

Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission no.: SEM-98-006
Submitter: Grupo Ecológico “Manglar”, A.C.
Party: United Mexican States
Date of Submission: 20 October 1998
Date of this notification: 4 August 2000

I – EXECUTIVE SUMMARY

In accordance with Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC or Agreement), the Secretariat of the Commission for Environmental Cooperation (CEC) may examine Submissions asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. Where the Secretariat determines that the requirements of Article 14(1) have been met, it shall decide whether the submission merits a response from the concerned Party in accordance with Article 14(2). In light of the response provided by that Party, the Secretariat may notify the Council that it considers that a factual record warrants preparation, in accordance with Article 15. The Council may then instruct the Secretariat to prepare a factual record. The final factual record is made publicly available upon a two-thirds vote of the Council.

This Notification contains the Secretariat’s analysis under Article 15(1) of the NAAEC, concerning the submission filed on 20 October 1998, by Grupo Ecológico “Manglar”, A.C.

The Submission asserts that Mexico is failing to effectively enforce its environmental law with respect to a shrimp farm operated by Granjas Aquanova, S.A. de C.V. (hereinafter, “Granjas Aquanova”), that allegedly has caused severe damage to wetlands, water quality, fisheries and to the habitat of a number of species under protection, in the state of Nayarit, Mexico. On 17 March 1999, the Secretariat determined that the Submission meets the requirements of Article 14(1) of the NAAEC and, guided by the factors in Article 14(2), requested a response from the Party. Mexico submitted its Response on 15 June 1999.

Having reviewed the Submission in light of the Party’s Response pursuant to Article 15(1) of the NAAEC, the Secretariat hereby notifies Council that this Submission warrants the development of a factual record in relation to some of its assertions, while others do not warrant further review in

this process or in the development of a factual record, and provides its reasons in this document. The Secretariat considers that the assertion that Mexico is failing to effectively enforce three international agreements for migratory species and wetland protection does not warrant development of a factual record.

The Secretariat hereby notifies the Council, that in light of the Party's Response, this Submission does warrant the development of a factual record in relation to the assertions that Mexico is failing to effectively enforce provisions of the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente- LGEEPA*), the Forestry Law (*Ley Forestal- LF*), Mexican Official Standards NOM-062-ECOL-1994¹ (NOM-062) and NOM-059-ECOL-1994² (NOM-059), the Law of National Waters (*Ley de Aguas Nacionales- LAN*) and its Regulations (RLAN), the Fisheries Law (*Ley de Pesca- LP*) and its Regulations (RPL), and the Federal Criminal Code (*Código Penal Federal- CPF*), in connection with the activities of Granjas Aquanova.

II – PROCEDURAL BACKGROUND

On 20 October 1998, the Secretariat of the CEC received a submission from Grupo Ecológico “Manglar”, A.C., in accordance with Article 14 of the NAAEC. On 22 October 1998, the Secretariat requested certain clarifications about the Submission, in accordance with sections 2.2 and 3.10 of the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (hereinafter, the “Guidelines”). The Submitter provided its clarifications and ratified its Submission by means of a document received 5 November 1998.

On 17 March 1999, the Secretariat determined that the Submission meets the requirements of Article 14(1) of the NAAEC and, considering the factors listed in Article 14(2) of the NAAEC, the Secretariat requested a response from the Party. Mexico submitted a response to the Secretariat on 15 June 1999, pursuant to Article 14(3) of the Agreement.

III – SUMMARY OF THE SUBMISSION

The Submission contains many detailed assertions of failures to effectively enforce environmental law, and cites over thirty different provisions. Allegedly, Granjas Aquanova has violated environmental impact requirements, destroying wetlands and other habitat of protected species.

¹ *Establishing specifications to mitigate the adverse effects on biodiversity of land use changes from forestry to agriculture*

² *Determining endangered, threatened and rare species and subspecies of terrestrial and aquatic wildlife and those subject to special protection, and establishing specifications for their protection*

The Submission also asserts that Granjas Aquanova illegally discharges waste water, causing harm to the environment and to fisheries in the area, and that such fisheries have been affected by illnesses supposedly caused by a new species of shrimp introduced by the company. The Submitter asserts a failure by Mexico to effectively enforce its environmental law with respect to these alleged violations.

Specifically, the Submission asserts that in connection with Granjas Aquanova, Mexico is failing to effectively enforce the following provisions: Articles 117, 118, 119, 121, 123, 129, 130, 168 and 182 of the LGEEPA; Article 51 of the LF; NOM-062; NOM-059; Articles 4, 9, 86 paragraph III, 88, 92 and 119 paragraphs I, II and VIII of the LAN; Articles 134, 135, 137 and 153 of the RLAN; Articles 3 paragraph VIII and 24 paragraph XXIV of the LP; Articles 44, 48 and 50 of the RLP; Article 416 paragraphs I and II and Articles 418 and 420 paragraph V of the CPF; the *Convention between the United Mexican States and the United States of America for the Protection of Migratory Birds and Game Animals*; the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* and the *Protocol* which amends it, and the *Trilateral Memorandum of Understanding for the Conservation of Migratory Birds and their Habitats*. In support of some of its arguments, the Submitter also invokes the following provisions: Article 74 of the Federal Administrative Procedure Law (*Ley Federal de Procedimiento Administrativo—LFPA*); Articles 37, 40 and 62 of the Internal Regulations of the Ministry of the Environment, Natural Resources and Fisheries (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca—SEMARNAP*), and Article 117 of the Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales—CFPP*).

Because the assertions in the Submission are very detailed and varied, they are not explained further at this point. In section VI.2, which presents the Secretariat's analysis of the assertions to determine whether a factual record is warranted, the Secretariat summarizes the violations allegedly committed by Granjas Aquanova. To facilitate their review, the Submitter's assertions have been grouped by subject area: environmental impact, water, fisheries and environmental crimes. Some of the assertions refer to alleged failures to take enforcement action, whereas others are concerned with the alleged insufficiency or illegitimacy of the actions taken by Mexico. Although clearly related, these two types of assertions are treated separately.

IV – SUMMARY OF THE PARTY'S RESPONSE

In its Response, submitted on 15 June 1999, Mexico states that it is aware of the environmental problems existing in the area where Granjas Aquanova is operating, and that it is using the legal means at its disposal to correct the deterioration caused by the company's violations of the authorizations that had been issued to it.

The Response addresses in detail each of the Submitter's assertions of non-compliance by

Granjas Aquanova, and responds to each allegation of failure by Mexico to effectively enforce environmental law. The Party lists the actions it has taken in alleged effective enforcement of its environmental law, which include environmental impact assessment procedures, inspection visits, working meetings and ordering mitigation measures. As in the previous section, no attempt is made here to further summarize the response to the many assertions in the Submission, given the level of detail in which they are explained in section VI of this Notification.

As a separate matter, Mexico states that the Submission is inadmissible under the Agreement, arguing that the Submitter must have exhausted the available legal remedies before filing the submission, and has not done so. In addition, the Response states that the Party does not consider a citizen complaint (*denuncia popular*) to constitute a remedy.

V – ANALYSIS OF THE SUBMISSION IN ACCORDANCE WITH ARTICLES 14(1) AND 14(2) OF THE NAAEC

As mentioned above, on 17 March 1999 the Secretariat determined that the Submission meets the criteria of Article 14(1) of the NAAEC and, considering the Article 14(2) factors, requested a response from the Party, which Mexico submitted on 15 June 1999.³

Article 14(1) of the Agreement provides that:

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 considers 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;

³ The Secretariat carried out the initial review of this Submission under the former version of the Guidelines, that did not require the Secretariat to explain its reasoning at the Articles 14(1) and 14(2) stages, as is now required by section 7.2 of the current Guidelines, adopted in June 1999. Thus, the Secretariat explains such reasons here.

(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.

Article 14(1) is not intended to place a heavy burden on submitters, although some initial review is required at this stage.⁴ The Secretariat reviewed the Submission by Grupo Ecológico “Manglar” with that perspective in mind.

The preamble of Article 14(1) requires that submissions assert that a Party is failing to effectively enforce its environmental law. The Submission contains assertions that satisfy Article 14(1) of the NAAEC in this respect. The Submitter asserts that Mexico is failing to effectively enforce its environmental law in relation to the operations of Granjas Aquanova, by failing to verify compliance by the company with all the environmental provisions that apply to it, and by failing to impose appropriate sanctions for violations detected during inspection visits. The Submission contains assertions of failures to effectively enforce the LGEEPA, the LF, NOM-062, NOM-059, the LAN and its Regulations, the LP and its Regulations, as well as failures to prosecute certain environmental crimes contemplated in the CPF.

To qualify for the Article 14(1) process, the provisions cited in a submission must also meet the definition of “environmental law” in Article 45(2) of the NAAEC, which refers to the primary purpose of such provisions.⁵ In the case of this Submission, the cited provisions meet the definition

⁴ See e.g. the Determination pursuant to Article 14(1) in relation to Submission SEM-97-005/Animal Alliance of Canada, et al.; and the Determination pursuant to Articles 14(1) and (2) in relation to Submission SEM-98-003/Department of the Planet Earth, et al., in its revised version.

⁵ Article 45(2) of the NAAEC states that:

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

- (a) **“environmental law”** means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
 - (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
 - (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
 - (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
- (b) For greater certainty, the term **“environmental law”** does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
- (c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather

of environmental law, the effective enforcement of which is the subject of this process, because from a simple reading, it is clear that their primary purpose is the protection of the environment, through the prevention and control of emissions and discharges of pollutants, and the protection of wild flora and fauna, endangered species and their habitat.

