Factual Record

ALCA-Iztapalapa II

(SEM-03-004)

**Prepared pursuant to Article 15
of the North American Agreement
on Environmental Cooperation**

**November 2007
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PROFILE

In North America, we share a rich environmental heritage that includes air, oceans and rivers, mountains and forests. Together, these elements form the basis of a complex network of ecosystems that sustains our livelihoods and well-being. If these ecosystems are to continue to be a source of life and prosperity, they must be protected. Doing so is a responsibility shared by Canada, Mexico, and the United States.

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

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the highest-level environmental authorities from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of 15 citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

MISSION

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

NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY SERIES

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Acronyms

ALCA	ALCA, S.A. de C.V.
ALDF	Legislative Assembly of the Federal District (*Asamblea Legislativa del Distrito Federal*)
CEC	Commission for Environmental Cooperation
CFPP	Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*)
CNDH	National Human Rights Commission (*Comisión Nacional de los Derechos Humanos*)
COA	Annual Operating Report (*Cédula de Operación Annual*)
CPF	Federal Criminal Code (*Código Penal Federal*)
DOF	Official Gazette of the Federation (*Diario Oficial de la Federación*)
Inacipe	National Institute of Criminal Sciences (*Instituto Nacional de Ciencias Penales*)
Inapam	National Senior Citizens' Institute (*Instituto Nacional de las Personas Adultas Mayores*)
INEGI	National Institute of Statistics, Geography, and Informatics (*Instituto Nacional de Estadística Geografía e Informática*)
INER	National Respiratory Disease Institute (*Instituto Nacional de Enfermedades Respiratorias*)
JPAC	Joint Public Advisory Committee
LAU	Consolidated Environmental License (*Licencia Ambiental Única*)
LFTAIPG	Federal Transparency and Access to Governmental Information Act (*Ley Federal Transparencia y Acceso a la Información Pública Gubernamental*)
LGEEPA	General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*)

MPF	Office of the Federal Public Prosecutor (*Ministerio Público Federal*)
NAAEC	North American Agreement on Environmental Cooperation
NGO	Nongovernmental organization
NOM	Mexican Official Standard (*Norma Oficial Mexicana*)
PGR	Attorney General of the Republic (*Procuraduría General de la República*)
Profepa	Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*)
PRTR	Pollutant Release and Transfer Register (*Registro de Emisiones y Transferencia de Contaminantes*)
RRP	Regulation to LGEEPA on Hazardous Waste (*Reglamento de la LGEEPA en materia de Residuos Peligrosos*)
Secodam	Ministry of Control and Administrative Development (*Secretaría de la Contraloría y Desarrollo Administrativo*)
Sedesol	Ministry of Social Development (*Secretaría de Desarrollo Social*)
Sedue	Ministry of Urban Development and Ecology (*Secretaría de Desarrollo Urbano y Ecología*)
Semarnap	Ministry of the Environment, Natural Resources and Fisheries (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca*)
Semarnat	Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*)
SIEM	Mexican Business Information System (*Sistema de Información Empresarial Mexicano*)
SMADF	Ministry of the Environment of the Federal District (*Secretaría de Medio Ambiente del Distrito Federal*)
SMGVDF	Legal Minimum Wage in the Federal District (*Salario Mínimo General Vigente en el Distrito Federal*
TCADF	Administrative Tribunal of the Federal District (*Tribunal de lo Contencioso Administrativo del Distrito Federal*)
VOC	Volatile organic compound
UNDP	United Nations Development Program
ZMVM	Mexico Valley Metropolitan Area (*Zona Metropolitana del Valle de México*)

1. Executive Summary

Articles 14 and 15 of the North American Agreement on Environmental Cooperation ("NAAEC" or the "Agreement") establish a process allowing persons residing or established in Canada, Mexico or the United States to file submissions asserting that a Party to NAAEC is failing to effectively enforce its environmental law. Under the Agreement, this process may give rise to the publication of a factual record. The Secretariat of the North American Commission for Environmental Cooperation (CEC) administers this process.

On 17 June 2003, Ángel Lara García (the "Submitter") filed a submission with the CEC Secretariat asserting that Mexico is failing to effectively enforce its environmental law in connection with a polystyrene latex manufacturing and impregnation plant operated by ALCA, S.A. de C.V. ("ALCA"). Submission SEM-03-004 (*ALCA-Iztapalapa II*) asserts that the government of Mexico is failing to effectively enforce its environmental law with respect to the crimes provided in Articles 414, first paragraph and 415, paragraph I of the Federal Criminal Code (*Código Penal Federal*—CPF) and the management of hazardous materials and wastes, pursuant to the first paragraph of Article 150 of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA).[1] On 9 June 2005, by means of Council Resolution 05-05, the CEC Council instructed the Secretariat to prepare a factual record with respect to the matter raised in the submission.

In preparing the factual record, the Secretariat considered information available to the public; information provided by Mexico, ALCA, the Submitter, and other interested parties; and technical information produced by the Secretariat through independent experts. This factual record presents relevant information concerning whether or not Mexico is failing to effectively enforce Article 150 of LGEEPA and Articles 414, first paragraph and 415, paragraph I of the CPF, with respect to the

1. "In accordance with Article 14 of the North American Agreement on Environmental Cooperation, I hereby request that my submission be examined, as I assert that the Mexican State is failing to effectively enforce its environmental laws..." Submission, p. 1.

matter raised in the submission. In relation to the enforcement of LGEEPA Article 150, first paragraph, the factual record includes the period September 1994–August 2005, and in relation to the enforcement of CPF Articles 414, first paragraph and 415, paragraph I it encompasses the period March 1997–August 2000.

Since May 1994, the Submitter applied to various governmental authorities to put forward his case, request advice, or file complaints against public servants.[2] In the present case, the Submitter stated that there were intense odors causing him nuisance and harming his health. The inspection reports prepared by the authorities note the presence of "solvent odors caused by a lack of collection and conduction of the emissions"[3] and "vapors emanating profusely from outlets at the wall giving onto the described outdoor area, without any filter, washer, or chimney."[4]

The Secretariat found that from 1994 to 2005, the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) conducted a total of 11 inspection visits and issued administrative decisions in which two partial closings were ordered, one in 1994 and one in 1997. The total of the fines imposed on ALCA for violations on air emissions and hazardous materials and waste management was 46,207.30 pesos.

The first order closing ALCA in 1994 was lifted after the corrective measures ordered were taken. However, other air emission-related instances of noncompliance persisted, which were not reported for purposes of the 1994 closure but the repeat offence of which led to a second closing order in 1997. On this occasion, ALCA did not comply with the conditions imposed by Profepa, alleging that they were technically impossible to implement. ALCA also stated that, according to its analyses, its pollutant emissions did not exceed the limits established in the applicable standards. Profepa ultimately deviated from the conditions imposed and accepted alternative enforcement measures and the criterion proposed by ALCA for analysis of its pollutant emissions.

2. These entities included the Federal Attorney for Environmental Protection (Profepa), the Attorney General of the Republic (PGR), the Ministry of Public Service (SFP), the National Human Rights Commission (CNDH), and the National Senior Citizens' Institute. Other authorities who took cognizance of the matter were the Ministry of the Environment of the government of Mexico City and the Borough of Iztapalapa, Federal District.
3. Report to the CNDH by the Industrial Inspection Branch (*Dirección General de Inspección Industrial*) of Profepa, dated 2 October 1997.
4. Inspection of 9 September 1996; report by the Risk Administration Division, Civil Protection Branch, Federal District.

The Ministry of the Environment of the Federal District (*Secretaría del Medio Ambiente del Distrito Federal*—SMADF) conducted 10 inspection visits of ALCA's facility and closed it in 1999 for noncompliance with air emissions — and wastewater discharge-related legal provisions. The closing was lifted on 4 November 1999, pursuant to a judgment of 13 July 1999 by the Administrative Tribunal of the Federal District (*Tribunal de lo Contencioso Administrativo del Distrito Federal*—TCADF).

The Office of the Federal Public Prosecutor (*Ministerio Público Federal*—MPF), the federal entity responsible for the prosecution of offenses, pursued criminal prosecution against ALCA on four occasions, requesting arrest warrants for ALCA officials. On all four occasions, the district judge denied the arrest warrant for lack of evidence to substantiate the probable existence of an offense.

In 2000 the MPF decided not to pursue further criminal prosecution, for lack of evidence. The MPF found that it was essential to perform clinical examinations of Ángel Lara García, his wife, and his son in order to prove the alleged environmental offenses. On this matter the Secretariat requested the opinion of an environmental criminal law expert, who concluded that although the decision not to pursue further criminal prosecution had basis in law,[5] as to the merits of the case — the possibility or impossibility of substantiating the offense — the MPF had other evidence-gathering methods contemplated in criminal law at its disposal but did not use them.

In November 2005 ALCA informed the Secretariat that due to market conditions it would be going out of business by the end of the year. The closing of the company was confirmed by information from borough of Iztapalapa authorities.[6]

2. Summary of the Submission

The Submitter asserts that Mexico is failing to effectively enforce its environmental laws with respect to the operation of a footwear mate-

5. Based on CPEUM Articles 21 and 102 paragraph A; CFPP Article 137; Articles 1, 2 paragraphs I and V, 8 paragraph I subparagraphs (j) and (m), 14, 15, and 18 of the Attorney General of the Republic Act (*Ley Orgánica de la Procuraduría General de la República*); Articles 2, 3, 5, and 31 paragraph VI of the Regulation to the Attorney General of the Republic Act; orders A/006/92 and A/086/97, and Article 27 of Circular C/005/99 issued by the PGR.
6. Document CPC/39I5/2006, dated 13 February 2006, issued by the Coordinator of Civil Protection, Borough of Iztapalapa.

rials factory owned by the company ALCA, located on a property adjacent to the Submitter's home in the Santa Isabel Industrial neighborhood of the borough of Iztapalapa, Mexico City.[7] The Submitter asserts that the factory's air emissions and ALCA employees' handling of hazardous substances and wastes violate LGEEPA Article 150, first paragraph and Articles 414, first paragraph and 415, paragraph I of the CPF.[8] In particular, the Submitter asserts that the company is unlawfully carrying on the storage, disposal, and discharge of substances considered environmentally harmful and hazardous without applying prevention and safety measures.[9]

The Submitter maintains that ALCA, without applying prevention or safety measures, emits, releases, or discharges environmentally harmful gas, smoke, dust, or pollutants into the atmosphere.[10] The Submitter asserts that the company is failing to manage hazardous materials and wastes as prescribed by LGEEPA and the applicable Mexican Official Standards (*Normas Oficiales Mexicanas*—NOMs) issued by the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat).[11] The Submitter asserts that these alleged violations are causing pollution harming his and his family's health.[12] He further asserts that Profepa, despite having found violations during an inspection of the factory, terminated the processing of a citizen complaint filed by the Submitter without taking the actions necessary to stop the alleged violations.[13]

3. Summary of Mexico's Response

In its response of 4 December 2003, Mexico focuses its arguments on three principal aspects of the Submission: i) enforcement acts against ALCA for violation of LGEEPA Article 150, first paragraph in response to a citizen complaint filed by the Submitter; ii) investigation of the offense contemplated in CPF Article 415, paragraph I in response to a criminal complaint; and iii) alleged failure to resolve a proceeding filed with Semarnat's Internal Control Agency claiming "collusion between

7. Submission, pp. 1, 3–4.
8. *Ibid.*, pp. 3–4.
9. *Ibid.*, p. 3.
10. *Ibid.*, p. 3.
11. *Ibid.*, p. 4.
12. *Ibid.*, p. 2.
13. *Ibid.*, and appendix to the submission: Administrative proceeding by the Public Affairs Branch (*Dirección General de Atención Ciudadana*) of the Ministry of Control and Administrative Development (*Secretaría de Contraloría y Desarrollo Administrativo*—Secodam), dated 23 October 2002.

inspectors and ALCA in an attempt to cover up responsibilities and thereby avoid sending the case to trial."[14]

As regards the alleged failure to enforce LGEEPA Article 150, first paragraph, Mexico refers to the citizen complaint that the Submitter filed on 10 November 1995, but provides no further information because, it claims, the file was lost in a flood of the archives. However, Mexico asserts that the process was concluded pursuant to law without initiation of a criminal investigation.[15] In addition, Mexico states that other proceedings were initiated against ALCA, including: i) a filing dated 10 November 1998 submitted to the borough of Iztapalapa by the coordinator of the Public Affairs Center (*Casa de Atención Ciudadana*) of the Legislative Assembly of the Federal District (*Asamblea Legislativa del Distrito Federal*—ALDF), noting the concern of the company's neighbors that it was releasing toxic gases such as hexane, heptane, styrene, toluene, and xylol; ii) a citizen complaint of 19 November 1998, filed by the coordinator of the Public Affairs Center against ALCA, alleging toxic gas emissions; and iii) a second citizen complaint filed by the Submitter on 14 September 2000.[16] Mexico states that this last proceeding, after consolidation with others, led to an inspection on 27 July 2001 during which facts and omissions constituting offenses under LGEEPA, as well as the air pollution, hazardous waste and environmental impact regulations thereunder, were observed. Further to the inspection, on 7 September 2001, ALCA was fined 2,421 pesos, the equivalent of 60 days' minimum wage in the Federal District.[17] Mexico states that after the fine was imposed, the consolidated citizen complaint file was deemed closed.[18]

As regards the violation of CPF Article 415, paragraph I, Mexico refers to a complaint of 14 March 1999 that gave rise to a criminal investigation. Mexico explains that this complaint was filed against ALCA and its representatives. Mexico states that, based on a legal opinion, it was decided 22 August 2000 not to proceed with criminal prosecution (*nolle prosequi*), as the investigations "did not fully substantiate the *corpus delicti* contemplated and penalized by Article 415, paragraph I of the Federal Criminal Code nor the probable liability of the suspects, since it may be deduced from the proceedings that although the facts asserted

14. Response of the Party, p. 1.
15. *Ibid.*, p. 2.
16. *Ibid.*, pp. 2–3.
17. *Ibid.*, p. 3.
18. *Ibid.*, p. 3.

may constitute an offense, it is impossible to prove the existence of the offense due to insuperable material obstacle, the evidence provided being insufficient to consider the facts substantiated."[19]

Concerning the lack of resolution of a proceeding filed with Semarnat's internal control agency, Mexico states that the proceedings initiated by the Submitter against Profepa officials were concluded without any sanctions being imposed because sufficient evidence of the public servants' alleged liability was not found. Mexico provides no further comment or documentary evidence in this regard, arguing that this information was classified as confidential under Article 13, paragraph V of the Federal Transparency and Access to Governmental Information Act (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*—LFTAIPG) and Article 26 of the Regulation thereunder.[20]

4. Scope of the Factual Record

On 23 August 2004, the Secretariat notified the CEC Council that the submission warranted the preparation of a factual record. In its recommendation to Council, the Secretariat stated that Mexico's response did not provide sufficient information regarding the effective enforcement of LGEEPA Article 150, first paragraph and CPF Articles 414, first paragraph and 415, paragraph I in relation to ALCA's activities. It further stated that Mexico's response did not address central issues raised in the submission about ALCA's application of safety measures in relation to: i) the alleged storage, disposal, and discharge of substances considered hazardous and environmentally harmful; ii) alleged emissions of environmentally harmful gas, smoke, dust, or pollutants; and iii) management of hazardous materials and wastes as prescribed by LGEEPA and the relevant NOMs issued by Semarnat.

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19. *Ibid.*, pp. 3–6.
20. LFTAIPG Article 13: "Information may be classified as reserved if it may... V. Seriously prejudice the verification of legal compliance, the prevention or prosecution of offenses, the operation of justice, the collection of taxes, the operation of migration control, or procedural strategies in judicial or administrative proceedings as long as decisions therein have not definitively closed the case."
    Regulation to LFTAIPG Article 26: "The directors of the administrative units of the executive departments and quasi-governmental entities shall classify the information at the time when:
    I. the information is produced, obtained, acquired, or transformed, or
    II. an access to information request is received, in the case of documents not previously classified.
    Classification may refer to a file or a document."

In addition, the Secretariat's recommendation noted that Mexico's response provided information about an inspection visit conducted on 27 July 2001 but did not discuss three other administrative proceedings against ALCA that are mentioned in a document issued by Profepa.[21] The information presented by Mexico was also insufficient in that only an incomplete copy of the legal opinion on which the Office of the Public Prosecutor decided not to proceed with criminal prosecution was attached to the response; therefore, it was impossible to ascertain in greater detail the reasoning behind the decision that the existence of environmental offenses allegedly committed by ALCA and its officials could not be substantiated.

In Council Resolution 05-05 of 9 June 2005 (see Appendix 1 for full text), the Council decided unanimously:

> TO INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* with respect to the issues raised in the submission, taking the above-noted considerations into account; ...[22]

The Council noted that the submission alleges "a lengthy history of releases of toxic chemicals, as well as continuation of such releases following enforcement action taken by the Government of Mexico in 2001."[23] The Council Resolution authorizes the Secretariat to include relevant facts dating from prior to the entry into force of NAAEC on 1 January 1994.

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21. Document by Profepa Environmental Complaints and Social Participation Branch (*Dirección General de Denuncias Ambientales y Participación Social*) of 14 February 2002.
22. In its Resolution, the Council considered the submissions filed 25 November 2002 and 17 June 2003 by Ángel Lara García as well as the response offered by the government of Mexico on 4 December 2003; reviewed the notification of 23 August 2004, whereby the Secretariat recommended to Council the preparation of a factual record in regard to the submission; reaffirmed that the focus of the factual record process is to examine facts pertinent to assertions that a party is failing to effectively enforce its environmental law, not the effectiveness of the law in question; recognized that a party, in its response to the Secretariat in respect of a submission, is not in a position to respond to assertions or matters that were not raised in the submission; and noted that LGEEPA Article 161 was not raised by the Submitter, but by the Secretariat. It further noted that, among other things, the submission alleges a lengthy history of releases of toxic chemicals, as well as continuation of such releases following enforcement action taken by the government of Mexico in 2001.
23. Council Resolution 05-05, of 9 June 2005.

Consequently, this factual record presents relevant information concerning:

(i) alleged violations by ALCA of LGEEPA Article 150, first paragraph and CPF Articles 414, first paragraph and 415, paragraph I;

(ii) inspection visits, administrative proceedings, or other governmental actions taken in connection with ALCA between 1994 and 2005 in relation to its history and continuation of toxic substance emissions, as well as its management of hazardous substances and wastes;

(iii) Mexico's alleged failure to effectively enforce LGEEPA Article 150, first paragraph and CPF Articles 414, first paragraph and 415, paragraph I in the case of ALCA.

Pursuant to Council Resolution 05-05 and NAAEC provisions, this factual record focuses on Mexico's acts of environmental law enforcement without presenting an assessment thereof or a determination of the corresponding extent of ALCA's environmental compliance, so that interested persons may reach their own conclusions.

5. Information-gathering Process

In accordance with Council Resolution 05-05, the Secretariat published its general plan for preparation of the factual record (see Appendix 2) on 21 July 2005. The document sets out the Secretariat's intention to gather and compile relevant information concerning ALCA's air emissions and its management of hazardous substances and wastes.

Pursuant to NAAEC Article 15(4), in preparing a factual record, "the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts."

In order to prepare the factual record, the Secretariat retained Ing. Enrique Nava[24] and Dr. Israel Alvarado[25] as independent external con-

24. Ing. Nava, a Profepa-accredited auditor, has more than fifteen years' experience with environmental audits, on-site environmental assessments, and contaminated site investigations, with particular emphasis on the chemical industry.

25. Dr. Alvarado holds a doctorate of laws from the National Autonomous University of Mexico (*Universidad Nacional Autónoma de México*) and is a research professor at the National Institute of Criminal Sciences (*Instituto Nacional de Ciencias Penales*).

sultants on environmental engineering and environmental criminal law, respectively. These consultants provided expertise on toxic chemical emissions, management and disposal of hazardous materials and wastes, and the interpretation and enforcement of environmental criminal law.

Pursuant to NAAEC Articles 15(4) and 21(1)(a), on 1 November 2005 the Secretariat asked Mexico to provide information relevant to the preparation of the factual record.[26] Likewise, the Secretariat requested the other two NAAEC Parties, JPAC, ALCA, business organizations, research institutes, and any other interested party to present relevant information. Appendices 4 and 5 contain the Secretariat's information requests.

On 24 November 2005, ALCA informed the Secretariat that the company would be going out of operation in late December of that year[27] and invited the Secretariat to visit its facility prior to its final closing and dismantlement. The Secretariat's legal officer, accompanied by the Secretariat's technical consultant, visited the facility on 1 December 2005. ALCA personnel indicated during the tour that they would send documents and other information relevant to the preparation of the factual record at a later date. The Secretariat did not receive any information nor succeed in contacting the company's officials subsequent to the visit.

On 10 February 2006, Mexico provided information to the Secretariat for preparation of the factual record in the form of a table summarizing Profepa's actions concerning ALCA.[28] On 11 April, the Secretariat requested additional information from Mexico[29] and on 20 April the Secretariat's legal officer held a meeting with Profepa and Semarnat representatives.[30] At this meeting, the Secretariat reiterated its request for documentation of inspection and enforcement actions by the authorities

26. See Appendix 4.
27. Telephone conference with ALCA operations manager on 24 November 2005. The exact date of the plant's closing was not provided during this conference, but the ALCA manager provided assurance that it would occur before the end of the year.
28. Documents PFPA-SII-DGIFC-0143/2006 and PFPA-SII-DGIFC-0143/2006, of 10 February 2006, by Profepa's Director General of Pollution Source Inspection.
29. Document A14/SEM/03-004/63/STP to Legislation and Consultation Branch (*Dirección General Adjunta de Legislación y Consulta*) of Semarnat.
30. Meeting of 20 April 2006 with representatives of Legislation and Consultation Branch of Semarnat and with the Profepa Office in the Mexico Valley Metropolitan Area (*Zona Metropolitana del Valle de México*—ZMVM).

in relation to ALCA. Mexico sent copies of Profepa administrative proceedings[31] and administrative proceedings of the government of Mexico City,[32] and stated that the criminal proceeding was in the possession of the Office of the Attorney General of the Republic (*Procuraduría General de la República*—PGR), that Semarnat and Profepa had been denied access to it and that, consequently, it could not be provided to the Secretariat.[33]

Through the Access to Information System (*Sistema de Solicitudes de Información*) of the Federal Access to Information Institute (*Instituto Federal de Acceso a la Información Pública*), the Secretariat's consultant on environmental criminal law requested from the PGR the information that served as a basis for not to proceed with criminal prosecution. The Secretariat sent Mexico a memo requesting clarifications concerning the criminal investigation of ALCA.[34] The government of Mexico did not respond to the request for clarification, nor did it indicate the reasons why it failed to respond. The Secretariat invited Semarnat to state any reasons why it might be impossible for it to provide further information, but received no response.[35]

Other authorities of the federal government and of Mexico City submitted information on sound management of chemicals,[36] the history of the Submitter's filings,[37] and the land use regime in Iztapalapa.[38] They also confirmed the closing of ALCA,[39] noted their lack of jurisdic-

31. Document 112/003310/06, of 4 May 2006, from the Legal Affairs Office (*Coordinación General Jurídica*) of Semarnat, received by the Secretariat on 10 May 2006. Originally, the Profepa administrative file was believed to have been lost in a flood of the archive, as the Party stated in its response of 4 December 2003.
32. Document 112/06, of 20 June 2006, in which the Legal Affairs Office of Semarnat gave information to the Department of Environment of the Federal District.
33. On 10 May 2006, the Legislation and Consultation Branch informed the Secretariat by telephone that the PGR had denied Profepa and Semarnat access to the record of the criminal proceeding.
34. Request by Secretariat to Legal Affairs Office of Semarnat, dated 7 September 2006.
35. E-mail of 23 November 2006 to Legal Affairs Office of Semarnat.
36. E-mail of 9 December 2005 from Assistant Director of Technical Reporting, Environmental Emergency Response Center (*Centro de Orientación para la Atención de Emergencias Ambientales*) of Profepa.
37. Document INER/DG/FCV/059/06, of 15 February 2006, from the Director, National Respiratory Disease Institute (*Instituto Nacional de Enfermedades Respiratorias*).
38. Document D-96/DPEDU/1.0.0/0366, of 7 February 2006, from Urban Development Branch (*Dirección General de Desarrollo Urbano*), government of the Federal District.
39. Document CPC/39I5/2006, of 13 February 2006, from Coordinator, Civil Protection, borough of Iztapalapa.

tion to respond to the Secretariat's request,[40] and stated that the information requested was classified as *restricted*.[41]

The Submitter filed with the Secretariat a certification of facts (*fe de hechos*) drawn up by a notary public.[42] In addition, the Submitter submitted a photographic appendix and a document containing statements related to ALCA's operations.[43] The Secretariat held interviews with the Submitter in order to obtain further details and clarify information.[44]

NAAEC Article 15(5) stipulates that "[t]he Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter." Article 15(6) stipulates that "[t]he Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council." The Secretariat submitted the draft factual record to Council on 6 August 2007. On 19 September 2007 the United States and Canada submitted their respective comments, as did Mexico on 20 September 2007.

