by this authority on April 13 of the current year."

On **November 8, 1994**, the Government of Quintana Roo requests INE in writing to "reconsider its authorization with regard to the site proposed by the Company for the construction of the Pier." The

document explains that “in accordance with the opinion of the technical staff” that participated in a “detailed inspection of the area in which construction is planned,” the Paraiso Coral Reef “would be seriously damaged both by construction activity and the operation of the Pier.”

On **November 25, 1994**, the General Directorate of Environmental Norms approves the implementation of the “Species Rescue Program.”

On **December 16, 1994**, the INE grants a new extension of the authorization for the Cruise Ship Pier, for 365 calendar days, from October 14, 1994.

1995

On **February 16, 1995**, Consortium H presents to the INE a “Master Plan describing the number and type of tourism service installations that the Federal Tourism Development Project [Puerta Maya] will offer and provide.” This document states that the EIS and the additional information related to “this project” authorizes only “what is set out in the First and Second Conditions” (of the environmental authorization), and requests that the environmental authority indicate if a Preliminary Report is the appropriate procedure for authorizing “the construction of buildings of any type or infrastructure on dry land supporting the Pier.”

On **February 23, 1995**, the INE responds to the Government of Quintana Roo that “due to a lack of arguments showing the existence of supervening environmental impacts not foreseen during the project evaluation procedure,” the Institute “lacks technical and legal grounds for any reconsideration of the resolution issued on December 19, 1990 [environmental authorization].”

On **March 29, 1995**, the Head of the Ministry of Environment, Natural Resources and Fisheries (Semarnap) sends a letter to the Ecological and Environmental Commission of the H. House of Representatives, in which she points out the most relevant facts that illustrate the situation of the Cruise Ship Pier Project in Cozumel and the respective undertakings of the INE. In this document the environmental authority states:

- That the authorities of Sedue, the Ministry of Social Development (Sedesol) and Semarnap assessed the environmental impact of the project in the location determined by the authorities of SCT, the Ministry of Tourism and the State Government of Quintana Roo.

- That the purpose of the Decree published on June 11, 1980, in the *Official Gazette of the Federation*, declaring “the west coast of the Island of Cozumel, Quintana Roo, as a refuge for the protection of the marine flora and fauna,” was to restrain commercial fishing activities and subaquatic sports fishing, due to the fact that a significant decline in the flora and fauna of the coral reef of the said coast, particularly in regard to pink snails (*Strombus gigas*), had been detected. To that effect, Article Two of the said Decree prohibits the mentioned activities, as well as any kind of biologic collection which is not intended for scientific research; however, it does not prohibit other activities.
- That the Government of Quintana Roo committed its support through the sale of land located along the Cozumel-Chan-Kanaab south coastal road, inland facilities which are indirectly related to the project. And that “given the obvious interest of the said government, expressed through the sale of the land and the granting of the corresponding authorizations,” and on the basis of the analysis of the environmental impact performed by the environmental authority based on the opinion of academic experts, Consortium H had been granted authorization to commence construction.
- That “the environmental impact resolution granted by the INE does not command construction, nor does it require that the project be carried out: it only implies that, if the project is indeed undertaken, the conditions set forth be thoroughly fulfilled.” And she made it clear that: “The Government of the State of Quintana Roo, the Municipal Government or the competent federal authorities may revoke its decisions and not authorize the project, in which case the INE would not have any competence whatsoever.”
- That “with the relocation of the Project [ordered by the environmental authority in Condition 1 of the Authorization], the axis of the Pier would remain further away from the northernmost group of coral patches of the Paraíso Reef. This would allow a reduction in the impacts so that no more than 3% of the group would be affected.”

On **April 26, 1995**, the Committee for the Protection of Natural Resources (one of the submitters) presents a Public Complaint to the Federal Attorney’s Office for Environmental Protection (Profepa) against the transplantation of species belonging to the coral reef, claiming that these activities authorized by INE have been carried out

inadequately and with incompetent personnel, and attaching as evidence a video showing the mismanagement that has taken place.

