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**Secretariat of the Commission for Environmental Cooperation**

**Secretariat determination in accordance with Article 15(1) of the North American Agreement on Environmental Cooperation that preparation of a factual record is not warranted**

<b>Submitters:</b>	Greenpeace México, A.C.; Frente Democrático Campesino; Unión Nacional de Productores Agropecuarios, Comerciantes, Industriales y Prestadores de Servicio El Barzón, A.C. (“El Barzón, A.C.”), and Centro de Derechos Humanos de las Mujeres, A.C.
<b>Represented by:</b>	Greenpeace México, A.C.
<b>Party:</b>	United Mexican States
<b>Original submission</b>	28 January 2009
<b>Revised submission</b>	5 February 2010
<b>Date of this determination:</b>	20 December 2010
<b>Submission no.:</b>	<b>SEM-09-001 (<i>Transgenic Maize in Chihuahua</i>)</b>

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**I. BACKGROUND**

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 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.<sup>1</sup>

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<sup>1</sup> 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 page at <<http://www.cec.org/citizen/>>.

2. On 28 January 2009 Greenpeace México,<sup>2</sup> Frente Democrático Campesino, El Barzón, A.C., and Centro de Derechos Humanos de las Mujeres, A.C. (los “Submitters”) filed a citizen submission with the CEC Secretariat in accordance with Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or the “Agreement”). In it, the Submitters assert that Mexico is failing to effectively enforce its environmental law with respect to the control, inspection, investigation, and assessment of the risks of transgenic maize in Chihuahua, Mexico.
3. On 6 January 2010, the Secretariat determined that the submission did not meet all the eligibility requirements of NAAEC Article 14(1) and, based on section 6.2 of the Guidelines, notified the Submitters that they had 30 days in which to file a submission meeting the Article 14(1) requirements. On 5 February 2010, the Submitters filed a revised submission with the Secretariat in accordance with Article 14(1).
4. On 3 March 2010, the Secretariat found that submission SEM-09-001 met the eligibility requirements of NAAEC Article 14(1) and, in accordance with the criteria of Article 14(2), requested a response from the Government of Mexico, advising it that it had a period of 30 days, i.e., until 1 April 2010. On 19 March 2010, the Secretariat received a notification from the Government of Mexico requesting that the period be extended to 60 days, in accordance with NAAEC Article 14(3) and section 9.2 of the Guidelines. On 19 March 2010, the Secretariat informed the Government of Mexico that it would await its response until 3 May 2010.
5. On 3 May 2010, the Secretariat received a response from Mexico to submission SEM-09-001. In addition, on May 7 the Party filed a version of its response for public disclosure.
6. Having analyzed the submission in the light of Mexico’s response, the Secretariat finds that submission SEM-09-001 does not warrant the preparation of a factual record. In accordance with section 9.6 of the Guidelines, the Secretariat hereby explains its reasons for this determination.

## **II. SUMMARY OF THE SUBMISSION**

### **A. The original submission**

7. The Submitters assert that the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—Semarnat); the Office of the Attorney General of the Republic (*Procuraduría General de la República*—PGR); the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa); the Ministry of Agriculture, Livestock, Rural Development, Fisheries, and Food (*Secretaría de Agricultura, Ganadería, Desarrollo*

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<sup>2</sup> Between the date of filing of submission SEM-09-001 and 27 March 2009, the Secretariat received 5728 e-mails from persons requesting to be considered as submitters. All the requests came from the same e-mail address: <[write-a-letter@smtp-gw.greenpeace.org](mailto:write-a-letter@smtp-gw.greenpeace.org)>.