6. Content and Scope of the Environmental Law in Question

The environmental law cited in the submission underwent revisions in 1996 and 2002. Of particular note are the revisions to the criminal provisions; in 1996 the environmental offenses were incorporated into a single body of law — the CPF — for greater order and systematization.[45] With this reform, the offenses previously contemplated in LGEEPA and other special environmental laws[46] were incorporated into the CPF

40. Document SJ-414/2005, of 5 December 2005, from Assistant Director, Legal Affairs, National Senior Citizens' Institute (*Instituto Nacional para la Atención de las Personas Adultas Mayores*); Document DGDU.05/DCDURT/1600, of 9 December 2005, from Director, Control of Urban Development and Land Regularization, Department of Urban Development and Housing (*Secretaría de Desarrollo Urbano y Vivienda*), government of the Federal District.
41. Document C.G.150/2006, of 1 March 2006, from Director, Legal and Governmental Affairs, borough of Iztapalapa, government of the Federal District.
42. Certification of facts by Lic. José Luis Latapí Fox, Notary Public no. 120 of the Federal District, by notarized document no. 38,241, of 10 January 2005.
43. Document of 13 February 2006 submitted to Secretariat by Ángel Lara García.
44. Meeting with the Submitter on 21 April 2006 and telephone conferences held from February to July 2006.
45. Statement of reasons for executive order revising, adding, and repealing various provisions of the CPF, Chamber of Deputies bill, Record of Debates of the Chamber of Deputies of the United Mexican States, 15 October 1996.
46. Prior to the reform, LGEEPA Articles 183–7, Articles 30–1 of the Federal Hunting Act (*Ley Federal de Caza*) and Article 58 of the Forests Act (*Ley Forestal*) defined various environmental offenses.

under the title *Delitos Ambientales* (*Environmental Offenses*). In the 2002 revision of the CPF, the title of the chapter was changed to *Delitos contra el Ambiente* (*Offenses against the Environment*) and an attempt was made to create a fairer and more graduated criminal liability system.[47]

6.1 CPF Article 414, first paragraph, and Article 415 paragraph I

The submission cites the offenses defined in Article 414, first paragraph (environmental harm caused by the illegal or unsound management of hazardous substances) and Article 415, paragraph I (environmental harm caused by releasing or authorizing or ordering the release of pollutants into the air) of the CPF of 2002. In view of the dates when the Submitter filed the complaint with the PGR and when the Office of the Public Prosecutor's proceedings took place, the text of Article 415, paragraphs I and II that was in force from 1996 to 2000 is also analyzed, as it defined criminal offenses equivalent to those cited in the submission.[48] The table below compares the versions of the CPF articles cited by the Submitter with the provisions in force when the acts of authority occurred:

Table 1. Comparison of versions of CPF articles

Provisions in force when the acts of authority occurred	*Provisions cited by the Submitter*
Art. 415 paragraph I (1996)	**Art. 414, first paragraph (2002)**
Anyone who commits any of the following acts is liable to a penalty of three months' to six years' imprisonment and one thousand to twenty thousand days' fine: *I. Engages, without the authorization of the competent federal authority or in violation of*	*Anyone who unlawfully, or without taking preventive or safety measures, engages in, orders, or authorizes the production, storage, traffic, import or export, transportation, abandonment, disposal, or discharge of, or carries on any other activity involving, substances considered hazardous due to their*

47. Statement of reasons for revision and addition of various provisions to the CPF and the CFPP, Executive Bill, Record of Debates of the Chamber of Deputies of the United Mexican States, 4 October 2001.

48. "Concerning proposed Article 414, it is proposed to incorporate into this article the conduct contemplated in the current Articles 414 and 415, paragraph I, referring to the performance of high-risk activities and the management of hazardous waste. In both cases, the conduct refers to the use of hazardous substances, making an unnecessary distinction between activities considered to be high-risk due to the use of hazardous materials, and waste management activities with the same characteristic..." Statement of reasons for revision and addition of various provisions to the CPF and the CFPP, Executive Bill, Record of Debates of the Chamber of Deputies of the United Mexican States, 4 October 2002. Therefore, the precursor to Article 414, paragraphs I and II (in force in 1997) was LGEEPA Article 183.

the terms of such authorization, in any activity with hazardous materials and wastes that cause or may cause harm to public health, natural resources, fauna, flora, or ecosystems.	*corrosive, reactive, explosive, toxic, flammable, or radioactive properties or the like, thereby causing harm to natural resources, flora, fauna, ecosystems, water quality, soil, subsoil, or the environment is liable to a penalty of one to nine years' imprisonment and three hundred to three thousand days' fine.*
Art. 415, paragraph II (1996)	**Art. 415, paragraph I (2002)**
Anyone who commits any of the following acts is liable to a penalty of three months' to six years' imprisonment and one thousand to twenty thousand days' fine: *...* *II. In violation of the applicable legal provisions or Mexican official standards, emits, discharges, or releases into the atmosphere, or authorizes or orders the emission, discharge, or release into the atmosphere, of gas, smoke, or dust causing harm to public health, natural resources, fauna, flora, or ecosystems, where such emissions originate from fixed sources under federal jurisdiction, pursuant to the General Ecological Balance and Environmental Protection Act.*	*Anyone who commits any of the following acts without applying preventive or safety measures is liable to a penalty of one to nine years' imprisonment and three hundred to three thousand days' fine:* *I. Emits, discharges, or releases into the atmosphere, or authorizes or orders the emission, discharge, or release into the atmosphere of gas, smoke, dust, or pollutants causing harm to natural resources, fauna, flora, ecosystems, or the environment, where such emissions originate from fixed sources under federal jurisdiction, pursuant to the General Ecological Balance and Environmental Protection Act.*

6.2 LGEEPA Article 150

With the reform of December 1996, the LGEEPA Article 150 provisions on hazardous waste were expanded,[49] resulting in the following text:

> Article 150. Hazardous materials and wastes must be managed with adherence to this Act, its Regulation, and the Mexican official standards issued by the Ministry on the advice of the Ministries of Trade and Industrial Development, Health, Energy, Communications and Transportation, the Marine, and the Interior. Regulation of the management of these materials and wastes shall include, as applicable, their use, collection, storage, transportation, reuse, recycling, treatment, and final disposal.
>
> The Regulation and the Mexican official standards contemplated in the preceding paragraph shall contain criteria and lists identifying and classifying hazardous materials and wastes by their degree of hazardousness,

49. LGEEPA Article 150 (text in force prior to 13 December 1996): "The Ministry, on the advice of the Ministries of Trade and Industrial Development, Health, Energy, Mines and Quasi-governmental Industry, Agriculture and Water Resources, and the Interior shall determine and publish in the Official Gazette of the Federation the list of hazardous materials and wastes for the purposes of this Act."

> considering their characteristics and volumes; in addition, they shall differentiate between those of high and low hazardousness. The Ministry is responsible for regulation and control of hazardous materials and wastes.
>
> Likewise, the Ministry, in coordination with the entities contemplated in this article, shall issue Mexican official standards establishing the requirements for labeling and packing of hazardous materials and wastes as well as for risk assessment and for information on contingencies and accidents that may arise from their management, particularly in regard to chemical substances.

Article 150, first paragraph establishes the obligation to manage hazardous materials and wastes as prescribed by LGEEPA and its regulations—in this case, the hazardous waste regulation—and the applicable NOMs. Article 150 also provides that the scope of the administrative regulations comprises the use, collection, storage, transportation, reuse, recycling, treatment, and final disposal of hazardous wastes. On 8 October 2003, the Waste Prevention and Integrated Management Act (*Ley General para la Prevención y Gestión Integral de los Residuos*) was published in the Federal Official Gazette (*Diario Oficial de la Federación*—DOF). Proceedings against ALCA continued under LGEEPA and its regulation, which were applicable at the time the administrative proceedings were brought.[50]

The LGEEPA provides that the regulation and control of hazardous materials and wastes are under federal jurisdiction.[51] In addition to the relevant definitions,[52] it includes the responsibility of the hazardous waste generator[53] and an obligation to both notify the authorities when such waste is generated[54] and to obtain the authorization to install and operate waste management, treatment, and final disposal systems.[55]

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50. Transitory Article 4 of the Waste Prevention and Integrated Management Act. It should be noted that the Regulation to LGEEPA on Hazardous Waste, published in the DOF on 25 November 1998, was repealed by the Regulation to the Waste Prevention and Integrated Management Act, published in the DOF on 30 November 2006.
51. LGEEPA Article 5, paragraph VI.
52. LGEEPA Article 3, paragraph XVII: "Hazardous material. Elements, substances, compounds, waste or mixtures of them that, notwithstanding their physical state, represent a risk to the environment, health or natural resources, due to their corrosive, reactive, explosive, toxic, flammable or biological-infectious characteristics." Paragraph XXXII: "Hazardous wastes. All those wastes, in any physical state, which, due to their corrosive, reactive, explosive, toxic, flammable or biological-infectious characteristics, represent a risk to ecological balance or the environment."
53. LGEEPA Article 151.
54. *Ibid*.
55. LGEEPA Article 151 bis, paragraph III.

For its management and generation of hazardous materials and wastes, ALCA was subject to the following specific obligations with respect to Profepa inspection:

- store hazardous wastes under safe conditions and in areas whose dimensions are sufficient to prevent spills and meet the specifications of the hazardous waste regulation;[56]
- sound management of hazardous materials used by ALCA (styrene, xylene, toluene, hexane, and heptane);[57]
- conduct a hazardousness analysis of the waste generated by ALCA;[58]
- register as a hazardous waste generator;[59]
- possess the delivery, shipping, and receipt documents for hazardous waste;[60]
- possess a log of hazardous waste entries and exits to/from the warehouse;[61]
- submit a semi-annual report to Semarnat on hazardous waste movements occurred.[62]

NOM-052-SEMARNAT-1993,[63] updated in June 2006,[64] establishes the characteristics for a waste to be considered hazardous; listing such wastes and setting the limits making waste hazardous as a function of their toxicity to the environment.[65] Although ALCA's production activi-

56. RRP Articles 8, paragraph VII, 14, paragraph I, and 15.
57. See section 8 of this document on the NOMs applicable to sound management of hazardous materials.
58. RRP Article 6.
59. RRP Article 8, paragraph I.
60. RRP Article 23.
61. RRP Article 21.
62. RRP Article 8, paragraph XI.
63. NOM-052-SEMARNAT-1993, Establishing the characteristics and list of hazardous wastes as well as the threshold above which a waste is considered hazardous due to its toxicity in the environment, published in the DOF on 22 October 1993.
64. NOM-052-SEMARNAT-2005, Establishing the characteristics, identification procedure, classification, and lists of hazardous wastes, published in the DOF on 23 June 2006.
65. NOM-052-SEMARNAT-1993 contains lists of hazardous waste classifications per industry and process, per nonspecific source, and per waste from raw materials, bags or containers in the production of paints.

ties are not specifically listed in this NOM,[66] certain wastes derived from nonspecific sources are listed.[67] This standard is relevant to the assertions concerning the effective enforcement of LGEEPA Article 150, first paragraph, with respect to the sound management of hazardous waste, and CPF Article 415, paragraph I (in force in 1996), which defines offenses involving the use of hazardous materials and wastes.

6.3 Context of the Environmental Law in Question

6.3.1 Environmental Law Enforcement by Profepa

a. Profepa's Jurisdiction over Odors and Emissions

The system delimiting the powers of the federation, the states, and the Federal District with respect to environmental matters is established in LGEEPA Articles 7 and 9, while the respective powers regarding air pollution are defined in Articles 111 bis and 112. The law provides that, in principle, the Federal District has the power to prevent and control air pollution from fixed sources considered to be commercial establishments, with the exception of sectors under federal jurisdiction.

Since the Federal District and the states were granted the same powers with respect to the environment in 1996, where provisions on air emissions refer to the states they must be construed as referring to the Federal District as well:

> Article 9. In respect of preservation of ecological balance and environmental protection, the powers of the Government of the Federal District are as provided by Articles 7 and 8 hereof, subject to the legal provisions enacted by the Legislative Assembly of the Federal District [emphasis added].
>
> Article 7. The powers of the States [hence the Federal District] are as follows, subject to the Act and the applicable local laws:
> ...
> III. Prevention and control of air pollution generated by fixed sources operating as industrial establishments as well as by mobile sources not under federal jurisdiction pursuant to this Act.

66. Only styrene-butadiene latex (SBL) production is listed in the NOM. SBL is used in carpet backing and paper coating. The Styrene Forum, glossary, online at <http://www.styreneforum.org/glossary_index_es.html#l/> (viewed 2 October 2006).
67. Appendix 3, table 2, paragraph 1, includes empty containers and drums used in hazardous waste management, used lubricating oils and used solvent waste (from xylene).

> Article 112. In respect of air pollution prevention and control, the governments of the States, the Federal District, and the Municipalities, in accordance with the distribution of powers set out in Articles 7, 8, and 9 of this Act as well as local legislation:
>
> > I. Shall control air pollution on premises and in areas under local jurisdiction as well as from fixed sources operating as industrial, commercial, or service establishments, provided that they are not covered by Article 111 Bis of this Act [emphasis added].

As Article 112 indicates, the Federal District's jurisdiction over air emissions from fixed sources operating as industrial establishments is not absolute. There are specific cases in which, pursuant to law, the federal government has jurisdiction:

> Article 111 Bis. The authorization of the Ministry shall be required for the operation of point sources under federal jurisdiction that release or may release odors, gases or solid or liquid particulates into the atmosphere.
>
> For the purposes of this Act, the chemical, petroleum and petrochemical, paint and dye, automotive, pulp and paper, metallurgy, glass, electrical power generation, asbestos, cement and lime, and hazardous waste treatment industries are considered fixed sources under federal jurisdiction [emphasis added].
>
> The regulation enacted for this purpose shall determine the specific subsectors belonging to each of the aforementioned industrial sectors whose establishments shall be subjected to the provisions of federal law as regards air pollutant emissions [emphasis added].

The definition of the industrial subsectors[68] appeared for the first time in an administrative decision — not a regulation — published in the DOF on 11 April 1997 and revised on 9 April 1998.[69] The list contains two

68. This list of subsectors is based on the Mexican Classification of Activities and Products (*Clasificación Mexicana de Actividades y Productos*—CMAP), an economic activity classification system developed by the National Institute of Geography, Statistics, and Informatics (*Instituto Nacional de Geografía, Estadística e Informática*—INEGI) that groups economic data by classes of activity. CMAP is currently being replaced by the North American Industry Classification System (NAICS).
69. The decision published in the DOF on 11 April 1997 and its subsequent revision and augmentation by the order published 9 April 1998 established the mechanism for obtaining the Consolidated Environmental License (*Licencia Ambiental Única*) and Annual Operating Report (*Cédula de Operación Annual*). A notice published 18 January 1999 in the DOF made public the instructions for obtaining the Consolidated Environmental License and the application form for the Consolidated Environmental License for Industrial Establishments under Federal Jurisdiction, as well as the Annual Operating Report.

basic criteria for determining which subsectors are included: i) it is among the sectors contemplated in LGEEPA Article 111 bis, and ii) it emits odors, gases, or solid or liquid particles into the atmosphere from its production processes.[70] The decision states that for the chemical industry, *synthetic rubber manufacturing* and *coating of parts when rubber is manufactured* are under federal jurisdiction. ALCA's operating license application states that its production process includes manufacturing of polystyrene latex and impregnation of parts.[71]

Lastly, under LGEEPA Article 111 bis, the federal government has jurisdiction over odors from point sources under federal jurisdiction. In contrast, LGEEPA Article 8, paragraph VI provides that municipalities are competent to enforce provisions related to odors from commercial and service establishments, but not industrial establishments.[72]

Nevertheless, the Profepa office in the Mexico Valley Metropolitan Area (*Zona Metropolitana del Valle de México*—ZMVM), in its response to the Secretariat's information request for preparation of the factual record, stated that ALCA's air emissions are not under its jurisdiction:

> Air emissions from the company [ALCA], if any, are under the jurisdiction of the Ministry of the Environment of the Department of the Federal District; the company has ceased to be a fixed source under federal jurisdiction, according to an entry in the DOF for 13 December de 1996.[73]

This statement contrasts with specific cases of environmental law enforcement by the federal authorities, since from 1994 to 1997, Profepa conducted five inspection visits to ALCA, closing the facility on two occasions due to air pollution-related violations. Similarly, ALCA's emission permits were obtained from the federal authorities and

70. Other criteria include involvement of chemical reactions, thermal operations, and smelting and tempering of metals. *Instructivo General. Licencia Ambiental Única (LAU)*, Semarnat, 1999.
71. Operating License Application no. 93-8975, of 16 December 1992, Appendix 2.
72. LGEEPA Article 8: "Pursuant to the provisions of this Act and the applicable local laws, the Municipalities have the following powers:
... VI. To enforce the legal provisions related to the prevention and control of pollution caused by noise, vibrations, thermal energy, electromagnetic and light radiation, and odors harmful to ecological balance and the environment, from fixed sources operating as commercial or service establishments, as well as to verify compliance with any provisions that may apply to mobile sources, except those sources that are considered to fall under federal jurisdiction pursuant to this Act."
73. Document issued by the Sub-delegate of inspection and enforcement from the Delegation of Profepa in the ZMVM and sent to Secretariat through document PFPA-SII-DGIFC-0142/2006, dated 10 February 2006, from Pollution Source Inspection Branch (*Dirección General de Inspección de Fuentes de Contaminación*) of Profepa.

describe a process consistent with the phrases *synthetic rubber manufacturing* and *coating of parts when rubber is manufactured*.[74]

b. Application of Sanctions

LGEEPA Articles 171 to 175 bis contain a chapter on sanctions for noncompliance with the environmental law. Article 171 lists the applicable sanctions:

1. Fines. The applicable fine from 1996 to 2001 was 20 to 20,000 days' minimum wage in the Federal District (*Salario Mínimo General Vigente en el Distrito Federal*—SMGVDF); after the reform of 2001, it is 20 to 50,000 times the SMGVDF.[75]

2. Closing, whether temporary or permanent, total or partial, in the following cases:

   - failure to comply with corrective measures ordered within the term required by order;
   - repeat violation, where the violations caused negative environmental impacts;
   - repeated failure, on three or more occasions, to comply with any corrective or emergency measure ordered.

3. Administrative arrest for up to 36 hours.

4. Seizure of objects related to the violation.

5. Suspension or revocation of permits.

Under article 173, in imposing the sanction, the authority must take account of:

1. The degree of the violation, considering harm to public health and the environment, as well as exceedence, if any, of limits set out in a NOM.

74. Operating license application no. 93-8975, of 16 December 1992.
75. The legal daily minimum wage in the Federal District on the date of the reform of 1996 was 26.45 pesos, while in 2001 it was 40.35 pesos. National Minimum Wages Commission (*Comisión Nacional de los Salarios Mínimos*), online at <http://www.conasami.gob.mx> (viewed 15 December 2006). That is, the minimum and maximum fines were 529 and 529,000 pesos, respectively, in 1996 and 807 and 2,017,500 pesos, respectively, in 2006.

2. The economic status of the violator.

3. Repeat violation. A violator violating a provision of LGEEPA within two years of the date on which the first violation of that provision was officially recorded, is considered a repeat violator, provided that the first violation has not been nullified.

4. The intention or negligence associated with the act, if any.

5. The benefit derived from the acts constituting the violation.

If a violation subsists upon expiry of the period granted to remedy it, the authority may impose fines for each day elapsed without remedy of the violation, up to a maximum fine of 50,000 times the SMGVDF. Where the violation is repeated, the amount of the fine may be up to twice the amount originally imposed, without exceeding twice the permitted maximum (i.e., up to 100,000 times the SMGVDF). Repeat violation may also be invoked to justify permanent closing of a facility.

6.3.2 Enforcement of Environmental Criminal Law

This section presents information on the criminal law context in Mexico in relation to the enforcement of CPF Articles 414, first paragraph and 415, paragraph I.

a. Pursuit of Criminal Prosecution

In Mexico, the prosecution in a criminal proceeding is the Office of the Public Prosecutor (*Ministerio Público*), an agency of the executive branch that is the sole entity legally authorized to request punitive action and redress before a judge in a criminal proceeding.[76] This power, called criminal action (*acción penal*), is granted to the Office of the Public Prosecutor by Article 21 of the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*— CPEUM).[77] At the

76. Miguel Ángel Castillo Soberanes, *El monopolio del ejercicio de la acción penal del Ministerio Público en México,* Instituto de Investigaciones Jurídicas, UNAM, Mexico, 1992, p. 13, online at <http://www.bibliojuridica.org/libros/2/864/4.pdf> (viewed 29 March 2006).

77. Article 21 of the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*—CPEUM): "The imposition of penalties is an exclusive attribute of the judiciary. The investigation and prosecution of offenses is the responsibility of the Office of the Public Prosecutor assisted by a police force under its immediate authority and command..."

federal level, investigation and prosecution of crimes is the responsibility of the MPF.[78]

At the investigation stage (*averiguación previa*), the MPF gathers the evidence necessary to substantiate the probable commission of an offense. The Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*—CFPP) grants the MPF "the broadest possible latitude to employ means of investigation as it sees fit, even if not explicitly provided by law, provided that they are not contrary to law."[79] Where the MPF, despite having exhausted all proceedings and means of proof at its disposal, does not succeed in substantiating the offense or probable liability of the alleged offender, it may decide not to proceed with criminal prosecution (*nolle prosequi*).

The revised CPF of 2002 sets forth a policy orientation in which preference is given to preventive and voluntary environmental protection measures over criminal law enforcement:

> It is important to note, however, that this initiative is not intended to represent a change toward a policy that emphasizes criminal law enforcement as an instrument of environmental policy; on the contrary, it shares the opinions of those who advocate minimal criminal law enforcement actions and of those who emphasize the use of preventive and voluntary legal instruments for enhancing environmental compliance.[80]

b. Third-party Intervention or Assistance

In relation to Profepa's participation in the environmental criminal justice system, LGEEPA Article 182 grants Semarnat, acting through Profepa, the power to report to the MPF the existence of unlawful acts, omissions, or facts that may involve offenses.[81] However, during the

78. CPEUM Article 102, paragraph A, second subparagraph: "The prosecution before the courts of all federal offenses shall be the duty of the Office of the Public Prosecutor; and, therefore, it has the power to apply for warrants of arrest of offenders; procure and present evidence to substantiate their liability; see that trials are conducted with due regularity in order that the administration of justice may be prompt and efficient; request the imposition of sentences, and intervene in all matters that the law may determine."
79. CFPP Article 180.
80. Statement of reasons for revision and addition of various provisions of the CPF and the CFPP.
81. LGEEPA Article 182: "In those cases where, in the course of exercising its powers, the Ministry takes cognizance of acts or omissions that may constitute offenses under the applicable law, it shall make the relevant report to the Office of the Federal Public Prosecutor.

period in question, Profepa was not authorized to collaborate with the officers of the MPF during the investigation or the criminal proceeding.

The concept of third-party intervention or assistance during criminal investigations and proceedings was introduced in 1986 in a provision that allows the victim or person injured by any offense to assist the MPF in a criminal proceeding.[82] However, for several years there was no legal precept or jurisprudence indicating that Profepa could intervene as a third party. Third-party intervention was incorporated into LGEEPA in 2002;[83] therefore, for the purposes of this factual record, during the period of criminal law enforcement in the case of ALCA, Profepa was prevented from assisting PGR.

c. Specialized Environmental Law Enforcement Entities

During the period at issue, while the PGR had various structures for investigating environmental offenses, Profepa lacked specialized powers and organization.

There were specialized environmental law enforcement structures within the PGR: at first (from 1991 to 1997), the Office of the Special Prosecutor for Forest-related Offenses (*Fiscalía Especializada para Delitos Forestales*), which became the Office of the Special Prosecutor for Environmental and Highway-related Offenses (*Fiscalía Especializada para Delitos Ecológicos y Carreteros*) from 1997 to 1998, and finally (1998) was transformed through the creation of three Offices of the Special Prosecutors for Environmental Offenses (*Fiscalías Especializadas para la Atención*

Any person may directly file criminal complaints corresponding to the environmental offenses defined by the applicable law.
The Ministry shall, in the areas under its jurisdiction, provide any technical or expert reports requested by the Office of the Public Prosecutor or the judicial authorities further to complaints filed by the Environmental Offenses Commission."

82. CFPP Article 141: "In any criminal proceeding, the victim or the person aggrieved by an offense is entitled to: ... II. Assist the Office of the Public Prosecutor."
This text was elaborated in 1994 by CFPP Article 365: "The suspect and his counsel are entitled to appeal to the Office of the Public Prosecutor, as are the aggrieved or his legitimate representatives where they have been recognized by the trial court judge, as assistants to the Office of the Public Prosecutor, for purposes of repair of harm and prejudice. In such case, the appeal shall be limited to matters relating to the repair of harm and prejudice and to the injunctive redress conducive to providing it."

83. LGEEPA Article 182, fourth paragraph, augmented 31 December 2002: "The Ministry shall assist the Office of the Federal Public Prosecutor as prescribed by the Federal Code of Criminal Procedure, without prejudice to any assistance provided by the victim or the person directly aggrieved by the unlawful act, on his own behalf or through his legal representative."

de Delitos Ambientales),[84] with the authority to take cognizance of, investigate, and prosecute environmental offenses.

Profepa had powers to investigate environmental violations and, where applicable, report to the MPF any acts, omissions, or facts indicative of the commission of offenses. However, not only was Profepa prevented from assisting until 2002, it had no specialized administrative criminal law enforcement structure for pursuing, opening files on, gathering evidence on, or carrying out any other activity to substantiate the existence of environmental offenses. Therefore, Profepa could not cooperate more extensively with the investigation carried out by the PGR officers due to a lack of adequate structure and specialization. In June 2001, the Internal Regulation of Semarnat created the Federal Environmental Offenses and Litigation Branch (*Dirección General de Delitos Federales contra el Ambiente y Litigio*). Furthermore, cooperation between the PGR, Semarnat, and Profepa is structured by a cooperation agreement published in the DOF on 13 October 2004.