The Submission also meets the six listed criteria in Article 14(1). It was filed in writing in Spanish, official language designated by Mexico.⁶ The Submitter identified itself as Grupo Ecológico “Manglar”, A.C., a non-governmental organization established in San Blas, Nayarit, Mexico.⁷ The Submission contains sufficient information that allowed the Secretariat to review it. It includes information on the activities of the Granjas Aquanova shrimp farm in Boca-Cegada in the Isla del Conde *ejido*, and on the harm to the environment it has allegedly caused.⁸ The Submission does not appear to be aimed at harassing industry, but rather at promoting enforcement of environmental law for the protection of natural resources and the environment, especially mangroves and other species considered to be endangered, threatened, rare or subject to special protection in the area where Granjas Aquanova is operating.⁹ The Submission includes copies of the correspondence sent to the authorities (a citizen complaint and amendments thereto) and the responses received.¹⁰

Having reviewed the Submission in accordance with Article 14(1) of the NAAEC and determined that it meets the criteria listed therein, the Secretariat considered the factors in Article 14(2) and determined the Submission to warrant a response from Mexico.

Article 14(2) provides as follows:

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;

than to the primary purpose of the statute or regulation of which it is part.

Although the Secretariat is not governed by the principle of *stare decisis*, it has, on previous occasions, in reviewing other determinations, found that the cited provisions must satisfy the definition of environmental law. See e.g. Determinations pursuant to Article 14(1) of the NAAEC for the following Submissions: SEM-98-001/Instituto de Derecho Ambiental et al. (September 13, 1999), SEM-98-002/Héctor Gregorio Ortiz Martínez (18 March 1999) and SEM-97-005/Animal Alliance of Canada, et al. (26 May 1998).

⁶ See Article 14(1)(a) of the NAAEC and section 3.2 of the Guidelines.

⁷ See Article 14(1)(b) and (f) of the NAAEC.

⁸ See Article 14(1)(c) of the NAAEC and pages 1 through 5 of the Submission.

⁹ See Article 14(1)(d) of the NAAEC.

¹⁰ See Article 14(1)(e) of the NAAEC and pages 11 through 12 of 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.

In deciding whether the Submission warranted requesting a Response from the Party, the Secretariat considered the severity of the damage that the Submitter contends has been caused to the ecosystem, by the alleged destruction of mangroves and other species subject to protection, as well as the habitat of species of this type; the asserted draining of wetlands; the harm presumably caused to aquatic species by alleged discharges of untreated wastewater and chemical substances and by waterway obstruction; and the supposed threat to the health of those species from the unauthorized introduction of a new species, all allegedly in violation of applicable environmental law.¹¹ According to the Submitter, the environmental authority did not oversee compliance by Granjas Aquanova with all the environmental provisions that apply to it. The Submission asserts that where inspection actions were taken, the irregularities detected were punished with ineffectual sanctions or were not sanctioned at all, and that Mexico has renounced its law enforcement powers with respect to the company's activities in an administrative agreement entered into with Granjas Aquanova, which the Submitter considers to be illegal. The importance of the natural resources allegedly affected is manifest in the international commitments that Mexico has undertaken relating specifically to their protection.¹² In view of the alleged severity of environmental damage that, according to the Submitter, arises from the asserted failures to effectively enforce environmental law, and given the particular importance of the natural resources of this ecosystem and the presence of an alleged 29 species subject to legal protection, in the opinion of the Secretariat, the Submission raises a matter whose further study in this process would advance the goals of the NAAEC, especially in relation to Articles 1 and 5 thereof.¹³

According to the Submission, the Submitter pursued a citizen complaint (*denuncia popular*) under the LGEEPA, as a private remedy to report the violations of environmental law it attributes to Granjas Aquanova.¹⁴ In the interest of clarity, it is worth here to refer to the comments that the Party's Response included on this point, keeping in mind that the review of a submission by the Secretariat under Article 14 of the NAAEC is done prior to, and independent of a Party's response.

The Party in its Response seems to suggest that Article 14(2)(c) establishes a *requirement* that

¹¹ Pages 2 through 5 of the Submission.

¹² See international instruments cited on page 11 of the Submission.

¹³ See Article 14(2)(a) and (b) of the NAAEC.

¹⁴ See Article 14(2)(c) of the NAAEC and appendices 2 through 9 of the Submission.

the submitters *exhaust* available private remedies. In the Secretariat's view, who respectfully disagrees with the Party, the language of the NAAEC is clear on this aspect. As provided by Article 14(2), the factors listed there should *guide the Secretariat in deciding* whether a submission warrants requesting a response from the Party, as opposed to Article 14(1), that establishes the criteria that a submission must meet for the Secretariat to consider it further. Among those considerations, Article 14(2)(c) includes the matter of whether "...private remedies available under the Party's law have been pursued..." On their part, sections 5.6(c) and 7.5(b) of the Guidelines provide additional guidance about the meaning of this Article 14(2)(c) factor by indicating respectively, that "the submission should address [...] the actions, including private remedies, available under a Party's law that have been pursued..." and that in considering that matter "... the Secretariat will be guided by whether: ... (b) reasonable actions have been taken to pursue such remedies prior to making a submission..." On this question, the Secretariat considered that the Submitter addressed in the Submission the private remedies that have been pursued, and that reasonable actions to pursue them were taken prior to making the Submission.¹⁵ It is also clear, in the opinion of the Secretariat, that for purposes of Article 14 of the NAAEC, the citizen complaint (*denuncia popular*) is a private remedy contemplated in the Party's law and available for submitters to seek remedy with that Party prior to making a submission.¹⁶ As mentioned, a citizen complaint was filed on the matters raised in this Submission, on 2-3 December 1997, and an addendum to it was filed on 4 August 1998.

As a final consideration under Article 14(2), the Secretariat noted that the Submission does not appear to be based on mass media reports, nor does it make reference to any.¹⁷

Having determined that the Submission meets the requirements of 14(1), and considering together all the factors in Article 14(2), the Secretariat determined on 17 March 1999 that the Submission warranted a response from the Party. Mexico submitted its Response to the Secretariat on 15 June 1999.

¹⁵ See the Secretariat's Determination pursuant to Article 15(1) of the NAAEC for Submission SEM-97-007/Instituto de Derecho Ambiental (14 July 2000).

¹⁶ The Party indicates that it considers that the citizen complaint (*denuncia popular*) contemplated in the LGEEPA is not a private remedy, but a mechanism to inform the government on environmental matters (pages 2 and 3 of the Response). Article 14(2)(c) refers to "...private remedies available under the Party's law..." requiring that they be contemplated in the Party's law, but without establishing other limits on the characteristics of those remedies. The citizen complaint is contemplated in Articles 189 et al. of the LGEEPA, it allows any person to denounce with the environmental authorities alleged violations of environmental laws and regulations or harm to the environment. It requires the government, among other things, to consider the complaint, take action if applicable and inform the petitioner of any resolution on the matter. The citizen complaint then, seems to be a private remedy contemplated by the Party's law and available for submitters to seek remedy with the Party prior to making a submission under Article 14 of the NAAEC. See the Secretariat's Determination pursuant to Article 15(1) of the NAAEC for Submission SEM-97-007/Instituto de Derecho Ambiental (14 July 2000).

¹⁷ See Article 14(2)(d) of the NAAEC.

VI – ANALYSIS OF THE SUBMISSION IN LIGHT OF THE PARTY’S RESPONSE, PURSUANT TO ARTICLE 15(1) OF THE NAAEC

Article 15(1) of the NAAEC provides that:

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.

This section examines the Submission’s allegations of failures to effectively enforce environmental law, in light of the Response provided by Mexico on 15 June 1999.

First, the Secretariat explains the reasons why it considers that the allegations concerning the failure to effectively enforce the international instruments cited in the Submission (the *Convention between the United Mexican States and the United States of America for the Protection of Migratory Birds and Game Animals*, the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* and the *Protocol* which Amends it, and the *Trilateral Memorandum of Understanding for the Conservation of Migratory Birds and their Habitats*) do not warrant further review in this process or in a factual record that may be developed on this Submission.

The second part of this section examines the allegations relating to the protection of the environment and natural resources under the cited Articles 117, 118, 119, 121, 123, 129, 130, 168 and 182 of the LGEEPA; Article 51 of the LF; NOM-059; NOM-062; Articles 4, 9, 86 paragraph III, 88, 92 and 119 paragraphs I, II and VIII of the LAN; Articles 134, 135, 137 and 153 of the RLAN; Articles 3 paragraph VIII and 24 paragraph XXIV of the LP; Articles 44, 48 and 50 of the RLP; and Articles 416 paragraphs I and II, 418 and 420 paragraph V of the CPF, and explains the reasons why, in regard to these allegations, the Secretariat considers that the Submission does warrant the development of a factual record.

1. Allegations of a failure to effectively enforce the cited international instruments for the protection of migratory birds and game animals, wetlands and waterfowl

The Submission asserts that Mexico is failing to effectively enforce its environmental law, because “... by permitting the destruction of the ecosystems that the company Granjas Aquanova has been carrying out, the government of the United Mexican States is also failing to fulfil the commitments...” contemplated in the *Convention between the United Mexican States and the United States of America for the Protection of Migratory Birds and Game Animals*, the

Convention on Wetlands of International Importance Especially as Waterfowl Habitat and the *Protocol* which amends it, and the *Trilateral Memorandum of Understanding for the Conservation of Migratory Birds and their Habitats*.¹⁸

In its Response, Mexico states that these instruments are domestic environmental law, but that they do not apply to the facts presented in the Submission. The Party also contends that the allegations are not clear and that the Submitter does not indicate the nature of the alleged violations to the international instruments cited, because it fails to mention the specific provisions of those instruments that the Party is allegedly failing to effectively enforce.¹⁹ In the Secretariat's opinion, the Submission is sufficiently clear: the Submitter asserts that by failing to enforce its environmental law, Mexico is allowing the destruction of the ecosystems, and is thus failing to fulfil the obligations it has undertaken in those instruments.²⁰ However, while the allegation is clearly expressed in the Submission, the Secretariat considers that the connection between the alleged failure to enforce domestic laws with respect to the alleged violations and the alleged failure to enforce the international instruments, does not occur as the Submission describes it, because, as noted by the Party, the instruments do not apply to the facts the Submission refers to, even if they qualify as domestic environmental law. The cited international instruments call on its parties to take legislative and regulatory measures to protect certain migratory birds and game animals, and to designate wetlands of international importance on their territory. Those instruments do not refer to the enforcement of domestic law by its parties, nor do they establish specific obligations (hypothetically, pollution standards, resource quality criteria or standards for aquaculture, for example) that could be connected to the violations alleged in the Submission.