*Rural, Pesca y Alimentación*—Sagarpa); the Ministry of the Treasury and Public Credit (*Secretaría de Hacienda y Crédito Público*—SHCP), and the Interministerial Commission on Biosafety of Genetically Modified Organisms (*Comisión Intersecretarial de Bioseguridad de los Organismos Genéticamente Modificados*—Cibiogem) are failing to effectively enforce the environmental law.<sup>3</sup>

8. The Submitters assert that these Mexican authorities are failing to effectively enforce Articles 4 and 17 of the Political Constitution of the United Mexican States (the “**Mexican Constitution**”); NAAEC Articles 5, 6, and 7; Articles 1, 2, 8, 9, 10, 15, and 16 of the Cartagena Protocol on Biosafety (the “**Cartagena Protocol**”); Articles 2 paragraphs I, II, VI, VII, XI, XII and XIII, 9 paragraphs I, II, III, IV, V, VIII, IX, X, XI, XIV, XV, XVI, XVII and XVIII, 12, 13, 17, 18, 28, 29, 32 paragraph I, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, 49, 60, 61, 62, 63, 65, 66, 86, 87, 88, 101, 102, 110, 111, 112, 113, 114, 115, 117, 119, and 120 of the Biosafety of Genetically Modified Organisms Act (*Ley de Bioseguridad de los Organismos Genéticamente Modificados*—**LBOGM**); Articles 1, 2 paragraph III, 15, 160, 161, 164, 165, 166, 170, 170 Bis, 182, 189, 190, 191, 192, 193, 198, 201, 202, 203, and 204 of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—**LGEEPA**), and Articles 420 Ter, 421, and 422 of the Federal Criminal Code (*Código Penal Federal*—**CPF**). The Submitters further assert that Mexico has not implemented various recommendations contained in *Maize and Biodiversity: the Effects of Transgenic Maize in Mexico*, a report produced by the CEC Secretariat in accordance with NAAEC Article 13.<sup>4</sup>
9. The Submitters note that in the state of Chihuahua, classified by the National Institute of Ecology (*Instituto Nacional de Ecología*—INE) as a region of high maize diversity, there are records of the occurrence of 23 landraces of native maize and two of teosinte.<sup>5</sup> They assert that despite the existence of a documented case of gene flow from transgenic maize to conventional maize varieties, the biosafety measures prescribed by the environmental laws cited in the submission are not being applied.<sup>6</sup>
10. The Submitters refer to the alleged “failure of the Mexican authorities to take measures ensuring an adequate level of protection of native and hybrid maize varieties from GM [genetically modified] seeds” entering the country and allegedly being planted in Chihuahua.<sup>7</sup> They further assert a lack of measures to control and supervise storage, distribution, and marketing centers, and they contend that measures contemplated in the environmental law that are necessary for adequate customs inspection and control of transgenic maize imported into Mexico have not been taken, citing risk assessment and prior informed consent as examples.<sup>8</sup> The Submitters affirm that importation,

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<sup>3</sup> Original submission, p. 2.

<sup>4</sup> *Ibid.*, pp. 5, 7, 9–13.

<sup>5</sup> *Ibid.*, p. 14.

<sup>6</sup> *Ibid.*, p. 1.

<sup>7</sup> *Ibid.*, p. 8.

<sup>8</sup> *Ibid.*, p. 8.

distribution, and cultivation of transgenic maize is taking place in the state of Chihuahua in violation of the environmental law provisions cited in the submission. Finally, the Submitters assert that they were not notified of the status of a complaint filed with the PGR in connection with the alleged illegal growing of transgenic maize.<sup>9</sup>

## **B. The revised submission**

11. In response to the Secretariat's determination of 6 January 2010, on 5 February 2010 the Submitters filed a revised version of the submission. In addition to the provisions cited in the original submission,<sup>10</sup> the Submitters assert in their revised version that Mexico is failing to effectively enforce LBOGM Articles 3 and 12, and LGEEPA Articles 161, 162, 163, 164, 167, 169, and 171.
12. The Submitters reiterate the central assertions in the original submission and include additional information. In particular, the submitters provide information relating to two complaints filed with the PGR in relation to alleged facts that may constitute offenses defined in the CPF;<sup>11</sup> they include documents about a complaint filed with Sagarpa and referred to Profepa;<sup>12</sup> they elaborate on their explanations as to how Mexico is allegedly failing to effectively enforce the Mexican Constitution, the LBOGM, the LGEEPA, and the CPF, and they present arguments as to why the Cartagena Protocol should be considered environmental law in the sense of the NAAEC.<sup>13</sup>
13. The Submitters cite information relating to a criminal investigation as evidence of the alleged lack of technical capacity on the part of PGR officers to gather information about the sites where the Submitters assert that transgenic maize is being planted;<sup>14</sup> they discuss an alleged lack of capacity on the part of Profepa inspectors to obtain samples of genetic material;<sup>15</sup> they refer to an alleged delay in carrying out a criminal investigation;<sup>16</sup> they indicate that two years after complaints were filed with the criminal investigative authority, the Submitters are unaware of the status of these complaints;<sup>17</sup> and they assert that because of a lack of transparency, there is no certainty in regard to any mitigation actions and measures that the government of Mexico may be taking.<sup>18</sup>