In relation to the MPF's capacity in the investigation of crimes, the 2004 human development report on Mexico, published by the United Nations Development Program (UNDP), states that "officials set aside cases requiring greater investigative effort in order to identify a suspect and at times leave evidence gathering to the prosecution... the Office of the Public Prosecutor tends not to proceed with criminal prosecution in more complex cases, arguing, for example, lack of evidence."[85]

d. Standard for Substantiation of Probable Offense

The law determines at what point the MPF is considered to have the evidence necessary to substantiate the probable commission of an offense before a judge. At different times in the period 1993–1999, there were two different constitutionally defined evidentiary standards that the MPF had to meet in order to substantiate the probable commission of an offense: *elements of the offense* (in force 1993–1999) and *corpus delicti* (in force as of March 1999). Thus, in the period being analyzed, both criteria were applicable at different times.

84. Order A/70/98 of the PGR, creating Offices of the Special Prosecutors for Environmental Offenses A, B and C. DOF, 10 August 1998. See also the Order A/21/91, issued by PGR, that creates six specialized prosecution agencies reporting to MPF; DOF, 15 July 1991. Now, PGR has the Specialized Unit for Investigation of Environmental Offenses in Accordance with Special Laws (*Unidad Especializada en Investigación de Delitos contra el Ambiente y Previstos en Leyes Especiales*).

85. United Nations Development Program, *Informe sobre desarrollo humano en Mexico 2004*, 2005, p. 150.

The fundamental difference between these two approaches is that the standard of *elements of the offense* includes that of *corpus delicti* and also encompasses the manner in which the offense was committed: either with criminal intent or with negligence. Therefore, the work involved in substantiating an offense under the *elements of the offense* standard involves determining whether the offense was committed intentionally or merely negligently.

In contrast, the analysis under the *corpus delicti* standard requires proof that the offense actually occurred (*materialidad del hecho*); that is, a demonstration of the existence of a fact with all its constituent elements, as defined by the law making it an offense.

For these reasons, at the time of the criminal investigation, substantiation of the alleged offense required a much more thorough analysis than was required after 1999.

e. Means of Proof

For substantiation of *elements of the offense* or of *corpus delicti,* the CFPP recognized as means of proof "anything manifesting itself as such, provided that it is conducive and not contrary to law in the opinion of the judge or the court."[86]

In the case of the investigation of ALCA's alleged crimes, inspection as well as expert, testimonial, and documentary evidence were the suitable evidentiary methods to initiate a report of facts, begin an investigation, and initiate the judicial process for environmental criminal liability.[87]

In the opinion of the Secretariat's legal consultant, the technical complexity of environmental offenses normally requires the use of expert testimony, which in this case could determine whether hazardous materials or wastes were at issue; establish the presence of harm — or at least danger — to public health, natural resources, fauna, flora, or ecosystems; identify the conduct as causing atmospheric emission, release, or discharge of gases, smoke, or dust; and determine the nature of the violation of the terms of the authorization issued by the competent federal authority, including violation of the applicable legal provisions or NOMs.[88]

86. CFPP Article 206.
87. Technical opinion on environmental criminal law by the Secretariat's legal consultant of 30 August 2006.
88. *Ibid*.

f. Application of Sanctions

The penalties prescribed by the CPF for the offenses of harm to the environment caused by hazardous waste management and air emissions were as follows:

1. 1996–2002, set forth in Article 415, paragraphs I and II:

   a. Three months' to six years' imprisonment, and

   b. 20 to 20,000 times the SMGVDF.

2. After the reform of 2002, set forth in Articles 414, first paragraph and 415, paragraph I:

   a. One to nine years' imprisonment, and

   b. 300 to 3,000 days' fine.

In contrast to the fine based on the minimum wage (the SMGVDF), the CPF provides that a "day's fine" (*día multa*) is equal to the net daily revenue of the sentenced person at the time when the offense was committed, taking into account all his revenue, and provides that the lower limit of the day's fine is equal to the legal daily minimum wage at the place where the offense was committed.[89]

The CPF provides that the judge must take the following factors into account in sentencing:[90]

1. The magnitude of the harm or danger caused.

2. The nature of the offense and the methods used to commit it.

3. The circumstances under which the offense was committed, including time, place, and method.

4. The manner and degree of the accused's involvement in the commission of the offense.

5. The age, schooling, customs, and social and economic status of the person who committed the offense.

89. CPF Article 29.
90. CPF Article 52.

6. The subsequent behavior of the accused in relation to the offense committed.

7. Any other special personal conditions obtaining at the time the offense was committed, provided that they are relevant.

7. History of ALCA in Iztapalapa

In his 17 June 2003 submission, the Submitter requested that the Secretariat take account of the information contained in submission SEM-02-005 (*ALCA-Iztapalapa*) of 25 November 2002, which contains information on ALCA's alleged operation in a residential zone for the last 40 years.[91] In Council Resolution 05-05, the Council considered "the submissions filed on 25 November 2002 and 17 June 2003 by Mr. Ángel Lara García, and the response provided by the Government of Mexico on 4 December 2003."

In regard of the foregoing, the Secretariat hereby provides information on those facts.

7.1 ALCA

ALCA operated in the borough of Iztapalapa from its opening in 1958 until December 2005, when it closed its facility for economic reasons and began to dismantle the plant. The company was engaged in the production and impregnation of polystyrene latex for the footwear industry.[92]

ALCA and the Submitter were neighbors from 1958 until the end of the company's operations in 2005. Chemicals were discharged via a hose connection leading to an outlet onto the street, just a few meters from the Submitter's house.[93] The storage tanks, the chemical reactor, and the furnace were located next door to the Submitter's home, separated from it by a wall built in 1995 and raised in 1997.[94] Open-air mixing of solvents took place on the same outdoor area as the raw materials delivery area,

91. Submitter correspondence to the CEC Secretariat, dated 3 July 2003.
92. Information provided by the ALCA operations manager during the tour conducted by the Secretariat's legal officer on 1 December 2005.
93. *Reporte final: Visita de reconocimiento de sitio*, Dames & Moore de México, S. de R.L. de C.V., February 2006.
94. Administrative decision no. 252/97, dated 4 November 1997, issued by the Industrial Inspection Branch.

the styrene storage tanks, the chemical reactor, and the furnace, causing intense odors.[95]

ALCA's employees mixed solvents manually on the plant's patio in order to prepare the "activator," which was supplied to customers as a latex adhesive.[96] As a result of conditions imposed by the environmental authorities, this process was modified and ultimately eliminated in late 1997[97] after Profepa ordered the company to install a storage system for hazardous materials.[98]

From 2000 to 2004, the footwear industry supplied by ALCA was affected by market factors such as footwear imports,[99] higher raw material prices,[100] and low productivity.[101] The consequence was the closing of many factories, so that companies supplying the sector, e.g., ALCA, had to curtail their operations.[102] In the case of ALCA, the prevailing climate in the footwear industry led to the layoff of some of the company's employees in 2003.[103] Operations continued, but in mid-December 2005, the company closed due to decreased sales.[104] ALCA informed the Secretariat during a visit conducted on 1 December 2005 that it had not yet notified the environmental authorities of the cessation of operations and dismantlement of the facility.

95. Dames & Moore de México, S. de R.L. de C.V., *op. cit.*, note 93.
96. *Ibid*.
97. "The applicant puts forward and proposes: a gradual change in the use of solvents with the adjustment of the formulas, decreasing the number of customers to whom the service of selling activators is provided... They substituted the use of xylol for toluol... likewise, triethanolamine was substituted for ammonia... In furnace 2 it was ordered to cover the building with Pintro-brand galvanized and prepainted siding in order to insulate the body of the furnace; in addition to having raised the height of the adjacent wall to 8 m." Administrative decision no. 252/97, dated 4 November 1997, issued by the Industrial Inspection Branch of Profepa.
98. Inspection report no. 09-009-0926/94-V-02, of 10 March 1997, p. 6.
99. Footwear imports increased by an average of 30 % in 2000–2001. Leather and Footwear Industry Competitiveness Program, Ministry of the Economy (*Secretaría de Economía*).
100. From 2002 to 2004, the cost of materials such as soles and other components increased by 13 %. *La Jornada*, Mexico, 10 January 2005.
101. The overall share of the footwear industry in the economy has declined significantly in the last four years due to its sluggish growth. Leather and Footwear Industry Competitiveness Program, Ministry of the Economy.
102. The records of the General Customs Administration (*Administración General de Aduanas*) indicate that documented footwear imports exceeded 34,500,000 pairs. *La Jornada*, Mexico, 10 January 2005.
103. Information provided by the ALCA operations manager during the tour of the facility on 1 December 2005.
104. *Ibid*.

The materials produced by ALCA were used in the manufacture of toecaps, heel pads or stiffeners, and synthetic lining or padding, as well as in the manufacture of women's bags and briefcases.[105] The Mexican Business Information System (*Sistema de Información Empresarial Mexicano*—SIEM) shows that ALCA produced heel pads or stiffeners for footwear and synthetic lining, using primarily textiles, pigments, and solvents in their production.[106] In 2004 ALCA had approximately 24 employees[107] and was classified as a small business.[108] Its facility covered an area of approximately 3,540 m^2 and the process areas consisted of: a) a chemical storage patio with eight 9,000-liter tanks for styrene monomer storage, a 400-liter tank for xylene storage, and a 4,700-liter tank for diesel storage; b) a reactor for preparation of latex where, in addition to the reactor itself, there was a 2,480-liter tank for styrene monomer storage and another tank of unknown capacity for xylol storage; c) a fabric impregnation area with vats and machinery for that purpose, as well as a vertical LPG furnace for latex drying and a horizontal furnace operating with steam coils and a steam boiler; d) two fabric production areas; and e) a hazardous-waste storage area with capacity for three 200-liter drums, consisting of a concrete platform with a concrete retaining wall on three sides and a rim sloping into the center to allow for movement of the containers and prevent possible dispersal of spilled material.[109]

ALCA's activities consisted of the following steps:[110]

- **Fabric production.** At this step, cotton-knitting machines were used to produce fabric rolls. The rolls were passed through plush knitting machines to raise the pile and give it a more padded texture. According to plant staff, at some point a no-knit process was being used with cotton tufts as the raw material. However, this process had been discontinued and was not observed during the site visit in December 2005.

105. Shoe Infonet ALCA, S.A. de C.V., online at <http://personales.com/mexico/mexico/alca/> (viewed 16 January were 2006).
106. Mexican Business Information System, online at <http://www.secofi-siem.gob.mx/portalsiem/> (viewed 16 January 2006).
107. Mexican Business Information System, reported in 2004, online at <http://www.secofi-siem.gob.mx/portalsiem/> (viewed 16 January 2006).
108. Pursuant to Article 3, paragraph III of the Development of Micro-, Small, and Medium-sized Business Competitiveness Act (*Ley para el Desarrollo de la Competitividad de la Micro, Pequeña y Mediana Empresa*), published in the DOF on 30 December 2002, industrial enterprises are classified according to the number of employees as either micro-businesses (0–10), small businesses (11–50), medium-sized businesses (51–250), or large businesses (over 250).
109. Dames & Moore de México, S. de R.L. de C.V., *op. cit.*, note 93.
110. *Ibid.*

- **Polystyrene latex preparation.** Polystyrene latex[111] is obtained from a combination of products, primarily styrene monomer and xylol.
- **Impregnation and drying**. Cotton fabric is submerged in latex for impregnation according to the required thickness and then put in a drying furnace. In this phase, air emissions were produced by the drying material and by combustion gases from the drying furnaces and the steam boiler.
- **Finishing and packing.** The dried impregnated material was cut and packed to customer specifications and requirements.

During the Secretariat's visit to ALCA's facility on 1 December 2005, it was observed that all the equipment, including the latex drying furnaces that had generated VOC emissions, was not operating. In the hazardous-waste storage area, there were three closed drums marked to indicate that one was for dirty solvent, one was for dirty oil, and one was for oil-impregnated solid waste.[112] Also found were containers of different types and capacities, mainly 200-liter metal drums and 19-liter buckets, some of them empty and others containing small quantities of substances, used for management of raw materials and prepared latex batches. Some of the labels indicated management of other chemicals used in latex preparation such as ethylene glycol, methylene glycol, toluene, and ammonium chloride.[113]

7.2 The Borough of Iztapalapa

In 2000, the population of Iztapalapa was 1,773,343,[114] making it the country's most populated incorporated area,[115] above the most populated areas of the states of Yucatán, Morelos, Durango, Querétaro,

111. The uses of polystyrene include manufacturing of plastics for furniture, electronic products, plastic crates, food containers, insulating materials, and toys. United States Environmental Protection Agency, Office of Air Quality Planning and Standards, *Locating and Estimating Air Emissions from Sources of Styrene*, April 1993.
112. Dames & Moore de México, S. de R.L. de C.V., *op. cit.*, note 93.
113. *Ibid.*
114. INEGI, *XII Censo General de Población y Vivienda 2000*, online at <http://www.inegi.gob.mx/> (viewed 19 December 2005).
115. Census results are grouped by municipality and, in the case of the Federal District, by borough. The populations of Mexico City, Monterey, Guadalajara, and Puebla significantly exceed that of Iztapalapa when considered as metropolitan areas; however, they are broken down into municipalities whose population is smaller than that of the borough of Iztapalapa. Sedesol, *Sistema de Consulta de Indicadores del Sistema Urbano Nacional*, 2005, online at <http://habitat2.sedesol.gob.mx/sedesol/scisunweb/index.php> (viewed 7 December 2005).

Zacatecas, Tlaxcala, Aguascalientes, Nayarit, Quintana Roo, Campeche, Colima and Baja California Sur.[116] The average urban density of Iztapalapa[117] was reported as 211 persons/ha,[118] 21% denser than the figure for the ZMVM.[119] The population of Iztapalapa grew by a factor of 23 in the five decades from 1950 to 2000.[120]

Table 2. Population growth in Iztapalapa[121]

Year	Total	Population growth
1950	76,621	
1960	254,355	177,734
1970	522,095	267,740
1980	1,262,354	740,259
1990	1,490,499	228,145
2000	1,771,673	282,174

In the last thirty years, Iztapalapa has exhausted its land base while accounting for 83.7% of growth in the Federal District.[122] In the 1970s,

116. Yucatán, 1,658,210; Morelos, 1,555,296; Durango, 1,448,661; Querétaro de Arteaga, 1,404,306; Zacatecas, 1,353,610; Tlaxcala, 962,646; Aguascalientes, 944,285; Nayarit, 920,185; Quintana Roo, 874,963; Campeche, 690,689; Colima, 542,627; Baja California Sur, 424,041. INEGI, *XII Censo General de Población y Vivienda 2000*, online at <http://sc.inegi.gob.mx/simbad/index.jsp?c=125> (viewed 19 December 2005).
117. The average urban density indicator is a weighted average of population and area of the basic geostatistical areas (AGEB). This method of calculating density more accurately reflects the degree of concentration of the urban population in a metropolitan area, since large areas of the metropolitan municipalities are not urbanized.
118. Sedesol, *Sistema de Consulta de Indicadores del Sistema Urbano Nacional*, 2005, online at <http://habitat2.sedesol.gob.mx/sedesol/scisunweb/index.php> (viewed 7 December 2005).
119. The average urban density reported for the ZMVM was 173.12 in 2000. Sedesol, *Sistema de Consulta de Indicadores del Sistema Urbano Nacional*, 2005, online at <http://habitat2.sedesol.gob.mx/sedesol/scisunweb/index.php> (viewed 19 December 2005).
120. Borough of Iztapalapa, *Cuaderno estadístico delegacional*, 2000, p. 23, Table 2.1, cited online at Borough of Iztapalapa, Demographics, <http://www.iztapalapa.df.gob.mx/> (viewed 16 December 2005).
121. INEGI, *Federal District. VII, VIII, IX, X, XI y XII Censos Generales de Población y Vivienda*, 1950, 1960, 1970, 1970, 1980, 1990 and 2000.
122. Borough of Iztapalapa, demographics, online at <http://www.iztapalapa.df.gob.mx/> (viewed 16 December 2005).

54.3% of demographic growth in the Federal District was due to Iztapalapa. In the 1980s, Iztapalapa grew 1.6 times more than the rest of the Federal District[123] as families moved there from the central boroughs of the Federal District and from other states.

A document dated 7 February 2006, issued by the Urban Development Planning and Evaluation Department (*Dirección de Planeación y Evaluación del Desarrollo Urbano*—DPEDU) of the government of the Federal District, acknowledges the complexity of urban planning in Iztapalapa:

> Due to its historical background, the borough of Iztapalapa comprises industrial buildings scattered among its residences, leading to a situation of mixed use and a heterogeneous image. Therefore, the environmental problems of the borough have multiple causes, but one of the most relevant urban development priorities is to improve the environment by controlling pollution sources, restoring and expanding forested areas, and applying technologies to reduce impacts on ecosystems.

The DPEDU document also describes three urban development programs corresponding to 1982, 1987 and 1997:[124]

- **Partial Development Program (1982).** The ALCA lot was located in zone 27, classified as *heavy neighborhood industry*, on which textile manufacturing, light industry, and assembly activities were permitted. *Heavy and extractive industrial activities on areas under 2 ha* were allowed with a land-use permit.

- **Partial Urban Development Program (1987).** The lot in question was zoned as *neighborhood industry, low-intensity zone up to 1.5 times the area*, in which *heavy, medium, and light industrial activities* were allowed with a land-use permit.

- **Borough Urban Development Program (1997).**[125] This program reaffirmed the zoning in the Partial Urban Development Program (1987),[126] classifying it as Industrial (I). The table of land uses

123. *Ibid*. However, the information published by the borough of Iztapalapa indicates demographic growth of 341,088, which differs from the figure reported by INEGI.
124. The latter available online at <http://www.iztapalapa.df.gob.mx/>.
125. Ministry of Urban Development and Housing, *Cartas de divulgación de desarrollo urbano*, online at <http://www.seduvi.df.gob.mx/programas/divulgacion/delegacionales97/iztapalapa/iztapalapa.html> (viewed 16 December 2005).
126. The other industrial zones are Guadalupe del Moral, Industrial Iztapalapa, Progreso del Sur, and Granjas Esmeralda.

> allows *micro-industry*, *domestic and high-technology industry, and neighborhood and small industry.*

In regard to ALCA's activities, the document concludes: "... in view of the specific characteristics of the industry type, in terms of land use the facility is considered to be Permitted in the respective zones, and therefore allowed to operate on the lot in question."

8. Standards and Health Effects of Compounds Used by ALCA

The Submitter, himself or through others, reported that emissions and vapors from compounds used by ALCA were causing him nuisance and harming his health, while persons exhibited symptoms including dizziness, eye irritation and burning, and headaches.[127] The documents enclosed with the submission state that the Submitter and his family:

> [H]ave been exposed to solvents emanating from a factory located alongside his house for approximately 40 years. Mr. Lara refers to the following symptoms: asthenia, adynamia, dizziness, vertigo, occipital headaches and abdominal pain accompanied by nausea and vomiting, as well as fine tremor in the upper extremities over approximately 20 years, increasing in intensity for the past 6 years, which symptoms and signs increase when the factory discharges the compounds used therein.[128]

And that:

> These compounds are: hexane, heptane, styrene, toluene and xylene, which are highly toxic polycyclic aromatic hydrocarbons (PAHs), and which pose a risk to public health, especially to families living near the source of exposure if there is not a sound management, disposal and storage thereof.[129]

127. Unnumbered documents dated 5 December 2001 and 24 February 2003, issued by the Assistant Director of Gerontology Units, Inapam; unnumbered document dated 26 May 2003, issued by Assistant Director of Certification and Supervision, Inapam; document dated 23 October 2002, issued by a local service provider. The documents, issued at the Submitter's request, are not addressed to any authority, and the Submitter attached them to his submission.
128. Submission, p. 2, and unnumbered rulings dated 15 and 26 January 2001, issued by the head of the INER Environmental Health Research department, addressed to the Minister of the Environment and the Office of the President, respectively. The Submitter reported the same symptoms to Secodam in an 18 January 2001 report. N.B. Asthenia is a sense of weakness and generalized loss of vitality, both physical and mental, while adynamia refers to the loss of strength or vigor, usually related to some illness.
129. Documents enclosed with submission SEM-02-005 (*ALCA-Iztapalapa*), dated 15 January (3 documents) and 26 January, 14 and 22 February, 8 and 16 October 2001, and 1 and 27 February 2002, issued by INER at the Submitter's request, addressed to the

According to the information gathered by the Secretariat, the substances used by ALCA in its process were styrene, xylene, heptane, hexane, and toluene. Depending on the degree and length of exposure, the symptoms caused by exposure to these substances are varied, including irritation of the nose, throat, and eyes;[130] central nervous system alteration;[131] weakness of muscles,[132] legs and arms;[133] fatigue and lack of coordination;[134] abdominal pain;[135] and vertigo.[136] Other documented effects were loss of sensitivity in feet and hands, followed by muscle weakness in feet and hands, in footwear industry workers.[137]

Minister of the Interior, the Attorney General, the Minister of the Environment and Natural Resources, the President, the Minister of Health, the Mayor of Mexico City, the Mexico City Environmental Attorney, the INSEN General Director, the Minister of Social Development, and the General Director of Civil Protection, respectively.

130. Symptom caused by exposure to styrene and xylenes. United States Department of Health and Human Services, Agency for Toxic Substances and Disease Registry (ATSDR), *Toxicological Profile for Styrene,* September 1992, p. 14, online at <http://www.atsdr.cdc.gov/toxprofiles/tp53.pdf> (viewed 20 January 2006); *Praxair Material Safety Data Sheet. Xylenes*, Praxair, 2000, online at <http://www.praxair.com/praxair.nsf/AllContent/E76F3FE7D6A00DC985256A860081E821/$File/p6244.pdf> (viewed 13 January 2006).

131. Symptom caused by exposure to styrene and toluene. ATSDR, *Toxicological Profile for Styrene*, p. 14; I. Andersen, G.R. Lundqvist, L. Molhave et al., "Human Response to Controlled Levels of Toluene in Six-Hour Exposures," *Scand. J. Work Environ. Health,* 9:405–418 (1983), cited in ATSDR, *Toxicological Profile for Toluene,* September 2000, p. 58, online at <http://www.atsdr.cdc.gov/toxprofiles/tp56.pdf> (viewed 24 January 2006).

132. Symptom caused by exposure to styrene and *n*-hexane. ATSDR, *Toxicological Profile for Styrene,* p. 14; Y. Yamamura, "*n*-Hexane polyneuropathy," *Folia Psychiatrica et Neurologica Japonica* 23(1):45–57 (1969), cited in ATSDR, *Toxicological Profile for* n-*Hexane*, July 1999, pp. 4, 38–9, online at <http://www.atsdr.cdc.gov/toxprofiles/tp113-p.pdf> (viewed 25 January 2006).

133. Symptom caused by exposure to *n*-hexane. ATSDR, *Toxicological Profile for* n-*Hexane*, online at <http://www.atsdr.cdc.gov/toxprofiles/tp113-p.pdf>, July 1999, pp. 4, 38–9.

134. Symptom caused by exposure to *n*-heptane. K.L. Low, J.R. Meeks, and C.R. Mackerer, "*n*-Heptane," in R. Snyder (ed.), *Ethel Browning's Toxicity and Metabolism of Industrial Solvents*, vol. 1, *Hydrocarbons* (Elsevier: Amsterdam, New York, and Oxford, 1987), cited in Ontario Ministry of the Environment, *Ontario Air Standards for* n-*Heptane*, March 2001, p. 4, online at <http://www.ene.gov.on.ca/envision/env_reg/er/documents/2001/airstandards/PA00E0009.PDF> (viewed 15 February 2006).

135. Symptom caused by exposure to *n*-hexane. ATSDR, *Toxicological Profile for* n-*Hexane*, online at <http://www.atsdr.cdc.gov/toxprofiles/tp113-p.pdf>, July 1999, pp. 4, 38–9.

136. Symptom caused by exposure to *n*-hexane and *n*-heptane. ATSDR, *Toxicological Profile for* n-*Hexane*, online at <http://www.atsdr.cdc.gov/toxprofiles/tp113-p.pdf>, July 1999; Ontario Ministry of the Environment, *Ontario Air Standards for* n-*Heptane*, March 2001, p. 4.

137. ATSDR, *Toxicological Profile for* n-*Hexane*, p. 4.

Various official documents and proceedings attest to the presence of and nuisance caused by the odors associated with ALCA's operations. For example, a certification of facts[138] recorded in 2005 found that, although the source could not be determined, there was "a strong perceptible and annoying odor" in the vicinity of ALCA. During inspection visits in 1994,[139] 1995,[140] and 2001,[141] Profepa noted perceptible odors from the polystyrene latex impregnation operations.