However, while the international instruments cited by the Submitter are not directly applicable to the facts discussed in the Submission, those instruments are nonetheless relevant to the effective enforcement of the other environmental provisions cited in the Submission, in that they underscore the importance given to the protection of these natural resources in the Mexican legal framework. The provisions cited in the Submission seek to protect the same resources stewarded by those international instruments, i.e. wetlands, migratory birds and game animals, and their habitat. The underscored importance of these resources was taken into account in considering that the Submission raises matters whose further study in this process would advance the goals of the NAAEC, and in requesting a response from the Party, pursuant to Article 14(2), and is taken into account now in determining that the Submission does warrant the development of a factual record in relation to the Submitter's assertions examined in the next section.

In view of the foregoing, the Secretariat determines that the allegation that Mexico is failing to effectively enforce the international instruments discussed in this section does not warrant further review in the process of this Submission or in the development of a factual record relating to it.

¹⁸ Page 11 of the Submission.

¹⁹ Page 30 of the Response.

²⁰ Page 11 of the Submission.

2. Allegations of a failure to effectively enforce the LGEEPA, the LF, Mexican Official Standards NOM-062 and NOM-059, the LAN and its Regulations, the LP and its Regulations, and the CPF

The Submission asserts that, with respect to the activities of the Granjas Aquanova shrimp farm, Mexico is failing to effectively enforce a number of provisions of the following laws, regulations and norms: the LGEEPA, the LF, Mexican Official Standards NOM-062 and NOM-059, the LAN and its Regulations; the LP and its Regulations, and the CPF. The Secretariat considers that the allegations concerning failures to effectively enforce these laws, regulations and standards do warrant the development of a factual record. In light of the Party's Response, the Secretariat has identified important outstanding issues relating to the enforcement by Mexico of said provisions and the effectiveness of the enforcement actions taken to protect the environment and the natural resources covered by those provisions, with respect to Granjas Aquanova, and that development of a factual record is therefore warranted.

The following sections contain a detailed analysis of the Submitter's assertions in light of the Party's Response, and an explanation of the reasons for considering that the Submission warrants the development of a factual record. To facilitate the analysis and the explanation, we first consider the violations allegedly committed by Granjas Aquanova and the alleged failures by Mexico to effectively enforce its environmental law with respect to those violations, grouping them by subject area: environmental impact, water, fisheries and environmental crimes (sub-section 2.1). As a second matter, we review the Submitter's allegations on the alleged insufficiency and illegality of the enforcement actions that were taken by Mexico in relation to the alleged violations by Granjas Aquanova (sub-section 2.2).

2.1. Allegations concerning the alleged violations by Granjas Aquanova and the asserted failures by Mexico to effectively enforce its environmental law

The Submission alleges and the Party's Response also indicates, that the company Granjas Aquanova allegedly committed violations of environmental law or the environmental impact authorizations issued to it by the National Institute of Ecology (*Instituto Nacional de Ecología*—INE). For the purposes of this analysis, the alleged violations (both administrative and criminal) may be summarized as follows:

1. Non-compliance with three of the conditions established in the environmental impact authorization for the first phase of the project in February 1995,²¹ non-compliance with

²¹ Page 6 of the Submission and page 10 of the Response. These conditions prohibited the installation of camps, ordered the preservation of the totality of the mangrove vegetation, required a mangrove replanting

various conditions established by the INE in December 1996,²² and non-compliance with the instructions issued by the INE in December 1997.²³

2. Unauthorized draining and filling of lagoons.²⁴
3. Unauthorized felling, clearing and burning of vegetation in the habitat of species with protected status.²⁵
4. Unauthorized land use changes.²⁶
5. Unauthorized removal of forest cover.²⁷
6. Wastewater discharges since 1996 without a permit, without performing the required monitoring and in violation of the applicable pollutant limits.²⁸
7. Unauthorized mangrove mortality.²⁹
8. Unauthorized diversion of natural watercourses.³⁰
9. Unauthorized accelerated destruction of habitat of species with protected status.³¹
10. Unauthorized obstruction of fishing activities.³²
11. Environmental crimes.³³

Based on this summary of the alleged violations, the following sections examine, in light of the Party's Response, the Submitter's assertions of a failure by Mexico to effectively enforce its environmental laws on Granjas Aquanova for violations in each of the subject areas (environmental impact, water, fisheries and environmental crimes).

2.1.1 Analysis of the alleged failures to effectively enforce environmental law relating to environmental impact

2.1.1.1 Considerations relating to the temporal applicability of the cited authorization requirements

The Submission asserts that Mexico failed to effectively enforce the environmental law because it

program and ordered the preservation and relocation of the specimens in the best condition (identifying them prior to removal).

²² Pages 7 and 8 of the Submission and 10 of the Response. Conditions concerning the maintenance of the ecological protection area as well as a conservation area within the concession area.

²³ Idem. Instructions concerning removal of the obstruction of the "Los Olotes" stream and impact on approximately 20 hectares of mangrove forest in the area of the "La Diabla" and "Los Olotes" streams.

²⁴ Pages 2 of the Submission and 4 of the Response.

²⁵ Pages 2 and 4 of the Submission and 5 and 6 of the Response.

²⁶ Pages 2 of the Submission and 5 and 10 of the Response.

²⁷ Pages 3 of the Submission and 5 of the Response.

²⁸ Pages 3 of the Submission and 11 of the Response.

²⁹ Pages 3 and 4 of the Submission and 12 of the Response.

³⁰ Pages 4 of the Submission and 13 of the Response.

³¹ Pages 4 of the Submission and 14 of the Response.

³² Pages 5 of the Submission and 15 and 16 of the Response.

³³ Pages 5 of the Submission and 16, 17, 22 and 23 of the Response.

did not require Granjas Aquanova to obtain the authorizations prescribed by law (Articles 28 of the LGEEPA, 12 and 19 bis11 of the LF and Mexican Official Standard NOM-062). Mexico contends that the applicable texts of the LGEEPA and the LF are not the ones cited in the Submission, but those in force prior to the reforms to the LGEEPA on 13 December 1996 and to the LF on 20 May 1997, because the authorization procedure was initiated prior to the entry into force of those reforms. This section thus specifically discusses the temporal scope of application of the cited authorization requirements, whereas the substantive aspects are discussed in the next section.

Under the LGEEPA reform decree, in the case of administrative procedures or remedies, the moment of initiation of a procedure or remedy determines whether the applicable provisions are the ones prior, or subsequent, to the reform.³⁴ However, it is clear that in other cases, that is, involving not administrative procedures or remedies initiated prior to the reform, but obligations, the applicable provisions are simply those that were in force at the time the events occurred. The Secretariat reviewed both the cited provisions and those prior to the reform in light of this, to determine which are applicable to each of the facts cited in the Submission, and reviewed the Submitter's assertions based on the provisions that are applicable in each case.

Concerning environmental impact, it is clear that the applicable provisions are the ones prior to the reform because the procedures for Granjas Aquanova were initiated and concluded before the reform, except in the case of the authorization for the discharge drain, phases II and III, issued 15 April 1997, of which the Party confirms that it was issued on the basis of the current LGEEPA.³⁵ In any case, the current version of LGEEPA and the one prior to the reform, both contemplate the obligation of obtaining an environmental impact authorization to carry out projects that may cause ecological imbalance or may exceed the applicable standards, and both establish the obligation to comply with any conditions imposed to prevent or minimize their negative effects on the environment.³⁶

³⁴ The fourth transitory Article of the LGEEPA Reform Decree of 13 December 1996 provides as follows: Administrative procedures and appeals related to the subject matter of the General Law on Ecological Balance and Environmental Protection initiated prior to the entry into force of this Decree shall be processed and resolved in accordance with the provisions in force at that time and any other provisions applicable to the matter in question.

³⁵ Page 8 of the Response.

³⁶ The first paragraph of Article 28 of the LGEEPA text in force prior to the reform provided as follows: The execution of public or private works or activities that may cause ecological imbalance or exceed the limits and conditions established in the regulations and technical environmental standards issued by the Federation for the purpose of protecting the environment shall be subject to the prior authorization of the Federal Government, through the Ministry or the federated entities or municipalities, according to the jurisdictions prescribed by this Law, and to compliance with the requirements imposed once any environmental impact that may be caused is assessed, without prejudice to other authorizations that are the jurisdiction of the competent authorities.

Article 28 of the current LGEEPA provides as follows: Environmental impact assessment is the procedure whereby the Ministry establishes the conditions governing the execution of those works and activities that could cause ecological imbalance or exceed the limits and conditions established in the applicable provisions

The Submitter mentions two types of authorizations relating to forestry, for which an environmental impact assessment is required: authorization for the use of timber forest resources in tropical forests, and authorization for land use changes in forest areas. Regarding the use of timber forest resources in tropical forests, the requirement of this authorization is established by the original text of the LF of 17 December 1992,³⁷ and it is also contemplated in Article 28, paragraph V of the current LGEEPA and Article 12, paragraph III of the current LF. It is therefore evident that the cited authorization is applicable to forest resource use activities initiated since the entry into force of the LF of 17 December 1992.

