**Secretariat of the Commission for Environmental Cooperation**

**Determination under Article 15(1) that Development of a Factual Record is not Warranted**

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| **Submitters:** | Instituto de Derecho Ambiental, A.C.<br>Asociación Vecinal Jardines del Sol, A.C.<br>Colonos de Bosques de San Isidro, A.C. |
| **Represented (respectively) by:** | Raquel Gutiérrez Nájera<br>Ludger Wilhelm Kellner Skiba<br>Héctor Javier Berrón Autrique |
| **Party:** | United Mexican States |
| **Submission received:** | 22 February 2008 |
| **Date of the determination:** | 12 August 2010 |
| **Submission I.D.:** | **SEM-08-001 (*La Ciudadela Project*)** |

## I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the "NAAEC" or the "Agreement") provide for a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC") initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1) and the "Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation" (the "Guidelines"). Where the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC and the Guidelines, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with NAAEC Article 15(1). Where the Secretariat decides to the contrary, or certain circumstances prevail, it then proceeds no further with the submission.[1]

2. On 22 February 2008, Instituto de Derecho Ambiental, A.C., Asociación Vecinal Jardines del Sol, A.C, and Colonos de Bosques de San Isidro, A.C. (the "Submitters"), represented by Raquel Gutiérrez Nájera, Ludger Kellner Skiba, and Héctor Javier Berrón Autrique, respectively, filed a submission with the Secretariat of the CEC in accordance with NAAEC Articles 14 and 15.

3. The Submitters assert that Mexico is failing to effectively enforce its environmental law in connection with a site allegedly contaminated with heavy

[1] Full details regarding the various stages of the process as well as previous Secretariat determinations and factual records can be found on the CEC's Submissions on Enforcement Matters website at http://www.cec.org/citizen/.

metals in Zapopan, Jalisco on which the La Ciudadela real estate development project (the "Project" or "La Ciudadela") is to be carried out.

4. The Submitters state that the environmental authorities are failing to restore the "Labna" lot where, as the Submitters note, an electronic component production facility operated for over thirty years, allegedly causing the site to be contaminated.[2] The Submitters assert that the company SSC Inmobiliaria selected the Labna lot for construction of La Ciudadela and that, even after the company disposed of contaminated soil, the lot continues to be contaminated with heavy metals.[3]

5. On 2 August 2008, the Secretariat determined that the submission meets the eligibility requirements of NAAEC Article 14(1) and, guided by the criteria enunciated in Article 14(2), requested a response from the government of Mexico, which was received by the Secretariat pursuant to NAAEC Article 14(3) on 26 September 2008.

6. Having analyzed the submission in light of Mexico's response (the "Response"), the Secretariat finds that submission SEM-08-001 does not warrant the preparation of a factual record. Pursuant to section 9.6 of the Guidelines, the Secretariat hereby explains its reasons for this determination.

## II. SUMMARY OF THE SUBMISSION

7. The Submitters assert that Mexico is failing to effectively enforce Articles 1, 2 paragraph IV, 5 paragraphs III, IV, V, VI, XVIII and XIX, 150, 151, 152 bis, and 189–199 of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA); 1, 4, 5, and 8 of the Hazardous Waste Regulation to the LGEEPA (*Reglamento de la LGEEPA en materia de Resíduos Peligrosos*—RRP); 1, 2, 3 paragraphs II and VI, 68, 69, 71, 73, 75, 78, and 79 of the General Integrated Waste Prevention and Management Act (*Ley General para la Prevención y Gestión Integral de Residuos*—LGPGIR), and 126, 127, 128, and 132–153 of the LGPGIR Regulation (*Reglamento de la LGPGIR*) in connection with the La Ciudadela project slated to be developed in the city of Zapopan, Jalisco.[4]

8. The Submitters state that Empresas Motorola and ON Semiconductores (collectively, "Empresas Motorola") engaged in the production and manufacturing of semiconductors and electronic devices on the Labna lot for over 30 years and that these activities ceased around 1999 when the companies interrupted their production at the site. The Submitters further assert that the operational phase of Empresas Motorola included the use of hazardous materials and substances and that, as a result, both companies qualify as hazardous waste generating industrial facilities under the legislation in force at the time.[5] According to the Submitters, companies generating waste were required to notify the environmental authority of that fact so that sound management could

[2] Submission, p. 8.
[3] *Ibid.*, p. 12.
[4] *Ibid.*, pp. 12-13. *N.B.* The LGPGIR Regulation was published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) on 30 November 2006 and came into force on 30 December 2006.
[5] Submission, p. 8.

take place in accordance with the provisions of the LGEEPA and the RRP then "in force and applicable."[6]

9. The Submitters also note that when Empresas Motorola ceased operating at the site, the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat) and the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa) failed to guarantee the environmental safety conditions required in view of the abandonment of the Labna lot.[7]

10. The Submitters assert that the contamination on the lot was not reported to the authorities during subsequent purchase and sale transactions, nor by the notaries public who notarized the transactions. Therefore, in the Submitters' opinion, there was a failure to fulfil the obligations established by the provisions cited in the submission as regards reporting the transfer of a lot having environmental liabilities, and remediating the contamination.[8] The Submitters attach copies of various notarized documents attesting to the sale of the Labna lot, the text of which – according to the Submitters – reveals that the parties to those transactions were aware of the contamination at the site.[9]

11. The Submitters state that in March 2007 one of the Submitters filed a citizen complaint with Profepa concerning the alleged existence of such environmental liabilities on the Labna lot and that it then began to request information to verify the sound management of the waste generated by the industrial processes of the companies found there.[10] In response to the request for information, according to the Submitters, Semarnat stated that it possessed no records or documentary evidence of hazardous waste management on the site.[11]

12. The Submitters further assert that in July 2007 Semarnat approved a proposal by SSC Inmobiliaria to carry out final disposal of thallium-contaminated soil from the Labna lot. After soil disposal was implemented by SSC Inmobiliaria, in November 2007 the environmental authority certified the soil disposal as completed.[12] In this regard, and with reference to a study attached to the submission, the Submitters state that:

> From the foregoing information it is evident that the study submitted by SSC Inmobiliaria concerning the soil analysis performed on the lot known as "[C]iudadela" is incomplete and not compliant with the applicable Mexican Official Standards, namely, NOM-147-SEMARNAT/SSA1-2004, Establishing criteria for determination of remediation concentrations for metal-contaminated soils; NMX-AA-123SCFI-2006, Soil sampling for identification and quantification of metalloids, and handling of the sample; NOM-133-SEMARNAT-2000, Polychlorinated biphenyls (PCB), management specifications, and NOM-052-SEMARNAT-2005, Establishing the

[6] *Ibid*.
[7] *Ibid*., pp. 1, 11.
[8] *Ibid*.
[9] *Ibid*., p. 7.
[10] *Ibid*., pp. 8-9.
[11] *Ibid*., p. 8.
[12] *Ibid*., pp. 10-11.

