

Secretariat of the Commission for Environmental Cooperation

Determination of the Secretariat in accordance with Articles 24.27(2) and (3) of the United States-Mexico-Canada Agreement

Submitters: Center for Biological Diversity
Animal Welfare Institute
Natural Resources Defense Council
Environmental Investigation Agency

Party: United Mexican States

Date of the submission: 11 August 2021

Date of the determination: 8 September 2021

Submission no.: SEM-21-002 (*Vaquita porpoise*)

I. INTRODUCTION

1. On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA or “the Agreement”) and the Environmental Cooperation Agreement (ECA) entered into force. After this date, the Submissions on Enforcement Matters (“SEM”) process originally established by Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) is governed by USMCA Articles 24.27 and 24.28. The Secretariat of the Commission for Environmental Cooperation (“CEC”) remains responsible for implementing the SEM process, as stipulated in the ECA.¹
2. Articles 24.27 and 24.28 of the USMCA provide a process for any national of a Party or entity organized under the laws of a Party to file a submission asserting that a Party to the USMCA is failing to effectively enforce its environmental laws. The CEC Secretariat (“the Secretariat”) initially reviews submissions based on the requirements set out in USMCA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements, it then determines, in accordance with the criteria of Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party’s response, the Secretariat then determines whether the matter warrants the preparation of a factual record and, if so, it so informs the CEC Council and the Environment Committee² providing

¹ The Commission for Environmental Cooperation was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), an instrument signed by Canada, Mexico, and the United States (the “Parties”). Under Article 2(3) of the Environmental Cooperation Agreement between the governments of the United Mexican States, the United States of America and Canada (ECA), the Commission for Environmental Cooperation (CEC) “will continue to operate under the modalities in place as of entry into force of this Agreement [the ECA].” The constituent bodies of the CEC are its Council, the Secretariat and the Joint Public Advisory Committee (JPAC).

² The Environment Committee was established under Article 24.26(2) of the United States-Mexico-Canada Agreement (USMCA or the “Agreement”) to oversee the implementation of Chapter 24.

its reasons in accordance with USMCA Article 24.28(1); otherwise, it terminates review of the submission.³

3. On 11 August 2021, the Center for Biological Diversity, the Animal Welfare Institute, the Natural Resources Defense Council, and the Environmental Investigation Agency—all of which are United States-based organizations—(“the Submitters”), filed a submission with the Secretariat pursuant to USMCA Article 24.27(1).⁴ The Submitters assert that Mexico is failing to effectively enforce the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS), its regulations, and various other legal instruments intended to protect the vaquita, which has practically led to this species’ extinction.
4. According to the Submitters, Mexico is failing to effectively enforce the following laws and regulatory instruments:
 - **LGVS Article 55**⁵
 - Article 56 of the LGVS Regulations (“**LGVS Regulations**”)⁶
 - *Order which temporarily suspends commercial fishing by means of gillnets and longlines operated on small vessels, in the Northern Gulf of California* (the “**2015 Gillnets Order**”)⁷
 - *Order which prohibits specific fishing gear, systems, methods and techniques, as well as restricts permissible hours, for small vessel fishing activities in marine waters under the Mexican federal government’s jurisdiction in the Northern Gulf of California, and which establishes landing sites and mandates the use of monitoring systems by such vessels* (the “**2017 Gillnets Order**”)⁸

³ For detailed information on the various stages of the submissions on enforcement matters process, as well as on the public register of submissions and the Secretariat’s determinations and factual records, please consult the CEC website <<http://www.cec.org/submissions-on-enforcement/>>.

⁴ SEM-21-002 (*Vaquita porpoise*), USMCA Article 24.27(1) Submission (11 August 2021), [Submission] <http://www.cec.org/wp-content/uploads/wpallimport/files/21-2-sub_en.pdf>. Note that references to the submission are to the original version in English.

⁵ *Ley General de Vida Silvestre, Diario Oficial de la Federación* (DOF), 3 July 2000, (latest amendment of 20 May 2021), [LGVS] <http://www.diputados.gob.mx/LeyesBiblio/pdf/146_200521.pdf> (viewed 15 August 2021).

⁶ Regulations of the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS), DOF, 30 November 2006, (last updated 9 May 2014), [LGVS Regulations]; online at: <www.diputados.gob.mx/LeyesBiblio/regley/Reg_LGVS.pdf> (viewed 2 September 2021).

⁷ *Acuerdo por el que se suspende temporalmente la pesca comercial mediante el uso de redes de enmalle, cimbras y/o palangres operadas con embarcaciones menores, en el Norte del Golfo de California*, DOF, 10 April 2015 [2015 Gillnets Order]; online at: <www.dof.gob.mx/nota_detalle.php?codigo=5388486&fecha=10/04/2015> (viewed 6 September 2021).

⁸ *Acuerdo por el que se prohíben artes, sistemas, métodos, técnicas y horarios para la realización de actividades de pesca con embarcaciones menores en aguas marinas de jurisdicción federal de los Estados Unidos Mexicanos en el Norte del Golfo de California, y se establecen sitios de desembarque, así como el uso de sistemas de monitoreo para dichas embarcaciones* DOF, 30 June 2017, [2017 Gillnets Order]; online at: <www.dof.gob.mx/nota_detalle.php?codigo=5488674&fecha=30/06/2017> (viewed 6 September 2021).