In regard to the environmental impact authorization for land use changes in forest areas, which is contemplated in Article 28, paragraph VII of the current LGEEPA, this authorization is applicable to activities carried out after 14 December 1996, except where the relevant authorization procedure was initiated prior to that date.³⁸

Having clarified the temporal issues concerning the applicable law on environmental impact, the following section examines the Submitter's allegations concerning the failure to effectively enforce these provisions, in light of the Party's Response.

2.1.1.2 Analysis of the Submitter's allegations on environmental impact, in light of the Party's Response

The Submission asserts that the Office of the Federal Attorney for Environmental Protection

for the protection of the environment and the preservation and restoration of ecosystems, for the purpose of preventing or minimizing the negative effects of such works and activities on the environment. To that end, in the cases determined by any Regulations issued for such purpose, anyone attempting to carry out any of the following works or activities shall require prior environmental impact authorization from the Ministry:

...V. Forest harvesting in tropical forests and those affecting slow-regenerating species.

...VII. Land use changes in forested areas, as well as in tropical wet forest and arid zones.

...X. Works and activities in wetlands, mangrove swamps, lagoons, rivers, lakes and estuaries connected to the sea, as well as on their littoral portions or federal zones;

...XII. Fishing, aquacultural or agricultural activities which could endanger the preservation of one or more species or cause harm to ecosystems, and...

³⁷ Articles 11 and 12 of the Forestry Law of 17 December 1992, prior to the reform of 20 May 1997, provided as follows:

Article 11. Authorization from the Ministry is required for the use of timber forest resources and for forestation and reforestation on forest land or land preferentially of a forestry nature. Such authorization shall comprise that of the management program contemplated in Article 12. [...]

Article 12. Applications for authorization to use timber forest resources, for forestation and reforestation must include:

...III. In the case of forest harvesting in tropical forests and those affecting species that do not easily regenerate, as well as in protected natural areas, environmental impact authorization from the Ministry of Social Development, as prescribed by the applicable legislation...

³⁸ See second paragraph of footnote #36.

(*Procuraduría Federal de Protección al Ambiente*—PROFEPA), during its visits to Granjas Aquanova, did not verify compliance with all the applicable provisions, although some of the violations indicated by the Submitter were identified by the government as irregularities during the inspection visits conducted by the PROFEPA.³⁹ The Submitter asserts that the PROFEPA did not verify compliance with the LF and its Regulations, in relation to environmental impact assessment, forest land use and use of timber forest resources; nor with Mexican Official Standards NOM-062 and NOM-059, in relation to adverse effects on biodiversity and the habitat of species with protected status.

In its Response, Mexico explains the environmental impact assessment process followed with respect to the Granjas Aquanova project and the actions taken with respect to its development and operation. Although a description of the government's actions is provided with some detail, the information furnished by the Party does not enable an understanding of how the actions taken by Mexico represent effective enforcement of the environmental impact requirements cited in the Submission.

Mexico explains in its Response, that the Granjas Aquanova project consisted of three phases and that the INE issued an environmental impact authorization for the first phase of the project on 7 February 1995, stipulating 43 conditions. The Party states that on 16 and 17 May of that year, the PROFEPA conducted an inspection visit and detected irregularities in compliance by Granjas Aquanova with the terms of this authorization, and that the Nayarit State Office of PROFEPA also conducted a visit on 19 April 1995. The Party asserts that it applied sanctions to Granjas Aquanova for these irregularities and that collateral measures were taken leading to a program to correct the negative impacts, apparently in the form of a mangrove planting program, although the Response does not explain the nature of that program, how compliance with the program was verified, or the results of that program. The Response also states that the authority detected during the inspection visits that the company had felled, cleared and burned mangroves and removed forest cover without an authorization to change forest land use, but that the authority did sanction this administrative violation. The Response does not specify the nature of the sanction,⁴⁰ although it indicates that the clearing, felling and burning activities were suspended on 9 May 1995 and that the authorization for forest land use change was denied on 28 May 1996.⁴¹

The Response states that the environmental impact authorizations for the second phase of the project were issued on 21 June and 8 July 1996, and that the third phase was authorized on 2 March and 19 May 1997. As for the authorization for use of timber forest resources, the Party neither confirms nor denies in its Response that Granjas Aquanova was conducting forest harvesting in tropical forests, nor is it clear based on the Submission that this was one of the

³⁹ Pages 5 and 10 of the Response and Appendices 17, 18, 19 and 20.

⁴⁰ Article 171 of the LGEEPA text applicable at that time contemplated fines, closings and administrative arrest as sanctions.

⁴¹ Page 5 of the Response.

activities carried out by the company. What the Response contends is that the authorizations cited by the Submitter were not required of the company because the provisions that contemplated the authorizations were not in force then. As indicated in the previous section, the LF in force since 1992 establishes the requirement of obtaining an authorization to use timber forest resources and provides that in tropical forests, an environmental impact assessment is required for such authorization.⁴² However, while it is clear that this requirement was in force at the time, it is not clear from the information provided in the Submission, nor from the Party's Response, whether the activities of Granjas Aquanova in fact do or do not include the use of timber forest resources in the terms of the LF.

This is not the case concerning the authorization for forest land use changes, since it follows from the Party's Response that the failure to obtain this authorization was one of the irregularities detected during the inspection of 22 January 1996, and the Response itself indicates that the authorization was then denied on 28 May 1996.⁴³ In light of the foregoing, the basis for the Party's assertion that there was no requirement for an authorization for forest land use change, is not confirmed.⁴⁴

Another allegation concerning environmental impact assessment is based on two Mexican Official Standards. The Submission indicates that the activities of Granjas Aquanova were carried out in a habitat of species with protected status under NOM-059.⁴⁵ The Submitter contends that this situation triggers the requirement of an environmental impact statement to enable the authorities to evaluate whether activities different from land use changes could be carried out, according to Article 4.7 of NOM-062,⁴⁶ which provides that:

... **4.7** In the event that species of flora or fauna listed in the relevant Mexican Official Standard as rare, threatened, endangered or subject to special protection are found, the only option that will be evaluated shall be that of carrying out some type of sustainable use of land or other resources that is different from land use changes and which does not entail the local disappearance of these species and their required habitat. The evaluation shall be subject to the interested party's presenting an environmental impact statement in its general form...

The Party's Response confirms the existence of species with protected status in the area where Granjas Aquanova operates, but it is not clear from the Response how this provision was applied

⁴² See *supra*, p. 14.

⁴³ Page 5 of the Response.

⁴⁴ Page 7 of the Response.

⁴⁵ Pages 2 and 4 of the Submission and 7 of the Response. The Response points out errors in the Submitter's classification of the species in question as compared with the specific status assigned in the NOM.

⁴⁶ *Establishing specifications to mitigate the adverse effects on biodiversity of land use changes from forestry to farming.*

to the environmental impact authorization, or during the inspection procedures the PROFEPA carried out with respect to this company's activities. Moreover, although the Party does not raise this consideration in its Response, it is not clear in the Secretariat's opinion, whether this provision is applicable to the matter raised in the Submission. The provisions of this Mexican Official Standard refer to land use changes from forest to farm land, and it cannot be confirmed from the information contained in the Submission and in the Response that the activities of Granjas Aquanova included land farming.

With respect to the environmental impact requirements provided in Article 28 of the LGEEPA, the purpose of the environmental impact procedure is to assess the potential environmental impact of a project and to establish the requirements governing that project in the event that it is authorized. On its part, Granjas Aquanova's environmental impact authorization, number D.O.O.P.-0333, of 7 February 1995, establishes in its Thirteenth Preamble Clause that non-compliance with its terms and conditions "will invalidate" the authorization. The subsequent authorizations, dated 21 June and 8 July 1996 for the second phase, and 2 March and 19 May 1997 for the third phase, also state that non-compliance with their provisions "may invalidate" the authorization issued. The Party's Response does not explain the reasons why the authorizations for the second and third phases were issued, in view of the degree of non-compliance recorded by the inspectors in relation to the authorization for the first phase, nor the reasons why the first authorization was not invalidated through the effective enforcement of its Tenth Preamble Clause. This is relevant especially in view of the importance given in the authorizations, and expressly acknowledged by the Party, to strict compliance with the terms of those environmental impact authorization in this case.⁴⁷

In addition to asserting that the required authorizations were not obtained or enforced, the Submission underscores the following specific alleged failures to effectively enforce environmental law in relation to environmental impact.

The Submitter states that the PROFEPA detected non-compliance with the terms of the environmental impact authorization issued by the INE during the inspection visits conducted in April 1995. The Submitter asserts that although the suspension of the clearing, felling and burning activities being carried out by Granjas Aquanova in violation of the INE authorization was indeed ordered, the administrative procedure corresponding to these violations was terminated on 12 May 1995 as the result of a working meeting in which it was agreed that the INE would issue a new ruling on the environmental impact assessment within 30 days. Neither the Submission nor the Response indicates that this ruling was issued, or that any further follow-up was given to this

⁴⁷ On page 4, the Response states that the limits and conditions established in the environmental impact authorizations are the limits within which the company's activities "could have been viable from an environmental standpoint".

particular matter.

According to the Submitter, the PROFEPA conducted other inspection visits in January 1996 during which irregularities were again detected in relation to the conditions established in the environmental impact authorization issued by the INE. The Party's Response states that on 22 January 1996, irregularities were in fact detected in the construction of a discharge drain that caused harm, as well as irregularities related to forestry, because of the lack of a land use authorization and the removal of 3.35 hectares of mangroves. It is not clear, based on the Party's Response, whether enforcement measures were taken in this regard.