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<sup>9</sup> *Ibid.*, pp. 4–6.

<sup>10</sup> The Secretariat notes that the revised submission no longer cites Article 17 of the Mexican Constitution; NAAEC Articles 5, 6 and 7; LBOGM Articles 2 paragraphs I, II, VI, VII, XII and XIII, 12, 28, 29, 102, 110 and 111, and LGEEPA Articles 1 and 2 paragraph III. In addition, the Submitters no longer characterize the recommendations in the report *Maize and Biodiversity: the Effects of Transgenic Maize in Mexico*, published by the CEC Secretariat in accordance with NAAEC Article 13, as environmental law.

<sup>11</sup> Revised submission, pp. 3-6.

<sup>12</sup> *Ibid.*, p. 4.

<sup>13</sup> *Ibid.*, pp. 7–10.

<sup>14</sup> *Ibid.*, p. 4.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* The Submitters add that 14 months after the complaint was filed, the investigating agency issued a decision stating that it was not competent to investigate the matter and that it had referred the matter to the PGR office in Chihuahua.

<sup>17</sup> *Ibid.*, p. 6.

<sup>18</sup> *Ibid.*, p. 7.

14. In the revised submission, the Submitters maintain that with the entry into force of the Cartagena Protocol, which Mexico signed, the authorities became obligated to implement the provisions of this international treaty, in this case by means of the LBOGM, which functions as the implementing instrument for the Protocol. The Submitters reiterate that Mexico “committed to take necessary and appropriate legal, administrative and other measures ... with a view to helping guarantee an *adequate level of protection*”<sup>19</sup> but that this has not occurred, since the authorities have not taken “administrative measures and others, such as penal measures[...],”<sup>20</sup> allegedly causing the spread of cases of transgenic contamination.<sup>21</sup>
15. The Submitters assert that despite the alleged entry and planting of GM maize in the Chihuahua region, no risk assessments have been done; nor has the principle of prior informed consent been applied; nor are there adequate measures in place to control and supervise storage, distribution, and marketing centers; nor is there any review, monitoring, or oversight of these matters on the part of the customs authorities.<sup>22</sup> The Submitters report that these facts are allegedly taking place in the municipalities of Cuauhtémoc, Namiquipa, Buenaventura, and Ascención in the state of Chihuahua.<sup>23</sup>

### **C. Mexico’s response**

16. On 3 May 2010, Mexico filed its response in accordance with NAAEC Article 14(3). In it, the Party asserts that the revised submission does not meet the Article 14(1) requirements since some of the provisions cited allegedly do not meet the NAAEC definition of environmental law while others are allegedly not related to the assertions in the submission; it asserts that the Secretariat should not have requested a response from Mexico, since the submission does not meet the Article 14(2) criteria; it argues that review of the submission should be terminated under Article 14(3) given the existence of pending proceedings, and it states that, in any event, Mexico is engaging in acts of “timely and effective enforcement of domestic law[...],”<sup>24</sup>
17. As to Articles 2(1) and (2) of the Cartagena Protocol, concerning the taking of measures by Mexico to implement its obligations under the Protocol, Mexico maintains that the LBOGM is “the instrument by which Mexico incorporated the provisions of the Cartagena Protocol into its domestic legal framework” and that it has taken other administrative measures, including the creation of Cibiogem, the Mexican Genetically Modified Organisms Monitoring Network (*Red Mexicana de Monitoreo de Organismos Genéticamente Modificados*), and the Living Modified Organisms Information System

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<sup>19</sup> *Ibid.*, p. 9 (emphasis in original).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> Response, p. 54.