From the documentation provided by Mexico, the Submitter, and ALCA as well as the information collected by the Secretariat, there is no doubt that ALCA handled styrene, xylene, heptane, hexane, and toluene. In particular, a chemical report issued by PGR experts points to the presence of such substances in samples taken from the company's storage tanks.[142] During the Secretariat's tour of the ALCA site in December 2005, it was observed that the total styrene and xylene storage capacities were 72,000 l and 400 l, respectively.[143] As to the other substances (toluene, hexane, and heptane), the documents issued by the authorities evidence their use by ALCA.[144] The waste materials used in the synthetic rubber production process are considered hazardous waste, as are the waste solvents derived from xylene and toluene.[145]

VOC emissions to the atmosphere from facilities with processes like those of ALCA are not regulated by standards establishing limits on air emissions. This being the case, the administrative authorities sanctioned ALCA for noncompliance with the conditions of the operating

138. Certification of facts notarized by Lic. José Luis Latapi Fox, Notary Public no. 120 of the Federal District, by notarized document no. 38,241, of 10 January 2005.
139. "Odors are perceived because the impregnation of the latex rolls is done manually," inspection report 09-009-0926/94, of 7 December 1994, p. 4.
140. "The air is not extracted from an enclosed area but from an open area, and the inlet does not coincide with the impregnation vats; therefore, odor emissions are perceived in the area in question," verification of measures report 09-009-0926/97U02, of 10 March 1997, p. 4.
141. "[D]uring the tour of the facility, odors characteristic of styrene were perceived", inspection report 15-009-0035/01-D, of 27 July 2001, p. 7.
142. Expert opinion on chemistry dated 25 July 1997, issued by experts from the PGR Expert Services Branch (*Dirección General de Servicios Periciales*).
143. Eight 9,000-l tanks for styrene storage and one 400-l tank for xylene storage. That is, 99 % of the storage capacity corresponded to styrene while the remainder corresponded to xylene used as a solvent.
144. Document CA/349/02, of 14 October 2002, from Coordinator of Semarnat advisors; and document 10950 of 25 July 1997 from experts from the PGR Expert Services Branch.
145. Mexican Official Standard NOM-052-SEMARNAT-1993, Establishing the characteristics and list of hazardous wastes as well as the threshold above which a waste is considered hazardous due to its toxicity in the environment.

license, which included the requirement to install VOC emission control equipment.[146]

Several chemicals handled by ALCA are listed in standards that serve to determine whether high-risk activities are conducted and, theretofore, produce an environmental risk study;[147] however, according to Profepa's site visit reports, inventories reported to the Ministry of Urban Development and Ecology (*Secretaría de Desarrollo Urbano y Ecología*—Sedue) and the Ministry of Social Development (*Secretaría de Desarrollo Social*—Sedesol), and company information,[148] ALCA handled smaller quantities than those regulated by the standards. Other substances used by ALCA are included in the Pollutant Release and Transfer Register (PRTR)[149] but these, too, were handled in quantities below the reportable limits. Similarly, some of the substances used by ALCA are listed in hazardous material transportation standards,[150] are subject to workplace exposure limits,[151] or are subject to risk identification during handling[152] and to special safety conditions.[153]

146. Administrative decision no. 252/97-V, of 5 September 1997, issued by the Industrial Inspection Branch of Profepa.
147. High-risk activities are determined as per the volume of chemical substances known as "reportable quantities" (*cantidades de reporte*), which are listed in the first and second lists of high-risk activities, published in DOF on 28 March 1990 and 4 May 1992, respectively. LGEEPA article 146 provides that a risk study must be prepared when conducting high-risk activities. The risk study contains, among other aspects, the definition of buffer zones.
148. Inspection reports 15-009-0035/01-D and 09-009-0029/05, dated 27 July 2001 and 3 August 2005, respectively, describe that ALCA does not handle chemical substances beyond reportable quantities. The inventories and releases reported to Sedue and Sedesol in March 1993 and March 1994 state that the monthly volume managed was 40,000 kilograms of styrene, 400 liters of toluene, 200 of hexane, and 50 of xylene. Also according to a document issued by ALCA on 7 October 1997, the monthly quantities used by ALCA that year were 1000 liters of xylene, 200 liters of toluene, 15 liters of hexane and 14 liters of heptane. N.B. Sedue and Sedesol had jurisdiction over environmental matters that were later transferred to Semarnat.
149. Order determining the list of reportable substances under federal jurisdiction for the pollutant release and transfer register. DOF, 31 March 2005. The reporting threshold for styrene is 1,000 kg/year.
150. Mexican Official Standard NOM-002-SCT-2003, List of most commonly transported substances and materials.
151. Mexican Official Standard NOM-010-STPS-1999, Health and safety conditions in workplaces where chemical substances that may cause contamination of the work environment are handled, transported, processed, or stored; NOM-047-SSA1-1993, Establishing the maximum permitted biological levels of organic solvents in occupationally exposed personnel.
152. Mexican Official Standard NOM-018-STPS-2000, System for identification and communication of hazards and risks posed by hazardous chemical substances in the workplace.
153. Mexican Official Standard NOM-028-STPS-2004, Workplace organization; safety in processes involving chemical substances.

Styrene is listed as a most commonly transported hazardous material.[154] As to workplace exposure: maximum permitted exposure limits,[155] type and degree of risk,[156] and handling rules have been established for this chemical.[157] In Mexico, styrene is on the list of substances subject to the PRTR,[158] but no reportable quantities have been set for determining the existence of high-risk activities.

Xylenes[159] are listed as most commonly transported hazardous materials;[160] there are workplace[161] and health-related[162] maximum permitted exposure limits for xylenes; the type and degree of risk they represent have been established;[163] and they are subject to rules for management as a chemical substance.[164] In terms of environment, there are maximum permitted levels of soil contamination by xylenes,[165] but they are not on the PRTR list. As regards risk, management of xylenes in quantities above the reportable quantity is considered a high-risk activity.[166]

Toluene is listed as a most commonly transported hazardous material;[167] there are workplace[168] and health-related[169] maximum permitted exposure limits for it; the type and degree of risk it represents have been

154. NOM-002-SCT-2003.
155. Mexican Official Standard NOM-010-STPS-1999, Health and safety conditions in workplaces where chemical substances that may cause contamination of the work environment are handled, transported, processed, or stored.
156. NOM-018-STPS-2000.
157. NOM-028-STPS-2004.
158. Order determining the list of reportable substances under federal jurisdiction for the pollutant release and transfer register. DOF, 31 March 2005. The reporting threshold for styrene, for PRTR purposes, is 1,000 kg/year.
159. There are three forms, or isomers, of xylene: *meta*-xylene, *ortho*-xylene, and *para*-xylene. There are also mixtures of the three isomers, which additionally contain 6–15 % ethyl benzene. ATSDR, *Toxicological Profile of Xylene (Draft),* Atlanta, September 2005.
160. NOM-002-SCT-2003.
161. NOM-010-STPS-1999.
162. Mexican Official Standard NOM-047-SSA1-1993, Establishing the maximum permitted biological levels of organic solvents in occupationally exposed personnel.
163. NOM-018-STPS-2000.
164. NOM-028-STPS-2004.
165. Mexican Official Standard NOM-138-SEMARNAT/SS-2003, Limits on hydrocarbons in soils and specifications for their characterization and remediation.
166. The second list of high-risk activities, published May 1992, establishes 200,000 kg/year as the reportable quantity for xylene. See also notes 147 and 148.
167. NOM-002-SCT-2003.
168. NOM-010-STPS-1999.
169. NOM-047-SSA1-1993.

established;[170] and it is subject to rules for management as a chemical substance.[171] In terms of environment, there are maximum permitted levels of soil contamination,[172] but toluene is not on the PRTR list. As regards risk, the use of toluene in quantities above the reportable quantity is considered a high-risk activity.[173]

Hexane is listed as a most commonly transported hazardous material;[174] there are maximum permitted workplace exposure limits for it;[175] the type and degree of risk it represents have been established;[176] and it is subject to rules for management as a chemical substance.[177] In terms of environment, it is not on the PRTR list, nor have any limits on soil contamination been established. As regards risk, the volume above which the management of hexane is considered a high-risk activity has been established.[178]

Heptane is listed as a most commonly transported hazardous material;[179] there are maximum permitted workplace exposure limits for it;[180] the type and degree of risk it represents have been established;[181] and it is subject to rules for management as a chemical substance.[182] In terms of environment, it is not on the PRTR list, nor have any limits on soil contamination been established. As regards risk, the reportable volume for determining whether the management of heptane is considered a high-risk activity has been established.[183]

The following table summarizes the standards applicable to the substances used by ALCA.

170. NOM-018-STPS-2000.
171. NOM-028-STPS-2004.
172. NOM-138-SEMARNAT/SS-2003.
173. The first and second lists of high-risk activities establish the reportable quantities for toluene in 10,000 kg/year (for toxic characteristics) and 100,000 kg/year (for flammable characteristics). See also notes 147 and 148.
174. NOM-002-SCT-2003.
175. NOM-010-STPS-1999.
176. NOM-018-STPS-2000.
177. NOM-028-STPS-2004.
178. The second list of high-risk activities specifies the reportable quantity for hexane as 20,000 kg/year. See also notes 147 and 148.
179. NOM-002-SCT-2003.
180. NOM-010-STPS-1999.
181. NOM-018-STPS-2000.
182. NOM-028-STPS-2004.
183. The second list of high-risk activities specifies the reportable quantity for heptane as 20,000 kg/year. See also notes 147 and 148.

Table 3. Official Mexican Standards applicable to the substances used by ALCA

	Transportation NOM-002-SCT-2003	**Workplace exposure** NOM-010-STPS-1999	**Health-related exposure** NOM-047-SSA1-1993	**Type and degree of risk** NOM-018-STPS-2000	**Rules for management** NOM-028-STPS-2004	**Soil contamination** NOM-138-SEMARNAT/SS-2003	**Listed in PRTR**	**Listed as high-risk activity**
Styrene	X	X		X	X		X	
Xylenes	X	X	X	X	X	X		X
Toluene	X	X	X	X	X	X		X
Hexane	X	X		X	X			X
Heptane	X	X		X	X			X

9. Environmental Law Enforcement in the Case of ALCA

The Submitter asserts that Mexico is failing to effectively enforce its environmental law in connection with the crimes penalized under CPF Articles 414, first paragraph and 415, paragraph I, and the duty of sound management of hazardous wastes under LGEEPA Article 150, first paragraph.[184]

Concerning the management of chemical substances, Profepa imposed sanctions that, in some cases, required ALCA to change the use and volume of solvents and to modify the equipment in its facility.[185] Concerning air emissions, although the authority did impose measures to reduce and control them, in Mexico there are no maximum permitted levels of VOC emissions to the environment that are applicable to ALCA's operations.[186]

Concerning criminal prosecution, the PGR opened an investigation and, on four occasions, pursued criminal prosecution of ALCA officials, but all of these attempts proved unsuccessful before the district judges. Further to the investigations, the authority decided not to proceed with criminal prosecution, concluding that it had not been able to gather the evidence necessary to prove criminal charges against the company's representatives.

The Secretariat received information from Mexico on environmental law enforcement by the SMADF. The information is presented to indicate the acts of inspection and enforcement by the SMADF of which the federal authorities had knowledge,[187] during the period when Profepa carried out acts of enforcement in connection with ALCA.

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184. Submission, pp. 3–4.
185. Administrative decision no. 252/97, of 4 November 1997, issued by the Industrial Inspection Branch of Profepa.
186. On environmental matters, the following standards have been enacted: NOM-075-SEMARNAT-1995, Maximum permitted levels of air emissions of volatile organic compounds from the water-oil separation process in petroleum refineries; NOM-021-SEMARNAT-1997, Establishing maximum permitted levels of air emissions of volatile organic compounds from in-plant new auto body coating operations for automobiles, multi-use units, passenger and utility units, freight units, and light trucks, as well as the emissions calculation method; and NOM-123-SEMARNAT-1998, Establishing the maximum permitted content of volatile organic compounds in solvent-based air-dry paints for domestic use and procedures for determining the content thereof in paints and coatings.
187. The administrative file in the possession of Profepa contains copies of reports of 26 February 2000, 5 April 2000, and 26 February 1999 sent to the office of the Head of Government of the Federal District.

9.1 Complaints Filed against ALCA

The Submitter turned to governmental authorities alleging that the company's emissions were harming his health. The following entities of the government of Mexico became aware of the matter raised by the Submitter:

- Semarnat;
- Ministry of Control and Administrative Development (Secodam);[188]
- Profepa;
- PGR;
- National Human Rights Commission (*Comisión Nacional de los Derechos Humanos*—CNDH);
- SMADF;
- Borough of Iztapalapa;
- National Senior Citizens' Institute (*Instituto Nacional para la Atención de las Personas Adultas Mayores*—Inapam);
- National Respiratory Disease Institute (*Instituto Nacional de Enfermedades Respiratorias*—INER);
- Environmental Preservation and Ecological Protection Commission of the ALDF.

The Secretariat documented the complaints related to the matter raised in the submission. The first complaint was filed in 1994, and the complaints continued until 2003. In some cases the petitioner was Ángel Lara García, while in other cases the complaint was filed by someone else, at the Submitter's request. The Secretariat has obtained copies of the documents containing the complaints filed by the Submitter or by others, while in some cases the information comes from documents issued by the authorities in reference to a complaint. Profepa's acts of inspection and enforcement were initiated as a result of complaints filed since 30 May 1994 by the Submitter.

The following table presents a list of complaints, letters, and other documents related to the matter raised in the submission. As applicable, the table states when the information on the complaint comes from a document issued by an authority.

188. Now, the Ministry of Public Service.

Table 4. Complaints filed with respect to the issue raised in the submission

1994
30-may-2004. Complaint filed with Profepa concerning excessive emissions of odors of burnt plastic and solvent. The complaint gave rise to an inspection visit by Profepa on 13 September. Information contained in document 006/97 issued by the Industrial Inspection Branch (*Dirección General de Inspección Industrial*), indicating that the complaint was received repeatedly. Thus, Profepa conducted a new inspection visit on 7 December 1994.
1995
10-nov-2005. Complaint filed with Profepa by Ángel Lara García. Further to the complaint, Profepa conducted an inspection visit on 7 December.
1996
23-aug-1996. Complaint filed with the DDF by Ángel Lara García, leading to an inspection by the Federal District General Bureau of Civil Protection (*Dirección General de Protección Civil*). Information on the complaint is taken from document DGPC/1029/96 dated 9 September 1996, issued by said Bureau.
7-nov-1996. Complaint filed with the Public Inquiries Branch (*Dirección General de Atención Ciudadana*) of the Federal District by Ángel Lara García. The complaint was referred to the Profepa Industrial Inspection Branch, which admitted the complaint on 29 January 1997.
1997
13-jan-1997. Complaint filed with Profepa by Ángel Lara García. The complaint gave rise to a Profepa inspection visit on 10 March 1997 to verify the corrective measures imposed by such authority in 1994. The authority determined that the company was in partial compliance but had not installed emissions control equipment. Information on the complaint contained in document PFPA.DGII.252/97 dated 2 October 1997, issued by the Profepa Industrial Inspection Branch.
14-mar-1997. Complaint filed in person with the Office of the Attorney for Environmental and Highway-related Offenses (*Fiscalía Especializada de Delitos Ecológicos y de Carreteras*) of the PGR by Ángel Lara García. The complaint gave rise to a criminal investigation of the company's officials. Information on the complaint contained in document DGCPPA-AUX-2794/00 dated 21 August 2000, issued by the Deputy Federal Prosecutor.
18-jul-1997. Complaint filed by Ángel Lara García with the National Human Rights Commission (*Comisión Nacional de Derechos Humanos*), stating his illness

caused by odors released by ALCA. Information contained in document V2/00024032 dated 1 August 1997, forwarding the complaint to Profepa.
1998
9-nov-1998. Request for inspection filed by Ángel Lara García with the Public Affairs Center of the ALDF in Iztapalapa. Thereafter, on 19 November, the Center coordinator filed a complaint with Profepa, leading to a request dated 25 November 1998 to the Profepa office in the ZMVM to initiate an inspection procedure.
1999
7-sep-1999. Complaint addressed to the Office of the President by Ángel Lara García. Document stamped as received by CNDH, Semarnat and PGR.
2001
15-jan-2001. Letter from INER to the Minister of Semarnat at the request of Ángel Lara García.
18-jan-2001. Administrative proceeding initiated at the request of Ángel Lara García with Secodam against the Special Prosecutor for Environmental Offenses (*Fiscal Especial para la Atención de Delitos Ambientales*).
26-jan-2001. Letter from INER to the President of the Republic at the request of Ángel Lara.
7-mar-2001. Complaint addressed to the Office of the President and the Ministry of the Interior, in which Ángel Lara García reports his filings before Profepa, Semarnap, PGR and SMADF.
28-may-2001. Administrative proceeding initiated at the request of Ángel Lara García with Secodam against various authorities.
21-jun-2001. Complaint filed with CNDH, in which Ángel Lara García reports his filings before Profepa, Semarnap, PGR and SMADF.
2002
3-oct-2002. Complaint filed by e-mail with Profepa by Ángel Lara. The complaint, concerning noise, was referred to the Sustainable Development Promotion Division (*Dirección de Promoción del Desarrollo Sustentable*) of Iztapalapa Borough (*Delegación Iztapalapa*) on October 17. Information on the complaint from document PFPA/09/DZMVM/2702/02 dated 17 October 2002, issued by the Profepa delegate in the ZMVM.
23-oct-2002. Administrative proceeding initiated at the request of Ángel Lara with the Ministry of Control and Administrative Development against the Director, Environmental Complaints, Profepa.

2003
11-mar-2003. Letter from the legal affairs department of Inapam referring the complaint of Ángel Lara García to the Minister of Health.
23-oct-2003. Letter from the legal affairs department of Inapam notifying the Public Inquiries Office (*Dirección General de Atención Ciudadana*) of the Ministry of the Public Service (*Secretaría de la Función Pública*) of the inconformity of Ángel Lara García with the outcome of his complaint. The complaint gave rise to a request on 17 November 2003 from the Ministry of the Public Service to the Profepa office in the ZMVM to review the ALCA file.

9.2 Acts of Environmental Law Enforcement in relation to Air Emissions and Hazardous Waste Management

Council Resolution 05-05 instructs the Secretariat to include in the factual record information on the points raised in the submission, taking into account that it "alleges a lengthy history of releases of toxic chemicals, as well as continuation of such releases following enforcement action taken by the Government of Mexico in 2001."[189]

In response to the Secretariat's request for information, Mexico sent a copy of an administrative proceeding brought by Profepa against ALCA for alleged instances of noncompliance related to air emissions and hazardous waste. The information presented in this section summarizes the administrative proceeding provided by Mexico.

9.2.1 Air Emissions

Between 1994 and 1997 Profepa conducted inspection visits to ALCA's facilities, where it identified violations to environmental law related to air emissions of VOCs coming from the chemical substances used by ALCA. As a result, Profepa imposed fines on the company totaling 24,160 pesos and ordered closing of the facility.

a. Closing of 7 December 1994

On 7 December 1994, Profepa conducted an inspection visit to ALCA's facility, during which it found that "odors were perceptible due to the fact that impregnation of latex rolls is being done manually with no mechanism for odor absorption, conduction, and control." It also found that the preparation of activators from hexane, toluol, and xylol

189. Council Resolution 05-05, of 9 June 2005.

"was being done outdoors on the patio... hence there is a lack of equipment for absorption, conduction, and control of volatile organic compounds." The Profepa inspectors who conducted the inspection visit applied temporary partial closing of ALCA's facility as a safety measure, placing seals on the machinery and equipment used for the process.[190]

b. Fine of 10 April 1995

On 10 April 1995, Profepa issued an administrative decision imposing a fine in the amount of 3,000 pesos and conditioning the lifting of the closing order conditional to corrective actions additional to those imposed in December 1994. The decision established that "should the detected irregularities subsist upon expiry of the term granted to correct them, pursuant to Article 171 of the aforementioned Act, fines may be imposed for each day of noncompliance with the decision."[191]

Profepa conducted a verification visit on 7 December 1995 and found that ALCA had not installed equipment for management of solvents in a closed area; therefore, the closing order was not lifted.[192] On 5 August 1996, Profepa conducted another visit to verify the corrective measures and found that the company had installed rubber valves and ducts on the solvent storage tanks and drums.[193]

On 14 August 1996, the closing order imposed in December was lifted, after Profepa found that the company had resolved the issues that had given rise to the closing order. The corrective actions on which rescission was not conditional, and for which compliance had been pending since 1995, were the installation of odor and emission control equipment — such as activated carbon filters or cartridges — in the latex impregnation, product preparation, and solvent mixing operations. Noncompliance with these corrective actions eventually led to the closing of ALCA on 5 September 1997.

190. Inspection report 09-009-0926/94, of 7 December 1994.

191. Administrative decision on file A-00111, of 10 April 1995, issued by the Profepa enforcement unit. Since the order was served on 2 August 1995, the period of 20 days expired 30 August 1995. The information related to fines imposed by Profepa for hazardous materials and waste management is presented in section 9.2.2 of this document.

192. Verification reports 09-009-877/94VB1 and 09-009-0926/9401, dated 7 December 1995. The verification report indicates that ALCA had not installed the control equipment in the fabric impregnation area and the mixing area. These were not conditions for rescinding the closing order, but activators were still being prepared outdoors, violating one of the conditions for rescinding the closing order (condition no. 6).

193. Verification report no. 09-09-0926/94-UR-01, of 5 August 1996.

c. Closing Order of 5 September 1997

Further to a complaint filed by Ángel Lara García,[194] on 10 March 1997, Profepa conducted an inspection visit to verify the corrective actions imposed since 10 April 1995. The inspection visit, along with others conducted in 1995[195] and 1996,[196] served as the basis for an administrative decision of 5 September 1997 consolidating the proceedings, imposing a fine, and closing ALCA's facility again.[197]

The decision of September 1997 concluded that, regarding air pollution, the company had complied with a large part of the conditions but could not demonstrate installation of emission control equipment (activated carbon filters or cartridges) in i) the latex impregnation area, and ii) the product and solvent preparation area.[198]

Concerning the installation of control equipment in the latex impregnation area, ALCA submitted a VOC study allegedly demonstrating that it was not emitting VOCs into the atmosphere.[199] Furthermore, it presented technical reasons for not installing pollution control equipment.[200] Profepa refuted the VOC study on the grounds that the procedure used to obtain the results was not recognized by Mexican environmental law, and because VOC vapors from the drum-filling operation had been observed during an inspection visit.[201] Profepa found that, in light of the inspection visits,[202] ALCA had not taken any

194. Citizen complaint filed with Profepa by Ángel Lara, on 13 January 1997.
195. Verification reports 09-009-877/94VB1 and 09-009-0926/9401, of 7 December 1995.
196. Verification report 09-09-0926/94-UR-01, of 5 August 1996.
197. Administrative decision no. 252/97-V, of 5 September 1997.
198. *Ibid*. ALCA was to install hoods, ducts, or chimneys to channel the emissions as well as equipment to reduce them. Operating license no. 7384, of 9 September 1993, paragraph 5, stipulates that "the emission pollution control equipment [*sic*] installed by the company must operate at the efficiency necessary to comply with the Environmental Technical Standards applicable to its combustion and process operations."
199. Inspection reports 09-009-877/94VB1 and 09-009-0926/9401, of 7 December 1995. During the visit, ALCA presented a study performed using EPA method 18, "Measurement of gaseous organic compound emissions by gas chromatography," as well as method NMX-AA-09-1993-SCFI, Sampling and analysis procedure for determination of gas flow in a pipe using a Pitot tube.
200. "If a filter were installed at the outlet of this [the furnace duct], it would create an obstruction that would completely disrupt the behavior of the air, creating internal pressures that would counterproductively alter the furnace's efficiency." Inspection report 09-009-0926/94-V-02, of 10 March 1997, p. 4.
201. Administrative decision 252/97-V, of 5 September 1997, by the Industrial Inspection Branch of Profepa.
202. "No control equipment was installed for reduction or minimization of emissions generated in the latex impregnation area." Verification report 09-09-0926/94-UR-

action to reduce VOCs and was operating in violation of a condition of its operating license of 1993 that required it to present a program of works and actions to control VOC emissions.[203] In view of the toxic characteristics of the emissions and the time elapsed since expiry of the period allowed in its operating license, Profepa imposed a fine of 5,290 pesos.[204]

Concerning the installation of control equipment in the mixing area, the company presented another study of xylene and styrene emissions in the working environment,[205] in which the concentrations detected were allegedly below the limits established by the standards; therefore, the company argued, the installation of emission control equipment was not justified.[206] In addition, ALCA proposed to install a system of storage tanks for sound management of solvents, for which purpose it requested a period of 180 days. As to the emission results, Profepa found that although the levels were below those established by one standard,[207] that standard was not applicable to the imposition of environmental conditions. In regard to the proposal to install storage tanks, Profepa found that it was not appropriate in view of the time elapsed since the obligation had arisen (in September 1993) and because it was observed that no steps were being taken in this regard at the time of the inspection visit. In regard to VOC emissions, Profepa imposed two fines of 7,935 pesos each[208] for failure to channel the omissions and to install control equipment. In imposing this sanction, the authority considered the expiry of the time periods granted in the operating license of September 1993 for taking corrective action as well as the toxic characteristics of the emissions.

01, of 5 August 1996, pp. 3–4; "The company states that it is impossible to install activated carbon filters or cartridges in the furnace..." Inspection report 09-009-0926/94-V-02, of 10 March 1997, p. 4.

203. Operating license no. 7384, of 9 February 1993. Paragraph 9 stipulates that "[ALCA has] 45 working days in which to file with this Ministry a program of works and activities to control its volatile organic compound emissions."

204. Fine equivalent to 200 days' minimum wage in the Federal District. Administrative decision 252/97-V, of 5 September 1997, by the Industrial Inspection Branch of Profepa.

205. NOM-047-STPS-1993, Industrial hygiene – Workplace environment – Determination of xylene in air – Gas chromatography method, and NOM-049-STPS-1993, Industrial hygiene – Workplace environment – Determination of styrene in air – Gas chromatography method.

206. Inspection report 09-009-0926/94-V-02 of 10 March 1997.

207. NOM-010-STPS-1999, Health and safety conditions in workplaces where chemical substances that may cause contamination of the work environment are handled, transported, processed, or stored.

208. Fines equivalent each one to 300 days' minimum wage in the Federal District. Administrative decision 252/97-V, of 5 September 1997, by the Industrial Inspection Branch of Profepa.