Finally, the Submitter claims that the last administrative procedure, initiated in December 1997 in relation to the various alleged violations by Granjas Aquanova, including those mentioned in this section, was terminated by means of an administrative agreement signed 30 March 1998, which the Submitter claims is illegal. This aspect is analyzed in further detail in section 2.2 concerning the enforcement actions Mexico has taken with respect to Granjas Aquanova.

As discussed above, the information provided by the Party does not enable an understanding of how the actions taken by Mexico represent effective enforcement of the environmental impact requirements cited in the Submission, with respect to Granjas Aquanova. It cannot be determined from the Party's Response how the government actions mentioned in the Response, contributed to enforcement of the limits within which, according to the Response itself, the activities of Granjas Aquanova "could have been viable from an environmental standpoint," in effective enforcement of the applicable environmental impact requirements and conditions.

The Secretariat considers the development of a factual record to be warranted in relation to the assertions in this Submission of a failure to effectively enforce the environmental impact requirements contained in the LGEEPA, the LF and NOM-062, as well as the additional requirements in the environmental impact authorizations governing the project, since these alleged failures of effective enforcement cannot be dismissed in light of the Party's Response. The factual record should contain information on the enforcement actions taken subsequent to the inspection visits, such as the collateral programs mentioned by the Party and other enforcement actions that may have been taken, as well as on the effectiveness of such actions in achieving compliance with the terms of the environmental impact authorizations and other cited environmental impact requirements that are applicable.

2.1.2 Analysis of the alleged failures to effectively enforce environmental law concerning water

The Submitter asserts that Mexico is failing to effectively enforce Articles 117, 118, 119, 121,

123, 129 and 130 of the LGEEPA concerning prevention and control of water pollution and pollution of aquatic ecosystems in relation to Granjas Aquanova. The Secretariat based its review on the current provisions since the reform of the LGEEPA in 1996 did not include amendments that affect the analysis of these allegations.⁴⁸ The Submission also asserts that Mexico is failing to

⁴⁸ LGEEPA, Article 117. For prevention and control of water pollution, the following criteria shall be considered:

- I. The prevention and control of water pollution is fundamental to preventing its availability from being reduced and to protecting the nation's ecosystems;
- II. The prevention of the pollution of rivers, watersheds, reservoirs and marine waters, and that of other water bodies and watercourses, including groundwater, is the responsibility of the State and society;
- III. Anyone using water in productive activities that may cause it to become polluted bears the responsibility for treatment of discharges so as to restore it to a condition suitable for use in other activities and to maintain the balance of ecosystems;
- IV. Wastewater of urban origin must receive treatment prior to being discharged into rivers, watersheds, reservoirs, marine waters and other water bodies or watercourses, including groundwater, and
- V. The participation and joint responsibility of society is an indispensable condition for the prevention of water pollution.

LGEEPA, Article 118. The criteria for water pollution prevention and control shall be considered in:

- I. The promulgation of Mexican Official Standards for wastewater use, treatment and disposal, in order to prevent risk and harm to public health;
- II. The formulation of Mexican Official Standards for the treatment of water for human use and consumption, as well as for wastewater infiltration and discharge into collecting bodies of water considered to be property of the nation;
- III. Agreements entered into by the Federal Executive Branch for bulk water delivery to user systems or users, especially in regard to the determination of wastewater treatment systems that must be installed;
- IV. The establishment of regulated, prohibited or reserved zones under the terms of the Law of National Waters;
- V. Concessions, assignments, permits and, in general, authorizations that must be obtained by concession holders, assignees, or permit holders and, in general, the users of waters that are the property of the nation, in order to infiltrate wastewater onto lands, or to discharge it into collecting bodies other than the sewerage systems of population centers; and
- VI. The organization, direction and regulation of waterworks in watersheds, beds and ditches for national waters, both above ground and underground;
- VII. Classification of collecting bodies for wastewater discharge according to their capacity to assimilate or dilute the pollutant load they could receive.

LGEEPA, Article 119. The Ministry shall promulgate the Mexican Official Standards required in order to prevent and control pollution of national waters, in accordance with the provisions of this Law, the Law of National Waters and its regulation, and any other applicable provisions.

LGEEPA, Article 121. No one may discharge wastewater containing pollutants, or allow such water to infiltrate, into any water body or watercourse or into the soil or subsoil without prior treatment and the permission or authorization of the federal authority, or the local authority in cases of discharge of water under local jurisdiction or into drainage and sewerage systems of population centers.

LGEEPA, Article 123. All discharges into collecting systems, rivers, aquifers, watersheds, riverbeds, reservoirs, marine waters and other water bodies or watercourses as well as spills of wastewater on soil, or infiltration thereof into lands, shall satisfy the requirements of any Mexican Official Standards promulgated for such purpose and any applicable particular discharge conditions established by the Ministry or the local authorities. Whoever generates such discharges is responsible for performance of the prior treatment required.

LGEEPA, Article 129. Grant of assignments, authorizations, concessions, or permits for the exploitation or use of water in economic activities that may pollute said resource shall be conditional on performance of the necessary prior treatment of any wastewater produced.

effectively enforce Article 86 paragraph III, Article 88 and Article 119 paragraphs I, II and VII of the LAN⁴⁹ and Articles 134, 135 and 137 of the RLAN.⁵⁰

LGEEPA, Article 130. The Ministry shall authorize the discharge of wastewater into marine waters in accordance with the provisions of the Law of National Waters, its Regulations and any Mexican Official Standards promulgated for such purpose. Where the discharges originate from mobile sources or from fixed platforms on the territorial sea or the exclusive economic area, the Ministry shall coordinate the issuance of the corresponding authorizations with the Ministry of the Marine.

⁴⁹ LAN, Article 86. The “Commission” shall be responsible for:

...3. Establishing and enforcing the specific conditions of discharge that must be met by wastewater generated on property and zones under federal jurisdiction, wastewater discharged directly into national waters or territory, or any land where such discharges may contaminate the subsoil or aquifers; and in the remaining cases set out in the General Law on Ecological Balance and Environmental Protection;...

LAN, Article 88. Natural or legal persons require a permit from the “Commission” to discharge wastewater on an ongoing, intermittent or fortuitous basis into collecting bodies, whether these be national bodies of water or other property of the nation, including marine waters, as well as where it infiltrates into lands that are the property of the nation or other lands where it may contaminate the subsoil or aquifers.

The “Commission”, by means of agreements of a general nature by watershed, aquifer, area, locality or use may replace the wastewater discharge permit by a mere notice.

The control of wastewater discharges into drainage or sewerage systems in population centers is the jurisdiction of the municipalities, with the support of the States as necessary and as determined by law.

LAN, Article 119. The “Commission” shall sanction the following violations, as prescribed by this Law:

I. Ongoing, intermittent or occasional discharge of wastewater in violation of the provisions of the present law into collecting bodies that are the property of the nation, including marine waters, as well as where such wastewater infiltrates into land that is the property of the nation or into other land where it could contaminate the subsoil or aquifers, without prejudice to the sanctions established by the sanitary provisions and the provisions on ecological balance and environmental protection;

II. Exploiting or using national waters in violation of the Mexican Official Standards governing quality and specific conditions established for such purpose;...

...VIII. Exploiting or using national waters without the relevant authorization, where required by the provisions of this law, as well as modifying or diverting riverbeds, watercourses or reservoirs where they are the property of the nation, without the permission of the “Commission” or where hydraulic works that are the property of the nation are damaged or destroyed;...

⁵⁰ RLAN, Article 134. Natural or legal persons who exploit or use water for any purpose or activity are required, under their responsibility and as prescribed by law, to take the measures necessary to prevent it from being polluted and, as the case may be, to restore it to adequate conditions for subsequent utilization in other activities or uses and for maintenance of the balance of ecosystems.

RLAN, Article 135. Natural or legal persons who discharge wastewater into collecting bodies of water contemplated by the “Law” must:

I. Possess the wastewater discharge permit issued by the “Commission” or, as the case may be, present the relevant notice contemplated by the “Law” and this Regulations;

II. Treat wastewater prior to discharging it into collecting bodies of water, where this is necessary to fulfil the obligations set out in the relevant discharge permit;

III. Pay, as applicable, the federal fees for the use or exploitation of public property of the nation as collecting bodies of water for wastewater discharges;

IV. Install and maintain in good condition the sampling devices and access necessary to verify the discharge volumes and the concentrations of the parameters contemplated in the discharge permits;

V. Inform the “Commission” of any change in its processes, where this gives rise to modifications of the characteristics or volumes of wastewater specified in the relevant discharge permit;

VI. Inform the “Commission” of any pollutants present in the wastewater generated by the industrial process

Generally speaking, the cited provisions concerning water establish the following: the applicable criteria for water pollution prevention and control; the requirement of obtaining an authorization for wastewater discharges; the obligation of users to observe the maximum allowable pollutant limits established in the Mexican Official Standards and any other specific discharge conditions and to perform the necessary treatment of the discharges; the mandate of the National Water Commission (*Comisión Nacional del Agua—CNA*) to enforce compliance with these provisions; the responsibility of those using or exploiting national waters to prevent them from becoming polluted; and the obligation of users to pay the applicable fees, to conduct the required monitoring of the quality of discharges and to periodically notify the results to the authorities.

The Submitter asserts that although the CNA is the competent enforcement body with respect to the LAN, the CNA only required of Granjas Aquanova that it “regularize” its situation, and did not effectively enforce the law and its regulations. It asserts that the CNA failed to enforce the cited provisions, given: 1) unauthorized water use by the company; 2) unauthorized wastewater discharges by the company; 3) obstruction of natural watercourses by the company without a permit, and 4) deterioration of water quality in the area because of Granjas Aquanova’s activities.