(*Sistema de Información de Organismos Vivos Modificados*—SIOVM),<sup>25</sup> as well as the implementation of a special protection regime for maize.<sup>26</sup>

18. Mexico states that Articles 8, 9 and 10 of the Cartagena Protocol, concerning the rules of notification in the case of export and import of living modified organisms, are not applicable to the matter raised in the submission, since “the Submitters did not provide information to support their assertions....”<sup>27</sup> Mexico states that the LBOGM, implementing Articles 8, 9 and 10 of the Cartagena Protocol, nonetheless establishes the legal framework for importation of GMOs by means of provisions that grant powers to the SHCP,<sup>28</sup> prescribe that permits for commercial release have the effects of import permits;<sup>29</sup> prohibit the importation of GMOs or products containing them where there is a prohibition in the country of origin;<sup>30</sup> determine requirements applicable to applications for permits for environmental release of GMOs in experimental, pilot program, and commercial phases, and the corresponding risk studies and monitoring;<sup>31</sup> and establish administrative sanctions.<sup>32</sup>
19. Mexico asserts that it incorporated Articles 15 and 16 of the Cartagena Protocol into its domestic legal system in the form of administrative procedures and criteria for the assessment, monitoring, and management of risk associated with activities involving GMOs.<sup>33</sup> It states that the LBOGM includes principles for the formulation and guidance of biosafety policy and the promulgation of the relevant provisions,<sup>34</sup> as well as monitoring, prevention, control, and safety measures governing the use of GMOs.<sup>35</sup>
20. Mexico argues that, although environmental protection is one of the purposes of the LBOGM, the act itself cannot be considered environmental law in the sense of the NAAEC and that, in any case, the Secretariat should have ascertained the scope of jurisdiction of the Mexican environmental authorities in determining whether the provisions cited in the submission qualify as environmental law.<sup>36</sup> Mexico concludes that the Secretariat exceeded the scope of application of the NAAEC in allowing the LBOGM for review within the citizen submission process.<sup>37</sup>

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<sup>25</sup> *Ibid.*, pp. 18–19.

<sup>26</sup> *Ibid.*, p. 18.

<sup>27</sup> *Ibid.*, p. 20.

<sup>28</sup> Response, pp. 20–1. *Cf.* LBOGM Article 32.

<sup>29</sup> Response, p. 21. *Cf.* LBOGM Article 36.

<sup>30</sup> Response, p. 21. *Cf.* LBOGM Article 40.

<sup>31</sup> Response, p. 21. *Cf.* LBOGM Articles 42, 43, 50, 51, 55, and 56.

<sup>32</sup> Response, p. 21. *Cf.* LBOGM Article 119 paragraph XV.

<sup>33</sup> Response, p. 22. *Cf.* LBOGM Article 2, as well as Title Two Chapter III, “Risk Study and Assessment,” and LBOGM Articles 46, 47, 50, 53, 54, 55, 60, 61, 62, and 63.

<sup>34</sup> Response, p. 23. *Cf.* LBOGM Article 9.

<sup>35</sup> Response, p. 23. *Cf.* LBOGM Article 37.

<sup>36</sup> Response, p. 29.

<sup>37</sup> *Ibid.*, p. 26.