In addition, due to repeated noncompliance with the control measures, Profepa ordered the temporary partial closing of ALCA's industrial facility as a safety measure. For the purposes of the fines, Profepa determined that, pursuant to the applicable law, the company was considered a repeat violator.[209]

Lifting of the closing order was made conditional on the following:

- channeling the emissions from the mixing area and from the mixing of activators,
- installing emission reduction equipment, and
- submitting a program of works and activities to decrease and control VOC emissions.[210]

On 4 November 1997, Profepa deviated from the conditions imposed and allowed ALCA to implement alternative measures including change and reduction in the use of solvents, permanent suspension of production of activators, and construction of emission control structures.[211] Profepa also accepted VOC measurement to determine the advisability of installing emission control equipment.[212]

On 11 December 1997, lifting of the closing was ordered. Profepa found that ALCA had carried out the measures ordered and that the VOC measurement results showed levels below the maximum permitted levels, thus deviating from its initial position in which it had rejected such analyses.[213] On 21 May 2001, a decision was issued acknowledging

209. "Since, as evidenced by the foregoing, the company has repeatedly failed to take the aforementioned corrective measures and never demonstrated its implementation of a duly authorized program for control of volatile organic compound emissions, whose gravity has been indicated on the basis of the provisions of Article 171, paragraph II(a) of the General Ecological Balance and Environmental Protection Act". Administrative decision 252/97-V, of 5 September 1997, p. 14.

210. Profepa granted periods of 40, 20, and 10 days, respectively, from notification of the administrative decision in which to comply with the measures ordered.

211. The works consisted of raising the wall adjacent to Ángel Lara's lot from 3.5 to 8 meters; covering the building housing the furnaces with Pintro-brand siding; installing a hood in the preparation area; and changing the direction of the furnace outlet duct so that it pointed away from Mr. Lara's house. Administrative decision no. 252/97, of 4 November 1997, by the Industrial Inspection Branch.

212. Administrative decision no. 252/97, of 4 November 1997, issued by Profepa Industrial Inspection Branch. Corrective measures verification report, of 5 December 1997, documenting the temporary removal of the seals in order to measure volatile organic compounds.

213. Administrative decision no. 154/01-DS, of 21 May 2001, issued by the Profepa official in the ZMVM.

compliance with the corrective measures that had been ordered on 5 September 1997 and closing the administrative proceeding that had given rise to the closing of ALCA.[214] The Secretariat did not obtain a copy of the 1997 decision lifting the closing order; however, it is cited in the decision of May 2001. The Secretariat is unaware of any other proceeding or event from December 1997 to May 2001 explaining the lengthy period of time required to close the administrative proceeding.

On 8 October 2002, Profepa closed the citizen complaint proceeding initiated further to the complaints filed by the Submitter and the coordinator of the Public Affairs Center from 1998 to 2000.[215] On 23 October 2002, the Submitter filed with the Semarnat Internal Control Agency a complaint of alleged irregularities in Profepa's decision to terminate the administrative proceeding against ALCA. The Submitter challenged this decision, alleging that he had not been given timely notice of the decision. The complaint was ratified on 23 October 2002 before the Semarnat Internal Control Agency, with attachment of documents to support the assertions, which served as the basis for two proceedings before the Internal Control Agency.[216] However, the Secretariat has obtained no details of the investigation since the two proceedings were classified as *reserved* information pursuant to LFTAIPG Article 13, paragraph V and Article 26 of the regulation thereunder.[217] Consequently, the extent to which the Agency found irregularities in Profepa's processing of the administrative proceedings against ALCA is unknown.

9.2.2 Hazardous Waste Generation and Management

The submission asserts that Mexico is failing to effectively enforce LGEEPA Article 150, first paragraph in connection with hazardous waste management by ALCA. The information provided by Mexico indicates that ALCA was a hazardous waste generator subject to the provisions of LGEEPA Article 150, first paragraph, which establishes a general framework of obligations relating to hazardous materials and wastes, in accordance with the applicable environmental law. A description of these obligations is given in section 6.2 of this document.

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214. *Ibid*.
215. The file provided to the Secretariat by Mexico does not contain copies of similar decisions on the four other citizen complaints filed with Profepa from 1994 to 1997.
216. Proceedings contained in files PQU 101/02 and PQU 285/02.
217. LFTAIPG Article 13, paragraph V and Regulation to LFTAIPG Article 26. See note 20.

From 2000 to 2005, Profepa conducted six inspection visits to ALCA's facility[218] and imposed fines for a total amount of 22,047.30 pesos for omissions to hazardous materials and waste management law.[219] The main irregularities detected by Profepa were related to hazardous materials and waste storage; the entry and exit logs to/from the hazardous waste warehouse; the monthly hazardous waste generation log; the preparation of semiannual waste generation reports; the signage relating to hazardous waste areas and containers; characterization of wastewater treatment sludges; and delivery, transportation, and receipt manifests.

Table 5. Imposition of hazardous waste-related fines and corrective measures

Inspection	Measures and fines
Inspections of 13 September and 7 December 1994 Profepa found the following deficiencies: • Inadequate storage of hazardous materials. • Inadequate storage of hazardous waste. • Failure to characterize hazardousness of sludge from wastewater treatment plant. • Lack of hazardous waste generator manifest.	**Administrative decision of 10 April 1995** Fine of 7,998.30 pesos.
Inspections of 17 February and 22 June 2000 The following deficiencies were found: • Inadequate storage of hazardous waste. • Lack of delivery, transportation, and receipt manifests; storage facility entry and exit logs; generation logs; and semiannual hazardous waste movement reports.	**Administrative decision of 5 July 2001** Modify the temporary hazardous waste storage facility, adding signage to indicate hazardousness. File a copy with Profepa of the semiannual report of hazardous wastes sent for recycling, treatment, incineration, or containment on the corresponding form. Fine of 4,842 pesos.

218. Inspection visits conducted 17 February and 22 June 2000, 27 July 2001, 18 December 2003, and 3 August 2005. Annex of the document PFPA-SII-DGIFC-0142/2006, of 10 February 2006, issued by the Profepa Industrial Inspection Branch.

219. Fines imposed by administrative decision on 10 April 1995, 5 July 2001, 7 September 2001, and 26 March 2004. *Ibid*.

Inspection of 27 July 2001 The following deficiencies were found: • Inadequate storage of hazardous waste. • Failure to characterize hazardousness of sludge from wastewater treatment plant. • Lack of delivery, transportation, and receipt manifests; storage facility entry and exit logs; generation logs; and semiannual hazardous waste movement reports.	**Administrative decision of 7 September 2001** Ratification of corrective measures imposed on 5 July 2001 and imposition of fine of 2,421 pesos.
Inspection of 18 December 2003 The following deficiencies were found: • Failure to complete administrative procedure consisting of hazardousness characterization of sludge from wastewater treatment plant. • Lack of hazardous waste generation, entry, and exit logs.	**Administrative decision of 26 March 2004** The following corrective measures were imposed: a) complete hazardousness characterization of sludge from wastewater treatment plant, and b) create monthly generation log and log of entries and exits from temporary hazardous waste storage facility. Fine of 6,786 pesos.
Inspection of 3 August 2005 The following was found: that completion of the Semarnat procedure consisting of hazardousness characterization of sludge from wastewater treatment plant ordered in March 2004 was still pending.	The authority did not issue an administrative decision since it was awaiting compliance information from ALCA; however, ALCA closed its facility in late December 2005.

9.3 Acts of Enforcement by the Government of the Federal District

From August 1994 to May 2004, the SMADF conducted 10 inspection visits of ALCA's facility.[220] On these visits, the authority verified compliance with the local environmental law governing noise, solid waste, and wastewater discharge. It also noted noncompliance with provisions related to hazardous waste management and air emissions.

220. Inspection visits conducted 15 August 1994, 8 July 1997, 18 February 1998, 14 July 1998, 8 February 2000, 16 May 2000 (two inspections conducted the same day), 19 July 2000 (two inspections conducted the same day), and 7 May 2004. Report E/CO2/DGPCC/DHS/0403/2000, of 5 April 2000, issued by SMA to the secretary to the head of government of the Federal District.

In April 1999, the SMADF fined and closed ALCA for hazardous waste-related and air emissions-related noncompliance.[221] The closing order was lifted pursuant to a judgment of 13 July 1999 by TCADF.[222] SMADF issued other administrative decisions on 5 October 2000, 21 May 2001 and 1 July 2004, in which it did not apply sanctions because it did not note any environmental violations.

The government of the Federal District[223] carried on pollution enforcement acts. The jurisdictional provisions set forth in LGEEPA Articles 9 and 111 bis, discussed in section 6.3.1, establish that federal authorities have jurisdiction over ALCA's emissions.

9.4 Environmental Criminal Law Enforcement

The Submitter asserts that Mexico failed to effectively enforce CPF Article 415, paragraphs I and II (in force as of 1997), which define the offenses of harm to the environment or public health arising from the unsound management of hazardous materials and wastes and from air pollutant emissions. In March 1997, the Submitter filed a complaint with the Office of the Special Prosecutor for Environmental and Highway-related Offenses that gave rise to an investigation. The investigation concluded in August 2000 when the MPF decided not to proceed with criminal prosecution, due to the existence of an insuperable material obstacle to the gathering of sufficient evidence.

On 24 March 1997, the MPF began the criminal investigation process for facts possibly constituting an offense. The MPF found that the facts complained of by the Submitter were described in CPF Article 415, paragraphs I and II. The two paragraphs describe separate instances of

221. Administrative decision of 28 April 1999, imposing a sanction of 20 days' minimum wage in the Federal District for instances of noncompliance related to air emissions and ordering temporary partial suspension of water supply and steam generation equipment due to wastewater- and air emissions-related instances of noncompliance. Report /CO2/DGPCC/DHS/0403/2000, of 5 April 2000, issued by SMA to the secretary to the head of government of the Federal District.

222. Judgment by Administrative Tribunal on trial II-3395/99, on 13 July 1999. Report E/CO2/DGPCC/DHS/0403/2000, of 5 April 2000, issued by SMA to the secretary to the head of government of the Federal District.

223. In terms of air emissions, the government of the Federal District verified compliance with NOM-085-ECOL-1994, Air pollution – Fixed sources – For fixed sources using solid, liquid, or gas fossil fuels or any combination thereof, establishing the maximum permitted levels of air emissions of smoke, total suspended particles, sulfur dioxide, and nitrogen oxides and the requirements and conditions for the operation of indirect combustion heating equipment, as well as the maximum permitted levels of sulfur dioxide emissions from direct combustion heating equipment.

criminal conduct[224] requiring different methods of proof and, consequently, different types of investigation. For paragraph I, it is necessary to substantiate the existence of substances or wastes considered hazardous, while paragraph II refers to air emissions of gas, smoke, or dust.

The MPF pursued criminal prosecution on four occasions, presenting the investigation to the district judge and requesting the corresponding arrest warrants. In all these cases, the district judge denied the arrest warrant. In the first case (28 November 1997), the MPF pursued criminal prosecution for conduct contemplated in Article 415, paragraph II, while in the three subsequent cases (December 1998, April 1999, November 1999), the prosecution was based on Article 415, paragraph I.

The table below presents a synopsis of the evidence obtained by the MPF during the investigation to substantiate the offenses contemplated in CPF Article 415, paragraphs I or II:

Table 6. Evidence gathered during investigation

Item of evidence	Description
Complaint filed by Ángel Lara García[225]	Evidence whose purpose is to demonstrate the *elements of the offense* and the *probable liability* of the physical persons named in the complaint as being probably liable.

224. CPF Article 415 (in force 1997–1999): "Anyone who commits any of the following acts is liable to a penalty of three months' to six years' imprisonment and one thousand to twenty thousand days' fine:
I. Engages, without the authorization of the competent federal authority or in violation of the terms imposed by such authorization, in any activity with hazardous materials and wastes that causes or may cause harm to public health, natural resources, fauna, flora, or ecosystems.
II. Emits, discharges, or releases into the atmosphere, or authorizes or orders the emission, discharge, or release into the atmosphere of gas, smoke, or dust causing harm to public health, natural resources, fauna, flora, or ecosystems in violation of the applicable legal provisions or Mexican official standards, where such emissions originate from fixed sources under federal jurisdiction, pursuant to the General Ecological Balance and Environmental Protection Act."

225. Complaint filed by appearance of 14 March 1997 by Ángel Lara García. In: Document DGCPPA-AUX-2794/00, of 21 August 2000, issued by the MPF assistant to the Attorney General.

MPF inspection of the scene[226]	Demonstrates the existence of a company, its adjacency to other lots, its proximity to the complainant's home, the existence of flora on the site, but not any allegation of harm or danger. This means of proof is suitable for substantiating the existence of the material object contemplated in the description of the offense.
Report of Judicial Police investigation[227]	Evidence intended to establish the type of activity in which the company was engaged, who worked there, and the general characteristics of the activity.
Forensic photography[228]	Substantiates the existence of the material objects and the activity (of the company), and, indirectly, the use of hazardous substances or wastes.
Characterization report	Evidence designed to prove scientifically the existence of substances having hazardousness characteristics. The report substantiated these characteristics. It should be noted that this is not proof of the charge, since the use of this type of substance or waste is not illegal unless its use is irregular and causes risk or harm to the environment or public health.
Chemical report by biology and chemistry experts[229]	Proof of discharge that determined that, in the flora samples taken, there was no evidence of "residues or any toxic substance that might harm flora, fauna, or public health".
Report by medical expert[230]	Evidence for the prosecution; however, it is not conclusive if there was no extensive sampling that could give an indication of "public health" harm, which would involve a large number of people.

226. Inspection of 25 April 1997. *Op. cit.*, note 225.
227. Report by the Planning and Operation Branch (*Dirección General de Planeación y Operación*) of the Federal Judicial Police (*Policía Judicial Federal*), of 27 April 1997. *Op. cit.*, note 225.
228. Report by the Expert Services Coordination Branch (*Dirección General de Coordinación de Servicios Periciales*) of PGR. *Op. cit.*, note 225.
229. Characterization report by the Expert Services Coordination Branch of PGR, 28 July 1997, and chemical expert's report of 21 August 1997. *Op. cit.*, note 225.
230. Medical expert's report of 16 June 1998. *Op. cit.*, note 225.

Certified copies of administrative proceeding before Profepa[231]	Substantiates the existence of an administrative proceeding before Profepa, although not of the content of the proceeding in terms of the jurisprudence applicable at that time.[232]
Private document consisting of a letter signed by congressman José Espina von Roherich to the Attorney General of the Republic.	For procedural purposes, its evidentiary value is purely circumstantial.
Photographs of the scene presented by congressman José Espina von Roherich.	Evidence intended to substantiate the existence of the material objects, the existence of the company's activity and, indirectly, the use of hazardous substances or wastes.
Medical report by the PGR medical expert	Report intended to substantiate the alleged health harm that may be caused by the management of hazardous waste.

During the investigation, the MPF requested the testimony of the ALCA operations manager,[233] ordered a visual inspection of the ALCA facility,[234] and required investigative reports from the Judicial Police.[235] Also during the investigation, photographs were taken of the ALCA facility[236] and two chemical expert reports were issued, one concluding that ALCA was managing hazardous substances and wastes[237] and the

231. Copies of administrative proceeding A-00111 against ALCA, issued 29 July 1998. *Op. cit.*, note 225.
232. Decision summary, Third Court, Supreme Court of Justice: AVERIGUACIONES PENALES, VALOR DE LOS PERITAJES RENDIDOS EN LAS, 17 part four, p. 14, direct *amparo* 4484/68, 2354/62 and 5897/66. Decision summary, Eighth Civil Court of the First Circuit: PRUEBA PERICIAL RENDIDA EN JUICIOS PENALES, APORTADA AL PROCEDIMIENTO CIVIL CARECE DE VALOR COMO TAL, part XIV, July, p. 738, direct *amparo* 71/94.
233. Testimony of 24 April 1997 and 22 May 1997. Document DGCPPA-AUX-2794/00, of August 21 2000, issued by the MPF assistant to the Attorney General.
234. Inspection of 25 April 1997. *Op. cit.*, note 225.
235. Investigative report solicited 8 May 1997; report by officer of the Planning and Operations Branch of the Federal Judicial Police. *Op. cit.*, note 225.
236. Photographs taken by personnel of the Expert Services Branch of the PGR and submitted in a sealed envelope on 1 July 1997. *Op. cit.*, note 225.
237. Document no. 10950, of 25 July 1997, by personnel of the Expert Services Branch of the PGR. *Op. cit.*, note 225.

other concluding that samples taken from a tree did not contain toxic residues or substances that could harm flora, fauna, or public health.[238]

At that time, the constitutional provisions that adopt the criterion of *elements of the offense* for substantiation of the probable existence of an offense were in force.[239] Having determined that the constitutional threshold was met, the MPF pursued criminal prosecution for the first time on 28 November 1997 for probable commission of environmental offenses under CPF Article 415, paragraph II and applied to the judge for an arrest warrant.

On 9 January 1998, District Judge 11 in Federal District criminal court denied the arrest warrant, holding that the evidence "did not demonstrate any probability that the factory in question was discharging gas, smoke, or dust, nor even circumstantially substantiated that such emissions were causing harm to public health, fauna, flora, or ecosystems, there being no evidence whatsoever to indicate this, since the study necessary to demonstrate this was not performed during the investigation."[240]

The MPF continued with its investigation and commissioned a medical expert report.[241] It also solicited the testimony of the ALCA operations manager as well as representatives and officials of the company.[242] The MPF also had access to information about the administrative proceeding brought by Profepa against ALCA.[243]

The MPF found that the evidence gathered substantiated the existence of the offense and therefore, on 7 December 1998, applied again for an arrest warrant. On this occasion it did so for the offense contemplated in CPF Article 415, paragraph I (instead of paragraph II, as on the previous occasion). On 16 December 1998, District Judge 6 in criminal court denied the arrest warrant for lack of evidence.[244]

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238. Document no. 13929, of 21 August 1997, issued by personnel of the Expert Services Branch of the PGR. *Op. cit.*, note 225.
239. See section 6.3.2 of this factual record.
240. *Op. cit.*, note 225.
241. The report is cited in document DGCPPA-AUX-2794/00, of 21 August 2000, which contains the technical opinion concerning the consultation on *nolle prosequi,* but neither its object nor its results are transcribed.
242. Testimony of 18 September and 13 and 20 October 1998. *Op. cit.*, note 225.
243. Document no. PFPA/DGJ/1039/98, of 29 July 1998, issued by the Director, Legal Affairs, Profepa.
244. *Ibid.*

In March 1999, Article 16 of the Constitution was revised and the criterion of *corpus delicti*, discussed in section 6.3.2 of this document, was adopted, thus lowering the constitutional threshold for substantiation of an offense. On 21 April 1999, for the third time, the MPF pursued criminal prosecution against ALCA officials as being probably liable for the offense contemplated in CPF Article 415, paragraph I. However, on 30 April 1999, District Judge 11 in Federal District criminal court denied the arrest warrant on the grounds that all the evidence comprised by the investigation had already been analyzed and evaluated, and no additional evidence had been provided.[245]

The MPF gathered further evidence and obtained a medical expert report concluding that ALCA managed hazardous waste that could pose a risk to health and the ecosystem.[246] On 8 November 1999, a final attempt was made to proceed with criminal prosecution against the ALCA officials for the offense contemplated in CPF Article 415, paragraph I. District Judge 2 in Federal District criminal court denied the arrest warrant on 14 December 1999, holding that the evidence gathered was insufficient to substantiate the *corpus delicti*. The decision was appealed by a motion before the Second Unitary Court of the First Circuit, which upheld the District Judge's decision on 28 January 2000.[247]

On 22 August 2000, the MPF decided not to pursue further criminal prosecution because it did not find "fully substantiated the *corpus delicti* contemplated and penalized by CPF Article 415, paragraph I and the probable liability of the suspects." The MPF found that it was essential to perform clinical examinations of Ángel Lara García, his wife, and his son in order to prove the offense. In Mexican law, the MPF cannot proceed with criminal prosecution if it is unable to do so due to an *insuperable material obstacle*, even if the facts or conduct may constitute an offense.[248]

In January 2001, the Submitter filed an administrative complaint with Secodam against PGR officials, in which he questioned the investi-

245. *Ibid.*
246. Document no. MF-3121, of 5 November 1999, issued by the medical expert of the PGR. In document DGCPPA-AUX-2794/00, *op. cit.*, note 225.
247. *Op. cit.*, note 225.
248. CFPP Article 137: "The Office of the Public Prosecutor shall not pursue criminal prosecution: ...
III. Where, even if the conduct or facts in question may constitute one or more offenses, it is impossible to prove their existence due to insuperable material obstacle...."

gation conducted by the law enforcement authorities.[249] Mr. Lara García stated that the evidence-gathering during the investigation had been deficient. Likewise, in his submission, he stated to the Secretariat that "the investigation by the authorities showed a clear lack of skill." The Secretariat was not able to obtain the documents relating to the investigation by Secodam, because the file was classified as *reserved*.[250]

In reviewing the documentation whereby it was decided not to proceed with criminal prosecution, the Secretariat's legal consultant found that the MPF had the opportunity to use other evidence gathering methods contemplated in criminal law but did not do so. These included search of premises,[251] testimony of neighbors and company employees,[252] and expert testimony on public health[253] and ecology.[254] The authorities could also have produced a report explaining the causal link between the conduct and the result (*dictamen de nexo causal*).[255]

The Secretariat consulted the government of Mexico on other means of proof available to the MPF and why they were not considered at the investigation stage.[256] When no response was forthcoming, the

249. Administrative proceeding of 18 January 2001, before the Ministry of Control and Administrative Development.
250. *Op. cit.*, note 225.
251. As provided by CFPP Article 61. Search of premises may yield access to logs, delivery/transportation/receipt manifests for hazardous substances or wastes, reports of pollutant quantities and emissions, documentation of hazardous waste treatment, and information about authorizations, licenses, or permits, as well as make it possible to determine the physical existence of hazardous materials in the facility.
252. Testimony concerning odors, smoke, community health impacts, and injuries (in the case of company employees) arising from the company's activities and its management of hazardous materials.
253. Medical examination of individuals living near the company's facility might have led to the conclusion that the health of this population in particular could have been jeopardized by the use of such materials. As well, a medical report on the health risks arising from the use of hazardous substances and wastes could have reached the same conclusion.
254. Veterinary and/or biological report of harm and/or risk to fauna, flora, natural features and/or ecosystems arising from the use of substances and wastes considered hazardous. Just as sampling for human health factors and harm and risk analysis are performed, such a report could have been used to substantiate harm and/or risk to fauna, flora, natural features, and/or ecosystems.
255. The purpose of a causal link report is to substantiate the link between the conduct ascribed to the suspects and the results (harm and/or danger), as well as the relevance of the conduct to the production of the result and the manner in which each individual, in particular, was involved.
256. Request for additional information, of 7 September 2006, to Director, Legislation and Consultation Branch of Semarnat.

Secretariat asked Mexico to provide an explanation in the event that it could not legally respond to the request; however, no explanation was obtained.[257]

10. Final Note

Factual records provide information regarding asserted failures to effectively enforce the environmental law in North America that may assist submitters, the NAAEC Parties, and other interested members of the public in taking any action they deem appropriate in regard to the matters addressed. Pursuant to Council Resolution 05-05, which determined its scope, this factual record provides information on alleged failures by Mexico to effectively enforce LGEEPA Article 150, first paragraph and CPF Articles 414, first paragraph and 415, paragraph I in the case of ALCA, as well as the administrative proceedings taken by Mexico in relation to the history of toxic substances emissions by the company.

With respect to enforcement of LGEEPA article 150, first paragraph between 2000 and 2005, Profepa conducted six inspections to ALCA's facility and imposed fines for a total amount of 21,687.30 pesos for omissions to hazardous materials and waste law.

In relation to the effective enforcement of CPF Articles 414, first paragraph and 415, paragraph I, the federal entity responsible for prosecution of offenses pursued criminal prosecution on four occasions (November 1997, December 1998, and April and November 1999), applying to the district judge for the corresponding arrest warrants. On all four occasions — and with less constitutional requirements to evidence the possible commission of an offense since 1999 — the public prosecutor did not gather enough proof before the district judge to substantiate the offenses allegedly committed by ALCA's representatives. On 22 August 2000, the MPF decided not to pursue further criminal prosecution, due to lack of evidence, arguing that it was essential to conduct clinical examinations to Ángel Lara García, his wife, and his son in order to prove the offense. In analyzing the documentation based on which the MPF decided not to proceed with criminal prosecution, the Secretariat found that the MPF had other means of proof contemplated in the criminal law at its disposal but did not use them.

Profepa had the power to investigate environmental violations and, where applicable, report acts, omissions, or facts involving the

257. E-mail of 23 November 2006 to Legal Affairs Office of Semarnat.

commission of offenses to the MPF. However, Profepa had no specialized administrative criminal law enforcement structure for pursuing, opening files on, gathering evidence on, or carrying out any other activity to substantiate the existence of environmental offenses. In this regard, Profepa could not cooperate more extensively with the investigation carried out by the PGR officers, due to a lack of adequate structure and specialization. Currently, the Internal Regulation of Semarnat provides for the existence of a specialized environmental criminal law structure.

As regards the MPF's capacity to investigate crimes, the UNDP 2004 human development report on Mexico states that "officials set aside cases requiring greater investigative effort in order to identify a suspect and at times leave evidence gathering to the prosecution... the Office of the Public Prosecutor tends not to proceed with criminal prosecution in more complex cases, arguing, for example, lack of evidence."[258]

With respect to the history of toxic substances emissions by the company, from 1994 to 1997, Profepa imposed a total of 24,160 pesos in fines and issued two orders closing ALCA's facility. The information indicates that although various corrective measures concerning odors and VOC emissions from the use of chemical substances were ordered, the company did not comply with all these measures. Lifting of the closing order was subject to actions that, the company argued, were technically impossible because they would disrupt the production process. In December 1997, Profepa modified the conditions previously imposed and, instead of requiring the installation of filters to control VOC emissions, accepted ALCA's proposal to reduce and change the use of certain solvents as well as to use the criterion proposed by the company for analysis of its emissions. Nevertheless, the nuisance caused to the Submitter by the odors continued until the plant closed permanently in December 2005, due to economic reasons.