- *Order which establishes a fishing ban on the Totoaba (Cynoscion macdonaldi), in the waters of the Gulf of California, from the mouth of the Colorado River to Río Fuerte, Sinaloa, on the east coast, and from the Colorado River to Bahía Concepción, Baja California, on the west coast (the “1975 Totoaba Fishing Ban”)*⁹
 - *Order which regulates fishing gear, systems, methods and techniques, as well as restricts permissible hours, for small and large vessels in Mexican marine areas in the Northern Gulf of California, and which establishes landing sites and mandates the use of monitoring systems for such vessels (the “2020 Gillnets Order”)*¹⁰
5. Having examined the submission, the Secretariat has determined that it is admissible, in accordance with the requirements of subparagraph (2) of USMCA Article 24.27 and, under subparagraph (3) of the same Article, merits a response from the Government of Mexico. The Secretariat’s reasoning is given below in section II: “Analysis.”
6. Furthermore, the Secretariat takes the view that although the provisions governing the SEM process are set forth in Chapter 24 of the USMCA, certain related procedures are also established under the ECA, namely: the Secretariat’s role in the implementation of the submissions on enforcement matters process,¹¹ the Council’s role in exchanging information with the Environment Committee,¹² the preparation and publication of factual records,¹³ and the Council’s cooperation activities.¹⁴ Thus, in relation to the implementation of the SEM process, the Secretariat is mindful of ECA Article 2(3):

The Commission will continue to operate under the modalities in place as of entry into force of this Agreement, including its rules, policies, guidelines, procedures, and resolutions, to the extent these modalities are consistent with this Agreement. The Council shall adjust, as required, these modalities to reflect and implement the provisions of this Agreement. If there is an inconsistency between these modalities and the provisions of this Agreement, the provisions of this Agreement shall prevail.

7. As the Secretariat established in its first USMCA Chapter 24 determination, the Secretariat is guided by the procedures established in the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”)—under the proviso that this is consistent with the provisions of the USMCA—as well as by the analysis of the criteria established in prior determinations

⁹ *Acuerdo que establece veda para la especie Totoaba, Cynoscion macdonaldi, en aguas del Golfo de California, desde la desembocadura del Río Colorado hasta el Río Fuerte, Sinaloa en la costa oriental, y del Río Colorado a Bahía Concepción, Baja California, en la costa occidental* DOF, 1 August 1975 [1975 Totoaba Fishing Ban Order]; online at: <www.dof.gob.mx/nota_detalle.php?codigo=4786520&fecha=01/08/1975> (viewed 6 September 2021).

¹⁰ *Acuerdo por el que se regulan artes, sistemas, métodos, técnicas y horarios para la realización de actividades de pesca con embarcaciones menores y mayores en Zonas Marinas Mexicanas en el Norte del Golfo de California y se establecen sitios de desembarque, así como el uso de sistemas de monitoreo para tales embarcaciones* DOF, 24 September 2020 [2020 Gillnets Order]; online at <www.dof.gob.mx/nota_detalle.php?codigo=5601153&fecha=24/09/2020> (viewed 6 September 2021).

¹¹ Environmental Cooperation Agreement (ECA), Article 5(5).

¹² *Id.* at Article 4(4).

¹³ *Id.* at Article 4(1), subparagraph (l).

¹⁴ *Id.* at Article 4(1), subparagraph (m).

and notifications issued in accordance with NAAEC Articles 14 and 15.¹⁵ Proceeding in this manner ensures uniform implementation of the SEM process.¹⁶

II. ANALYSIS

8. Under Article 24.27(2), the Secretariat may consider submissions that assert that a Party to the USMCA is failing to effectively enforce its environmental laws, provided such submissions satisfy the admissibility requirements. The Secretariat reiterates, in accordance with prior NAAEC Articles 14 and 15 determinations, that the requirements of USMCA Articles 24.27(1), (2), and (3) are not intended to be an insurmountable procedural screening device¹⁷ and must therefore be given a broad interpretation consistent with the objectives of Chapter 24 of the Agreement.¹⁸ The Secretariat reviewed this submission with that perspective in mind.

A. Article 24.27(1)

9. Under USMCA Article 24.27(1), any person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws.
10. The Submitters' assertions focus on the following issues:

a. Insufficient action to ensure the implementation of the 2020 Gillnets Order.

The Submitters assert that the Enforcement Plan for the Zero-Tolerance Area and the Vaquita Protection Refuge (*Plan de Aplicación en la Zona de Tolerancia Cero y el Área de Refugio para la Protección de la Vaquita Marina*—the “Enforcement Plan”)¹⁹ is inadequate.²⁰ They further assert that the enforcement plan should specify the required monitoring and inspection actions, as well as the activities to ensure the recovery, disposal, and recycling of illegal or lost nets. The Submitters argue that Mexico has not issued a plan that satisfies these requirements.²¹ They argue that various agencies, including the International Committee for the Recovery of the Vaquita (CIRVA), have acknowledged that greater efforts are required to ensure an

¹⁵ SEM-20-001 (*Loggerhead turtle*), USMCA Articles 24.27(2) and (3) Determination (8 February 2021) §6; online at: <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/loggerhead-turtle>>.