> characteristics and the identification and classification procedure for hazardous waste.[13]

13. The Submitters assert that the study attached to the submission indicates that the remediation proposal for the Labna lot should have considered not only thallium but also other hazardous waste still present on the site of the La Ciudadela project.[14]

14. According to the Submitters, the environmental authorities did not fundamentally resolve the public concerns expressed in regard to the remediation of the site, since they declared it "free of contaminants" knowing that the lot selected for the Project was still contaminated.[15] The submission makes reference to certain studies allegedly demonstrating that the Labna lot continues to be contaminated by "activated cadmium (sic) and other chemical elements such as nickel, silver, gold, lead, coal sulfate (sic), tetrachloride (sic), mercury, and other substances".[16]

15. The Submitters assert that despite the conditions persisting on the Labna lot, construction began on La Ciudadela without the proper environmental impact authorization.[17]

## III. SUMMARY OF THE RESPONSE

16. On 2 August 2008, Mexico filed its response to submission SEM-08-001 pursuant to NAAEC Article 14(3). Mexico requested that the Secretariat proceed no further with its consideration of the submission because the matter is the subject of four pending judicial proceedings,[18] an ongoing criminal investigation,[19] and three administrative proceedings[20] which, according to Mexico, concern the same matters raised in the submission. Mexico requests that the Secretariat keep the information relating to these proceedings confidential[21] and states that, if consideration of SEM-08-001 proceeds further:

> The States Parties would be denied the possibility of guaranteeing access to private remedies made available under domestic law to combat failures of law enforcement.[22]

17. Mexico asserts that the submission is not aimed at promoting environmental law enforcement and therefore does not meet the requirement of NAAEC Article 14(1)(d). Mexico states that "the Secretariat has allowed a submission that is manifestly improper, being aimed at harassing a real estate company,"[23] since "it does not center around acts or omissions of the Party but around the behavior

[13] *Ibid*., p. 9.
[14] *Ibid*., p. 11.
[15] *Ibid*., p. 13.
[16] *Ibid*.
[17] *Ibid*.
[18] Response, pp. 5-14.
[19] *Ibid*., p. 14.
[20] *Ibid*., pp. 14-15.
[21] *Ibid*., p. 4.
[22] *Ibid*., p. 22.
[23] *Ibid*., pp. 15-16.

of a particular company,"[24] and Mexico indicates that the website of one of the Submitters expresses concerns that are not of an environmental nature.[25] Mexico further asserts that the Submitters allege, without any evidence and without stating the reasons for these assertions, that the remediation proposal and the final sampling are non-compliant with the law, thus demonstrating that their intent is to "harass the company SSC Inmobiliaria, S.A. de C.V."[26]

18. The Party asserts the Submitters' alleged ties to the company Cigarrera Mexicana ("Cigatam"), indicating that it is cited on the website of one of the Submitters[27] as a company that may possibly support the cause promoted by Asociación Vecinal Jardines del Sol. Mexico attests to the fact that Cigatam belongs to the Carso group, a consortium operating businesses that compete in the same sector as SSC Inmobiliaria,[28] demonstrates that the submission is not aimed at promoting the effective enforcement of environmental law, since "if there are ties between the Submitters and Cigatam and they themselves consider it to be the ace up their sleeve, it is relevant to ask whether their interest in blocking construction of the 'La Ciudadela' project is aimed at favoring one of the Grupo Carso companies."[29]

19. Mexico maintains that the submission should not have been allowed under NAAEC Article 14(1)(c) because it does not include documentary evidence to support it.[30] In Mexico's judgment, "the submitters only proved one of the 17 assertions made, [and they attached] nine documents that do not constitute conclusive evidence."[31]

20. Concerning the environmental law cited in the submission, the Party indicates that some of the provisions are inapplicable,[32] while others have been repealed[33] or it is not possible to enforce them retroactively, for that would contravene Mexican law.[34]

21. As to the Submitters' assertions relating to the Labna lot, Mexico clarifies that the companies cited in the submission were the owners of the lot from 1968 to 1999.[35] Concerning the environmental liability that allegedly can be deduced from the notarized documents, Mexico states that this evidence is insufficient to demonstrate the existence of an environmental liability in the legal sense of the

[24] *Ibid*., pp. 21.
[25] *Ibid*., pp. 20-21.
[26] *Ibid*., p. 18.
[27] The Secretariat was able to verify this information at "Público 19 de mayo de 2007," <http://www.noalproyectociudadela.com.mx/Pub_19_05_07.htm> (viewed 3 December 2009).
[28] Response, p. 19.
[29] *Ibid*., pp. 19-20.
[30] *Ibid*., p. 22.
[31] *Ibid*., p. 30.
[32] Articles 145-147 of the LGPGIR Regulation, since the first refers to remediation plans for lots in which the human population is indicated as affected by the contamination, while the two others are applicable in the case of emergencies. Neither of these situations obtains in the case of the Labna lot. Response, pp. 71-72.
[33] LGEEPA Article 152 Bis was repealed by LGPGIR Articles 68, 69, and 70. *Cf*. Response, p. 62.
[34] Articles 126-128 of the LGPGIR Regulation. Response, p. 66.
[35] Response, p. 35.

term.[36] It further states that the existence of soil contamination is not asserted or proven in the notarized documents concerning the transfer of the property:[37] these documents contain no technical references indicating the existence of environmental liabilities;[38] they do not include information which, if environmental liabilities were present, would make it possible to identify the contaminant or determine the degree of contamination;[39] and while the word *saneamiento* is used, its meaning in context has nothing to do with the environmental cleanup of a contaminated lot.[40] In regard to one of the documents,[41] Mexico argues that its scope is limited in any event since it only establishes the environmental liability of the parties entering into a purchase and sale transaction.[42]

22. Mexico adds that the parties participating in the transfer of ownership of the Labna lot established procedures to identify whether or not contamination was present at the site;[43] that the environmental authorities only learned of the existence of contaminants when Empresas Motorola was no longer occupying the Labna lot;[44] that the authorities proceeded in accordance with the joint and several liability mechanism prescribed by the LGPGIR when they learned of the environmental situation on the lot;[45] that it would be illegal to determine the existence of a site abandonment,[46] and that therefore, it would be impossible to order the registration of the lot as a contaminated site, as the Submitters insist.[47]

23. Concerning the activities carried out on the Labna lot, Mexico specifies that the law in force at the time Empresas Motorola was operating did not establish which activities were considered hazardous waste generators;[48] that the Party does not possess information sufficient to determine whether these companies were indeed engaging in activities with hazardous waste or materials,[49] and that it is impossible to conclude whether Empresas Motorola were engaging in high-risk activities[50] or generating hazardous waste.[51] Mexico emphasizes that the obligation to register as a hazardous waste generator originated in 1988 and that,

[36] In this regard, Mexico cites Article 134 of the LGPGIR Regulation, which, in its definition of the concept of "environmental liability," specifies that the existence and release of hazardous materials and waste on the site must take place without timely remediation. Response, p. 30.
[37] Response, p. 31: "Therefore, the existence of environmental liabilities is neither asserted nor proven, as the Submitters state."
[38] *Ibid*., pp. 32-34.
[39] *Ibid*., p. 33.
[40] *Ibid*., p. 34. "…the Party considers it important to clarify that in the aforementioned notarized documents, the phrase '*saneamiento para el caso de evicción*' is employed; it should be emphasized that this refers to the seller's obligation under Mexican law to guarantee the purchaser's legal and peaceable possession of the *res vendita*."
[41] Notarized document no. 3042, before Notary Public no. 96 of the city of Guadalajara, Jalisco.
[42] Response, p. 32.
[43] *Ibid*., p. 65. *Cf*. LGPGIR Article 71.
[44] Response, pp. 63, 65. *Cf*. LGPGIR Articles 68 and 69.
[45] Response, p. 63. *Cf*. LGPGIR Article 70.
[46] Response, p. 65. *Cf*. LGPGIR Article 73.
[47] Response, p. 66. *Cf*. LGPGIR Articles 75 and 76.
[48] Response, p. 37.
[49] *Ibid*., p. 36.
[50] Response, pp. 36-38. *Cf*. List of high-risk activities published in the DOF on 28 March 1990 and 4 May 1992.
[51] Response, pp. 39-40.

in any event, the activities of Empresas Motorola fell outside the scope of the legislation in force.[52] The Party adds that it duly responded to a request for information on hazardous waste management and transportation from one of the Submitters[53] and that any hazardous waste carriers that Empresas Motorola may have hired had no obligation to provide the names of their clients to the authorities.[54]

24. Concerning the alleged existence of radioactive contaminants, Mexico argues that the National Nuclear Safety and Safeguards Commission (*Comisión Nacional de Seguridad Nuclear y Salvaguardias*—CNSNS) found that the samples taken on the Labna lot show normal values of radiation of natural origin present in the soils and water at the site, and thus pose no risk to human health.[55] It further points out that Profepa informed the Submitters of the results of those studies.[56]