The Party’s Response to the assertions concerning the alleged water-related violations by Granjas Aquanova is based on a report rendered by the CNA on 22 April 1999 to the SEMARNAP in connection with this Submission.⁵¹ We proceed to examine each of the alleged failures to

or service being operated, that were not specified in the original discharge conditions;

VII. Operate and maintain, by itself or third parties, the works and installations necessary to manage and, as applicable, treat the wastewater as well as to ensure the quality control of said water before discharging it into collecting bodies of water;

VIII. Submit to any inspection and enforcement procedures established by the “Commission” for the control and prevention of water quality, as provided in the “Law” and the “Regulations”;

IX. Conduct quality monitoring of wastewater discharged or infiltrating, as prescribed by the law and by regulatory provision;

X. Keep records of monitoring information for at least three years, as prescribed by the applicable legal provisions, standards, conditions and technical specifications, and

XI. Any other requirements prescribed by the laws and regulatory provisions.

Domestic wastewater discharges that do not form a part of a municipal sewerage system may be carried out subject to any applicable Mexican Official Standards and subject to mere notice.

RLAN, Article 137. It is the responsibility of all water users and all concession holders contemplated in Chapter II, Title Six of the “Law”, including the irrigation units and districts, to comply with the Mexican Official Standards and, as the case may be, with any other specific discharge conditions, for the prevention and control of widespread or dispersed pollution as a result of the management and application of substances that may contaminate the quality of national waters and collecting bodies of water.

The “Commission” shall promote and carry out, as applicable, any actions and measures necessary, and shall coordinate the issuance, with the competent authorities, of any Mexican Official Standards required to make land use compatible with the objectives of preventing and controlling the pollution of water bodies and property of the nation. In setting Mexican Official Standards for land use that may affect national bodies of water, the technical opinion of the “Commission” shall be obtained.

⁵¹ Page 11 and Appendices 13 and 14 of the Response.

effectively enforce environmental law enumerated in the foregoing paragraph, in light of the Party's Response.

1) Water use. According to the aforementioned CNA report, the water use permit to which the Submitter refers, does not apply because the water is being extracted from lagoons, estuaries and streams, which are marine waters. However, the Response does not indicate the basis for classifying these bodies of water as marine waters, and for asserting that use of marine waters does not require an authorization.

2) Wastewater discharges. The Party's Response states that the company has in effect discharged wastewater without the relevant permit starting in 1996 and apparently until 6 November 1998, when permit 08NAY104898/13BKGE98 was issued for one of the three discharges. An attestation of the issuance of that permit is annexed to the Response, while not the permit itself. According to the Response, the permit was entered in the Public Registry of Water Rights on 21 December 1998. The Party's Response also states that the permit relating to the other two discharges is still pending, and that a favourable technical opinion was issued on 11 December 1998, although neither that opinion nor other documents concerning the alleged permitting procedure were provided with the Response.

3) Diversion of watercourses. The Response confirms the assertion that the company diverted natural watercourses, but the Party alleges that this was contemplated in the environmental impact authorization, although it doesn't specify which of the three existing authorizations allegedly permitted the diversion of watercourses, nor the relevant clause thereof. The Response doesn't indicate either, on what grounds INE could issue, through an environmental impact authorization, a permit for an activity the authorization of which, or its sanctioning as the case may be, is in the authority of the CNA.⁵² The Response also states that the obstructions of the Los Olotes and La Cegada streams had been removed, arguably by the time the Response was submitted. There is no indication of the status of the alleged obstructions of the La Tronconuda and La Atascona streams mentioned by the Submitter, nor of any actions the Party may have taken in that regard, in view of the prohibition on diverting or obstructing watercourses without a permit, contemplated in Article 119, paragraph VIII of the LAN.⁵³

4) Water quality monitoring. The Submitter asserts that the absence of water quality monitoring is a violation of environmental law and a failure to effectively enforce such law by the CNA. The Response states that the CNA has reported that it has developed a monthly water quality monitoring program that allegedly encompasses the principal estuaries relating to the activities of

⁵² Article 119, paragraph VIII of the LAN provides that the CNA shall sanction diversion of watercourses without a permit issued by said Commission. The jurisdiction of the CNA to issue permits for diversion of reservoirs, watercourses and streams is set out in Article 9, paragraph VII of the LAN, although this paragraph was not cited in the Submission.

⁵³ See footnote #49.

Granjas Aquanova. It is also stated in the Response that the company has a monitoring program to comply with Mexican Official Standard NOM-089-ECOL-1994.⁵⁴ The CNA also reported that the sampling conducted at four sites (allegedly between October 1998 and April 1999) demonstrated that the wastewater discharges meet Mexican Official Standard NOM-001-ECOL-1996.⁵⁵ Neither of these statements is accompanied by sampling data or other documents supporting these assertions and showing the results.

As indicated above, the Party's Response addresses enforcement by the CNA of the provisions cited in the Submission, based on what the CNA itself stated in its report, but neither the CNA report nor the Party's Response provides information for understanding how the actions of the CNA may be interpreted as effective enforcement of the cited environmental law for the prevention and control of water pollution and the protection of aquatic ecosystems. Because the alleged failures to effectively enforce environmental law concerning water described in the Submission cannot be dismissed in light of the Party's Response, the Secretariat considers the development of a factual record to be warranted on these allegations.

2.1.3 Analysis of the alleged failures to effectively enforce the environmental law concerning fisheries

The Submitter asserts that Mexico has failed to effectively enforce the LP and its Regulations by introducing a shrimp species of commercial interest (*Penaeus* sp., variety SPR43) in the production of which viral diseases allegedly develop.⁵⁶ The Submitter asserts that more than 500 fishermen have been economically affected by the high mortality of fish species they formerly caught, as well as by the obstruction of certain watercourses along which they would travel in order to carry out their fishing activities.⁵⁷

Article 3, paragraph VIII and Article 24, paragraph XXIV of the LP, as well as Articles 44, 48 and 50 of the RLP, cited in the Submission, establish federal powers relating to the introduction of aquatic plant and animal species into federal bodies of water and relating to aquatic sanitary matters. The provisions contemplate as a violation of this law, the introduction or management of species that cause harm or alter or endanger the conservation of fisheries, and require a concession for aquaculture, as well as compliance with certain sanitary standards.⁵⁸

⁵⁴ Cited in page 12 of the Response, NOM-089-ECOL-1994-*Establishing the maximum allowable pollutant limits for wastewater discharges into collecting bodies of water from agriculture*. It is worth noting here that, in the Secretariat's opinion, it is not clear that the company is engaged in agriculture.

⁵⁵ *Establishing the maximum allowable limits for pollutants in wastewater discharges into national bodies of water and national property*.

⁵⁶ Page 4 of the Submission.

⁵⁷ The Submission states that the volume of fish decreased by 80% in the locality of San Blas and by 100% on the left bank of the Santiago River (page 5).

⁵⁸ Articles 3 and 24 of the Fisheries Law provide as follows:

The Party's Response states that the Submitter's assertions in this regard are false. The Response states that Granjas Aquanova has a concession issued by the Aquaculture Director General (*Dirección General de Acuacultura*) of the SEMARNAP, although a copy of the concession was not provided. The Party also states that the species in question does not produce viral diseases, and that this was allegedly shown in the sanitary certificates which, according to the Party, were presented prior to each seeding period, although copies of these sanitary certificates are not provided either.

Regarding the Submitter's assertions that fish stocks have substantially declined due to the company's operations, the Party's Response states that in a memorandum from the Aquaculture Director General of the SEMARNAP, of 26 April 1999, it was reported that fish production had not decreased but rather increased. This document is not annexed to the Party's Response, nor is other data provided that would dismiss the Submitter's assertions in this regard.⁵⁹

In summary, the Party's Response denies the Submitter's assertions, but does not provide a basis for dismissing those assertions, nor for enabling an understanding of how the Party enforced the cited environmental law provisions for the effective protection of fish resources in connection with species introduction, with respect to Granjas Aquanova. In light of this, the Secretariat considers that the development of a factual record is warranted in relation to the Submitter's assertions concerning fisheries, described in this section.

LP, Article 3. The enforcement of this Law is the responsibility of the Ministry of Fisheries, without prejudice to the powers invested in other bodies of the Federal Public Administration, that shall establish the necessary coordination with this Ministry, which is empowered to:

...VIII. Regulate the introduction of aquatic flora and fauna species into bodies of water under federal jurisdiction; define sanitary technical standards to guarantee the healthful development of aquatic species and verify the prevention and control measures in the area of aquacultural health, either directly or through duly accredited laboratories, in coordination with the competent bodies of the Federal Public Administration;...

LP, Article 24. The following constitute violations of the present Law:

...XXIV. Introducing or managing in waters under federal jurisdiction, species or biological material in any form that cause harm or alter or endanger the conservation of fisheries resources; and...

The Fisheries Law Regulations provides as follows:

RLP, Article 44. Aquaculture is the cultivation of aquatic species of fauna and flora using methods and techniques for their controlled development at all biological stages and in all aquatic environments and kinds of facilities.

Only aquaculture carried out in bodies of water under federal jurisdiction shall require a concession.

RLP, Article 48. Aquaculturists who do not require a concession for said activity shall register in the National Fisheries Register within the 30 working days following the commencement of their operations. Anyone carrying on aquaculture activities under the terms of this Article is required to comply with any sanitary standards issued by the Ministry, as well as any others that may be applicable.

RLP, Article 50. An authorization for the introduction of aquatic flora and fauna species into bodies of water under federal jurisdiction shall only be granted where it is proven that the species to be introduced are free of parasites and diseases that could harm local species or cause public health problems.

The introduction of species causing the extinction of native species is prohibited.

⁵⁹ Page 16 of the Response.