¹⁶ SEM-97-001 (*BC Hydro*), NAAEC Article 15(1) Notification (27 April 1998); online at <www.cec.org/wp-content/uploads/wpallimport/files/97-1-adv-s.pdf> (“At a minimum, references to previous determinations will assist in ensuring that the Secretariat consistently applies the provisions of the NAAEC”).

¹⁷ SEM-97-005 (*Biodiversity*), NAAEC Article 14(1) Determination (26 May 1998) and SEM-98-003 (*Great Lakes*), NAAEC Articles 14(1) and (2) Determination (8 September 1999).

¹⁸ *Cfr.* USMCA, Article 24.2.

¹⁹ *Plan de Aplicación en la Zona de Cero Tolerancia y el Área de Refugio para la Protección de la Vaquita Marina*, DOF, 20 January 2021; online at: <www.dof.gob.mx/nota_detalle.php?codigo=5610105&fecha=20/01/2021>.

²⁰ Submission at 6.

²¹ *Id.*

area free of nets.²² Likewise, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has urged Mexico to intensify and expand its net removal efforts.²³

According to the Submitters, the administrative order that establishes implementation triggers for vaquita protection measures is manifestly in violation of the 2020 Gillnets Order.²⁴ They argue that not only was this administrative order issued eight months late, but that it also violates Article 13 of the 2020 Gillnets Order, which states that monitoring in the zero-tolerance zone “will be conducted in a manner that ensures real time response capabilities to avert any cases of violation” of the Protection Order. The Submitters argue that the government plan, which includes implementation triggers, actually enables violations in the zero-tolerance zone where fishing activities are “permanently and totally” banned.²⁵

The Submitters observe that Article 10 of the 2020 Gillnets Order designates Conapesca as responsible for collecting surrendered fishing gear. However, according to the official reply to their information request regarding this matter, “no documents were found containing the information requested.”²⁶

b. Failure to enforce Fishing and Trade Bans

The Submitters argue that Mexico has shown a pattern of failure in enforcing fishing bans and controlling the illegal trade in totoaba over the last 30 years.²⁷ They assert that a December 2017 CIRVA report concluded that “high levels of illegal fishing continue” and enforcement actions have been completely ineffective in reducing illegal totoaba fishing in the Upper Gulf of California.²⁸

The Submitters assert that reports in the media have documented totoaba fishing with impunity.²⁹ In October 2019, investigators in the area reported the presence of 87 vessels in the zero-tolerance zone in a single day. Likewise, in December 2019, the Sea Shepherd Conservation Society (SSCS) reported that in a single day nearly

²² International Committee for the Recovery of the Vaquita (CIRVA), *Report of the Eleventh Meeting of CIRVA, La Jolla, CA*, 19–21 February 2019 (“CIRVA-11 (2019)”); online at: <<https://www.iucn-csg.org/wp-content/uploads/2019/03/CIRVA-11-Final-Report-6-March.pdf>> (viewed 19 August 2021).

²³ Submission at 6.

²⁴ *Acuerdo por el que se establecen los indicadores, factores detonantes y acciones predeterminadas, de conformidad con el artículo décimo séptimo del Acuerdo por el que se regulan artes, sistemas, métodos, técnicas y horarios para la realización de actividades de pesca con embarcaciones menores y mayores en zonas marinas mexicanas en el norte del Golfo de California y se establecen sitios de desembarque, así como el uso de sistemas de monitoreo para tales embarcaciones*, publicado el 24 de septiembre de 2020. DOF, 9 July 2021; online at: <www.dof.gob.mx/nota_detalle.php?codigo=5623442&fecha=09/07/2021> (viewed 7 September 2021).

²⁵ Submission at 7.

²⁶ Transparency Unit, Conapesca, Response to information request no. 0189700216820 (3 February 2021).

²⁷ Submission at 8.

²⁸ International Committee for the Recovery of the Vaquita, *Report of the Tenth Meeting of CIRVA, La Jolla, CA*, 11–12 December 2017; online at: <https://iucn-csg.org/wp-content/uploads/2018/01/CIRVA-10_final-report-2018.pdf> (viewed 19 August 2021).

²⁹ Submission at 8.

80 small vessels were observed using gillnets. In January and February 2020, the International Union for Conservation of Nature (IUCN) reported the recovery of 50 totoaba nets in the zero-tolerance zone.³⁰

The Submitters argue that Mexico's failure to effectively enforce the 2020 Gillnets Order commenced "immediately" after it came into effect. In December 2020, the IUCN used maps to document "the existence of high levels of illegal fishing, which continues to take place day and night."³¹ The maps show hundreds of longlines inside the zero-tolerance zone. A total of 1,185 longlines were counted in November 2020 alone.³²

In addition, they observe that the failure to enforce environmental law has led to violence inside the zero-tolerance zone. They document a case in which, sadly, a fisherman died following an attack against the SSCS's ship.³³

11. USMCA Article 1.5³⁴ defines the term "person of a Party" as "a national of a Party or an enterprise of a Party." In turn, an *enterprise* is defined as "an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization," while an *enterprise of a Party* signifies "an enterprise constituted or organized under the law of a Party."
12. Submission SEM-21-002 (*Vaquita porpoise*) includes the names and addresses of the Submitters, the identification data of their representatives and sufficient information to establish that they are "persons of a Party" in the terms of Article 24.27(1).³⁵ The Submitters are non-profit organizations constituted in accordance with the laws of the United States. The Center for Biological Diversity is a non-profit organization, headquartered in Tucson, Arizona and was incorporated in the state of California in 2010. The Animal Welfare Institute is a non-profit organization headquartered in Washington, DC. The Natural Resources Defense Council was incorporated under the laws of the state of New York and is headquartered in New York City. The Environmental Investigation Agency was organized under the laws of Washington, DC, which is also the location of its head office.³⁶

B. Environmental laws in question

³⁰ *Id.* at 9.