25. Concerning remediation of the Labna lot, Mexico states that Profepa verified the process as prescribed by the LGPGIR Regulation;[57] that it made inspection visits to the Labna lot on 30 May, 30 August, 14 September, and 5 December 2007[58] and that, in due course, it instituted an administrative proceeding to order restoration of the lot.[59]

26. In relation to the soil analysis study of the Labna lot, Mexico denies that it was left incomplete or that it was performed in violation of Mexican law, as asserted in the submission. The Party indicates that the study submitted by the Submitters in support of their assertions was done by someone who is not an expert on this matter and is not independent, and that it does not include sampling to support its conclusions, since only a documentary review was performed.[60] Mexico states that Profepa supervised the analysis of samples taken from 19 points on the Labna lot and that the results indicated contamination with thallium, and hence the site restoration took place only pursuant to the standard applicable to thallium-contaminated soils[61] and not pursuant to the provisions applicable to the management of PCBs[62] and to hazardous waste characterization standards,[63] which the submission claims to be applicable. Concerning the production of an environmental risk assessment as requested by the Submitters, Mexico clarifies that such a study is relevant in the

[52] Response, p. 39. *Cf.* LGEEPA Articles 28 and 29; RRP Articles 7 and 8 paragraph I.
[53] Response, p. 38.
[54] *Ibid*., p. 40.
[55] *Ibid*., pp. 40-42.
[56] *Ibid*., p. 42.
[57] *Ibid*., pp. 42 and 56. *Cf.* Articles 132-151 of the LGPGIR Regulation.
[58] Response, pp. 42-44.
[59] Response, p. 44. *Cf.* LGPGIR Article 70; Articles 132-151 of the LGPGIR Regulation.
[60] Response, p. 46.
[61] Mexican Official Standard NOM-147-SEMARNAT/SSA1-2004, Establishing criteria for determining the remediation concentrations for soils contaminated with arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, selenium, thallium, and/or vanadium.
[62] Response, p. 45. *Cf.* Mexican Official Standard NOM-133-SEMARNAT-2000, Environmental protection — polychlorinated biphenyls — management specifications.
[63] Mexican Official Standard NOM-052-SEMARNAT-2005, Establishing the characteristics and procedures for identification and classification as well as the lists of hazardous wastes.

absence of legal provisions, which is not the case here since the contaminants of interest are covered by standards.[64]

27. Mexico reports that since the soil analysis indicated the presence of thallium in excess of the values set out in the applicable provisions,[65] Profepa instituted an administrative proceeding[66] and ordered urgent enforcement measures consisting of site characterization as well as random sampling on the portion of the Labna lot that had not been characterized. In both cases, the presence of Profepa personnel was required.[67] Likewise, Profepa ordered the production of a site remediation proposal; presentation of hazardous waste delivery, transportation, and receipt manifests,[68] and temporary suspension of activities and permits granted by the municipality of Zapopan for works, applicable until 15 June 2007.[69]

28. Mexico maintains that the Management of High-Risk Materials and Activities Branch (*Dirección General de Gestión Integral de Materiales y Actividades Riesgosas*—DGGIMAR) approved the remediation proposal subject to conditions including measures such as transportation and final disposal of thallium-contaminated soil at a controlled containment facility; production and delivery of the required manifests, and prior notification to DGGIMAR and Profepa for purposes of monitoring and supervision of the work.[70]

29. The Party explains that at the conclusion of the remediation process, point-source analysis including at least six sampling series was conducted with Profepa's involvement. DGGIMAR certified the completion of the removal of 102 tons of thallium-contaminated soil on 9 November 2007.[71] Mexico asserts that at the time of filing of the submission, SSC Inmobiliaria had complied with the corrective measures ordered by Profepa and with the conditions ordered by DGGIMAR.

30. The Party contradicts the alleged failure to enforce in relation to attestation of transportation and final disposal of thallium-contaminated soil, since the Profepa file contains the delivery, transportation, and receipt manifests for 113 tons of earth,[72] 200 cubic metres of materials ensuing from the soil disposal, and two tons of asbestos-containing materials, among others.[73]

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[64] Response, p. 67. *Cf.* Articles 132, 140, 141 and 142 of the LGPGIR Regulation.
[65] Mexican Official Standard NOM-147-SEMARNAT/SSA1-2004, Establishing criteria for determining the remediation concentrations for soils contaminated with arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, selenium, thallium, and/or vanadium.
[66] Notice of irregularities detected during inspection visit (*acuerdo de emplazamiento*) of 22 May 2007, issued by the Profepa officer in Jalisco. Response, pp. 52-53.
[67] Response, p. 54.
[68] *Ibid*., p. 55.
[69] *Ibid*., p. 56.
[70] *Ibid*., pp. 69-70.
[71] *Ibid*., pp. 17, 46.
[72] Note: The figure of 113 tons is the one appearing in the response signed by the director of the Legal Affairs Coordinating Unit (*Unidad Coordinadora de Asuntos Jurídicos*) (p. 17) but it does not correspond to the figure appearing in the electronic version of the response sent by Mexico, which refers to 102 tons.
[73] Response, p. 46.

31. Mexico contradicts the alleged failure to process the citizen complaint filed by one of the Submitters, stating that Profepa allowed the complaint for processing; fulfilled its obligation to notify the complainant and the respondent of their respective rights; took the necessary measures on the Labna lot, and notified other authorities, including CNSNS.[74] Mexico reports that Profepa made an inspection visit to the Labna lot on 12 April 2007 and ordered SSC Inmobiliaria to conduct sampling in order to detect the presence of heavy metals, which gave rise to the soil analysis submitted by the company.[75]

32. In its response, Mexico states that CNSNS issued a report on 19 July 2007 that concludes:

> The environmental dose rate values obtained from the monitoring work as well as the activity concentration values obtained from the samples analyzed at the CNSNS laboratories show normal values due to natural radiation present in the soils and well water.[76]

33. Finally, Mexico denies that any works associated with La Ciudadela existed prior to its environmental impact authorization, as the Submitters claim, stating that the "dismantlement and earth removal work" to which the Submitters refer may have corresponded to authorized activities carried out in the context of site remediation.[77]

## IV. ANALYSIS

34. The Secretariat proceeds to explain why there is no scope for Mexico's procedural objections to the submission's eligibility and that the Secretariat's determination of 2 August 2008 stands. Also, pursuant to NAAEC Article 14(3), the Secretariat considered the information concerning the alleged existence of pending proceedings and found that the proceedings in progress are not likely to interfere with an analysis to determine whether the Secretariat should recommend a factual record. Finally, after analyzing the submission in light of the response of Mexico pursuant to Article 15(1), the Secretariat finds that no central questions remain open that would warrant the development of a factual record. Pursuant to section 9.6 of the Guidelines,[78] the Secretariat hereby presents its reasons for this determination.

### A. Mexico's argument regarding the alleged ineligibility of the submission under Article 14(1)

35. On 2 August 2008, the Secretariat found that the submission meets all the NAAEC Article 14(1) requirements and that, pursuant to NAAEC Article 14(2),

[74] Response, p. 48-50. *Cf*. LGEEPA Articles 191-3 and 198.
[75] Response, p. 51.
[76] *Ibid*.
[77] *Ibid*., p. 40.
[78] "If the Secretariat considers that the submission, in light of any response provided by the Party, does not warrant development of a factual record, the Secretariat will notify the Submitter and the Council of its reason(s) in accordance with section 7.2 of these guidelines, and that the submission process is terminated with respect to that submission."

it warranted requesting a response from Mexico. The Party is of the view that the Secretariat should not have allowed submission SEM-08-001.

36. Mexico asserts that the submission is not admissible since it does not include documentary evidence to support it, pursuant to NAAEC Article 14(1)(c),[79] and because it is not aimed at promoting law enforcement, pursuant to NAAEC Article 14(1)(d).[80] It should be noted at the outset that the Agreement does not foresee the Secretariat retroactively changing a determination it has made pursuant to Article 14(1) regarding the admissibility of a submission. The Secretariat may though, in light of a any response, determine whether to recommend a factual record.