21. Mexico maintains that certain provisions were not explicitly cited by the Submitters,<sup>38</sup> while others are only applicable to the formulation and guidance of biosafety policy and the enactment of legal provisions within the scope of the LBOGM, and therefore do not qualify for review of their effective enforcement.<sup>39</sup> Mexico further states that in some cases, the provisions in question are applicable to the regulation of agricultural species,<sup>40</sup> or else their enforcement is not within the remit of the environmental authority.<sup>41</sup> In this regard, Mexico further argues that LBOGM Article 11 paragraphs II, IV, VII and VIII, and Article 15 are the ones that mark out the environmental authority's jurisdiction as regards GMOs, but these were not cited in the submission.<sup>42</sup> In its response, Mexico emphasizes that the Submitters should have cited provisions whose enforcement is the responsibility of the environmental authorities.<sup>43</sup>
22. Mexico argues that the primary purpose of the legislation cited in the submission is not environmental protection, since its purpose, Mexico asserts, is the regulation of the jurisdictional framework of the SHCP;<sup>44</sup> the creation of a comprehensive administrative framework for permitting of GMO releases;<sup>45</sup> the establishment of administrative requirements for labeling and identification of GMOs;<sup>46</sup> the creation of the legal framework for acts of inspection and surveillance;<sup>47</sup> the establishment of safety measures;<sup>48</sup> the application of sanctions;<sup>49</sup> the procedures to be followed by Semarnat in the case of acts or omissions that may constitute environmental offenses;<sup>50</sup> the establishment of a private right of action in criminal cases,<sup>51</sup> and the processing of administrative remedies. In sum, the Party states that the purpose of these provisions is to establish an administrative framework for the enforcement of the LBOGM and the LGEEPA.<sup>52</sup> Mexico further maintains that the enforcement of provisions relating to investigative, judicial, regulatory, or compliance matters is not eligible for review by the Secretariat since such provisions involve the reasonable exercise of the Party's discretion.<sup>53</sup> The Party concludes that "While it is true that certain of the criteria of

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<sup>38</sup> Response, p. 29. Cf. LBOGM Article 9 paragraphs VI, VII, XI, XII and XIX.

<sup>39</sup> Response, p. 29. Cf. LBOGM Article 9 paragraphs I, II, III, IV, V, VIII, IX, X, XI, XIV, XV, XVI, XVII, XVIII and XIX.

<sup>40</sup> Response, p. 30. Cf. LBOGM Article 12 paragraph I.

<sup>41</sup> Response, pp. 31 and 33. Cf. LBOGM Articles 13 paragraphs II, IV and VI and 18 paragraphs I, II, IV and V.

<sup>42</sup> Response, pp. 31-32.

<sup>43</sup> *Ibid.* Cf. LBOGM Articles 11 paragraphs II, IV, VII and VIII, and 15.

<sup>44</sup> Response, p. 33. Cf. LBOGM Article 18 paragraphs I, II, IV and V.

<sup>45</sup> Response, p. 34. Cf. LBOGM Articles 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, and 49.

<sup>46</sup> Response, pp. 34-35. Cf. LBOGM Article 101.

<sup>47</sup> Response, p. 35. Cf. LBOGM Articles 112, 113, and 114.

<sup>48</sup> Response, p. 35. Cf. LBOGM Article 115.

<sup>49</sup> Response, p. 37. Cf. LBOGM Articles 119 and 120, and LGEEPA Articles 160, 161, 164, 165, 166, 170 and 170 Bis.

<sup>50</sup> Response, p. 39. Cf. LGEEPA Article 182.

<sup>51</sup> Response, p. 39. Cf. LGEEPA Article 182, second paragraph.

<sup>52</sup> Response, pp. 35-7 and 38-41. Cf. LBOGM Articles 112, 113, 114, 115, 119, and 120, and LGEEPA Articles 160, 161, 164, 165, 166, 170, 170 Bis, 182, 201, and 202.

<sup>53</sup> Response, pp. 36-7 and 38-41.

NAAEC Article 45(2) are coincident with the purposes of the LBOGM,” it cannot be concluded that its primary purpose is environmental protection or the prevention of a danger to human life or health.