³¹ International Union of Conservation of Nature, Cetaceans Specialist Group, *Vaquita update October through December 2020*, 26 January 2021; online at: <<https://iucn-csg.org/vaquita-update-october-through-december-2020>> (viewed 19 August 2021).

³² Submission at 9.

³³ *Id.*

³⁴ The Secretariat is cognizant of the adoption of The Protocol of Amendment to the Agreement between the United States of America, the United Mexican States and Canada (the "Protocol"), by means of which provisions were added to Chapters 1 and 24. Consequently, some articles of this instrument were amended. In the case of the Spanish version, one must therefore consult the USMCA and said Protocol.

³⁵ Submission: Annex A. Organizational Statements.

³⁶ *Id.*

13. The Secretariat outlines its reasoning on the admissibility of the legal provisions cited by the Submitters. USMCA Article 24.1 establishes that:

[E]nvironmental law means a statute or regulation of a Party, or provision thereof, including any that implements the Party’s obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:

- a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- b) the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto, or
- c) the protection or conservation of wild flora or fauna,¹ including endangered species, their habitat, and specially protected natural areas,²

but does not include a statute or regulation, or provision thereof, directly related to worker safety or health, nor any statute or regulation, or provision thereof, the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources.³⁷

¹ The Parties recognize that “protection or conservation” may include the protection or conservation of biological diversity.

² For the purposes of this Chapter, the term “specially protected natural areas” means those areas as defined by the Party in its law.

As for **law or regulation**, these terms mean:

- b) for Mexico, an Act of Congress or regulation promulgated pursuant to an Act of Congress that is enforceable by action of the federal level of government;³⁸

14. The Submitters cite **LGVS Article 55**³⁹ which establishes that:

The importing, exporting and re-exporting of specimens, parts and derivatives of wildlife species included in the Convention on International Trade in Endangered Species of Wild Fauna and Flora shall be carried out in the terms of this Convention, the provisions of this Act and of the provisions deriving therefrom, under which it is prohibited to import, export, re-export and trade ivory, when such activities are not in compliance with the international treaties to which Mexico is a party or with the applicable legislation.

15. The LGVS is a law passed by Mexico’s Congress which is enforceable through the actions of the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat).⁴⁰ The Submitters assert that Mexico is failing to enforce LGVS Article 55 because it has not implemented actions to effectively enforce CITES in relation to the illegal trade in totoaba (*Totoaba macdonaldi*), a listed species (see CITES, Appendix I). The Secretariat determines that **LGVS Article 55** qualifies as an environmental

³⁷ USMCA, Article 24.1.

³⁸ *Id.*

³⁹ Submission at 2.

⁴⁰ LGVS, Article 9, second paragraph.

law in the terms of the USMCA as its primary purpose is the protection of wild flora and fauna.

16. The Submitters refer to Article 56 of the LGVS Regulations⁴¹ which establish:

The import, export, and re-export of biological material of species included in the appendices to CITES will be subject to the provisions of said convention.

17. The LGVS Regulations are regulations promulgated pursuant to a law of Congress applicable through actions of the Ministry of the Environment and Natural Resources (Semarnat).⁴² The Submitters assert that Mexico fails to effectively enforce Article 56 of the LGVS Regulations since it has not implemented actions for “the import, export and re-export of biological material of species included in the appendices to CITES will be subject to the provisions of said convention”.⁴³ The Secretariat determines that **Article 56 of the LGVS Regulations** qualifies as environmental legislation in the terms of the T-MEC because its main purpose is the protection of wild flora and fauna.

18. The Secretariat notes that the Submitters erroneously cite Article 56 of the LGVS, for which it requested clarification on environmental legislation by email dated 2 September 2021. The Submitters corroborated that they are indeed referring to Article 56 of the LGVS Regulations.⁴⁴

19. The **1975 Totoaba Fishing Ban Order** contains provisions of a regulatory character, was promulgated in accordance with various provisions of laws of Mexico’s Congress,⁴⁵ and is actionable by the National Fisheries Institute (*Instituto Nacional de Pesca*), now known as the National Aquaculture and Fisheries Commission (*Comisión Nacional de Acuacultura y Pesca—Conapesca*).

20. This order acknowledges that totoaba production statistics “show a notable trend towards lower catches” in the Santa Clara Peñasco and San Felipe areas, as well as in the vicinity of the mouth of the Colorado River, Islas Encantadas, Bahía de Santa Inés and Bahía San Rafael.⁴⁶ This order establishes a total ban on totoaba fishing in the Gulf of California to protect the species.⁴⁷ The Secretariat finds that the 1975 Totoaba Fishing Ban Order qualifies as an environmental law as its aim is environmental protection in the terms of USMCA Article 24.1.