37. In regard to the Article 14(1)(c) requirement, the Secretariat has previously found that NAAEC Article 14(1) is not intended as an insurmountable procedural screening device,[81] as it is not oriented to make an unreasonably narrow interpretation of the eligibility requirements for a submission.[82] In its determination of 2 August 2008, the Secretariat found that the submission presents a succinct account of the facts and contains sufficient information to review it, since the Submitters provide copies of various notarized documents that substantiate transactions related to the Labna lot and indicate the possible existence of an environmental liability.[83] The Secretariat found that the Submitters attached studies to support their assertion of the alleged substances causing contamination to the Labna lot,[84] and included copies of correspondence with the authorities in which they complain of alleged failures to effectively enforce the environmental law.[85]

38. Concerning Mexico's view that the documents attached to the submission do not constitute conclusive evidence, the Secretariat finds that its task is to determine, for a given submission, whether the documentation contemplated in NAAEC Article 14(1)(c), to which section 5.3 of the Guidelines refers, can allow the Secretariat to review it, and support the central assertions in the submission. In the case of submission SEM-08-001 the Secretariat found that the supporting information is sufficient to study the Submitters' central assertions and, after considering the remaining requirements and criteria of NAAEC Articles 14(1) and (2), allowed the submission and requested a response from Mexico.

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[79] "The Secretariat may consider a submission from any non-governmental organization or person … if the Secretariat finds that the submission:
…
(c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;

[80] "The Secretariat may consider a submission from any non-governmental organization or person … if the Secretariat finds that the submission:
…
(d) appears to be aimed at promoting enforcement rather than at harassing industry;"

[81] See, in this regard, SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

[82] In previous determinations the Secretariat has acknowledged that submitters may not always possess the financial and human resources to monitor compliance with environmental laws and regulations and to collect evidence of specific violations; SEM-98-004 (*BC Mining*), Article 15(1) Notification (11 May 2001), pp. 14-15.

[83] SEM-08-001 (*La Ciudadela Project*), Article 14(1) Determination (2 July 2008), p. 7.

[84] *Ibid*.

[85] *Ibid*.

39. Concerning the Party's assertion that the submission is aimed at harassing SSC Inmobiliaria, and thus allegedly does not satisfy Article 14(1)(d), the Secretariat found that the submission focuses on failures to enforce by the Mexican authorities and not on compliance by a particular company, and noted that the Submitters are not competitors who stand to benefit economically from the submission.[86] The latter determination follows from section 5.4(a) of the Guidelines.[87]

40. Mexico asserts that the Submitters have ties to a cigarette manufacturer belonging to a group that allegedly competes with SSC Inmobiliaria. It asserts that these ties prove that the submission is not aimed at promoting the effective enforcement of environmental law.[88] Without taking any position on the alleged ties between the Submitters and a competitor of SSC, the Secretariat notes that Mexico's assertion provides no documentation demonstrating that the Submitters are competitors of SSC Inmobiliaria who stand to benefit economically from the submission.

41. Furthermore, the Secretariat does not concur with Mexico's argument about non-environmental concerns expressed against the La Ciudadela project on the website of one of the Submitters.[89] These concerns are not included in submission SEM-08-001 and, in any case, do not support Mexico's assertion of an alleged intent to harass SSC Inmobiliaria. The Secretariat is authorized to analyze the submission in question solely on its own merits, and centers its analysis around the assertions made in SEM-08-001.

**B. Mexico's argument regarding pending proceedings pursuant to NAAEC Article 14(3)**

42. NAAEC Article 14(3)(a) stipulates:

> The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:
>
> (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further …

43. NAAEC Article 45(3)(a) defines the term "judicial or administrative proceeding" as:

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[86] *Ibid*.
[87] "A submission must appear to be aimed at promoting enforcement rather than at harassing industry. In making that determination, the Secretariat will consider such factors as whether or not:
(a) the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission;"
[88] Response, p. 19.
[89] *Ibid*.

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

44. In analyzing the notification from Mexico of the existence of ongoing proceedings,[90] the Secretariat accordingly considers whether the proceeding was initiated by the Party; whether it is timely in accordance with its law; whether it is related to effective enforcement matters raised in the submission, and whether the proceeding invoked has the potential to resolve the matter raised in the submission.[91]

45. With reference to section 7.5 of the Guidelines, the Secretariat has furthermore indicated that when an ongoing proceeding was not initiated by the Party – and thus falls outside the Article 45(3)(a) definition – the Secretariat must examine the possibility of whether further consideration of the submission could duplicate or interfere with the proceeding,[92] meaning duplication of effort in terms of measures the Party may be taking to enforce the environmental law or interference with domestic legal process.[93]

46. Mexico asserts that further analysis of submission SEM-08-001 would "deny the possibility of ensuring access to private remedies available under domestic law."[94] In this regard, the Secretariat reiterates that neither the citizen submissions mechanism nor the production of a factual record constitutes an adjudicatory proceeding concerning the effective enforcement of environmental law. Thus, NAAEC Article 15(3)[95] leaves open the possibility of "any further steps that may be taken with respect to any submission," which could include, for example, domestic legal proceedings.

47. The Party notifies the Secretariat of the existence of four pending judicial proceedings, a pending criminal investigation, and three pending administrative proceedings which, it asserts, concerns the same matters raised in the submission.[96]

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[90] On past practice with regard to pending proceedings, see: SEM-07-001 (*Minera San Xavier*), Article 15(1) Notification (15 July 2009), p. 10, §33.

[91] The Secretariat is mindful that it has always analyzed Party responses on the merits pursuant to Article 14(3) and that its "commitment to the principle of transparency pervading the NAAEC [entails that it] cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a Submission, on the mere assertion of a Party to that effect"; SEM-01-001 (*Cytrar II*), Article 14(3) Determination (13 June 2001). *Cf.* SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*), Article 15(1) Notification (18 May 2005); SEM-04-005 (*Coal-Fired Power Plants*), Article 15(1) Notification (5 December 2005), and SEM-05-002 (*Coronado Islands*), Article 15(1) Notification (18 January 2007).

[92] SEM-97-001 (*BC Hydro*), Article 15(1) Notification (28 April 1998), p. 9.

[93] SEM-07-001 (*Minera San Xavier*), Article 15(1) Notification (15 July 2009), p. 14, §46.

[94] Response, p. 22.

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

[96] Response, p. 4.

48. The Secretariat has analyzed these proceedings and concludes that their existence does not terminate the process with respect to the submission. Section 9.4 of the Guidelines obliges the Secretariat to state its reasons when it finds that the existence of pending proceedings justifies termination of the submission process. However, Mexico classified the information concerning the pending proceedings as confidential under NAAEC Article 19(2) and section 17.2 of the Guidelines. On 3 October 2008, the Secretariat requested that Mexico provide a summary of the confidential information for public disclosure.[97] On 2 June 2010, the Legal Affairs Coordination Unit of Semarnat responded to the information request from the Secretariat.[98] The information contains a list of proceedings and its procedural stage. Notwithstanding the above, the list of proceedings provided by Mexico does not suffice to make public the reasons why the Secretariat rejects Mexico's argument on the existence of pending proceedings pursuant to NAAEC Article 14(3). With the sole exception of a criminal investigation initiated by the Attorney General of the Republic (*Procuraduría General de la* República) —which information disclosed by Mexico does not differ from the response— the summary of the remaining proceedings is not sufficient for the Secretariat to make public its reasoning. Thus, the Secretariat must keep the section below of paragraphs 50 to 57 confidential.

49. The Secretariat reiterates that section 17.3 of the Guidelines[99] encourages the Parties to provide a summary of the confidential information, since its absence limits the possibility of making public the Secretariat's reasons concerning the existence of pending proceedings in an Article 14(3) determination.