2.1.4 Analysis of the alleged failures to effectively enforce environmental law concerning environmental crimes

The Submitter asserts that Mexico has failed to effectively enforce the CPF concerning environmental crimes allegedly committed by Granjas Aquanova. The actions that according to the Submitter constitute crimes, in addition to involving administrative violations, include: unauthorized draining and filling of lagoons; unauthorized felling, clearing and burning of vegetation in the habitat of species with protected status; unauthorized land use change; unauthorized removal of forest cover; wastewater discharges without a permit, without discharge monitoring and in contravention of the applicable pollutant limits; unauthorized mangrove mortality; unauthorized diversion of natural watercourses; unauthorized accelerated disappearance of habitat of species with protected status, and unauthorized obstruction of fishing activities.⁶⁰

The Party's Response states that the environmental authority has submitted reports to the Office of the Attorney General (*Ministerio Público*) that were requested in the context of preliminary investigation DGMPE/C/I-3/039/98, allegedly initiated in response to a criminal complaint filed by the Submitter concerning Granjas Aquanova. The Response asserts, however, that under Article 16 of the Federal Code of Criminal Procedure, these reports cannot be disclosed, and no further

⁶⁰ On page 5 of the Submission, the following Articles of the Federal Criminal Code are cited:

CPP, Article 416. Anyone who, without such authorization as may be required, or in violation of the legal and regulatory provisions or Mexican Official Standards, engages in any of the following actions is liable for a penalty of three to six months in prison and a fine for the equivalent of one thousand to twenty thousand times the daily general minimum wage for the Federal District, applicable on the the day the crime is committed: I. Discharging, depositing or allowing to infiltrate, or authorizing or ordering the discharge, deposit or infiltration of wastewater, chemical or biochemical liquids, waste or contaminants into soils, marine waters, rivers, watersheds, reservoirs and other water bodies and watercourses under federal jurisdiction that cause or may cause harm to public health, natural resources, flora, fauna, water quality in watersheds or ecosystems... Where the waters in question are to be delivered as bulk water to population centers, the maximum penalty is three additional years in prison; or...

II. Destroying, draining or filling wetlands, mangrove swamps, lagoons, estuaries or marshes.

CPP, Article 418. Anyone who, without the authorization required under the Forestry Law, fells or destroys natural vegetation, cuts, pulls out, fells or chops trees, engages in forest resource use or land use changes, is liable for a penalty of three months to six years in prison and a fine fine for the equivalent of one hundred to twenty thousand times the daily general minimum wage for the Federal District, applicable on the the day the crime is committed.

The same Penalty shall apply to anyone who, with criminal intent, causes fires in woodlands, forests or natural vegetation that harm natural resources, wild flora or fauna or ecosystems.

CPP, Article 420. Anyone who engages in any of the following actions is liable for a penalty of six months to six years in prison and a fine fine for the equivalent of one thousand to twenty thousand times the daily general minimum wage for the Federal District, applicable on the the day the crime is committed:

...IV. Engages in any activity for commercial purposes with wild flora or fauna species considered to be endemic, threatened, endangered, rare or subject to special protection, as well as their products or sub-products...

V. Harms, with criminal intent, the wild flora or fauna species contemplated in the preceding paragraph.

information is provided on the status of the preliminary investigation or on the matter it specifically referred to.⁶¹ The Party also asserts that the applicable provisions are those set out in the LGEEPA prior to the reform of 14 December 1996, rather than those set out in the CPF and invoked by the Submitter, since according to the Party, the alleged crimes were committed prior to the aforementioned reform.⁶²

The Secretariat first considered whether under Article 14(3)(a) of the NAAEC it should proceed no further on these assertions, if such assertions are subject of a pending judicial or administrative proceeding, and determined that it is not barred from proceeding. Under Articles 14(3)(a) and 45(3), the assertions would not be reviewed further if such proceeding is “pending”, if it is a proceeding “pursued by the Party in a timely fashion and in accordance with its law”, and if the matters addressed by such proceeding are the same as those of the Submission.⁶³

The Party’s Response does not invoke these provisions of the NAAEC, but merely states that it knows of the existence of the preliminary investigation because it provided reports in that process, and indicates that the investigation was instituted as a result of a complaint by the Submitter.⁶⁴ Thus, it is not established that the proceeding is “pending”, and the proceeding does not appear to have been “pursued by the Party”. In addition, it is not clear that the matters addressed in the preliminary investigation are the same as those raised in the Submission. As mentioned before, the only information provided on the preliminary criminal investigation, is the indication that environmental authorities provided reports in that preliminary investigation. It may not be established from the information provided by the Party, that the preliminary investigation supposedly initiated in connection with the alleged crimes by Granjas Aquanova, actually concerns the same events referred to by the Submitter, and that it is based on the same legal provisions invoked in the Submission.

Having determined that it is not barred by Article 14(3) from continuing its review of these assertions, and there being no indication that there would be potential duplication or interference with pending litigation, the Secretariat considered these allegations in light of the Party’s Response, to determine whether they warrant preparation of a factual record.⁶⁵ The assertions in the Submission involve allegations that specific actions and ongoing activities by Granjas Aquanova are environmental crimes under Articles 416, 418 and 420 of the CPF, and that these provisions

⁶¹ Pages 17 and 23 of the Response.

⁶² Pages 16 and 17 of the Response.

⁶³ See, e.g., Secretariat’s Determination pursuant to Article 15(1) in relation to Submission SEM-96-003/The Friends of the Oldman River (2 April 1997); and Secretariat’s Notification to Council concerning the development of a factual record in relation to Submission SEM-97-001/B.C. Aboriginal Fisheries Commission, et al. (27 April 1998).

⁶⁴ Page 17 of the Response.

⁶⁵ See Secretariat’s Determination pursuant to Article 15(1) in relation to Submission SEM-96-003/The Friends of the Oldman River (2 April 1997).

have not been enforced. These provisions entered into force in December 1996. In at least two cases, the Submission states that the allegedly criminal activities were ongoing until October 1998 (when the Submission was filed). In particular, the Submitter asserts that the filling and draining of lagoons began in 1995 and was ongoing on the date of the Submission, and asserts that between the first quarter of 1996 and the date of the Submission, Granjas Aquanova was carrying out allegedly criminal wastewater discharges. In the remaining cases noted by the Submitter, the dates on which the events occurred are not specified, so it is not clear whether they occurred when environmental crimes were contemplated in the LGEEPA, as the Party claims, or under the current provisions of the CPF, as the Submitter asserts.⁶⁶ As discussed above, the response to these allegations indicates that a preliminary investigation was initiated, presumably in 1998, but it does not follow from the Party's Response that the matter investigated by the Party is the same as the matter raised by the Submitters, nor does it follow that enforcement action has been taken with respect to the Submitter's allegations, or that it wouldn't be required. On the contrary, the information provided by the Party seems to indicate that Granjas Aquanova may have undertaken presumably criminal activities, and that no enforcement action has been taken in that respect. The Response provides no basis for considering that the Submitter's allegations of a failure to effectively enforce environmental law in this respect, warrant dismissal. For these reasons, the Secretariat considers that a factual record is warranted concerning these allegations of the Submission.

2.2. Allegations concerning enforcement actions taken by Mexico

Sub-section 2.1 above reviews in light of the Party's Response, the assertions concerning failures to take effective enforcement action of environmental law in relation to the activities of Granjas Aquanova. This sub-section examines, also in light of the Party's Response, the Submitter's allegations concerning enforcement actions taken by the Party in connection with the alleged violations of Granjas Aquanova, which the Submitter considers to have been insufficient, and in one case, to be contrary to law.

The Submitter asserts that in the administrative proceedings relating to the violations of Granjas Aquanova, environmental law was not enforced effectively. The Submission states that "... in response to the irregularities it detected, the PROFEPA issued two administrative decisions on 6 January 1996 and 5 December 1997, respectively, whereby it did no more than impose a minuscule fine of \$29,000 [Mexican Pesos] on Aquanova [...] which is absurd and not proportional to the severity of the damage caused by the company. Moreover, the environmental authority refrained from ordering corrective or urgent measures that would prevent the continuation of the activities that are harming the ecosystems".⁶⁷ Finally, the Submitter states that

⁶⁶ Pages 5, 7 and 8 of the Submission.

⁶⁷ Page 7 of the Submission. As reference, Article 171 of the LGEEPA provided that fines could range from a minimum of 20 times the general daily minimum wage in the Federal District and a maximum of 20,000 times that

the PROFEPA made another inspection visit on 16–17 December 1997, during which it identified various violations of environmental law, but the Submitter states that said proceeding against Granjas Aquanova was terminated by the signing of an administrative agreement with the company, which the Submitter asserts is contrary to law.

In its Response, Mexico acknowledges the deterioration of the ecosystems in the area where Granjas Aquanova is operating. The Party states that it has detected that the company has committed violations of the environmental impact authorizations issued by the INE and that said violations have caused deterioration of the ecosystem. However, the Party's Response also states that while it recognizes the problem, the environmental authority has at all times abided by the laws and regulations governing the matter in carrying out its actions, and that it has addressed the problem with the legal means available.⁶⁸ The Party's Response further asserts that the agreement whereby the administrative proceeding against Granjas Aquanova for various violations was terminated is legitimate.

It is clear to the Secretariat that the Party's actions are contemplated by law. However, it is also clear that the fact that the authority takes actions that are contemplated by law does not in itself imply that the authority is enforcing environmental law effectively. That is, the fact that the actions taken by the authority are legitimate and within its jurisdiction is a pre-requisite of the effective enforcement of environmental law, but the latter is not its necessary consequence. In this regard, the Party's Response speaks to the powers of the various authorities that have taken action concerning this matter, but does not provide information that would support an understanding of how the actions taken amount to effective enforcement of its environmental law on the alleged violations of Granjas Aquanova referred to in the Submission. For example, the Party in its Response does not provide information to understand why given the wide array of alleged violations, the fine of \$29,000 Mexican Pesos, apparently the only one imposed on the company, amounts to effective enforcement of environmental law.