21. The **2015 Gillnets Order** contains provisions of a regulatory character. It was issued in accordance with various provisions of laws enacted by the Mexican Congress⁴⁸ and is

⁴¹ Submission at 5-6.

⁴² LGVS, Article 9, section II, second paragraph.

⁴³ Submission at 5-6.

⁴⁴ Email from Submitters’ representative (2 September 2021).

⁴⁵ The 1975 Totoaba Fishing Ban Order was issued in accordance with the provisions of the State Ministries and Departments Act (*Ley de Secretarías y Departamentos de Estados*) and the Federal Fisheries Development Act (*Ley Federal para el Fomento de Pesca*).

⁴⁶ 1975 Totoaba Fishing Ban Order, Second Legal Ground.

⁴⁷ *Id.* at Article 1.

⁴⁸ The 2015 Gillnets Order was issued in accordance with the following laws enacted by the Mexican Congress: the Organic Law of Federal Public Administration (*Ley Orgánica de la Administración Pública*

enforceable by Semarnat—acting through the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa). Other responsible authorities include Conapesca and the Ministry of Agriculture, Livestock Farming, Rural Development, Fisheries and Food (*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación*—Sagarpa). Said ministries act in coordination with the Ministry of the Navy (*Secretaría de Marina*—Semar) to monitor Mexican marine areas.⁴⁹

22. This Order recognizes the following facts concerning the vaquita porpoise (*Phocoena sinus*): it is an endemic species in the Upper Gulf of California; it has a restricted distribution range; it is the most endangered species among the 128 cetacean species in the world; and it is listed under NOM-059-SEMARNAT-2010 (NOM-059).⁵⁰ This Order temporarily suspends the use of gillnets and longlines in small vessel commercial fishing to protect the vaquita. The area where this suspension is in force is in the Upper Gulf of California Biosphere Reserve Natural Protected Area and the Colorado River Delta.
23. The Secretariat finds that the 2015 Gillnets Order qualifies as an environmental law as its aim is environmental protection in the terms of USMCA Article 24.1.
24. The **2017 Gillnets Order** contains provisions of a regulatory character. It was issued in accordance with various provisions of laws enacted by the Mexican Congress⁵¹ and is enforceable through the actions of Sagarpa, Conapesca, and Semarnat—acting through Profepa. Said ministries shall act in coordination with Semar in relation to monitoring Mexican marine areas.⁵²
25. The 2017 Gillnets Order essentially reprises the considerations outlined in the preamble of the 2015 Gillnets Order and establishes a permanent ban on the use of gillnets, including passive operation, for fishing activities in the marine area of the Northern Gulf of California to protect the vaquita.⁵³ The Order prohibits nighttime fishing activities with small vessels and sport fishing in the restricted area established by it.⁵⁴ Furthermore, it mandates that holders of fishing concessions or permits must be equipped with a monitoring system in accordance with the provisions of LGPyAS Article 125.⁵⁵

Federal—LOAPF), the Federal Administrative Procedures Act (*Ley Federal de Procedimiento Administrativo*—LFPA), the General Sustainable Fisheries and Aquaculture Act (*Ley General de Pesca y Acuacultura Sustentables*—LGPYAS), the General Ecological Balance and Environmental Protection Act (*Ley General de Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) and the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS).

⁴⁹ 2015 Gillnets Order, Third Article.

⁵⁰ Official Mexican Standard NOM-059-Semarnat-2010 *Environmental Protection - Native wild flora and fauna species of Mexico - Risk categories and the specifications for the inclusion, exclusion or change in category of species - List of threatened species*, DOF, 30 December 2010.

⁵¹ The 2017 Gillnets Order was issued in accordance with the LOAPF, LPFA, LGPyAS, LGEEPA and LGVS.

⁵² 2017 Gillnets Order, Ninth Article.

⁵³ *Id.* at Second Article.

⁵⁴ *Id.*

⁵⁵ *General Sustainable Fisheries and Aquaculture Act* (LGPYAS), DOF, 24 July 2007, Article 125:

26. The Secretariat finds that the 2017 Gillnets Order qualifies as an environmental law as its aim is environmental protection in the terms of USMCA Article 24.1.
27. The **2020 Gillnets Order** contains provisions of a regulatory character. It was issued in accordance with various provisions of laws enacted by the Mexican Congress,⁵⁶ and is enforceable through the actions of Semarnat, the Ministry of Agriculture and Rural Development (*Secretaría de Agricultura y Desarrollo Rural—Sader*), Semar, Conapesca, and Profepa.⁵⁷
28. This Order acknowledges the following facts: among the different species of cetaceans in the Gulf of California, the vaquita porpoise (*Phocoena sinus*) is one of the world’s smallest marine mammals (maximum length of 1.5 meters); although an endemic species, its biology and habits are little known; and the vaquita is listed as an endangered species in NOM-059. Its biology and habits are little known precisely because it is endangered and also because it is generally found with the totoaba (*Totoaba macdonaldi*), which increases the potential for interaction with different types of gillnets, including passively operated gillnets (“agalleras”), which are usually used in illegal totoaba fishing.
29. The 2020 Gillnets Order demarcates the zone in which gillnets, including “agalleras” are banned⁵⁸ and it permanently bans all gillnets—as well as any modifications thereto—whether deployed in a passive or active manner. It establishes, among other provisions, that such nets may not be utilized in any fishing activity, nor deployed or recovered for any other reason, stored on board any vessel, or be in one’s possession in the area established by the Order.⁵⁹ The Order establishes the following provisions: the requirements for maintaining a concession or permit; the obligation to report any interaction with marine mammals; the requirement that both small and large vessels be equipped with monitoring equipment; the inspection of vessels prior to sailing and upon their arrival; and the authorized departure, landing, and transshipment sites for fishing products. In particular, the Order demarcates a zero-tolerance zone where fishing, including sport fishing, is totally and permanently prohibited and where all types of vessel and craft are banned. In effect, it seeks to protect the vaquita through various fishing bans and restrictions in the species range.
30. The Secretariat finds that the 2020 Gillnets Order qualifies as an environmental law as its aim is environmental protection in the terms of USMCA Article 24.1.