23. In addition, Mexico argues that several provisions cited in the submission are not related to the matter raised by the Submitters, since these provisions allegedly have to do with the regulation of plants considered agricultural species, which come under the Federal Plant Protection Act (*Ley Federal de Sanidad Vegetal*);<sup>54</sup> they deal with procedures for the legal release of these organisms,<sup>55</sup> or they refer to cases of unintentional rather than deliberate illegal release of GMOs;<sup>56</sup> they deal with risk study and assessment in the context of the permitting process for environmental release of GMOs,<sup>57</sup> and they establish the principles of environmental policy, the issuance of Mexican official standards, and the enforcement instruments contemplated in the LGEEPA.<sup>58</sup> Mexico asserts that the Submitters do not substantiate the filing of the public complaint<sup>59</sup> that they claim to have filed, nor do they demonstrate having pursued the actions in civil liability for environmental harm afforded them by the provisions cited in the submission.<sup>60</sup>
24. In Mexico’s view, the Submitters did not address the Secretariat’s observations in regard to citing any provision establishing the obligation of the PGR to notify a complainant of progress on an investigation.<sup>61</sup> Mexico further argues that the assertions relating to guarantees of transparency in the processing of administrative and judicial proceedings exceed the scope of the citizen submission process and the NAAEC itself,<sup>62</sup> and that those relating to access to justice and the Party’s institutional capacities — including the assertion of the alleged lack of capacity to investigate and prosecute violations relating to GM maize seeds — do not relate to the effective enforcement of environmental law but rather to “assessment of the effectiveness of the Parties’ policies, laws, and institutions.”<sup>63</sup>
25. Mexico maintains that the submission does not contain sufficient information to allow the Secretariat to review it, since the Submitters do not “cite the provisions compelling the PGR to inform a complainant of the status of an investigation.”<sup>64</sup> Mexico contradicts the submission in stating that Article 16 of the Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*—CFPP) obligates the authorities to keep information concerning criminal investigations strictly confidential.<sup>65</sup> The Party asserts that the

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<sup>54</sup> Response, p. 31. Cf. LBOGM Article 13 paragraphs III, V and VI.

<sup>55</sup> Response, p. 34. Cf. LBOGM Articles 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, and 49.

<sup>56</sup> Response, pp. 33, 36. Cf. LBOGM Articles 17 and 117.

<sup>57</sup> Response, p. 34. Cf. LBOGM Articles 60, 61, 62, 63, 63, 64, 65, 66.

<sup>58</sup> Response, p. 37. Cf. LGEEPA Article 15.

<sup>59</sup> Response, p. 40. Cf. LGEEPA Articles 189, 190, 191, 192, 193, 198, 201, 202.

<sup>60</sup> Response, p. 41. Cf. LGEEPA Articles 203 and 204.

<sup>61</sup> Response, pp. 3–4.

<sup>62</sup> *Ibid.*, p. 6.

<sup>63</sup> *Ibid.*, p. 8.

<sup>64</sup> *Ibid.*, p. 4

<sup>65</sup> *Ibid.*, pp. 4–5.

submission contains no documentary evidence to support the Submitters' assertions<sup>66</sup> of denial of information by the authorities,<sup>67</sup> lack of adequate safety protocols for the release of GM maize,<sup>68</sup> failure to respond to complaints,<sup>69</sup> and lack of capacity to investigate and prosecute violations relating to GM maize seeds.<sup>70</sup>

26. According to Mexico, the revised submission did not merit a response pursuant to Article 14(2), since the Submitters based their assertions exclusively on media reports and in no way demonstrated that they have direct knowledge of the facts asserted in their submission.<sup>71</sup> Mexico asserts that the Submitters based their assertions on "various scientific and academic publications containing general information ... not directly related to any of the assertions...."<sup>72</sup> Mexico maintains that the Submitters based their complaints on newspaper accounts,<sup>73</sup> claiming that their arguments are supported by an article and a press release made public by the authorities<sup>74</sup> as well as letters sent to the authorities.<sup>75</sup>
27. With reference to NAAEC Article 14(3), Mexico mentions the existence of actions and remedies initiated by the Party and by the Submitters<sup>76</sup> that are pending before various bodies in Mexico, and therefore invokes the "automatic" termination<sup>77</sup> of submission SEM-09-001 pursuant to Article 14(3).
28. Concerning the application of LBOGM Article 2 paragraph XI<sup>78</sup> in relation to the alleged lack of a special protection regime for maize,<sup>79</sup> the operation of safeguard mechanisms, and the assessment of risk within the permitting process, Mexico responds that the special

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<sup>66</sup> *Ibid.*, pp. 6-9.

<sup>67</sup> *Ibid.*, p. 6.

<sup>68</sup> *Ibid.*, p. 8.