[CONFIDENTIAL SECTION: paragraphs 50 to 57]

[97] Acknowledgment of receipt of Mexico's response to submission SEM-08-001 (*La Ciudadela Project*) dated 3 October 2008. The same request was made on 24 February 2010 and on 16 March 2010.
[98] Letter 112. 00002363 dated 26 May 2010 issued by the Legal Affairs Coordination Unit of Semarnat. URL: http://www.cec.org/Storage/88/8536_08-1-55-PTS_es.pdf
[99] "Given the fact that confidential or proprietary information provided by a Party … may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted, contributors are encouraged to furnish a summary of such information …."

**3) The criminal investigation**

58. In its response, Mexico gives notice of the existence of a pending criminal procedure, without specifying the offense in question.

59. The Secretariat has previously found that criminal investigations are not judicial or administrative proceedings in the sense of NAAEC Article 45(3), being "[a]ctivities that are solely consultative, information-gathering or research-based in nature, without a definable goal, and that are not designed to culminate in a specific decision, ruling or agreement within a definable period of time…"[109] While, in particular circumstances, a criminal investigation has been considered an argument for terminating the submission process,[110] in this case, without more information, the Secretariat cannot reach that conclusion.

60. Section 9.5 of the Guidelines states:

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

61. Furthermore, section 17.3 of the Guidelines[111] requests the Party in question to provide a summary of the confidential information so that this information "may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted." Given the lack of specificity in Mexico's response and guided by section 9.5 of the Guidelines, which authorizes the Secretariat to begin its consideration of whether a factual record is warranted following the expiration of the response period, the Secretariat proceeds with the further analysis of submission SEM-08-001.

**C. NAAEC Article 15(1) analysis of the Submitters' assertions in light of Mexico's response**

62. Having determined pursuant to NAAEC Article 14(3) that the proceedings adduced by Mexico in its response are not an impediment to further analysis of SEM-08-001, the Secretariat proceeds to consider whether, in the light of Mexico's response, the submission warrants preparation of a factual record.

**1) Assertions concerning hazardous waste management by Empresas Motorola and its registration as a hazardous waste generator**

63. The Submitters assert that it was public knowledge that for more than thirty years (from 1968 to 1999), Empresas Motorola produced and manufactured

[109] SEM-00-004 (*BC Logging*), Article 15(1) Notification (27 July 2001), pp. 19-20.
[110] *Ibid*., p. 21.
[111] "Given the fact that confidential or proprietary information provided by a Party, a nongovernmental organization or a person may substantially contribute to the opinion of the Secretariat that a factual record is, or is not, warranted, contributors are encouraged to furnish a summary of such information or a general explanation of why the information is considered confidential or proprietary."

semiconductors and electronic devices at its facility on the Labna lot.[112] They add that Empresas Motorola used hazardous substances and materials in their production processes and were therefore hazardous waste generators. Consequently, the Submitters assert, Semarnat should have ensured Empresas Motorola's compliance with RRP Article 8[113] respecting the obligations of hazardous waste generators, as well as ensuring that the companies were compliant with their obligations under LGEEPA Article 151,[114] relating to the management, storage, transportation, treatment, and final disposal of hazardous waste.

64. The LGEEPA came into force on 28 January 1988, and the RRP on 25 November 1988. LGEEPA Article 151 and RRP Article 8 were both in force during the operations of Empresas Motorola on the Labna lot. The Submitters assert that on 9 August 2007 Semarnat wrote to them stating that it had no records or documentary evidence of hazardous waste management on the Labna lot.[115]

65. Mexico maintains that there is no information in submission SEM-08-001 to indicate the type of raw materials used in the operations of Empresas Motorola,[116] nor whether hazardous materials were handled or hazardous waste generated.[117] The

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[112] Submission, p. 8.

[113] Submission, p. 8. *Cf*. RRP Article 8: "The hazardous waste generator shall:

I. Register with the registry established for such purpose by the Ministry;
II. Keep a monthly log on generation of its hazardous waste;
III. Manage hazardous waste in the manner prescribed by the Regulation and the relevant environmental technical standards;
IV. Accord separate management to hazardous wastes that are incompatible under the relevant environmental technical standards;
V. Pack its hazardous waste in containers meeting the safety conditions set out in this regulation and in the relevant environmental technical standards;
VI. Identify its hazardous waste with the inscriptions prescribed by this Regulation and the relevant environmental technical standards;
VII. Store its hazardous waste under safety conditions and in areas meeting the requirements set out in this Regulation and in the relevant environmental technical standards;
VIII. Transport its hazardous waste in such vehicles as the Ministry of Communications and Transportation shall determine and under the conditions prescribed by this Regulation and the applicable environmental technical standards;
IX. Provide appropriate treatment for its hazardous waste pursuant to the provisions of this Regulation and the applicable environmental technical standards;
X. Provide appropriate final disposal for its hazardous waste in accordance with the methods prescribed by the Regulation and with the provisions of the applicable environmental technical standards;
XI. Submit to the Ministry, in such form as the latter shall determine, a semiannual report on any movement of its hazardous waste during that period, and
XII. Any further requirements set out in the Regulation and in other applicable provisions."

[114] "The responsibility for management and final disposal of hazardous waste rests with the generator. Where hazardous waste management and final disposal services are obtained from companies authorized by the Ministry and the waste is given to such companies, the responsibility for the operations rests with them, regardless of any responsibility that may rest with the generator.
Anyone who generates, reuses, or recycles hazardous waste shall so notify the Ministry as prescribed by the Regulation to this Act. Authorizations for the establishment of hazardous waste containment facilities shall only include waste that is not technically and economically fit for reuse, recycling, or thermal or physicochemical destruction, and containment of hazardous waste in the liquid state shall not be permitted."

[115] Submission, pp. 8-9.

[116] Response, p. 36.

[117] *Ibid*., p. 62.

Party further states that the applicable law did not establish which activities were considered high-risk,[118] since the lists applicable to high-risk activities were not published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) until 28 March 1990 and 4 May 1992. Mexico maintains that, in any event, the obligation to register as a hazardous waste generator under RRP Articles 7 and 8 only applied to persons engaging in works or activities requiring environmental impact authorization under LGEEPA Articles 28 and 29, which – it asserts – was not the case of Empresas Motorola's activities.

66. Concerning the information about Empresas Motorola that allegedly should have been in the possession of hazardous waste management service providers, Mexico maintains that:

> Procurement of hazardous waste management services is granted after consideration of the information and documentation that each company is required to file. These legal requirements describe processes, activities, equipment, machinery, and facilities employed in the provision of such services but not the names of the clients to whom the services are provided.…

67. From the information in the submission and the response it may be observed that, in principle, Empresas Motorola may have generated hazardous waste. For example, the appendices to the response make reference to a neutralization pit and hazardous waste storage facility on the Labna lot where sampling was done and thallium was found in excess of the reference concentration. Furthermore, the response leaves open the matter of the origin of the 102 tons of soil removed during the remediation process.

68. Nor does the response directly address the reason why the activities of Empresas Motorola were not considered hazardous waste-generating under the applicable law. RRP Article 7, invoked only by Mexico, refers to works and activities that may have an impact on the environment pursuant to the provisions of LGEEPA Articles 28 and 29. It is clear that the latter provisions were not applicable to Empresas Motorola, as the Party states. However, the Submitters do not assert any failure to effectively enforce them, while they do assert the failure to enforce RRP Article 8, which lists the obligations of hazardous waste generators.

69. The Secretariat is also mindful that despite the foregoing considerations, the concerns raised by the submission regarding the registration of Empresas Motorola as hazardous waste generators correspond to a period running from 26 November 1988, the date that RRP Article 8 came into force, to 31 July 1999, the date when the Labna lot ceased to belong to Empresas Motorola. Thus, at most, the development of a factual record on this issue could consider the matter as from the entry into force of the NAAEC on 1 January 1994,[119] making manifest the time limitation on the collection of relevant factual information.