258. *Informe sobre Desarrollo Humano en Mexico 2004*. See note 85.

APPENDIX 1

Council Resolution 05-05, Instruction to the Secretariat of the Commission for Environmental Cooperation regarding the assertion that Mexico is failing to effectively enforce Article 150 of the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y Protección al Ambiente*) and Articles 414 and 415 of the Federal Penal Code (*Código Penal Federal*) (SEM-03-004)

9 June 2005

COUNCIL RESOLUTION 05-05

Instruction to the Secretariat of the Commission for Environmental Cooperation regarding the assertion that Mexico is failing to effectively enforce Article 150 of the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y Protección al Ambiente*—LGEEPA) and Articles 414 and 415 of the Federal Penal Code (*Código Penal Federal*—CPF) (SEM-03-004).

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

CONSIDERING the submissions filed on 25 November 2002 and 17 June 2003 by Mr. Ángel Lara García, and the response provided by the Government of Mexico on 4 December 2003;

HAVING REVIEWED the 23 August 2004 notification submitted to the Council by the Secretariat, recommending the development of a factual record with respect to the submission;

REAFFIRMING that the focus of the factual record process is to examine facts pertinent to assertions that a Party is failing to effectively enforce its environmental law, and not the effectiveness of the law in question;

RECOGNIZING that a Party, in its response to the Secretariat in respect of a submission, is not in a position to respond to assertions or matters that were not raised in the submission;

NOTING that Article 161 of LGEEPA was not raised by the submitter, but by the Secretariat;

FURTHER NOTING that, among other things, the submission alleges a lengthy history of releases of toxic chemicals, as well as continuation of such releases following enforcement action taken by the Government of Mexico in 2001;

HEREBY UNANIMOUSLY DECIDES:

TO INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* with respect to the issues raised in the submission, taking the above-noted considerations into account;

TO DIRECT the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and the opportunity to comment on that plan; and

TO FURTHER DIRECT that the Secretariat may include, in its preparation of a factual record, any relevant facts that existed prior to the entry into force of the NAAEC on 1 January 1994.

APPROVED BY THE COUNCIL.

APPENDIX 2

Overall Plan to Develop a Factual Record with Regard to Submission SEM-03-004

Secretariat of the Commission for Environmental Cooperation

Overall Plan to Develop a Factual Record

Submission I.D.: SEM-03-004 (*ALCA-Iztapalapa II*)

Submitter: Ángel Lara García

Party: United Mexican States

Date of this plan: 21 July 2005

Background

On 17 June 2003, the Submitter identified above presented to the Secretariat of the Commission for Environmental Cooperation (CEC) a submission, in accordance with Article 14 of the North American Agreement on Environmental Cooperation (NAAEC). The submission, along with supporting materials, asserts that Mexico is failing to effectively enforce its environmental laws with respect to the operation of a footwear products facility owned by a company called ALCA, S.A. de C.V. (ALCA), located on a piece of land adjacent to the personal residence of the Submitter in the Santa Isabel industrial suburb of Mexico City, D.F. The Submitter alleges that the air releases by the facility and the handling of toxic substances and wastes by ALCA's employees do not comply with Article 150 of Mexico's General Law of Ecological Balance and Environmental Protection (*Ley General del Equlibrio Ecológico y de Protección al Ambiente*—LGEEPA) and Articles 414, first paragraph, and 415, Section I, of the Federal Criminal Code (*Código Penal Federal*—CPF).

In particular, the Submitter asserts that the company is illegally carrying on the storage, disposal and unloading of environmentally harmful hazardous substances without applying prevention and safety measures. The Submitter also claims that ALCA does not apply prevention or safety measures to prevent the atmospheric release or discharge of environmentally harmful gas, smoke, dust or pollutants. The Submitter asserts that the company is failing to manage hazardous materials and wastes in accordance with LGEEPA and the Mexican Official Standards (*Normas Oficiales Mexicanas*—NOMs) issued by the Secretariat of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat). The Submitter asserts that these alleged violations are causing pollution harming his and his family's health. He

further asserts that the Office of the Federal Attorney General for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), despite having found violations during a factory inspection, terminated a citizen complaint filed by the Submitter without taking the actions necessary to stop the alleged violations.

On 9 September 2003, the Secretariat determined that the submission met the requirements of Article 14(1) of NAAEC and requested a response from the Party concerned (Mexico), in accordance with Article 14(2).

Mexico submitted its response on 4 December 2003. Referring to the citizen complaint filed on 10 November 1995 by the Submitter, alleging violations by ALCA to Article 150 of LGEEPA, Mexico asserted the process was concluded by Profepa in accordance with the law. It additionally claimed that the relevant file was lost in a flood that occurred in the file room of Profepa, and asserted that the process was concluded without initiation of a criminal investigation. Mexico asserted that another complaint filed by the Submitter, on 14 September 2000, was concluded with the imposition of a fine against ALCA of 2,421 pesos. Regarding ALCA's alleged criminal violation under Article 415, first paragraph, of the CPF, Mexico asserted that it did not undertake a criminal action because, according to a technical opinion issued by officers of the District Attorney's Office, neither the commission of a crime nor the probable liability of the suspects was clearly established "as we deduce from the acts that although the asserted facts may constitute a crime, it is impossible to determine whether the crime exists due to irreparable material hindrance, because the proof provided is insufficient to evidence the crime."

On 23 August 2004, the Secretariat informed the CEC Council that, in light of Mexico's response, it considered that the Submission warranted the preparation of a factual record.

On 9 June 2005, in Council Resolution 05-05, the Council decided unanimously to instruct the Secretariat to prepare a factual record in accordance with Article 15 of NAAEC and the *Guidelines for Submissions on Enforcement Matters* (*The Guidelines*) under Articles 14 and 15 of NAAEC.

The Council directed the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan. The Council stated that the Secretariat may include, in its preparation of the factual record,

any relevant facts that existed prior to the entry into force of the NAAEC on 1 January 1994.

Under Article 15(4) of NAAEC, in developing a factual record, "the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee (JPAC); or (d) developed by the Secretariat or by independent experts."

Overall Scope of the Fact Finding

To prepare the factual record, the Secretariat will gather and develop information relevant to the following items with regard to the Government of Mexico's alleged failure to effectively enforce Article 150 of LGEEPA and Articles 414, first paragraph, and 415, Section I, of the CPF regarding the facility's air releases and hazardous substances and wastes handling by ALCA's workers, as asserted in the submission:

(i) the alleged failure by ALCA to comply with Article 150 of LGEEPA and Articles 414, first paragraph, and 415, Section I, of the CPF;

(ii) the inspections, administrative procedures or any other environmental actions that could have been initiated against ALCA before or after 2001 regarding (1) its trail of toxic chemical releases and its continuing to generate releases, and (2) its handling of hazardous substances and wastes; and

(iii) if Mexico is failing to effectively apply Article 150 of LGEEPA and Articles 414, first paragraph, and 415, Section I, of the CPF, in the case of the company ALCA.

Overall Plan

Consistent with Council Resolution 05-05, execution of the overall plan will begin no sooner than 8 August 2005. All other dates are best estimates. The overall plan is as follows:

- Through public notices or direct requests for information, the Secretariat will invite the Submitters, JPAC, community members, the general public, and local, provincial and federal government officials to

submit information relevant to the scope of fact-finding outlined above. The Secretariat will explain the scope of the fact finding, providing sufficient information to enable interested nongovernmental organizations or persons or JPAC to provide relevant information to the Secretariat (Section 15.2 of *The Guidelines*). **[August—October 2005]**

- The Secretariat will request information relevant to the factual record from federal, provincial and local government authorities of Mexico, as appropriate, and shall consider any information furnished by a Party (Articles 15(4) and 21(1)(a) of NAAEC). **[August—October 2005]**

- The Secretariat will gather relevant technical, scientific or other information that is publicly available, including from existing databases, public files, information centers, libraries, research centers and academic institutions. **[August—January 2006]**

- The Secretariat, as appropriate, will develop, through independent experts, technical, scientific or other information relevant to the factual record. **[October—January 2006]**

- The Secretariat, as appropriate, will collect relevant technical, scientific or other information for the preparation of the factual record, from interested nongovernmental organizations or persons, JPAC, or independent experts. **[August 2005—January 2006]**

- In accordance with Article 15(4), the Secretariat will prepare the draft factual record, based on the information gathered and developed. **[January 2006 through April 2006]**

- The Secretariat will submit a draft factual record to Council, and any Party may provide comments on the accuracy of the draft within 45 days thereafter, in accordance with Article 15(5). **[end of April 2006]**

- As provided by Article 15(6), the Secretariat will incorporate, as appropriate, any such comments in the final factual record and submit it to Council. **[June 2006]**

- The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission, according to Article 15(7).

Additional information

The submission, the Party's response, the Secretariat's determinations, the Council Resolution, and a summary of these are available online in the Registry on Citizen Submissions at the CEC home page <www.cec.org>, or upon request to the Secretariat at the following address:

Secretariat of the CEC
Submissions on Enforcement
Matters Unit (SEM Unit)
393 St-Jacques St. West
Suite 200
Montreal, QC H2Y 1N9
Canada

CEC / Mexico Liaison Office:
Atención: Unidad sobre
Peticiones Ciudadanas (UPC)
Progreso núm. 3
Viveros de Coyoacán
México, D.F. 04110
México

APPENDIX 3

Request for Information describing the scope of the information to be included in the factual record and giving examples of relevant information

Secretariat of the Commission for Environmental Cooperation

REQUEST FOR INFORMATION
for Preparation of a Factual Record
Submission SEM-03-004 (*ALCA-Iztapalapa II*)
16 November 2005

I. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created under the North American Agreement on Environmental Cooperation (NAAEC) by Canada, Mexico and the United States. The CEC operates through three organs: a Council, made up of the highest-level environmental official in each member country; a Joint Public Advisory Committee (JPAC), composed of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of the NAAEC allows residents in North America to inform the Secretariat, in a submission, that any member country (hereinafter, a Party) is failing to effectively enforce its environmental law. This initiates a process of review of the submission, after which the Council may instruct the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Articles 15(4) and 21(1)(a) of the NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party and may ask a Party to provide information. The Secretariat also may consider any relevant technical, scientific or other information that is publicly available; provided by JPAC, the Submitters or other interested persons or nongovernmental organizations; or developed by the Secretariat or independent experts.

On 9 June 2005, in Council Resolution 05-05, the Council decided unanimously to instruct the Secretariat to develop a factual record in accordance with Articles 14 and 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the *Guidelines)*. The Secretariat is now requesting information relevant to matters to be

addressed in the factual record. The following sections provide background on the submission and describe the kind of information requested.

II. The ALCA-Iztapalapa II submission and Council instructions

The submission, along with its support materials, asserts that Mexico is failing to effectively enforce its environmental law with respect to the operation of a footwear materials factory owned by the company ALCA, S.A. de C.V. ("ALCA"), located on property neighboring the Submitter's home in the Santa Isabel Industrial neighborhood of the borough of Iztapalapa in Mexico City. The Submitter asserts that the factory's air pollution and ALCA employees' handling of hazardous substances and wastes violate Article 150 of the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) and Articles 414, first paragraph and 415, Section I of the Federal Penal Code (*Código Penal Federal*—CPF).

In particular, the Submitter asserts that the company is illegally carrying on the storage, disposal and discharge of environmentally harmful hazardous substances without applying prevention and safety measures. The Submitter also claims that ALCA does not apply prevention or safety measures to prevent the atmospheric release or discharge of environmentally harmful gas, smoke, dust or pollutants. The Submitter asserts that the company is failing to manage hazardous materials and wastes in accordance with LGEEPA and the Mexican Official Standards (*Normas Oficiales Mexicanas*—NOMs) issued by the Secretariat of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat). The Submitter asserts that these alleged violations are causing pollution that harm his and his family's health. He further asserts that the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa), despite having found violations during a factory inspection, terminated a citizen complaint filed by the Submitter without taking action necessary to stop the alleged violations.

On 9 September 2003, the Secretariat determined that the submission met the requirements of Article 14(1) of NAAEC and requested a response from the Party in question (Mexico), pursuant to Article 14(2).

Mexico submitted its response on 4 December 2003. With respect to the citizen complaint filed in 1995, in which the Submitter alleged

ALCA's violations of Article 150 of the LGEEPA, Mexico asserts in its response that the corresponding process was concluded by Profepa pursuant to law. Mexico further reported that the file was lost due to a flood in the Profepa file room, but noted that the citizen complaint did not give rise to a criminal investigation. With respect to another citizen complaint filed by the Submitter in 2000, Mexico asserts that it concluded the process with the issuance of an administrative ruling, fining ALCA $2,421.00 pesos. As regards ALCA's alleged violations of Article 415 paragraph 1 of the CPF, Mexico states that agents of the Public Prosecutor (*Ministerio Público*) issued a technical opinion stating that the investigations "did not clearly establish a crime as set forth and penalized under Article 415, Section I of the CPF nor the probable liability of the suspects, as we deduce from the acts that although the asserted facts may constitute a crime, it is impossible to determine whether the crime exists due to irreparable material hindrance, because the proof provided is insufficient to evidence the crime."

On 23 August 2004, the Secretariat notified the CEC Council that in light of Mexico's response, the submission warranted developing a factual record.

On 9 June 2005, in Council Resolution 05-05, the Council decided unanimously to instruct to Secretariat to develop a factual record with respect to the matters raised in the submission, in accordance with NAAEC Article 15 and the Guidelines.

The Council ordered the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and the opportunity to comment on that plan. The Council further instructed that in developing the factual record the Secretariat should take into account considerations noted in Council Resolution 05-05. The Council stated that the Secretariat may include, in its preparation of a factual record, any relevant facts that existed prior to the entry into force of the NAAEC 1 January 1994.

Under Article 15(4) of the NAAEC, in developing a factual record, "the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts."

III. Request for information

The Secretariat of the CEC requests information relevant to the facts concerning:

(i) ALCA's alleged violations of Article 150 of the LGEEPA and Articles 414 first paragraph and 415 Section I of the CPF;

(ii) any inspection visits, administrative proceedings or other governmental actions conducted with ALCA before and after 2001 with respect to its history of (1) releases of toxic chemicals and the continuation of such releases, and (2) the handling of hazardous wastes and substances; and

(iii) whether Mexico is failing to effectively enforce Articles 150 of the LGEEPA and 414 first paragraph and 415 Section I of CPF in the case of ALCA.

IV. Examples of relevant information

1. Information on any municipal, state or federal environmental enforcement policies or practices that are applicable to ALCA's alleged violation of Article 150 of the LGEEPA and of Articles 414, first paragraph and 415, Section I of the CPF.

2. Information on the applicable land use of the property where the Submitter's home is located (at Cerrada de Vaqueros No. 11, Colonia María Isabel Industrial, Delegación Iztapalapa in Mexico City) and the property where the ALCA plant is located, as well as information on whether the plant is located in an area not suitable for industrial activities. The submission states that ALCA was constructed on the property near the Submitter's home around 1960.

3. Information on the urban development plan applicable to ALCA and any other similar plans or zoning rules applicable to the property, in effect from 1932 to date.

4. Information on whether ALCA's air pollution releases and its handling of hazardous wastes and substances fall under the provisions of Article 150 of the LGEEPA and Articles 414, first paragraph and 415, Section I of the CPF, as applicable. In particular, information as to whether ALCA carries on the following:

(i) generation, storage, disposal and discharge of environmentally harmful hazardous substances and/or wastes without applying prevention and safety measures;

(ii) atmospheric release or discharge of environmentally harmful gas, smoke, dust or pollutants without applying prevention and safety measures; and/or

(iii) management of hazardous materials and wastes without complying with the LGEEPA and the NOMs issued by Semarnat.

5. Information on the acts undertaken by municipal, state or federal health, environmental, labor, social development or any other authority and any administrative files kept thereby, in respect of the reported health effects on the Submitter, his family and other residents in the area, allegedly caused by ALCA's alleged atmospheric release of pollutants and its alleged mismanagement of hazardous substances.

6. Information on how the potential effects and risks of ALCA's operations on the environment and on the neighboring residents' health have been evaluated.

7. Information that ALCA has reported to municipal, state or federal authorities with respect to its releases and handling of hazardous wastes and substances, including any information submitted in statements, studies, samplings, log-books, monitoring data, reports, notices, requests and renewals of permits and licenses from the time its operations began up to the present.

8. Information on the criteria applied by the relevant authority (in general terms and specifically with regard to ALCA) in considering repeat offenses in the enforcement of Articles 150 of the LGEEPA and 414, first paragraph and 415, Section I of the CPF.

9. Any other technical, scientific or other information that could be relevant in the development of this factual record.

V. Additional background information

The submission, Mexico's response, the determinations by the Secretariat, the Council Resolution, the overall plan to develop a factual

record and other information are available in the Registry and Public Files section of Citizen Submissions on Enforcement Matters on the CEC website <http://www.cec.org>, or may be requested from the Secretariat.

VI. Where to send information

Relevant information for the development of the factual record may be sent to the Secretariat until **15 February 2006**, to either of the following addresses:

Secretariat of the CEC
Submissions on Enforcement
Matters Unit (SEM Unit)
393, rue St-Jacques Ouest,
bureau 200
Montreal QC H2Y 1N9
Canada
Tel.: (514) 350-4300

CCA / Mexico Liaison Office
Atención: Unidad sobre Peticiones
Ciudadanas (UPC)
Progreso núm. 3
Viveros de Coyoacán
México, D.F. 04110
México
Tel.: (5255) 5659-5021

For any questions, please send an e-mail to the attention of Rosa Blandon, at <rblandon@cec.org>.

APPENDIX 4

Information Requests to Mexican Authorities

Letter to the Party requesting information for development of the factual record for SEM-03-004

16 November 2005

Re: Development of the factual record for submission SEM-03-004 (*ALCA-Iztapalapa II*)

The Secretariat hereby requests from Mexico relevant information to develop the factual record for the ALCA-Iztapalapa II submission, SEM-03-004, in accordance with NAAEC Articles 15(4) and 21(1)(a).

As you are aware, on 9 June 2005, the Council of the Commission for Environmental Cooperation of North America unanimously resolved to instruct the Secretariat to develop a factual record, in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the NAAEC (Guidelines)*, with respect to the assertions stated in the submission referred to above.

Under Article 15(4) and 21(1)(a) of the NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party, and may also request additional information. As well, the Secretariat shall consider information publicly available and provided by the Joint Public Advisory Committee (JPAC), submitters or other interested nongovernmental organizations or persons, as well as information developed by the Secretariat or independent experts.

Attached you will find the list of matters on which information is requested of Mexico for developing this factual record. Please respond to this request no later than 15 February 2006. If any clarification are needed, questions may be sent to the following electronic mail address, to the attention of Rosa Blandón: <rblandon@cec.org>.

Thank you in advance for your attention to this matter.

Sincerely,

Legal Officer
Submissions on Enforcement Matters Unit

Attachment

cc: [Environment Canada]
[US EPA]
CEC Executive Director

Secretariat of the Commission for Environmental Cooperation

Request to Mexico for information for the development of a factual record on Submission SEM-03-004 *(ALCA-Iztapalapa II)* 16 November 2005

In Submission SEM-03-004 (*ALCA-Iztapalapa II*) Mexico is allegedly failing to effectively enforce its environmental law with respect to the operation of a footwear materials factory owned by the company ALCA, S.A. de C.V. ("ALCA"), located on property neighboring the Submitter's home in the Santa Isabel Industrial neighborhood of Iztapalapa District in Mexico City. The Submitter states that the factory's air emissions and ALCA employees' handling of hazardous substances and wastes violate Article 150 of the General Law on Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección del Ambiente*—LGEEPA) and Articles 414, first paragraph and 415, paragraph I of the Federal Penal Code (*Código Penal Federal*—CPF).

In particular, the Submitter asserts that the ALCA is illegally storing, disposing of and discharging substances considered to be hazardous and harmful to the environment, without applying preventive and safety measures. The Submitter also claims that ALCA does not apply preventive or safety measures to avoid the atmospheric release or discharge of environmentally harmful gas, smoke, dust or pollutants. The Submitter asserts that the company is failing to manage hazardous materials and wastes in accordance with LGEEPA and Mexico's Official Standards (*Normas Oficiales Mexicanas*—NOMs) issued by the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat). The Submitter asserts that these alleged violations are causing pollution that is harming his and his family's health. He further asserts that even though the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) found violations during a factory inspection, it terminated a citizen complaint filed by the Submitter without taking the necessary actions to stop the alleged violations.

For the development of the factual record regarding this submission, the Secretariat is requesting the Party to provide additional information on the effective enforcement of the environmental law indicated above in the cases referred to in the submission and with respect to the history of monitoring procedures that Mexico's environmental authorities have initiated in order to ensure ALCA's compliance with the corre-

sponding environmental law. Also, the information requested may include pertinent actions taken prior to 1 January 2004, when the North American Agreement on Environmental Cooperation went into effect. In particular, please:

1. Provide information regarding any municipal, state or federal environmental enforcement policies or practices that are applicable to ALCA's alleged violation of Article 150 of the LGEEPA and of Articles 414, first paragraph and 415, paragraph I of the CPF. Indicate how these policies or practices have been applied in the case of ALCA.

2. It is evident from the submission and the attached documents that since 1932 the Submitter has resided at Cerrada de Vaqueros No. 11, in the Santa Isabel Industrial neighborhood of Iztapalapa District in Mexico City, and that ALCA established in the neighboring property in approximately 1960. Provide details on the land use applicable to both properties from 1932 to the present, and clarify whether the ALCA factory is located in an area not suitable for industrial activities.

3. Provide a copy of the urban development plan applicable to the area in which ALCA and the Submitter's home are located, including land use plans, environmental management units, compatibility matrixes, etc., and also a copy of any other similar plans or ordinances applicable to these properties and in effect from 1932 to date.

4. Provide additional information on whether ALCA's atmospheric emissions and its handling of hazardous wastes and substances fall under the provisions of Article 150 of the LGEEP or Articles 414, first paragraph and 415, paragraph I of the CPF. In particular, provide information as to whether ALCA has, since the beginning of its operations to the present:

   (i) conducts activities of generating, storing, disposing of or discharging environmentally harmful hazardous substances, materials and/or wastes, without applying preventive or safety measures;

   (ii) releases or discharges environmentally harmful gases, smokes, dusts or pollutants into the atmosphere, without applying preventive or safety measures; and/or

(iii) fails to manage hazardous materials and wastes in accordance with LGEEPA and Mexico's Official Standards issued by Semarnat.

5. Provide information on the acts undertaken by municipal, state or federal authorities in health, environment, labor, social development or any other areas, and any administrative files kept thereby, in relation to the reported health effects on the Submitter, his family and other residents in the area, allegedly caused by ALCA's air emissions and its alleged hazardous substances mismanagement. Indicate how the potential effects and risks of ALCA's operations for the environment and the health of neighboring residents have been evaluated.

6. Provide a copy of any information in the possession of municipal, state or federal authorities in areas of health, environment, labor, social development or other, in relation to reported health effects on the Submitter, his family and other residents in the area, allegedly caused by ALCA's air emissions and its alleged hazardous substances mismanagement.

7. Provide a copy of the information that ALCA has reported to municipal, state or federal authorities, with respect to its releases and handling of hazardous wastes and substances, its high-risk activities, and environmental impact, and including any information submitted in statements, studies, samplings, logbooks, monitoring data, reports, notices, requests and renewals for permits and licenses from the time its operations began, and in particular, since the date of the submission on 25 November 2002.

8. Provide a complete copy of the Technical Opinion with respect to the advice not to exercise criminal action that Mexico attached to its response as Exhibit 11.

9. Provide a copy of the official documents regarding the flooding of Profepa's file room, where the citizen complaint presented by the Submitter on 10 November 1995 was filed.

10. Attached to the submission is a document dated 14 February 2002 and issued by Profepa's General Bureau of Environmental Complaints and Social Participation (*Dirección General de Denuncias*

Ambientales, Quejas y Participación Social),[1] which cites the following actions undertaken by the authority with respect to the complaints regarding ALCA:

(i) An inspection visit dated 7 December 1994, following a citizen complaint filed on 5 October 1994, by Ángel Soto Medina. During the visit, various violations of federal environmental rules were detected, and the temporary partial closing of pollution sources was imposed as a safety measure. The closure was lifted on 14 August 1996.

(ii) With respect to the citizen complaint filed by Ángel Lara García on 13 January 1997, an inspection visit was conducted on 10 March 1997. Given the company's observed noncompliance, an administrative ruling was issued on 5 September 1997, imposing a fine of 21,160.00 pesos and ordering that various correction actions be implemented.

(iii) An inspection visit was carried out on 17 February 2000, with non-compliances noted in relation to hazardous waste generation.

(iv) An inspection visit on 27 July 2001, found possible offenses regarding hazardous waste, risks and air pollution.

In its response, Mexico provided information only with respect to the last administrative procedure listed in the Profepa document. Please provide a copy of all the documents corresponding to the acts cited above and of the acts and other documents in the files addressing any other administrative procedures in the inspection and monitoring of ALCA initiated by Profepa, in relation to the handling of hazardous substances and wastes and the release of atmospheric pollutants, in accordance with applicable legislation.

11. All the inspection and monitoring procedures mentioned by Mexico in its response were completed before the Submitter presented the submissions filed in November 2002 and June 2003 and in which the Submitter asserts that ALCA allegedly continued to violate Articles 150 of the LGEEPA and 414, first paragraph and 415, paragraph I of the CPF. Provide information regarding the acts

1. Ruling No. DG/094/DI/167/2002, FOLIO 027/4/98/2, dated 14 February 2002, issued by the General Bureau of Environmental Complaints and Public Participation, signed by General Director Edgar del Villar Alvelais.

undertaken with respect to ALCA to enforce these provisions, from 25 November 2002 to date.