<sup>69</sup> *Ibid.*, pp. 8-9.

<sup>70</sup> *Ibid.*, p. 8.

<sup>71</sup> *Ibid.*, pp. 9-10.

<sup>72</sup> *Ibid.*, p. 6.

<sup>73</sup> *Ibid.*, pp. 8, 10.

<sup>74</sup> *Ibid.*, p. 10.

<sup>75</sup> *Ibid.*, pp. 10-11.

<sup>76</sup> *Ibid.*, p. 3.

<sup>77</sup> *Ibid.*, p. 2.

<sup>78</sup> It is relevant to note that the Secretariat determined that LBOGM Article 2 is not environmental law in the sense of the NAAEC; Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §5.

<sup>79</sup> In this regard, see also Transitory Article 5 of the LBOGM Regulation, published in the DOF on 19 March 2008, which provides that:

Within the sixty days following the entry into force of this Regulation, Semarnat and Sagarpa shall issue those biosafety-related legal provisions making up the special protection regime contemplated in Article 2 paragraph XI of the Act that are necessary to resolve upon permit applications for release of maize.

Semarnat and Sagarpa may solicit the opinion of CibioGem with respect to the formulation of the legal provisions mentioned in the preceding paragraph.

Permit applications for release of maize shall be resolved upon by the competent ministries in accordance with the first paragraph of this article.

protection regime was enacted by means of an executive order, published in the DOF on 6 March 2009, that amends, adds, and repeals various provisions of the Regulation to the LBOGM.<sup>80</sup> Mexico notes the regulatory proceeding that took place prior to the promulgation of the order, in which one of the Submitters participated.<sup>81</sup> In addition, the Party asserts that the revisions to the LBOGM Regulation “establish a sufficient legal basis for the immediate issuance of permits for the various phases of release of GM maize” and concludes that the federal authorities “assessed the benefits and risks of the use of GM maize, specifically considering that Mexico is the center of origin and genetic diversity for this crop.”<sup>82</sup> Mexico asserts that the LBOGM Regulation now contains requirements additional to those provided by LBOGM Article 16 for decision-making on permit applications for experimental release of GM maize,<sup>83</sup> in particular the requirement of the nonexistence of any conventional alternative variety, as well as a system for monitoring the effectiveness of the measures contained in permits;<sup>84</sup> that it prohibits experimentation with or release of GM maize whose characteristics interfere with or limit its human or animal use or consumption;<sup>85</sup> that it prescribes measures for development of subsidy programs for the conservation of native maize varieties and wild relatives;<sup>86</sup> that it establishes specific monitoring measures for GM maize laboratories,<sup>87</sup> and that it establishes measures for eliminating, controlling, and mitigating the illegal presence of GM maize.<sup>88</sup>

29. As to the enforcement of LBOGM Articles 86, 87, and 88<sup>89</sup> in respect of the determination of centers of origin and genetic diversity, Mexico asserts that Conabio, in 2006, produced a background document on centers of origin and diversity in the case of maize in Mexico and that Cibogem, in August 2006, approved funding for the “Maize Project” with a view to generating information on centers of origin, and that this project has generated over 15,300 new distribution records for maize landraces and varieties.<sup>90</sup>
30. In regard to the alleged lack of control and supervision measures for seed storage, distribution, and marketing centers, Mexico responds that the LBOGM provisions relating to the contained use of GMOs establish no obligation for the Mexican authorities to take such measures nor to regulate the storage of GM seeds, except in customs

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<sup>80</sup> Response, p. 42.

<sup>81</sup> The “Order amending, adding, and repealing various provisions of the LBOGM Regulation” was preceded by the regulatory impact statement (MIR) procedure for the “Order establishing those biosafety-related legal provisions making up the special protection regime for maize that are necessary to resolve upon permit applications for environmental release of genetically modified maize.” Mexico states that Greenpeace México, A.C. submitted comments on the draft order during the MIR process. Response, pp. 42-49.

<sup>82</sup> Response, p. 48.

<sup>83</sup> LBOGM Regulation Article 66.

<sup>84</sup> *Ibid.*, Article 68.

<sup>85</sup> *Ibid.*, Article 67.