Furthermore, it is clear that the review of a Party's actions by the Secretariat under Articles 14 and 15 of the Agreement concerns the effective enforcement of its environmental law to which the Parties have committed in the NAAEC,⁶⁹ and not the legality of the government's actions as such.

amount, that is, between approximately \$600.00 Mexican Pesos and \$600,000.00 Mexican Pesos, in December 1997 (apparently the time the fine was imposed).

⁶⁸ Page 2 of the Response.

⁶⁹ Article 5 of the NAAEC, contained in Part Two, titled "Obligations", provides as follows:

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;

However, the Secretariat verifies, as appropriate, that the Party's assertions are consistent with its own laws, because, as stated above, the legality of the government's actions is a pre-requisite of the effective enforcement of environmental law.

Both issues are raised in this Submission: 1) the Submitter contends that one of the actions taken by the authority in alleged enforcement of environmental law is contrary to law, and 2) the Submitter asserts that the authority failed to effectively enforce environmental law.

Concerning the first issue, the Submitter contends that the administrative agreement that terminated the proceeding relating to violation by Granjas Aquanova, is contrary to law because the proceeding should have been concluded by a decision, not an agreement. The Submitter argues that "...the authority cannot negotiate compliance and enforcement of laws designed to preserve public order and protect the public interest, such as the General Law on Ecological Balance and Environmental Protection and the Forestry Law."⁷⁰ It states that by virtue of the agreement with Granjas Aquanova, the authority renounces its power to sanction the alleged violations of Granjas Aquanova. The Response states that the authorities that entered into the administrative agreement are empowered to do so. The Party further contends that it is not mandatory to terminate an environmental proceeding with a decision, since Article 7, paragraph VI of the Federal Administrative Procedure Law contemplates an agreement between the parties as a means of terminating an administrative proceeding.⁷¹ Mexico further alleges that the agreement is not

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- (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.

⁷⁰ Page 9 of the Submission.

⁷¹ The Secretariat observes that it is not entirely clear that said provision of the Federal Administrative Procedure Law (LFPA) may be applied in place of the LGEEPA provisions that establish the environmental inspection and enforcement proceeding. The LGEEPA details the environmental proceeding and contemplates

contrary to law because its purpose is not to negotiate compliance with the law, as the Submitter asserts, but to further the restoration of the environment, and that it has not renounced its power to sanction.⁷² In the opinion of the Secretariat and based on a general scrutiny which the Secretariat considers to be sufficient for the purposes of the Article 14 process, the arguments raised by the Party's Response concerning the legal validity of the agreement which terminated the proceeding appear to be consistent with the applicable legal framework, despite the issues discussed in the relevant footnotes thereof. Moreover, it is worth recalling that the use of compliance agreements is also consistent with the aforementioned Article 5 of the NAAEC, which refers to various government enforcement actions which the Parties may use to fulfil their obligation to effectively enforce their environmental laws and regulations. In light of the foregoing and for the purposes of the analysis of this Submission in accordance with Articles 14 and 15 of the NAAEC, the Secretariat adopts the assumption that, as the Party asserts, the administrative agreement in question is legally valid.⁷³

Regarding the second issue, the Secretariat considers that the Response does not provide any certainty that the Party has effectively enforced its environmental law by means of the actions described therein, which culminated in the signing of the agreement in question, notwithstanding its alleged validity. As discussed, the statements in the Response are not accompanied by factual references or explanations that lead to an understanding of how the inspections and enforcement procedures, and the actions culminating in the agreement result in the effective enforcement of the provisions cited by the Submitter for the protection of the aquatic resources and the species subject to protection in the area as well as the prevention of water pollution. In light of the Party's Response, the Secretariat considers that the development of a factual record is warranted in relation to the effectiveness of the enforcement actions taken with respect to the alleged violations of Granjas Aquanova, that presumably caused the deterioration of natural resources and the environment. The Party's Response does not provide information that supports dismissing these assertions of the Submission.

2.3. Summary of allegations warranting preparation of a factual record

its termination by means of a written decision of the authority indicating the corrective measures and the relevant sanctions (168 and 169). The LFPA, for its part, establishes in Article 2 that its provisions are of a suppletory nature, in the case of proceedings governed by a special law.

⁷² The Secretariat further observes that it is not entirely clear that the agreement does not negotiate compliance but merely restoration of the environment, as the Response contends (page 28), since the agreement's express purpose, according to its Clause One, is to terminate the administrative proceeding relating to alleged irregularities by the company.

⁷³ A matter not raised in the Response, but which is important in this case, is that administrative acts, like all legal acts, are presumed valid unless and until annulled by a competent authority (Article 8 of the Federal Administrative Procedure Law). In consequence, they will be valid and enforceable from the moment that the legally served notice of such act takes effect (Article 9 of the LFPA). Neither the Submission nor the Response indicates that any process in that regard has been initiated to annul those acts.

In summary, the Secretariat, in light of the Party's Response, considers the development of a factual record to be warranted in relation to the effective enforcement of the provisions of the LGEEPA, the LF, NOM-062, the LAN and its Regulations, the LP and its Regulations, and the CPF, reviewed in sections 2.1 and 2.2 above.

With regard to the environmental impact requirements contained in the LGEEPA, the LF, NOM-062 and the three environmental impact authorizations governing Granjas Aquanova, the failures by Mexico to effectively enforce alleged by the Submitter cannot be dismissed in light of the Party's Response. The information provided in the Response does not lead to an understanding of how the inspection visits, working meetings and collateral actions taken by Mexico, represent the effective enforcement of environmental impact requirements on Granjas Aquanova. An understanding does not follow from the Party's Response concerning how the actions taken served to enforce the limits within which, according to the Response itself, the activities of Granjas Aquanova "could have been viable from an environmental standpoint". Preparation of a factual record is warranted to understand this.

The alleged failures to effectively enforce environmental law concerning water, also cannot be dismissed in light of the Party's Response. The Party's Response addresses enforcement by the CNA based on a report by the CNA itself, but neither the CNA report nor the Party's Response serve to verify compliance by Granjas Aquanova of its obligations concerning wastewater discharge monitoring and treatment, and water use. The Party's Response does not provide an understanding of how CNA's actions amount to effective enforcement of the cited environmental law for the prevention and control of water pollution and the protection of aquatic ecosystems. The Secretariat therefore considers the development of a factual record to be warranted on those matters.

Likewise, regarding fisheries, the Secretariat considers the development of a factual record to be warranted in relation to the assertions contained in the Submission. The Party's Response denies the Submitter's assertions, but it does not provide data that may show compliance by Granjas Aquanova, to dismiss the Submitter's assertions, and that may support an understanding of how the Party enforced the cited environmental law for the effective protection of fisheries in connection with the introduction of a new species.

Concerning the enforcement actions taken by Mexico, the Secretariat considers the development of a factual record to be warranted. The statements in the Response are not supported by information that would enable an understanding of how, in addition to being legitimate, the inspections and other actions that culminated in the agreement with the company, amount to effective enforcement of the provisions cited by the Submitter for the protection of aquatic resources, and the species subject to protection in the area, as well as the prevention of water pollution.

Finally, the Submission also warrants the development of a factual record in order to gather additional information on the effective enforcement of the cited provisions of the CPF in relation to the alleged commission of environmental crimes by Granjas Aquanova. While presumably there has been a preliminary investigation by the Office of the Attorney General, based on a complaint by the Submitters, the information in the Party's Response does not support dismissing the Submitter's assertion of failures to effectively enforce environmental crimes on the alleged violations by Granjas Aquanova, which the Secretariat considers warrant including in a factual record prepared with respect to this Submission.

VII – NOTIFICATION TO COUNCIL PURSUANT TO ARTICLE 15(1) OF THE NAAEC

In accordance with Article 15(1) of the NAAEC, the Secretariat hereby notifies the Council that it considers that some of the assertions in the Submission filed by Grupo Ecológico Manglar, A.C. do not warrant further review in this process or in the development of a factual record, while others do warrant the development of a factual record.

For the reasons stated in section VI, sub-section 1 of this document, the Secretariat considers that the assertion that Mexico is failing to effectively enforce the *Convention between the United Mexican States and the United States of America for the Protection of Migratory Birds and Game Animals*; the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat* and the *Protocol* which amends it, and the *Trilateral Memorandum of Understanding for the Conservation of Migratory Birds and their Habitats*, does not warrant further review in this process or in the development of a factual record on this Submission, because those international instruments are not directly applicable to the events referred to in the Submission, although most of them are part of Mexican environmental law, and they underscore the importance given within the Mexican legal framework to the protection of the natural resources to which the Submission refers.

On the other hand, the Secretariat considers that the Submission does warrant the development of a factual record in relation to the Submitter's assertions that in regard to Granjas Aquanova, S.A. de C.V., Mexico is failing to enforce provisions of the General Law on Ecological Balance and Environmental Protection, the Forestry Law, Mexican Official Standards NOM-062-ECOL-1994 and NOM-059-ECOL-1994, the Law of National Waters and its Regulations, the Fisheries Law and its Regulations, and the Federal Criminal Code. In light of the Party's Response, the Secretariat considers the development of a factual record to be warranted in order to gather information about the enforcement actions taken by the Party and about the effectiveness of such actions, concerning environmental impact, protection of aquatic resources, species subject to protection and fisheries, and prevention of water pollution, with respect to Granjas Aquanova. The Submission filed by Grupo Ecológico "Manglar", A.C. also warrants the development of a

factual record to gather additional information about the effective enforcement of the cited provisions of the Federal Criminal Code, in relation to the alleged commission of environmental crimes by Granjas Aquanova. The reasons for this determination by the Secretariat are set forth in section VI, sub-section 2 of this document.

Respectfully submitted on this 4th day of August 2000.

(original signed)
Janine Ferretti
Executive Director