
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

Victor Lichtinger
Executive Director