In the monitoring and inspection tasks conducted to ensure compliance with this Act, and the provisions deriving therefrom, may be utilized any instrument which mobilizes scientific and technological discoveries and advances, provided that the utilization thereof is not restricted or prohibited by law.

In its monitoring and inspection of fishing activities in lagoon, estuary and territorial sea systems and the exclusive economic zone, the Ministry may utilize location systems and satellite monitoring. To this end, it shall determine, by means of regulatory provisions or in concessions and permits, which vessels shall require specialized monitoring equipment for the operation of such systems.

The data delivered by the instruments referred to in this Article shall be considered means of proof with the evidentiary value accorded them in the applicable legal provisions.

⁵⁶ The 2020 Gillnets Order was issued in accordance with the LOAPF, the Organic Law of the Mexican Navy (*Ley Orgánica de la Armada de México*), the LPFA, LGPyAS, LGEEPA, LGVS and the Maritime Navigation and Trade Act (*Ley de Navegación y Comercio Marítimos*).

⁵⁷ 2020 Gillnets Order, Seventeenth Article.

⁵⁸ *Id.* at First Article.

⁵⁹ *Id.* at Second Article.

C. Article 24.27(2) Requirements

31. Article 24.27(2) provides five more requirements for a submission to be eligible for consideration by the CEC Secretariat. The Secretariat has determined that the submission satisfies the requirements, as explained below.

a) is in writing in English, French, or Spanish

32. The submission is written in English. The Secretariat therefore finds that the submission satisfies USMCA Article 24.27(2)(a).⁶⁰

b) clearly identifies the person making the submission

33. The submission includes the names, addresses, emails, and telephone numbers of the organizations filing it, which is sufficient information to identify and communicate with the Submitters.⁶¹ The Secretariat finds that the submission satisfies USMCA Article 24.27(2)(b).

c) provides sufficient information to allow for the review of the submission including any documentary evidence on which the submission may be based and identification of the environmental law of which the failure to enforce is asserted

34. The submission contains sufficient information to enable the Secretariat to analyze it since it includes documentation that supports the Submitters' assertions and identifies the laws and administrative orders in the submission.

35. The submission includes links for downloading documentation that supports the Submitters' assertions, including: the North American Conservation Action Plan for the Vaquita,⁶² an update on the status of the vaquita as of December 2020,⁶³ a report published on the IUCN's website regarding the number of vaquitas in the zero-tolerance zone,⁶⁴ the IUCN's data sheet on the vaquita's conservation status,⁶⁵ a report prepared by the Environmental Information Agency that discusses the issue of illegal totoaba fishing and its impact on the vaquita

⁶⁰ The Secretariat made a Spanish translation of the Submission available to the Parties and the public and published it on the public registry at <<http://www.cec.org/es/peticiones-sobre-aplicacion-de-la-legislacion-ambiental/registro-publico-de-peticiones/vaquita-marina>>.

⁶¹ Submission at 11-12.

⁶² Commission for Environmental Cooperation, *North American Conservation Action* (2008) <<http://www3.cec.org/islandora/en/item/1136-vaquita-north-american-conservation-action-plan>> (viewed 17 August 2021).

⁶³ International Union of Conservation of Nature, Cetacean Specialist Group, *Vaquita update October through December 2020*, 26 January 2021 <<https://iucn-csg.org/vaquita-update-october-through-december-2020/>> (viewed 19 August 2021).

⁶⁴ L. Rojas-Bracho, et al., *Report on using expert elicitation to estimate total unique vaquitas and calves in the Zero Tolerance Area with recommendations for future research efforts*, c. October 2019 <<https://iucn-csg.org/wp-content/uploads/2021/04/Vaquita-Report-on-Using-Expert-Elicitation-Final.pdf>> (viewed 17 August 2021).