11. Provide information on the criteria applied by the relevant authority in considering repeat offenses, in all the acts undertaken to enforce Articles 150 of the LGEEPA and 414, first paragraph and 415, paragraph I of the CPF, in relation to ALCA since the beginning of its operations.

12. Provide information on the effectiveness of Mexico's enforcement of Articles 150 of the LGEEPA and 414, first paragraph of the CPF, in relation to ALCA's handling of hazardous substances and wastes since the beginning of its operations.

13. Provide information on the effectiveness of Mexico's enforcement of Article 415, paragraph I of the CPF, in relation to ALCA's atmospheric emissions since the beginning of its operations.

14. Provide any other technical, scientific or other information that could be relevant in the development of this factual record.

Mexican Authorities Recipient of a Request for Information for the Development of the Factual Record on Submission SEM-03-004

FEDERAL

Ministry of Environment and Natural Resources (Semarnat)

- Secretary for Environment and Natural Resources
- International Affairs Coordination Unit (UCAI)

Federal Attorney for Environmental Protection (Profepa)

- Profepa Delegation in the Valle de México metropolitan area
- General Bureau of Pollution Source Inspection
- Environmental Emergency Response Resource Center (*Centro de Orientación para la Atención de emergencias Ambientales*—COATEA)

Ministry of Social Development

- General Bureau of the National Institute for the Elderly (*Instituto Nacional de las Personas Mayores*—INAPAM)
- INAPAM Legal Office

STATE

Mexico City Government

- Urban Development and Housing Department (*Secretaría de Desarrollo Urbano y Vivienda*—SEDUVI)
- SEDUVI Urban Development Office
- Borough of Iztapalapa
- Civil Protection Coordination of the Borough of Iztapalapa

APPENDIX 5

Information Requests to NGOs, JPAC and other Parties to the NAAEC

Form Letter to NGOs

28 November 2005

Re: Request for information relevant to the factual record for Submission SEM-03-004 (*ALCA-Iztapalapa II*)

The Secretariat of the Commission for Environmental Cooperation of North America (CEC) recently began the process of preparing a "factual record" regarding the assertion that Mexico is failing to effectively enforce its environmental law with respect to the operation of a footwear materials factory owned by the company ALCA, S.A. de C.V. (hereinafter "ALCA") and located on property neighboring the Submitter's residence in the Santa Isabel Industrial neighborhood of Iztapalapa District in Mexico City. This assertion was made in a "submission" filed with the CEC Secretariat in June 2003 by Mr. Ángel Lara García.

I am writing to invite you to submit information relevant to the factual record. The attached Request for Information explains the citizen submissions and factual records process, gives background on the submission referred to as ALCA-Iztapalapa II (SEM-03-004), describes the scope of the information to be included in the factual record for this submission, and provides examples of information that might be relevant. We will accept information for possible consideration in connection with the factual record **until 15 February 2006**.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. Please feel free to contact the Secretariat if you have questions. Contact information is provided at the end of the Request for Information.

Sincerely,

Legal Officer
Submissions on Enforcement Matters Unit

Attachment

Memorandum to the Joint Public Advisory Committee

Memorandum

DATE:	17 November 2005
À / PARA / TO:	Chair, JPAC
CC:	JPAC Members, CEC Executive Director, JPAC Liaison Officer
DE / FROM:	Legal Officer, Submissions on Enforcement Matters Unit
OBJET / ASUNTO /RE:	Request for information relevant to the factual record for submission SEM-03-004 (*ALCA-Iztapalapa II*)

As you know, the CEC Secretariat recently began the process of preparing a factual record for the submission SEM-03-004 *(ALCA-Iztapalapa II*). This submission was filed with the Secretariat in June 2003 by Ángel Lara García. Consistent with Council Resolution 05-05, the factual record will focus on the assertion that Mexico is failing to effectively enforce its environmental laws with respect to the operation of a footwear products facility owned by a company called ALCA, S.A. de C.V. (ALCA), located on a piece of land adjacent to the personal address of the Submitter in the Santa Isabel Industrial neighborhood, in Mexico City, D.F.

I am writing to invite the JPAC to submit information relevant to the factual record, consistent with Article 15(4)(c) and Article 16(5) of the NAAEC. The attached Request for Information, which has been posted on the CEC website, provides background on the ALCA-Iztapalapa II submission, describes the scope of the information to be included in the factual record, and provides examples of information that might be relevant. We will accept information for possible consideration in connection with the factual record until 15 February 2006.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. For any questions, please send an email to the attention of Rosa Blandon, at <rblandon @cec.org>.

Letter to the Other Parties of the NAAEC (Canada and US)

16 November 2005

Re: Invitation to provide information relevant to the factual record for submission SEM-03-004 (*ALCA-Iztapalapa II*)

As you know, the CEC Secretariat recently began the process of preparing a factual record for submission SEM-03-004 (*ALCA-Iztapalapa II*), consistent with Council Resolution 05-05. I am writing to invite the [Canadian][the United States] Party to submit information relevant to the factual record, in accordance with Article 15(4) of the NAAEC.

The attached Request for Information, which has been posted on the CEC website, provides background information on the ALCA-Iztapalapa II submission, describes the scope of the information to be included in the factual record, and provides examples of information that might be relevant. We will accept information for consideration in connection with the factual record until February 15, 2006.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. For any questions, please send an email to the attention of Rosa Blandon, at <rblandon @cec.org>.

Sincerely,

Legal Officer
Submissions on Enforcement Matters Unit

cc: [US EPA]
Semarnat
[Environment Canada]
CEC Executive Director

Enclosure

Nongovernmental organizations and individual recipients of a request for information for development of the factual record in regard to Submission SEM-03-004

ALCA, S.A. de C.V.

Ángel Lara García

National Chemical Industry Association (*Asociación Nacional de la Industria Química*—ANIQ)

- General Direction
- Environment Directorate

Commission of Private Sector Studies for Sustainable Development

- Executive Director's Office

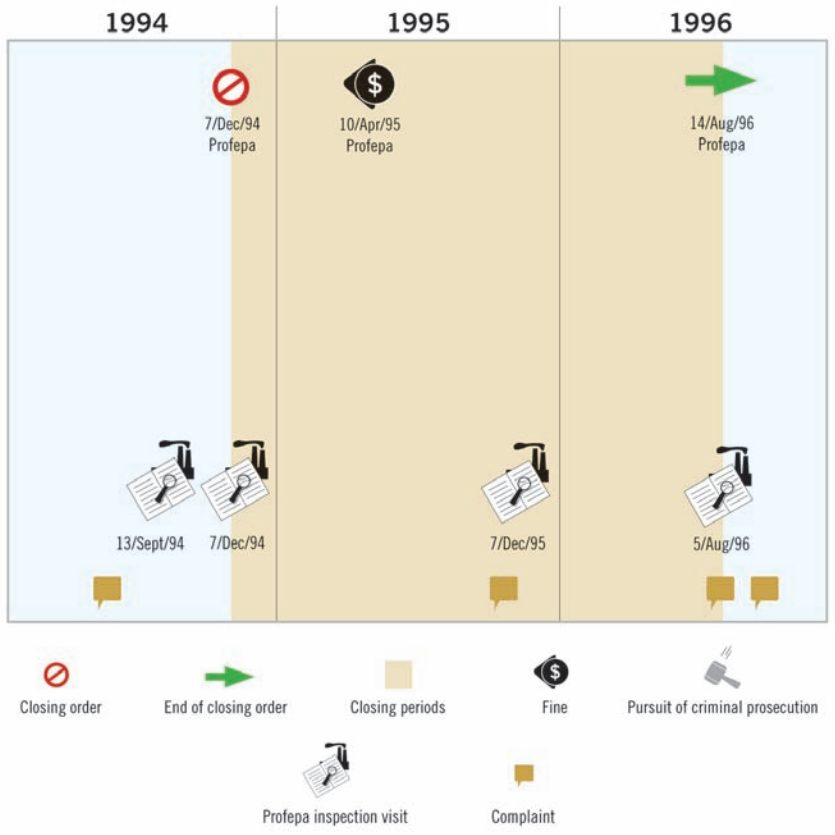
National Respiratory Disease Institute *(Instituto Nacional de Enfermedades Respiratorias*—INER)

- Department of Biochemistry and Environmental Medicine

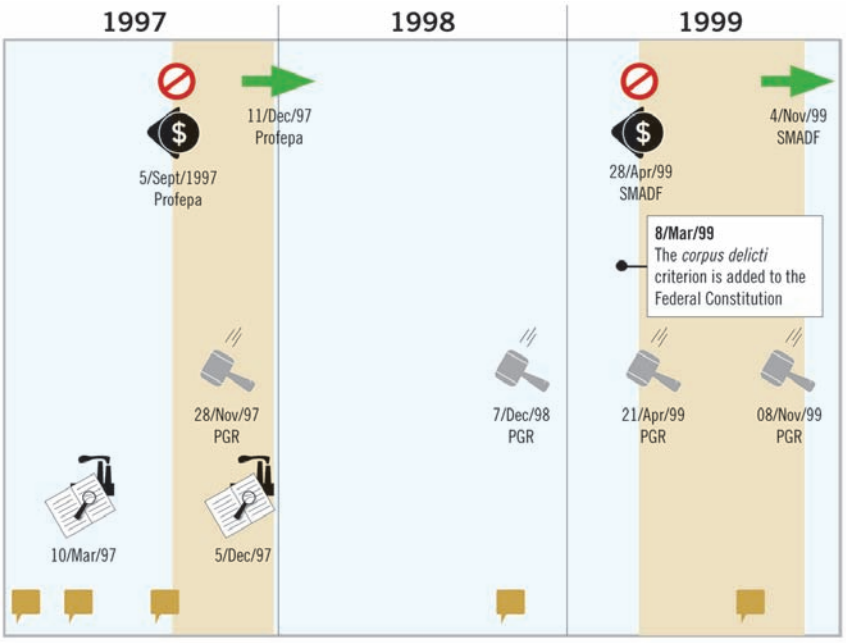
APPENDIX 6

Chronology of events

Chronology of events

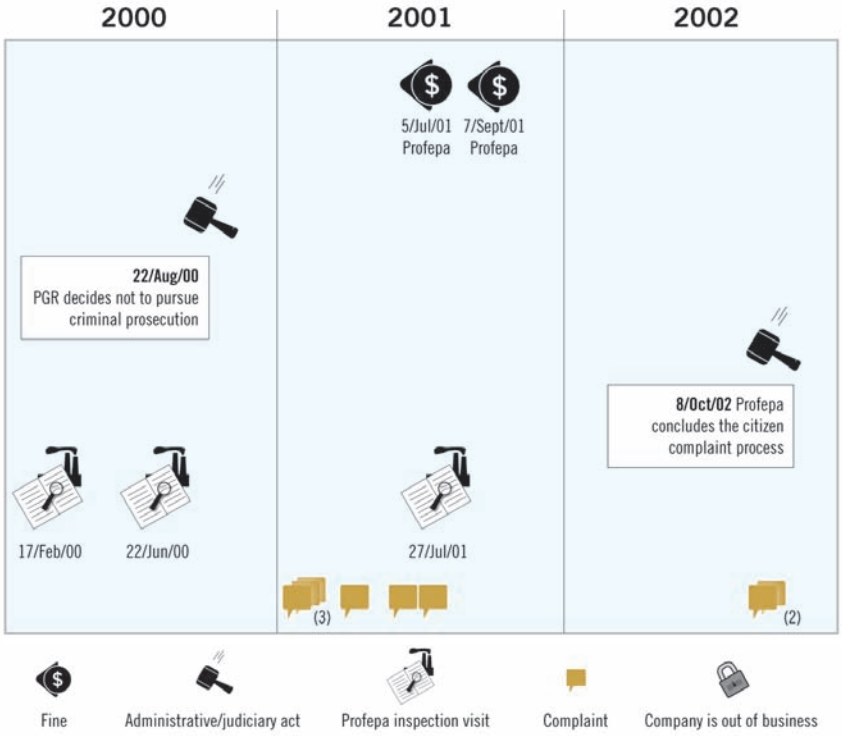


Chronology of events

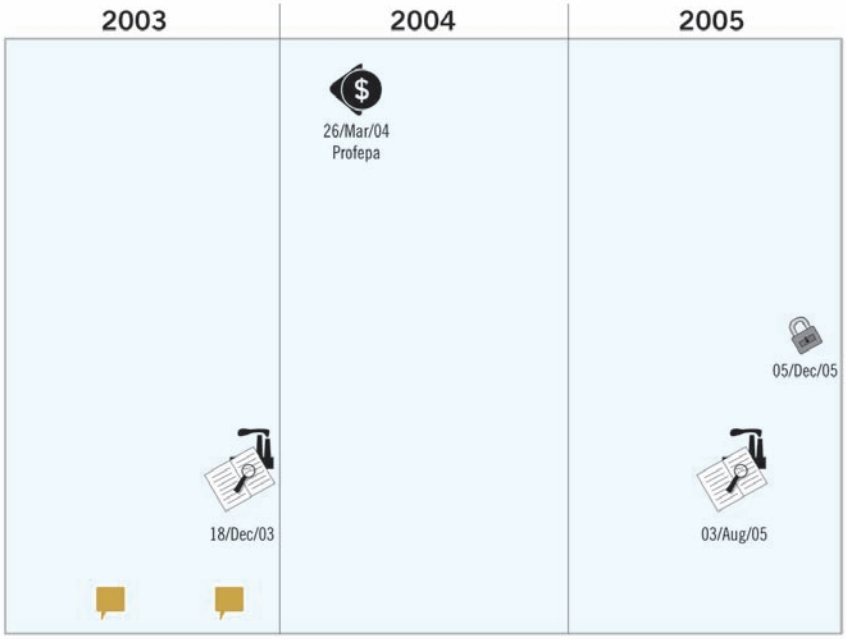


PGR	Attorney General of the Republic (*Procuraduría General de la República*)
Profepa	Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*)
SMADF	Ministry of the Environment of the Federal District

Chronology of events



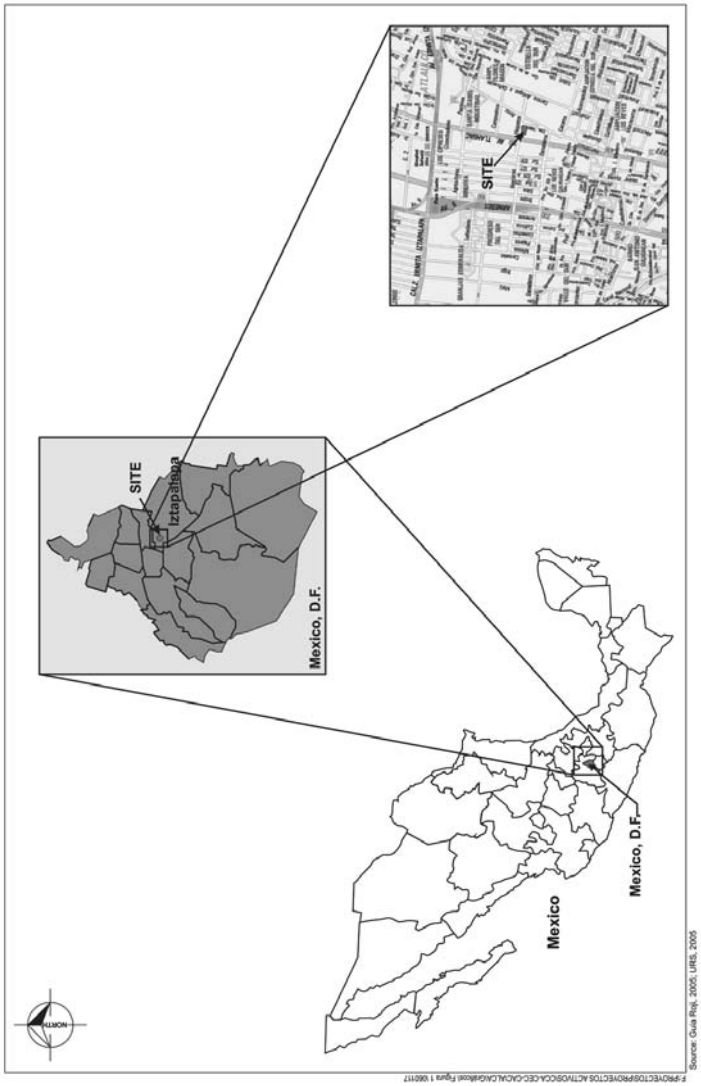
Chronology of events



PGR	Attorney General of the Republic (*Procuraduría General de la República*)
Profepa	Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*)
SMADF	Ministry of the Environment of the Federal District

APPENDIX 7

Figures

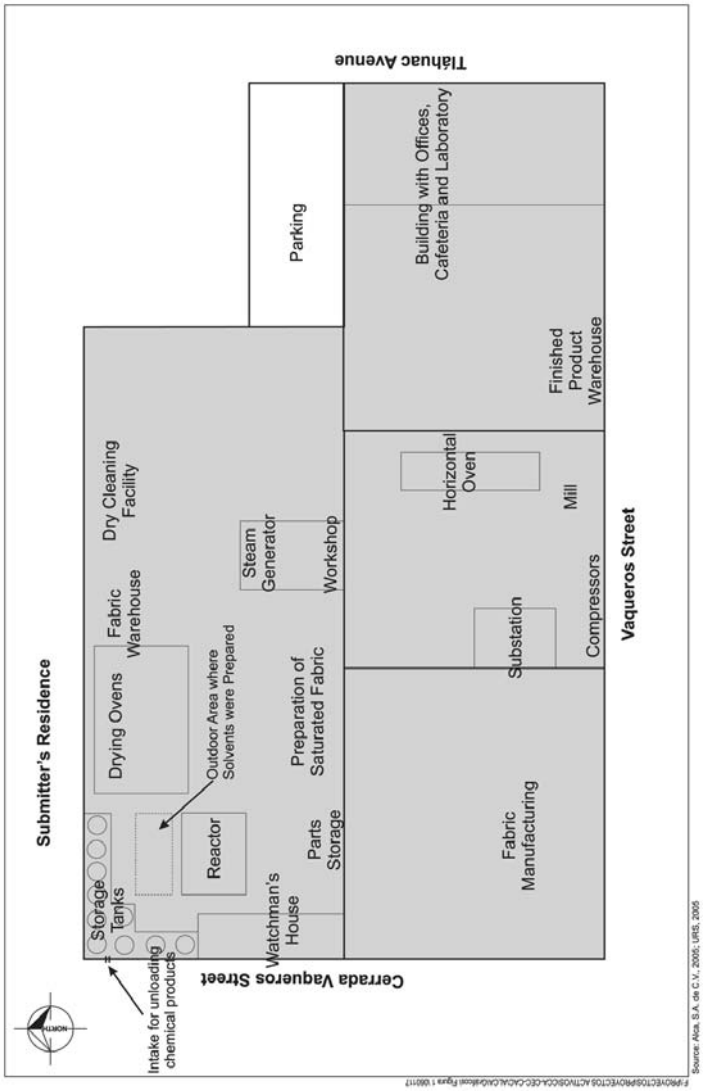


LOCATION MAP
Site Visit to Alca, S.A. de C.V.
Iztapalapa, D.F., Mexico

February 2006
40015015
Commission for Environmental Cooperation Of North America

URS Dames & Moore de México

FIGURE 1



Source: Alca, S.A. de C.V., 2006; URS, 2006

SITE LAYOUT
Site Visit to Alca, S.A. de C.V.
Iztapalapa, D.F., Mexico

February 2006
40015015
Commission for Environmental Cooperation Of North America

URS Dames & Moore de México

FIGURE 2

APPENDIX 8

Photographs

Photo No. 1: View to the west of Submitter's residence, located at 11 *Cerrada de Vaqueros* street.

Photo No. 2: Zone for delivering of solvents (xylene and styrene), next to Submitter's residence on 11 *Cerrada de Vaqueros*. There is a hole in the wall for inserting a hose used to deliver the product.

Photo No. 3: Styrene monomer storage tank with capacity of 9,000 liters. Only some of the tanks were observed to have the corresponding indications.

Photo No. 4: Area with storage tanks for chemical products. There are no signs indicating the presence of risk. At the back of the area is the wall bordering the Submitter's residence.

Photo No. 5: Reactor used to produce latex. The drums were used for transporting the product to the saturation area. Day tanks for xylene and styrene monomer can be seen at the back.

Photo No. 6: View of the outdoor area where the activator was prepared. The process was conducted in the open air. Also visible is a screen for catching any product spilled.

Photo No. 7: Machine for saturating fabric with polymer.

Photo No. 8: View of horizontal oven for drying polymer-saturated fabric.

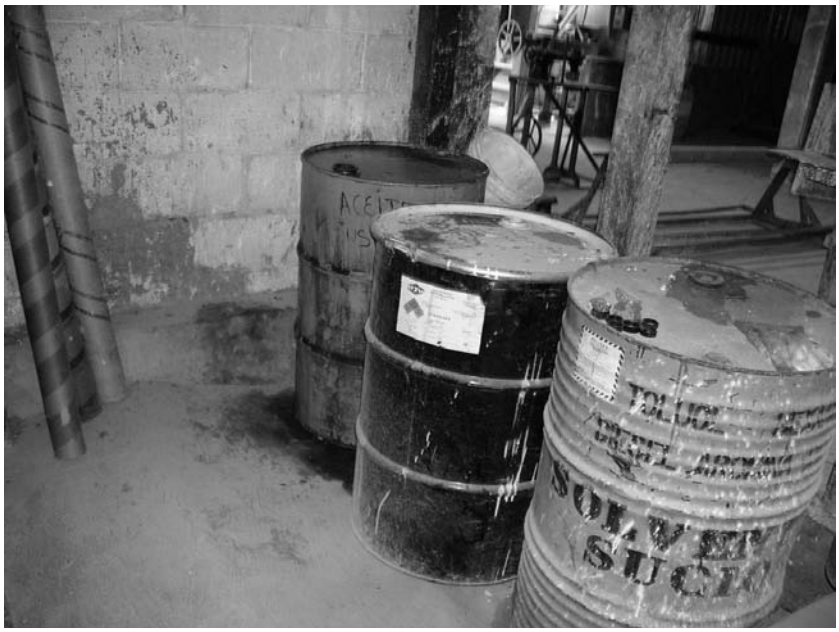


Photo No. 9: Area for storing hazardous wastes. Drums with solvents and used oils were observed there.

Photo No. 10: Dismantling of the ALCA's facility.

ATTACHMENT 1

Council Resolution 08-02

30 May 2008

COUNCIL RESOLUTION: 08-02

Instruction to the Secretariat of the Commission for Environmental Cooperation to make public the Factual Record for Submissions SEM-03-004 (ALCA-Iztapalapa II)

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

HAVING RECEIVED the final factual record for Submission SEM-03-004; and

NOTING that pursuant to Article 15(7) of the NAAEC, the Council is called upon to decide whether to make the factual record publicly available;

HEREBY DECIDES:

TO MAKE PUBLIC and post on the registry the final factual record for Submission SEM-03-004;

TO ATTACH to the final factual record comments provided by Canada, Mexico, and the United States of America to the Secretariat on the draft factual record; and

TO INCLUDE with the final factual record a disclaimer which states that the document was prepared by the Secretariat, and that the views contained therein do not necessarily reflect the views of the governments of Canada, Mexico or the United States of America.

APPROVED IN THE NAME OF THE COUNCIL:

_____

David McGovern
Government of Canada

_____

Enrique Lendo Fuentes
Government of the United Mexican States

_____

Scott Fulton
Government of the United States of America

ATTACHMENT 2

Comments of Canada

September 17, 2007

Adrián Vazquez
Executive Director
Secretariat of the Commission for Environmental Cooperation
393 St-Jacques Street West, Suite 200
Montreal, QC H2Y 1N9

Dear Mr. Vázquez,

Further to Article 15(5) of the North American Agreement on Environmental Cooperation (NAAEC), the Government of Canada has reviewed the draft Factual Record for Submission SEM-03-004 (*ALCA-Iztapalapa II*).

As a supporter of the citizen submissions process, Canada is providing the following comments to ensure that factual records are accurate in their scope and purpose.

Canada's longstanding position has been that the factual record should consist of an impartial reporting of facts which allows the public to formulate independent conclusions. The factual record, therefore, should not include opinions or draw conclusions. Canada is concerned that the following passages in the draft factual record provide legal opinions. In discussing the prosecutorial strategy of the Office of the Federal Public Prosecutor (MPF) the factual record states on page 44:

> . . . that the MPF had the opportunity to use other evidence gathering methods contemplated in criminal law but did not do so.

The draft factual record goes on to state on page 45:

> . . . the public prosecutor did not gather enough proof before the district judge to substantiate the offenses allegedly commited by ALCA's representatives. . . In analyzing the documentation based on which the MPF decided not to proceed with criminal prosecution, the Secretariat found that the MPF had other means of proof contemplated in the criminal law at its disposal but did not use them.

These passages indicate that the analysis and opinion of the expert is being presented as a factual conclusion. Canada is of the view that this type of legal analysis is not appropriate for the factual record.

Canada also questions the use of information from the UNDP report *Informe sobre Desarrollo Humano en Mexico 2004.* The quote drawn from this report on pages 18 and 44 is inserted into the factual record as a factual statement on the capacity of the MPF. While the use of such publicly available information is permitted under Article 15(4)(a) of NAAEC, Canada believes it is essential to ensure that the full context of quotes are included within the factual record. In this case, the quote is in relation to all criminal prosecutions and therefore may not be applicable for environmental violations. In providing the full context, the Secretariat can ensure that the appropriate weight is given to the information.