70. Even if the Secretariat were to recommend to Council the preparation of a factual record in regard to enforcement on the Labna lot between 1 January 1994 and 31 July 1999, it appears that the assertion of alleged failures to effectively enforce RRP Article 8 and LGEEPA Article 151 is not a matter that continues to produce effects

[118] *Ibid*., p. 37.
[119] *Cf*. NAAEC Article 47: "This Agreement shall enter into force on January 1, 1994, immediately after entry into force of the NAFTA, on an exchange of written notifications certifying the completion of necessary legal procedures."

today. In this regard, the Secretariat has previously found that the ongoing nature of an alleged failure to effectively enforce the environmental law is a criterion for determining the eligibility of a submission.[120] In light of Mexico's response, the matter raised by the Submitters concerning registration of the company as a hazardous waste generator does not warrant further investigation, since Empresas Motorola ceased to operate on the site more than ten years ago, relevant factual information is likely not to be on a current matter and thus, relevant. While the alleged failure of effective enforcement concerning the obligations set out in RRP Article 8 could have resulted, as SEM-08-001 asserts, in the contamination of the Labna lot, that alleged consequence is analyzed in a different section of this determination dedicated to effective enforcement in relation to its environmental remediation.

71. The Secretariat thus concludes that the assertions concerning registration as a hazardous waste generator and the effective enforcement of the obligations ensuing from that situation do not, in light of Mexico's response, constitute a matter in which a failure to effectively enforce LGEEPA Article 151 and RRP Article 8, in force during the period of Empresas Motorola's operations, could be *ongoing* and therefore decides not to devote further study to this assertion.

### 2) Assertions concerning alleged abandonment of the Labna lot, documentation of the Labna lot in notarized documents of transfer of ownership, and alleged existence of an environmental liability

#### (i) Assertions concerning alleged abandonment of the Labna lot

72. The Submitters assert that Semarnat is failing to enforce LGPGIR Article 73, in force since 8 October 2003, relating to the obligation to remediate sites contaminated with hazardous waste that are abandoned or whose owner is unknown.[121]

73. Mexico responds that the conditions described in LGPGIR Article 73 do not obtain in this case, since the site was not abandoned and the Labna lot, it asserts, has a "known, well-identified owner."[122] In its response, Mexico states that when it learned of the existence of contaminants on the site, Empresas Motorola was operating on the Labna lot and Mexico proceeded to enforce LGPGIR Article 70, which provides for the joint and several liability of the owners of a contaminated lot, without prejudice to the power to recover against the party causing the contamination, in accordance with the "polluter pays" principle contemplated in LGPGIR Articles 68 and 69. The Party asserts that, on the basis of this provision, it proceeded to take site remediation measures.

74. The Secretariat notes that the notarized documents to which the Submitters and the Party refer indeed demonstrate the uninterrupted transfer of the lot between its sale by Empresas Motorola 31 July 1999 and its ultimate purchase by Deutsche Bank Mexico, S.A. on 20 April 2006. Therefore, the Secretariat observes that there is no issue of effective enforcement warranting the preparation of a factual record with respect to the enforcement of LGPGIR Article 73, and decides to devote no further analysis to this particular assertion.

[120] In this regard, see SEM-97-004 (*CEDF*), Article 14(1) Determination (25 August 1997), p. 3; and SEM-09-005 (*Skeena River Fishery*), Article 14(1)(2) Determination (18 May 2010) §§ 22-23.
[121] Submission, p. 12.
[122] Response, p. 66.

### (ii) Notarized documents of transfer of the Labna lot

75. The Submitters indicate that the notaries public and the director of the Public Registry of Property and Business (*Registro Público de la Propiedad y Comercio*) of the state of Jalisco failed to require Semarnat authorization for transfer of the Labna lot as prescribed by LGPGIR Article 71,[123] in force as of 6 January 2004. They add that at the time of the transactions transferring the property, the Parties were aware that the Labna lot was contaminated with hazardous waste, and Semarnat authorization was therefore necessary.[124] They also assert the alleged failure to effectively enforce Articles 126 to 128 of the LGPGIR Regulation (in force as of 30 December 2006), specifying remediation-related activities ensuing from environmental liabilities.[125]

76. Mexico responds that it is not evident from the documents attached to the submission that the Parties involved in the various purchase and sale processes were aware of the contamination on the Labna lot.[126] It states that, in any event, the purchase and sale agreements contain procedures for determining liability in the event of hazardous waste being detected in the soil of the Labna lot subsequent to the transaction.[127] Furthermore, it notes that the Semarnat authorization to which LGPGIR Article 71 refers is only required when the lot is contaminated, not when it is presumed to be contaminated.[128] Mexico notes further that Articles 126 to 128 of the LGPGIR Regulation are not applicable in this case, since they came into force on 30 November 2006 while the last purchase and sale transaction occurred on 20 April 2006.[129]

77. LGPGIR Article 71 provides as follows:

> The ownership of sites contaminated with hazardous waste may not be transferred without the express authorization of the Ministry.
>
> Persons transferring to third parties real property contaminated by hazardous materials or waste as a result of activities carried out on said real property must so inform the persons to whom they transfer ownership or possession of said properties.
>
> In addition to remediation, anyone found responsible for contamination of a site is liable to the corresponding penal and administrative sanctions.

78. The Secretariat notes that the authorization contemplated in LGPGIR Article 71 is required in the case of a transfer of real property contaminated with hazardous waste "as a result of activities carried out on them," in this case the production and manufacturing of semiconductors and electronic devices that may have generated hazardous waste.

79. Articles 126 to 128 of the LGPGIR Regulation establish the procedures of notification and application for Semarnat authorization, and provide clarity as to the

[123] Submission, p. 14.
[124] *Ibid*., p. 7.
[125] *Ibid*., p. 14.
[126] Response, pp. 30-34.
[127] *Ibid*., p. 32.
[128] *Ibid*., p. 30.
[129] *Ibid*., p. 66.

scope of LGPGIR Article 71, since that provision "has as its only effect that of defining the party responsible for taking remediation measures in regard to the transferred site."[130] While it is true that these provisions of the LGPGIR Regulation came into force subsequent to the transfer of ownership transactions relating to the Labna lot, it is clear that the purpose of this authorization procedure is to establish environmental liability during the transfer of lots contaminated with hazardous waste in Mexico.

80. The Secretariat recalls that the notarized documents give indication of acts to establish liability in the event that hazardous materials or waste should be found on the Labna lot, and that, except for document no. 79,713 of 31 May 2004, substantiating the existence of contamination on the Labna lot,[131] there is no other information in the submission indicating the status of contamination on the site. Mexico maintains that the notarized documents in question do not contain information sufficient to determine the degree of contamination and the specific remediation measures.[132] However, document 79,713 contains the following clause:

> The PURCHASER acknowledges that the real property is contaminated, as is evident from the environmental assessment reports (phase one), the limited investigation (phase two), and the soil investigation (phase three), the hazardous waste quantification, and the detailed report of asbestos-containing materials, prepared by Consultores en Tecnología Ecológica, S.A. de C.V. on 25 September and 14 November 2003, complete copies of which the SELLER has given to the PURCHASER, who acknowledges receiving and taking full cognizance of them.
>
> The PURCHASER represents that it is aware of the environmental remediation required to be carried out on the real property and the cost associated with said remediation …[133]

81. It is clear that the parties to the transaction recorded in document 79,713 were aware of the contamination of the Labna lot, since they both received copies of environmental assessment reports of the site that included quantification of hazardous waste. Thus, in that document the purchaser undertook to indemnify and hold harmless the seller for any measure taken in relation to the environmental condition of the Labna lot,[134] which appears to satisfy the second paragraph of LGPGIR Article 71. A systematic reading indicates that the only matter that could, in any case, warrant analysis of effective enforcement is the one relating to the Semarnat authorization to transfer ownership of the property, prescribed by the first paragraph of LGPGIR Article 71, since the seller of the Labna lot expressly informed the purchaser of the contamination of the Labna lot and the purchaser purchased the lot with knowledge of the restoration measures to be taken, pursuant to the second paragraph of that provision.