⁶⁵ L. Rojas-Bracho and B.L. Taylor, *Phocoena sinus*. *The IUCN Red List of Threatened Species* 2017 <<https://www.iucnredlist.org/es/species/17028/50370296>> (viewed 17 August 2021).

population,⁶⁶ and various reports issued by CIRVA on the conservation actions implemented by Mexico.⁶⁷

36. The submission cites various articles and reports in peer-reviewed publications, which discuss the status of vaquita conservation.⁶⁸ It also cites resolutions, decisions, and reports adopted by international organizations including UNESCO,⁶⁹ CITES,⁷⁰ the International Whaling Commission⁷¹ and non-governmental organizations.⁷² The Secretariat finds that the submission satisfies USMCA Article 24.27(2)(c).

d) appears to be aimed at promoting enforcement rather than at harassing industry

37. The Secretariat finds that the submission satisfies USMCA Article 24.27(2)(d), as it is evident, based on the information and documentation included in the submission and the annexes, that its aim is not to harass an industry, but rather to ensure the effective enforcement of the environmental law applicable to the protection and conservation of the vaquita porpoise in Mexico.

⁶⁶ Environmental Information Agency, *Facing Extinction: Survival of the Vaquita Depends on Eliminating the Illegal Trade in Totoaba*, November 2017 <https://eia-international.org/wp-content/uploads/EIA_Ocean_report_briefing_Vaquita_Final.pdf> (viewed 19 August 2021).

⁶⁷ CIRVA, *Report of the Eleventh Meeting of CIRVA, La Jolla, CA*, 19-21 February 2019; CIRVA, *Report of the Third Meeting of CIRVA, Ensenada, Baja California*, 18-24 January 2004; and CIRVA, *Report of the Tenth Meeting of CIRVA, La Jolla, CA*, 11-12 December 2017.

⁶⁸ L. Rojas-Bracho, R. R. Reeves and A. Jaramillo-Legorreta, "Conservation of the vaquita *Phocoena sinus*," *Mammal Review* 36, 3 (2006): 179-216; L. Rojas-Bracho and R.R. Reeves, "Vaquitas and gillnets: Mexico's ultimate cetacean conservation challenge," *Endangered Species Research* 21, 1 (2013): 77-87; C. D'agrosa, C. E. Lennert-Cody and O. Vidal, "Vaquita bycatch in Mexico's artisanal gillnet fisheries: driving a small population to extinction," *Conservation Biology* 14, 4 (2000): 1110-1119; L. Findley, *Totoaba macdonaldi*. The IUCN Red List of Threatened Species (2010); online at: <www.dx.doi.org/10.2305/IUCN.UK.2010-3.RLTS.T22003A9346099.en> (viewed 20 August 2021); Y. De Mitcheson, et al., "Emerging from the murk: threats, challenges and opportunities for the global swim bladder trade," *Reviews in Fish Biology and Fisheries* 29, 4 (2019): 809-835; B.L. Taylor, et. al. "Likely annual calving in the vaquita, *Phocoena sinus*: A new hope?", *Marine Mammal Science* 35, 4 (2019): 1603-1612.

⁶⁹ UNESCO World Heritage Committee, 43rd session in Baku, Azerbaijan, Decision: 43 COM 7B.26, 3 June to 10 July 2019 (23 July 2019); online at: <<https://whc.unesco.org/archive/2019/whc19-43com-18-en.pdf>> (viewed 22 August 2021); UNESCO World Heritage Committee, 44th session, held online in Fuzhou, China, Decision: 44 COM 7A.56, 16-31 July (31 July 2021); online at: <<http://whc.unesco.org/archive/2021/whc-21-44com-18-en.pdf>> (22 August 2021).

⁷⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Decision 18.294: Totoaba (*Totoaba macdonaldi*); online at: <<https://cites.org/eng/taxonomy/term/42103>> (viewed 22 August 2021); IUCN Cetacean Specialist Group (3 March 2020), December 2019 – February 2020 Vaquita Update; online at: <<https://iucn-csg.org/december-2019-february-2020-vaquita-update/>>; IUCN Cetacean Specialist Group (26 January 2020), Vaquita Update - October through December 2020; online at: <<https://iucn-csg.org/vaquita-update-october-through-december-2020/>>.

⁷¹ International Whaling Commission (2021). Report of the Scientific Committee (Virtual Meetings, 27 April to 14 May 2021) at 143; online at: <<https://archive.iwc.int/pages/view.php?ref=19276&k=>>>; International Whaling Commission Scientific Committee, Rep. International Whaling Commission, 42, at 79 (10 June 1990).

⁷² Sea Shepherd (n.d.). Operation Milagro: The solution; online at: <<https://seashepherd.org/milagro/solution/>> (describing partnership with Mexican government).

e) indicates whether the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any

38. The Submitters cite specific documents to substantiate that the matter was communicated to the relevant authorities of the Government of Mexico. The submission cites an email sent to the heads of Semarnat, Semar, Conapesca, and Profepa, the authorities charged with enforcing the environmental laws in question.⁷³ This email included a copy of a letter to the CITES Secretariat that documented the Government of Mexico's alleged inaction in the face of the vaquita's current status. In addition, the submission included a communication, dated 11 August 2017, sent to the head of Semarnat⁷⁴ and another dated 2 February 2018 sent to the heads of Semarnat and Sader.⁷⁵ The Submitters state that they received no response to these communications.
39. The Secretariat finds that the submission satisfies USMCA Article 24.27(2)(e), as it includes information that demonstrates that the matter at hand was communicated in writing to the relevant authorities of the Party—the heads of Semarnat, Profepa, Semar, Conapesca, and Sader—who are responsible for the effective protection of the vaquita and the enforcement of the environmental law in question.