As a procedural matter, comments of a Party are not to be made public unless and until Council votes to make the final factual record publicly available pursuant to Article 15(7) of the NAAEC.

Canada appreciates the substantial work of the Secretariat in compiling the draft factual record and hopes that our comments will assist the Secretariat in ensuring that the factual record for *ALCA-Iztapalapa II* constitutes an objective reporting of the facts.

Yours sincerely,

David McGovern
CEC Council Alternate Representative, Canada
Assistant Deputy Minister, International Affairs, Environment Canada

cc: Jerry Clifford, Alternate Representative, US EPA
Enrique Lendo, Alternate Representative, Mexico, SEMARNAT

ATTACHMENT 3

Comments of United States

September 18, 2007

Mr. Adrian Vazquez
Executive Director
Secretariat of the Commission for Environmental Cooperation (CEC)
393, rue St-Jacques west, bureau 200
Montreal QC H27 1N9

Re: ALCA-Iztapalapa II Factual Record

Dear Mr. Vazquez,

Thank you for providing the United States with a copy of the draft factual record for Submission SEM-03-004 (*ALCA-Iztapalapa II*). The United States continues to support the submissions on enforcement matters process provided for under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) and welcomes the opportunity to review and comment on this draft factual record.

In our view, a factual record should provide the public with an impartial presentation of the relevant facts, and should not contain conclusions by the Secretariat as to whether a Party is, in fact, effectively enforcing its environmental law. It is within this context that the United States provides the comments to the Secretariat on the ALCA-Iztapalapa II draft factual record as an attachment to this letter.

The United States recognizes the substantial effort it took to prepare this draft factual record and deeply appreciates the Secretariat's effort in this regard.

Should you have any questions regarding the United States' comments, please do not hesitate to contact Nadtya Hong (202-564-1391) or Anne Rowley Berns (202-564-1762).

Sincerely,

Jerry Clifford
Acting Assistant Administrator
U.S. Alternate Representative
to the CEC Council

Attachment

Attachment: Comments of the United States of America on the *ALCA-Iztapalapa II* Draft Factual Record

- The U.S. suggests that the word "residents" in the first sentence of the first paragraph of page 1 of the draft factual record be replaced with the word "persons," and that the word "citizen" be removed from that same sentence. Under Article 14.1 of the North American Agreement on Environmental Cooperation the Secretariat may consider a submission on enforcement matters from any "person" residing or established in Canada, Mexico, or the U.S. The word "person" would therefore include not only citizens and permanent residents, but also juridical persons, such as corporations or environmental non-governmental organizations, of Canada, Mexico, or the U.S.

- The reference in the third paragraph of page 18 of the draft factual record, to the United Nations Development Programme human development report on Mexico, does not, at least as currently drafted, seem relevant, because the reference is to a discussion of Mexican criminal law proceedings in general, and not specifically to any proceedings related to assertions raised in the ALCA-Iztapalapa II submission. We therefore think the paragraph should be removed.

- The U.S. suggests that information in the second paragraph of page 40 of the draft factual record be rephrased so that it is a description of facts, e.g., of what the relevant Mexican laws actually say as contrasted with the enforcement actions taken by the Federal District, rather than purely as a legal conclusion drawn by the Secretariat.

ATTACHMENT 4

Comments of Mexico

LEGAL AFFAIRS COORDINATING UNIT

ADJUNCT GENERAL BUREAU FOR LEGISLATION AND CONSULTATION

CONSULTATION BUREAU
F.I.: 09393

OFFICIAL COMMUNICATION
NO. 112/00004663/07

Mexico City, 19 September 2007

FELIPE ADRIÁN VÁZQUEZ GÁLVEZ
EXECUTIVE DIRECTOR
COMMISSION FOR ENVIRONMENTAL COOPERATION

With respect to your Memorandum dated 6 August 2007, pursuant to Article 15(5) of the North American Agreement on Environmental Cooperation (NAAEC), we hereby submit the comments of the Party on the draft factual record for citizen submission **SEM-03-004 (*ALCA-Iztapalapa II*).**

The Party finds that the draft text contains various inaccuracies, but calls attention to three matters exceeding the Council mandate and therefore affecting the contents of the factual record, as detailed below:

I. The draft addresses issues not included in the submission.

To clarify this point, we refer to the issues set out by the submitter, summarized as follows:

- He submitted a complaint with the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) against the company ALCA, S.A. de C.V., leading to the criminal investigation No. 4999/FEDEC/97. A criminal prosecution was begun against the company, although the company was found not guilty because the investigation was allegedly not properly conducted;

- His submission to the Secretariat is based on Articles 414, first paragraph and 415, section I of the Federal Penal Code (*Código Penal Federal*—CPF), and Article 150, first paragraph of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA);

- He asks that a party response is requested from the government of his country, considering the grave harm to his person and his community, and stated that he had exhausted all remedies available to assure adequate environmental law enforcement.

However, the Secretariat's draft factual record includes sections on issues beyond those stated by the submitter, such as:

a) In numeral 6.2, *LGEEPA Article 150* at pages 11 to 13, the Secretariat's analysis addresses the full text of the article, although the submitter's submission includes only the first paragraph thereof.

The second paragraph on page 12 states the obligations that allegedly applied to ALCA with respect to the hazardous materials and waste inspected by Profepa, which do not correspond to enforcement of the law but rather the obligations that, in the Secretariat's view, should be met by a private interest.

The last paragraph of the same section includes a reference to Mexican Official Standard (*Norma Oficial Mexicana*) NOM-052-SEMARNAT-1993, which falls outside the scope of LGEEPA Article 150 and the Council mandate.

Numeral 6.3, *Context of Environmental Law*, is subdivided into numerals 6.3.1 and 6.3.2, which respectively refer to *Environmental Law* and *Environmental Crimes Legislation,* at pages 13 to 20, addressing Profepa's jurisdiction, penalties, criminal actions, assistance to the prosecutorial authorities, agencies specializing in environmental crimes, and the threshold for evidencing the existence of a possible crime and means of proof.

The Party believes that the draft, by focusing on issues and articles not stated in the submission or falling outside the Council mandate, generates unnecessary information that does not constitute a reference framework for interpreting LGEEPA Article 150, first paragraph and CPF Articles 414, first paragraph and 415, section I in effect at the time the facts described by the submitter occurred.

b) Section 7, *History of ALCA in Iztapalapa* (pages 20 to 25) should not be included in the factual record, as the Council Resolution does not include any consideration of the background to the company's operations or sociogeographical issues of the Iztapalapa section of Mexico City that justifies the analysis of these topics.

This is significant, considering that the Secretariat offers no reason to justify why historical information is necessary for the facts asserted in the submission, or how such information relates to Mexico's effective enforcement of its environmental laws.

c) In section 8, the Secretariat inserts information on the symptoms to human health caused by exposure to various chemicals allegedly used by ALCA, although the submission of Mr. Ángel Lara García did not assert any fact regarding specific symptoms or illnesses.

Moreover, the first paragraph of section 8 (page 25) states that "... *the submitter, in various letters to the authorities, reported that emissions and vapors from compounds used by ALCA were causing him nuisance and harming his health...*" The footnotes included in the draft make no reference enabling an identification of the documents where the submitter makes these assertions.

The same paragraph further states that *other persons exhibited symptoms including dizziness, eye irritation and burning and headaches*. To support this information, the draft includes a reference to two unnumbered official communications dated December 5, 2001 and February 24, 2003, issued by administrative units of the National Senior Citizen's Institute (*Instituto Nacional de las Personas Adultas Mayores*—INAPAM).

However, this information is inaccurate, as it fails to establish any linkage with the company's operations or the facts stated in the submission. Note that the documents referenced by the Secretariat were requested by the submitter himself.

Chapter 8 as a whole constitutes the Secretariat's interpretation of the possible effects on dwellers of the substances allegedly used by ALCA. However, it should be noted that:

- Symptoms depend on the extent and time of human exposure to a given substance, and therefore their existence cannot be inferred, and require at least a vulnerability study.

- The mere citation of scientific or medical information is not enough; epidemiology issues need to be addressed by a medical expert. Otherwise, information is taken out of context and is used speculatively.

- The toxicological profiling of substances does not constitute scientific evidence linked to the submission or the alleged symptomology that the Secretariat attributes to the submitter.
- The Secretariat collected information on the materials allegedly used by ALCA in its processes at year-end, improperly basing stock estimates on warehouse capacity.

Page 30 includes a chart intended to summarize the rules applicable to the substances allegedly used by ALCA.

However, it does not state the purpose of this comparative analysis. Considering that the information preceding it is incomplete, a reader may get the idea that the Party failed to regulate certain substances even where, under the environmental laws, they should not be regulated by Mexican Official Standards.

d) The first paragraph of section 9, *Environmental Law Enforcement in the Case of ALCA* (page 31) should not be included in the factual record, since the submitter did not assert the alleged failure to effectively enforce environmental laws in such regard.

Numeral 9.1, *Complaints Filed against ALCA*, also should be deleted, since the Secretariat states that the submitter appeared before a number of government agencies and institutions, allegedly documenting 21 complaints relating the matter raised in the submission.

However, it states that "... in *nearly* all cases, it is certain that the petitioner was Ángel Lara García, although in *some* cases the complaint was filed by someone else, *at the submitter's request...*"

This assertion is at odds with the statement at page 32, that "... *the Secretariat has obtained some of the documents containing the complaints, while in the remaining cases, the information comes from documents issued by the authorities, in reference to a complaint...*".

It should be noted that the information on the content of the complaints filed is imprecise, as it refers only to official communications issued by various authorities without evidence of the purpose, petitioner or whether they refer to the enforcement of Mexican environmental laws, in order to link them with the submission.

Therefore, the Secretariat's mere assertion is insufficient to consider the existence of such complaints.

In addition, table 4 on pages 32 and 33 leads the reader to believe that the complaints, rulings and letters described therein constitute a repeated failure to enforce environmental laws, and furthermore that all of them were filed, sought or requested by the submitter.

II. Inclusion of opinions constituting an assessment of the Party's actions.

In the last paragraph of pages 2 and 3, the Secretariat asserts that it requested an expert opinion on the determination of the Office of the Federal Public Prosecutor (*Ministerio Público Federal*—MPF) issued on 2000, deciding not to order a criminal prosecution due to the lack of evidence. The expert found that while the MPF action was in accordance with law, it had other evidence available that were not considered.

This assertion is reiterated in the following sections:

- Page 19, third paragraph:

  For these reasons, at the time of the criminal investigation, substantiation of the alleged offences required a much more thorough analysis than was required after 1999.

- Page 22, sixth paragraph:

  In the opinion of the Secretariat's legal consultant, the technical complexity of environmental offenses normally requires the use of expert testimony, which in this case could determine whether hazardous materials or wastes were at issue; establish the presence of harm—or at least danger—to public health, natural resources, fauna, flora or ecosystems; identify the conduct as causing the emission, release or discharge or gas, smoke or dust into the atmosphere, or determine the violation of the terms of the authorization from the competent federal authority, or the violation of the provisions of applicable laws or NOMs.

- Page 44, last paragraph and the first paragraph on page 45:

  In reviewing the documentation on the decision *not to proceed with criminal prosecution*, the Secretariat's legal consultant found that the MPF had the opportunity to use other evidence gathering methods contemplated in criminal law but it did not do so. These included search of premises, testimony of neighbors and company employees, and expert testimony on public health and ecology. The authorities could also have produced a report explaining the link between the conduct and the result (*dictamen de nexo causal*).

As seen, the above statements do not constitute a fact or statement thereof, but rather an examination and assessment of the MPF's actions, whereby the Secretariat goes beyond the Council instructions.

The information prepared by the Secretariat through experts cannot qualify the suitability, relevance or scope of the investigations conducted or question how they were carried on.

This is because the purpose of the development of a factual record is to make public any information on events relating to the effective enforcement of environmental laws by the NAAEC parties.

The Secretariat's function is to state such facts, without such presentation is not translated into conclusions or opinions affecting the reader's own interpretation and implicitly leading him to share the opinions set out in the document.

A factual record cannot establish conclusions, and especially should not contain statements that may be construed as incriminating the Party; it should join and summarize the essences of the submission and the response. Otherwise, the insertion of opinions, viewpoints or judgments as to the Party's actions implicitly make the Secretariat a reviewing agency, a power not conferred by the NAAEC, thereby affecting the impartiality of its actions.

To demonstrate its impartiality, the factual record should address the information provided by the Party in its response, as regards the MPF's 22 August 2000 decision not to prosecute, because:

- The investigations did not fully substantiate the *corpus delicti* contemplated and penalized by Article 415, paragraph I of the Federal Criminal Code nor the probable liability of the suspects.

- It may be deduced from the proceedings that, although the facts asserted may constitute an offense, it is impossible to prove the existence of that offense due to insuperable material obstacle.

The Secretariat states, in this same regard, that it consulted the government of Mexico on other means of proof available to the MPF and why they were not considered at the investigation stage.[1]

1. Request for additional information, of 7 September 2006, to Director, Legislation and Consultation Branch of Semarnat.

When no response was forthcoming, the Secretariat asked Mexico to provide an explanation in the event that it could not legally respond to the request; however, no explanation was obtained.

However, the Secretariat fails to consider that its authority to collect information for the development of a factual record does not justify its request for explanations on the actions of an investigative authority, since this would make it a supranational reviewing agency, which is not the intent of the NAAEC with respect to citizen submissions or factual records.

III. Inclusion of information contained in reports from international organizations providing isolated considerations that, when used outside their original context, constitute a characterization of the Party's actions.

In section 6.3.2, *Enforcement of Environmental Criminal Law*, subsection c, *Specialized Environmental Law Enforcement Entities* (page 18, third paragraph) the Secretariat provides the following information:

> In relation to the MPF's investigative capacity, the 2004 human development report on Mexico, published by the United Nations Development Program (UNDP), states that "[...] officials set aside cases requiring greater investigative effort in order to identify a suspect and at times leave evidence gathering to the prosecution [...] the Office of the Public Prosecutor tends not to proceed with criminal prosecution in more complex cases, arguing, for example, lack of evidence."

This reference does not constitute a fact nor does it provide any objective information, although it does carry an implied opinion of the actions of Mexican prosecutors based on a value judgment taken out of context, leading the reader towards an opinion, rather than enabling the reader to form his own opinion based on impartial and objective information. Therefore, the Secretariat is acting outside the instructions given by the Council.

Note also that the above publication does not fall under the definition of environmental law pursuant to NAAEC Article 45(2), and that it bears no relationship with the facts described in the submission or any matter raised therein.

IV. Other inaccuracies

1) The Secretariat states that the submitter, Angel Lara García, asserts that the Party is failing to effectively enforce its environmental laws,

expressly referring to such assertion at pages 1, 3 and 4 of the of the submission (section 1, *Executive Summary*, second paragraph, page 1; section 2, *Summary of the Submission*, first paragraph, page 3; section 9, *Environmental Law Enforcement in the Case of ALCA,* first paragraph, page 31; numeral 9.2.2 of said section, first paragraph, page 38; numeral 9.4 of said section, first paragraph, page 40).

However, in submission SEM-03-004 (*ALCA-Iztapalapa II*), Mr. Lara García never makes the assertions indicated by the Secretariat.

2) In the third paragraph on page 2, summarizing the purpose of the closures imposed by Profepa against ALCA, S.A. de C.V., the Secretariat holds that the second closing ordered by Profepa in 1997 was based on the company's *persistence* in violations involving air emissions.

By using the term "*persistence of other air emission-related instances*", it assumes that the closure imposed in 1994 was due to company violations. This is inaccurate, as the same paragraph states; the first closure was ordered after the corrective measures ordered by Profepa were carried on.

Therefore, it is necessary for the Secretariat to specify that the cause for the second closure was the company's second violation of Mexican environmental law.

3) In that same paragraph, the Secretariat asserts that "*Profepa ultimately deviated from the conditions imposed and accepted the criterion proposed by ALCA for analysis of its pollutant emissions.*" This statement is repeated in:

- Fourth paragraph of page 37 (*9. Environmental Law Enforcement Against ALCA*):

  > On 4 November 1997, Profepa deviated from the conditions imposed and allowed ALCA to implement alternative measures including change and reduction in the use of solvents, permanent suspension of production of activators, and construction of emission control structures.[2] Profepa also accepted VOC measurement to determine the advisability of installing emission control equipment.

2. The works consisted of raising the wall adjacent to Ángel Lara's lot from 3.5 to 8 meters; covering the building housing the furnaces with Pintro-brand siding; installing a hood in the preparation area; and changing the direction of the furnace outlet duct so that it pointed away from Mr. Lara's house. Administrative decision no. 252/97, of 4 November 1997, by the Industrial Inspection Branch.

- Last paragraph on page 46 (*10. Final Note*):

> In December 1997, Profepa modified the conditions previously imposed, and instead of requiring the installation of filters to control COV emissions, accepted ALCA's proposal to reduce and change the use of certain solvents as well as to use the criterion proposed by the company for analysis of its emissions.

More than a statement of fact, these sentences constitute inaccurate assertions leading to error in the assessment of the Mexican environmental authority's actions.

The information analyzed by the Secretariat is also incomplete, as it fails to refer to the technical reasons offered by the company to propose alternative measures, and to the fact that the proposal was technically reviewed prior to approval. This information is found in documents that the Secretariat had available but failed to analyze.

Under Mexican law, the substitution of measures is legally appropriate because it materializes the general principle of law that no one is bound to do the impossible. Also, Profepa determined other technically feasible measures for the company to remedy the irregularities found.

Note that Profepa did not set aside the conditions imposed to lift the closure, but rather endeavored to effectively enforce the law and protect the environment.

Therefore, the wording of the aforementioned paragraphs should be changed so that they effectively summarize the authority's actions and not contain statements qualifying such information, especially considering that it is already provided in the executive summary.

4) In the last paragraph of section 3, "Party's Response", the Secretariat refers to a procedure with the Semarnat's Internal Control Agency (*Contraloría Interna*). In this regard, notwithstanding the Party's reference thereto in its response, such procedure cannot be included in the factual record because these procedures are not deemed environmental laws for NAAEC purposes, and the analysis does not constitute a topic subject to review by the Secretariat.

5) In section 4, *Scope of the Factual Record*, the Secretariat states that "... the Council noted that the submission alleges "a lengthy history of releases of toxic chemicals, as well as continuation of such releases following

enforcement action taken by the Government of Mexico in 2001." (second paragraph on page 6).

However, in its Resolution, the Council only states that it took note of the fact that the submission *alleges a lengthy history of releases of toxic chemicals, as well as continuation of such releases following enforcement action taken by the Government of Mexico in 2001*.

We therefore find that by generalizing all statements contained in the preamble to the Council resolution as *considerations*, the draft creates the impression of an incomplete analysis leading to evidence of persistent releases and therefore a persistent alleged failure of the Mexican environmental authority.

6) In section 5, *Information Gathering Process*, seventh paragraph, the Secretariat states that through the "Access to Information System (*Sistema de Solicitudes de Información*) of the Federal Access to Information Institute (*Instituto Federal de Acceso a la Información Pública*), the Secretariat's consultant on environmental criminal law requested from the PGR the information that served as a basis for not to proceed with criminal prosecution", and therefore "The Secretariat sent Mexico a memo requesting clarifications concerning the criminal investigation of ALCA" and that the Party "did not respond to the request for clarification, nor did it indicate the reasons why it failed to respond".

In this regard, the Secretariat fails to consider that under NAAEC Article 15(4), the Party is to provide information to the Secretariat, and shall be provided any available information, but is not bound to provide explanations.

7) In Section 6, "Content and Scope of the Environmental Law in Question", the Secretariat includes inaccurate information and draws conclusions outside the spirit of the factual record, which should therefore be eliminated. In this regard, the following is specified:

In the introduction, the Secretariat states, with respect to the amendments to the criminal law, that "Of particular note are the revisions to the criminal provisions; in 1996 the environmental offenses were incorporated into a single body of law—the CPF—for greater order and systematization. With this reform, the offenses previously contemplated in LGEEPA and other special environmental laws were incorporated into the CPF under the title *Delitos Ambientales* (*Environmental Offenses*). In the 2002 revision of the CPF, the title of the chapter was changed to *Delitos contra el Ambiente* (*Offenses against the Environment*) and an

attempt was made to create a fairer and more graduated criminal liability system."

In the above text, more than stating a fact, the Secretariat seeks to summarize the purpose of the amendments, drawing on the reasons stated by the legislators in the statement of legislative intent from the initial stage of the legislative process. Anything stated in this stage (bill) does not constitute a justification of the amendment, thereby creating inaccuracies in the information included in the draft.

8) Section 6.1, analyzing CPF Articles 414, first paragraph and 415, section I, states that "*The submission cites the offenses defined in Article 414, first paragraph (environmental harm caused by hazardous waste)*..."

Note that this sentence does not completely summarize the definition of the crime, as it refers to damage caused by activities involving the handling of hazardous waste. As the Secretariat describes it, one may suppose that the mere existence of hazardous waste may cause damage to the environment and be deemed a crime accordingly.

The summary of the crime described in Article 415, section I, qualifying as a crime the emission, discharge, release or authorization or ordering of such emission, discharge or release into the environment without authorization, is likewise incomplete. The Secretariat attempts to summarize the provisions of the article, and in doing so states that air emissions are crimes, which is incorrect.

9) In section 6.2, entitled "LGEEPA Article 150," the Secretariat states that "... Article 150 establishes the obligation to manage hazardous materials and wastes pursuant as prescribed by LGEEPA and its hazardous waste regulation..."

This is incorrect. LGEEPA Article 150 provides that the management of hazardous materials and waste is to be done pursuant to the Act, its Regulations and other legal provisions deriving thereunder, but without establishing a specific name for such Regulations.

The Secretariat goes on to state that "... Article 150 also provides that the scope of the administrative regulations comprises the use, collection, storage, transportation, reuse, recycling, treatment, and final disposal of hazardous wastes..."

This assertion is inaccurate. The end of the first paragraph of LGEEPA Article 150, transcribed by the Secretariat, uses the term

"*regulación*", and not "*reglamentación*". [Translator's note: The term "*regulación*" refers to the act of being regulated, while the term "*reglamentación*" refers to the specific adoption of regulatory provisions.] Therefore, the management of hazardous waste and materials may be addressed not only in regulations but also in Mexican Official Standards, Mexican Standards or any other legal instrument that the Secretariat of the Environment and Natural Resources (Semarnat) has the authority to issue.

The Secretariat further holds that "... The LGEEPA provides that the regulation and control of hazardous materials and wastes are under federal jurisdiction. In addition to the relevant definitions, it includes the responsibility of the hazardous waste generator and a permitting system whereby generators are required to install and operate waste management, treatment, and final disposal systems..."

This is inaccurate; the authorization (not permit) system includes persons providing hazardous waste management services. As regards the obligation of generators to install and operate handling, treatment and disposal systems, the Secretariat is incorrect in its summary of the provisions of LGEEPA Articles 151 and 151 bis.

The Secretariat further states that "... NOM-052-SEMARNAT-1993, updated in June 2006, establishes the characteristics for a waste to be considered hazardous; lists the activities which, when carried out with certain hazardous materials, are considered to generate hazardous wastes; and sets the thresholds above which a waste is considered toxic in the environment..."

This is incorrect and inaccurate. NOM-052 lists the substances whose presence in a waste, regardless of the percentage thereof, make such waste hazardous; classifies waste based on the generating source (not hazardous waste-generating activities as claimed by the Secretariat); defines corrosive, reactive, explosive and flammable characteristics and the level or percentage of presence thereof making waste hazardous; and how waste is characterized to determine whether or not such concentrations exist.

Although ALCA's production activities are not specifically listed in this NOM, certain wastes derived from generic activities are listed..."

The Secretariat is incorrect, as the aforesaid lists correspond to a list of waste classified as hazardous based on the generating source. Thus,

ALCA's activities are not listed in the standard, and therefore do not constitute a hazardous waste-generating source.

The degree of hazard of waste generated during ALCA's production processes may be determined based on the levels of corrosive, reactive, flammable or toxic characteristics, as provided elsewhere in the Official Mexican Standard but not in the above-mentioned lists.

10) Section 6.3, entitled *Context of the Environmental Law in Question*, states that "The system delimiting the powers of the federation, the states, and the Federal District with respect to environmental matters is established in LGEEPA Articles 7, 9, 111 bis, and 112..."

This is incorrect and the transcriptions inserted in the following lines are incomplete. The aforesaid provisions establish powers to the different levels of government with respect to air pollution prevention and control, not environmental enforcement as a whole.

In its transcriptions, the Secretariat also fails to reference the federal authority with respect to air pollution prevention and control, and to clarify competencies in the case of odors. This is significant as it makes the Secretariat's assertions on the scope of Article 112 inaccurate.

The same section also includes an assertion that "... The definition of the industrial subsectors appeared for the first time in an administrative decision — not a regulation..."

As you will see, the Secretariat points out that the subsector definition was not made in a regulation. This assertion is unnecessary, and rather than clarifying any aspect of the information, it leads the reader to believe that the nonregulation of industry subsectors implies an omission by the Mexican environmental authority. This is beyond the Council instructions to the Secretariat, in the sense that the facts should be stated so that the reader may form his own conclusions, i.e., the Secretariat's assertions cannot be inductive or speculative.

Based on the foregoing, I hereby request that the necessary corrections and changes be made so that the factual record is in accordance with the NAAEC and Council mandate and faithfully reflect the facts and Mexican legal provisions.

I take this opportunity to send my warmest regards and assurances of my highest consideration.

YOURS TRULY
UNIT HEAD

LIC. WILEHALDO CRUZ BRESSANT

cc: Ing. Juan Rafael Elvira Quesada, Secretary of the Environment and Natural Resources

MPU