82. The Secretariat finds that the lack of Semarnat authorization alone does not warrant the preparation of a factual record in relation to the effective enforcement of the first paragraph of LGPGIR Article 71, since no more information would be

[130] LGPGIR Regulation, Article 127, third paragraph.
[131] Submission, p. 5.
[132] Response, p. 33.
[133] Submission, unnumbered appendix: Notarized document no. 79,713 of 31 May 2004 before Carlos de Pablo Serna, notary no. 137 of the Federal District, p. 18.
[134] *Ibid*. "…The PURCHASER hereby gives the SELLER … the broadest legal release for any claim that the PURCHASER may bring against it for any issue relating to the environmental condition of the real property. The PURCHASER hereby undertakes to … indemnify and save them harmless from any action that may be brought against them …"

obtained than what is already contained in the submission and the response. In this regard, it must be kept in mind that both the Submitters and the Party in question acknowledge that notarized document 79,713 contains mechanisms for determining environmental liability and indicates the studies conducted with a view to taking restoration measures. The Secretariat is also mindful that Article 127 of the LGPGIR Regulation (in force) recognizes that the sole purpose of the Semarnat authorization is to "identify who is responsible for taking remediation measures."[135]

83. Therefore, the Secretariat finds that a factual record would not present more information than what is already set out in the submission and the response in regard to the acts of effective enforcement of LGPGIR Article 71 during the transfer of ownership of the Labna lot, substantiated by notarized document 79,713.

**(iii) Alleged existence of environmental liability on the Labna lot and alleged lack of action to inventory it as a contaminated site**

84. The Submitters repeatedly maintain that the notarized documents corresponding to the transfer of ownership of the Labna lot substantiate the existence of environmental liabilities[136] and that an obligation arises under Mexico's environmental law to restore the lot. They further affirm that despite knowing the kind of activities carried out on the site for over 30 years, Semarnat failed to fulfill its obligations to take action to identify and register the Labna lot as a site contaminated with hazardous waste for the purpose of determining whether remediation was necessary, pursuant to LGPGIR Article 75.

85. Mexico responds that it was unaware of the existence of contaminants on the site when Empresas Motorola owned the Labna lot[137] and that, given the order ultimately issued by the environmental authorities to remediate the site, the condition of LGPGIR Article 75 does not obtain. Furthermore, it clarifies that the concept of environmental liability does not apply in the case of the Labna lot, since for such a situation to exist the site would have to be: i) contaminated with hazardous waste, and ii) not remediated in a timely manner.

86. LGPGIR Article 75, in force as of 6 January 2004, provides as follows:

> The Ministry and the local competent authorities, as the case may be, shall be responsible for taking measures to identify, inventory, register, and categorize sites contaminated with hazardous waste with a view to determining whether their remediation is necessary, pursuant to the criteria established in the Regulation for that purpose.

87. Article 134, third paragraph, of the LGPGIR Regulation, in force since 30 November 2006, provides as follows:

> Those sites contaminated by the release of hazardous materials or waste that were not remediated in a timely manner with a view to preventing the spread of contaminants but entail an obligation of remediation are considered environmental liabilities. This

[135] "The Ministry's authorization does not stand in the way of acts of commerce or civil law; its sole effect is to define who is responsible for taking remediation measures for the transferred site." LGPGIR Regulation Article 127, third paragraph.
[136] Submission, pp. 2, 7, 8, 13, 14, and 15.
[137] Response, p. 65.

definition includes contamination generated by an emergency having effects on the environment.

88. The Secretariat finds that, while not all the notarized documents attached to the submission indicate that there is indeed contamination on the Labna lot, document 79,713 substantiates the existence of contamination on the site and mentions an environmental assessment that apparently quantifies hazardous waste on the property. Concerning whether the environmental remediation was timely, the Secretariat observes that document 79,713 substantiated the soil contamination on the Labna lot on 31 May 2004 and that not until 12 April 2007 did Profepa make an inspection visit during which the taking of soil samples was noted. This inspection visit was conducted further to a citizen complaint of 29 March 2007 concerning the alleged existence of environmental liabilities on the Labna lot. Profepa requested information on the operations of Empresas Motorola and, on 22 May 2007, instituted an administrative proceeding against SSC Inmobiliaria, which gave rise to the subsequent site remediation.

89. This chronology of the facts confirms that, while the environmental authorities may not have been aware of the contamination of the Labna lot since 31 May 2004, the relevant authorities responded on 12 April 2007 to a citizen complaint filed fourteen days earlier in relation to restoration of the Labna lot. Therefore, the assertion of the persistence of environmental liabilities on the Labna lot is not, in light of Mexico's response, an open question.

90. Concerning whether Mexico failed to effectively enforce LGPGIR Article 75, since it did not, pursuant to the Regulation, identify the Labna lot as a contaminated site with a view to undertaking remediation thereof, it is relevant to consider that the LGPGIR Regulation, insofar as it prescribes the mechanisms to be used in carrying out such work, was only in force as of 30 November 2006. As well, Mexico reported in its response that it proceeded to take environmental remediation measures in accordance with LGPGIR Article 70 (in force as of 6 January 2004) and the principle of joint and several liability.[138]

91. While Mexico argues that it was unaware of the contamination on the site, the response indicates that once the situation was reported to Profepa through the filing of a citizen complaint that noted the possible contamination of the Labna lot with heavy metals, Profepa made an inspection visit fourteen days later and instituted an administrative proceeding. Even though Mexico's response does not present information on a process of *inventory* and *registration* of the Labna lot, the response to the citizen complaint appears to respond to central issues raised in the submission concerning measures to remediate the Labna lot.

92. Therefore, the Secretariat does not find open central questions in regard to the alleged abandonment of the Labna lot and the existence of environmental liability, as defined by Mexican law. Nor does it find that the facts described in notarized document 79,713 itself constitute a compelling reason to develop a factual record. Therefore, the Secretariat does not recommend to the CEC Council an investigation into the effective enforcement of LGPGIR Article 75,

[138] Response, p. 63. *Cf.* LGPGIR Article 70: "Private property owners or holders and holders of areas under concession whose soils are found to be contaminated shall be jointly and severally liable for taking any remediation measures that may prove necessary, without prejudice to the right to recover against those who caused the contamination."

since the response of the Party evidences various acts of enforcement by Profepa further to a citizen complaint concerning the contamination of the Labna lot.

**3) Characterization and environmental remediation of the Labna lot**

93. The Submitters maintain that on 31 July 2007 Semarnat approved a remediation proposal for the Labna lot.[139] They assert a failure by Mexico to enforce provisions relating to the requirements and procedure for the drafting of environmental restoration plans, the taking of remediation measures, and the mechanism for declaring the remediation process to be completed.[140]

94. According to the Submitters, the remediation proposal for the Labna lot was based on an incomplete soil analysis, since various Mexican Official Standards were not considered during the drafting of the proposal.[141] The remediation proposal, they note, only considered thallium, omitting other components that may have been found on the site.[142] The Submitters maintain that Semarnat should not have declared the remediation to be complete since the documents attesting to completion are insufficient, and they criticize Profepa for having declared the site free of contaminants, since "only a search for thallium was performed, not a remediation of the entire lot."[143]

95. Concerning the alleged deficiencies in the soil analysis performed in connection with restoration of the Labna lot, relating to the alleged lack of consideration of certain Mexican Official Standards, Mexico responds that the NOM applicable to the determination of soils contaminated with heavy metals, including thallium, was enforced,[144] and that it was not relevant to consider the other standards to which the Submitters refer, since these apply to the determination of polychlorinated biphenyls[145] and to the procedure for identifying a waste as hazardous.[146] Concerning the polychlorinated biphenyls standard, Mexico finds that its application to the characterization of contaminants in the soil on the Labna lot was not necessary,[147] since "its purpose is to establish environmental protection