On **May 23, 1995**, the INE replies to Consortium H, stating that for the “construction of any type of support infrastructure on dry land for the ‘Cruise Ship Pier in Cozumel,’ it will be necessary to present General Environmental Impact Statement, rather than a Preliminary Report.”

On **July 3, 1995**, the Profepa, Quintana Roo District, responds to the Public Complaint of May 5, 1995 relating to the “Transplantation of corals in inadequate form and with incompetent personnel.”

On **November 8, 1995**, the environmental authority grants a new extension for the project authorization until October 14, 1996. The purpose of the extension request consisted in pursuing the development of the project works, in order to be in a position to conclude such works, thereby complying with the Concession Title. The environmental authority exhorted the Company to “keep on adequately complying with the Terms and Technical Considerations provided by this Institute for the referenced project.”

1996

On **January 12, 1996**, Consortium H informs the Director General of Environmental Management and Impact that the Species Rescue Program has concluded on October 15, 1995.

On **May 14, 1996**, Consortium H presents an Environmental Impact Statement for the “Puerta Maya” Project [EIS-96] in Cozumel, Quintana Roo. The Company declares that it submits the document “...in order to comply with [INE Document] D.O.O. DGNA-2137 of May 23, 1995”; this document consists of the General Environmental Impact Statement, for the “Real Estate Development Project called ‘Puerta Maya,’ which includes the construction and operation of the Terminal, a Port Area designed to provide the services for which this concession was granted, and the Infrastructure necessary for tourism.”

On **July 2, 1996**, Consortium H requests a prolongation of the extension to the authorization, for an additional period of 180 days beginning on October 15, 1996. In its letter the Company requests an extension “in order for the company to be in a position to conclude those works which are necessary for the construction of the Tourist Cruise Ship Pier in the Island of Cozumel, Quintana Roo, thereby complying with the Concession Title granted.”

On **July 19, 1996**, the Decree whereby the zone known as the Cozumel Coral Reefs, located in front of the coast line of the Municipality of

Cozumel, State of Quintana Roo, with a total area of 11,987.875 hectares, is declared a Natural Protected Area with the character of a National Marine Park, is published in the *Official Gazette of the Federation*.

On **December 16, 1996**, Consortium H contacts the Director General for Ports and Merchant Marine Affairs of SCT to respond to its document dated July 22, 1993, in which the SCT set out the requirements and procedures to formalize the donation to the Federal Government of a portion of the land acquired from the Government of Quintana Roo (on September 13, 1994). Consortium H states that "it has all of the documents to enable it to enter into the appropriate donation contract" and requests that the SCT designate "the place and date when the donation should take place."

On **December 20, 1996**, INE, through the General Directorate of Ecological Regulation and Environmental Impact, "authorizes the Consortium for Development and Real Estate Promotion H, S.A. de C.V. [Consortium H] to build and operate the works referred to in the second paragraph, First Condition of the Concession. These consist of: 1. Port Area (passenger terminal building); 2. Open Space (access from the terminal to the tourist cruise ship pier); and 3. Parking (parking and public access road)." The authorization was subjected to six terms and seventeen conditions. In the same document dated December 20, 1996, the INE informs Consortium H that "it does not authorize the construction of works for Tourist-Commercial use, contained in an area of 47,178.80 square meters, referred to in the Environmental Impact Statement submitted [EIS-96]."

1997

As of **February 10, 1997**, according to the information presented by Consortium H, the First Condition of the Concession granted by the SCT had not been fulfilled. Consequently, the donation of the land had not taken place, the last requirement for fulfilling this First Condition. According to the Mexican environmental authorities, this Condition must be realized before the Fifth Condition, subparagraph e) is operative (the period of three months from the granting of the Title to present the Environmental Impact Report for the Port Terminal).

ANNEX III: MAPS