D. Article 24.27(3) Criteria

40. Having established that the submission satisfies the requirements of Article 24.27(2), the Secretariat now analyzes whether the submission merits a response from the Party pursuant to Article 24.27(3). The Secretariat is guided by the following considerations:

a) whether the submission alleges harm to the person making the submission

41. The submission documents the gradual reduction in vaquita specimens in the Upper Gulf of California and presents information showing that illegal totoaba fishing has been detrimental to the vaquita porpoise since 1976 when the totoaba was included in Appendix I of CITES.⁷⁶ The submission observes that since the 1990s there has been a documented decline in the vaquita population due to illegal fishing.⁷⁷ It observes that, notwithstanding efforts such as the declaration of the Upper Gulf of California Biosphere Reserve in 1993, protection and conservation measures have been “ineffective” as fishing with various types of gillnets has continued without interruption.⁷⁸ The Submitters allege that despite two decades of regulation, multiple fishing bans, and the establishment of protected areas, the number of vaquita individuals has declined. In 2013, 97 individuals were reported; that number fell to 30 individuals in 2015 and in July 2017, just 10 vaquitas were counted.⁷⁹

⁷³ Uhlemann, S, email (18 May 2021) and annex: *Mexico's New Fishing Regulations Applicable to CITES Totoaba and Vaquita Decisions 18.292-18.295* (1 April 2021).

⁷⁴ Animal Welfare Institute and others, letter to the head of Semarnat (11 August 2017).

⁷⁵ Center for Biological Diversity and others, letter to the heads of Semarnat and Sader (5 February 2018).

⁷⁶ Submission at 3.

⁷⁷ *Id.* at 4.

⁷⁸ *Id.*

⁷⁹ *Id.*

42. The Secretariat has determined that when considering the question of damages it must consider whether the damages asserted are due to the alleged failure to effectively enforce environmental law and whether said damages are related to environmental protection.⁸⁰ Therefore, in keeping with normal SEM practices, the Secretariat finds that the submission satisfies the criterion of USMCA Article 24.27(3)(a).

b) the submission, alone or in combination with other submissions, raises matters about which further study would advance the goals of this Chapter

43. USMCA Article 24.2(2) establishes that the objectives of Chapter 24 are “to promote mutually supportive trade and environmental policies and practices; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation, in the furtherance of sustainable development.”

44. The Secretariat finds that reviewing the submission in question would contribute to encouraging high levels of environmental protection, as well as to the effective enforcement of environmental laws. The Secretariat finds that the submission satisfies the criterion of USMCA Article 24.27(3)(b).

c) private remedies available under the Party’s law have been pursued

45. The submission documents the attempt to elicit action from the federal authorities through the filing of a citizen complaint on 14 March 2017 with the Profepa office in the state of Baja California. The grounds for this complaint were based on the provisions of the General Ecological Balance and Environmental Protection Act (*Ley General de Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*) Article 189 and LGVS Article 107, among others, and advanced the same assertions as the submission.

46. The Secretariat finds that the submission satisfies the criterion of USMCA 24.27(3)(c) as the Submitters provided documentation and information that substantiate their efforts to pursue private remedies provided for under Mexican law.

d) the submission is not drawn exclusively from mass media reports

47. Regarding subparagraph (d), the Secretariat finds that the submission is *not* based on mass media reports but is instead based on the documentation and information gathered by the Submitters, largely from official sources, including technical documentation and reports on the status of vaquita protection and conservation in Mexico. The submission refers to an investigation by the Excelsior newspaper, but this investigation is not the submission’s principal source of information.

48. Consequently, the Secretariat finds that the submission satisfies the criterion of USMCA Article 24.27(3)(d).

⁸⁰ SEM-19-004 (*Barred Owl*), Articles 14(1) and (2) Determination (21 November 2019), §28; SEM-11-002 (*Sumidero Canyon II*), Articles 14(1) and (2) Determination (6 September 2012), §36; and SEM-13-001 (*Tourism Development in the Gulf of California*), Articles 14(1) and (2) Determination (23 November 2013), §62. *Cfr.* Guidelines, subparagraph 7.4.

III. DETERMINATION

49. For the reasons outlined above, the Secretariat finds that submission SEM-21-002 (*Vaquita porpoise*) satisfies the admissibility requirements stipulated in USMCA Article 24.27(2) and merits a response from the Government of Mexico, in accordance with USMCA Article 24.27(3), concerning the effective enforcement of LGVS Article 55, Article 56 of the LGVS Regulations, the 1975 Totoaba Fishing Ban Order, the 2015 Gillnets Order, the 2017 Gillnets Order, and the 2020 Gillnets Order.
50. Pursuant to the provisions of USMCA Article 24.27(4), the Party may provide a response to the submission within sixty days of receipt of the present determination.

Respectfully submitted for your consideration,

Secretariat of the Commission for Environmental Cooperation

(original signed)

Per: Paolo Solano
Director of Legal Affairs and Submissions on Enforcement Matters

cc: Iván Rico, Alternate Representative of Mexico
Catherine Stewart, Alternate Representative of Canada
Jane Nishida, Alternate Representative of the United States
Environment Committee Contact Points
Richard A. Morgan, Executive Director, CEC
Submitters