[139] Submission, pp. 9-11.
[140] LGPGIR Regulation, Articles 132-153.
[141] Submission, p. 9. The Mexican Official Standards (NOM) and Mexican Standards (NM) to which the submission refers are NOM-147-SEMARNAT/SSA1-2004, Establishing criteria for determination of remediation concentrations for metal-contaminated soils; NMX-AA-123SCFI-2006, Soil sampling for identification and quantification of metalloids, and handling of the sample; NOM-133-SEMARNAT-2000, Polychlorinated biphenyls (PCB), management specifications, and NOM-052-SEMARNAT-2005, Establishing the characteristics and procedure for identification and classification of hazardous waste.
[142] Submission, p. 11.
[143] *Ibid*., p. 12.
[144] Mexican Official Standard NOM-147-SEMARNAT/SSA1-2004, Establishing the criteria for determination of remediation concentrations for soils contaminated with arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, selenium, thallium, and/or vanadium.
[145] Mexican Official Standard NOM-133-SEMARNAT-2000, Environmental protection: polychlorinated biphenyls, management specifications.
[146] Mexican Official Standard NOM-052-SEMARNAT-2005, Establishing the characteristics and procedure for identification and classification of hazardous waste.
[147] The object of NOM-133-SEMARNAT reads as follows: "This Mexican Official Standard establishes environmental protection specifications for the management of equipment, electrical equipment, contaminated equipment, liquids, solids, and hazardous waste containing or contaminated with polychlorinated biphenyls, and timetables for their elimination through decommissioning, reclassification, and decontamination."

specifications for equipment, electrical equipment, contaminated equipment, liquids, solids, or waste containing or contaminated with polychlorinated biphenyls, and in the case at hand there was no reason to apply it."[148] As for the hazardous waste standard, "it essentially applies to processes"[149] and not to soil characterization.

96. The appendices to the response substantiate that from 18 to 23 April 2007, sampling was done at 19 points on the Labna lot and the samples were analyzed for arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, selenium, and vanadium, in addition to thallium.[150]

97. In view of the thallium concentrations obtained from the soil analyses performed to determine the presence of chemical elements contemplated in NOM-147-SEMARNAT/SSA1-2004, Profepa instituted an administrative proceeding against SSC Inmobiliaria.[151] According to the Party, these studies revealed that thallium was the only chemical detected in excess of the allowable concentration.[152] Mexico asserts that since the results of the analysis were not sufficient to determine the volume of contaminated soils,[153] Profepa ordered urgent enforcement measures including characterization of the site with respect to thallium; random sampling on the unassessed portion of the lot to determine the presence of thallium; drafting of a site remediation proposal based on the results obtained, and filing of the delivery, transportation, and receipt manifests for the waste.[154]

98. The remediation measures supervised by Profepa included site characterization pursuant to NOM-147-SEMARNAT/SSA1-2004; random sampling; drafting of a remediation proposal; documentation of waste generated by the removal of contaminated soil, and application of an administrative penalty.[155] The appendices to the response indicate that DGGIMAR evaluated the remediation proposal and the characterization. That authority noted the deficiencies that the study was to consider and approved the performance of the study, subject to compliance with certain conditions.[156] On this basis, from July to September 2007, remediation work took place on the Labna lot with the removal of 102.915 tons of thallium-contaminated soil.[157] Once the soil was removed, sampling for the contaminants covered by NOM-147-SEMARNAT/SSA1-2004 was repeated and it was found that they did not exceed the parameters set out in the standard for agricultural/residential/commercial land uses.[158]

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[148] Response, p. 45.
[149] Response, p. 46.
[150] Response, p. 54
[151] Response, Appendix 9: Doc. no. PFPA-JAL/SJ/1285/07/2337 of 22 May 2007, issued by the Profepa office in the state of Jalisco, p. 2.
[152] Response, p. 53.
[153] Response, p. 53 and Appendix 9: Doc. no. PFPA-JAL/SJ/1285/07/2337 of 22 May 2007, issued by the Profepa office in the state of Jalisco, p. 4.
[154] Response, p. 55 and Appendix 9: Doc. no. PFPA-JAL/SJ/1285/07/2337 of 22 May 2007, issued by the Profepa office in the state of Jalisco, pp. 7-11.
[155] Response, Appendix 50: Technical report for decision no. PFPA/DJAL/DT/36.4/169/07 of 20 August 2007, issued by the Profepa office in the state of Jalisco, pp. 17-25.
[156] Response, Appendix 7: Doc. no. DGGIMAR.710/005163 of 31 July 2007, issued by the Management of High-Risk Materials and Activities Branch of Semarnat.
[157] Response, Appendix 66: Doc. no. DGGIMAR.710/007243 of 9 November 2007, issued by the Management of High-Risk Materials and Activities Branch.
[158] *Ibid*.

99. Therefore, on 21 January 2008, the Profepa office in Jalisco declared the remediation of thallium-contaminated soil on the Labna lot to be completed.[159]

100. The Secretariat finds that the appendices to the response reflect the soil analysis conducted to determine the possible presence of arsenic, barium, beryllium, cadmium, hexavalent chromium, mercury, nickel, silver, lead, vanadium, selenium, and thallium[160] and, further to any findings, to determine the relevant remediation measures. The foregoing appears to respond to the Submitters' concern that there was no analysis of other heavy metals under Mexican law. The Secretariat has not identified open central questions that warrant the development of a factual record in regard to this particular assertion. Concerning the consideration of other Mexican Official Standards applicable to the hazardous waste generation processes and management of polychlorinated biphenyls on the Labna lot, Mexico's response appears to respond adequately to these issues, since Mexico enforced the NOM relating to characterization of contaminated soils.

101. Concerning the assertion of an alleged failure to enforce in connection with the verification of transportation and final disposal of thallium-contaminated soil from the Labna lot, the Profepa file contains the delivery-receipt manifests for 102 tons of earth from the lot as well as 200 $m^3$ of exhaust ducts and fiberglass material, PVC pipe, and two tons of asbestos-containing sheets and asbestos-containing materials, among other things, from the facility dismantled on the Labna lot.[161]

102. Therefore, Mexico's response to the Submitters' assertion concerning the characterization and environmental remediation of the Labna lot leaves no central open questions. In the absence of other, more specific assertions concerning Mexico's alleged failure to enforce in this regard, the Secretariat does not recommended the preparation of a factual record.

## V. DETERMINATION

103. The Secretariat has reviewed submission SEM-08-001 (*La Ciudadela Project*), filed by Instituto de Derecho Ambiental, A.C., Asociación Vecinal Jardines del Sol, A.C, and Colonos de Bosques de San Isidro, A.C. in accordance with NAAEC Articles 14 and 15. The Submitters allege failures to effectively enforce Mexican environmental law in connection with an alleged contaminated site in Zapopan, Jalisco, where La Ciudadela real estate project is located. Having considered SEM-08-001 and in light of the response of Mexico, the Secretariat finds that a factual record would not present more information than what is already contained in the submission and the response. Furthermore, after analyzing the Submitters' assertions in light of the Party's response, the Secretariat finds that some assertions were either adequately addressed in the response or correspond to alleged failures to enforce that are not taking place. Therefore, and as explained in the body of this determination, the Secretariat

[159] Response, Appendix 69: Doc. no. PFPA-JAL/SJ/0313/08 of 21 January 2008, issued by the Profepa office in the state of Jalisco.
[160] Response, Appendix 50: Technical report for decision no. PFPA/DJAL/DT/36.4/169/07 of 20 August 2007, issued by the Profepa office in the state of Jalisco.
[161] Response, p. 18.

finds that development of a factual record is not warranted in regard to submission SEM-08-001 (*La Ciudadela Project*) and hereby terminates the process relating to the submission.

Respectfully submitted for your consideration on this 12th day of August, 2010.

**Secretariat of the Commission for Environmental Cooperation**

(*original signed*)
Per: Evan Lloyd
Executive Director

c.c. Enrique Lendo, Mexico Alternate Representative
David McGovern, Canada Alternate Representative
Michelle DePass, US Alternate Representative
Submitters