<sup>86</sup> *Ibid.*, Article 70.

<sup>87</sup> *Ibid.*, Article 71.

<sup>88</sup> Response, pp. 45–46, 49.

<sup>89</sup> Articles 86, 87, and 88 make up a chapter of the LBOGM relating to centers of origin and genetic diversity.

<sup>90</sup> Response, p. 50.

facilities,<sup>91</sup> since the applicable legislation in this case is the Federal Seed Production, Certification, and Commerce Act (*Ley Federal de Producción, Certificación y Comercio de Semillas*),<sup>92</sup> which is not environmental law in the sense of NAAEC Article 45(2).<sup>93</sup>

31. Regarding the alleged failure to respond in a timely manner to a complaint filed with the Sagarpa office in Chihuahua, Mexico states that, in response to this complaint, the authority made a plant protection-related inspection visit to Ejido de Benito Juárez<sup>94</sup> and that the corresponding investigations by the National Food Safety and Inspection Service (*Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria*—Senasica) were “impeded by the death of the alleged violator.”<sup>95</sup> In addition, Mexico notes that Sagarpa referred the matter to Profepa for investigation of violations arising from the possible release of GMOs in Ejido de Benito Juárez and states that the Profepa office in Chihuahua initiated an administrative proceeding.
32. Concerning the alleged failure to address complaints of alleged offenses defined in CPF Articles 420, 420 Ter, 420 Quater paragraphs II and III, and 421 in the municipalities of Cuauhtémoc, Namiquipa, Buenaventura, and Ascensión in the state of Chihuahua, Mexico responds that the criminal investigation is “pending,” and therefore this information is strictly confidential under Mexican law.<sup>96</sup>
33. In relation to the alleged lack of action, capacity, and coordination on the part of the Mexican authorities to investigate and prosecute violations relating to the illegal presence of GM seeds in maize crops, Mexico asserts that the Submitters do not reference any provisions referring to the technical capacities necessary to carry out acts of enforcement of the LBOGM.<sup>97</sup>
34. Mexico states that Senasica, Profepa, the Ministry of Health, the SHCP, and Cibiozem have, within the scope of their respective jurisdictions, initiated administrative proceedings,<sup>98</sup> as well as implementing an inspection and surveillance strategy providing for training of staff, verification of permit conditions, response to contingencies arising from the handling of GMOs, response to complaints, and institutional coordination.<sup>99</sup> The Party further asserts that it has taken biosafety-related measures, acting by the Mexican customs administrators,<sup>100</sup> and that its authorities followed up on complaints of alleged unauthorized release of transgenic maize in the state of Chihuahua,<sup>101</sup> in addition to forming a high-level executive working group tasked with strengthening coordination

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<sup>91</sup> *Ibid.*, p. 51.

<sup>92</sup> *Ibid.*, p. 51.

<sup>93</sup> *Ibid.*, p. 52.

<sup>94</sup> *Ibid.*, pp. 52–53.

<sup>95</sup> *Ibid.*, p. 53.

<sup>96</sup> *Ibid.*, pp. 53–54.

<sup>97</sup> *Ibid.*, p. 62.

<sup>98</sup> *Ibid.*, p. 55.

<sup>99</sup> *Ibid.*, p. 56.

<sup>100</sup> *Ibid.*, p. 57.

<sup>101</sup> *Ibid.*, p. 57.

among the authorities for response to cases of illegal release of GMOs.<sup>102</sup> Other measures described by Mexico include the drafting of a coordinated action protocol for response to cases of illegal environmental release of GMOs;<sup>103</sup> implementation of a capacity building project on implementation of the Cartagena Protocol,<sup>104</sup> and implementation of the SIOVM as a tool for analyzing and identifying potential risks in cases of environmental release of GMOs.<sup>105</sup>

35. Mexico also notes the promulgation of biosafety provisions, including the Regulation and Rules of Operation of Cibiogem,<sup>106</sup> the LBOGM Regulation,<sup>107</sup> and the order amending, adding, and repealing several provisions of the Regulation;<sup>108</sup> the promulgation of the Rules of Operation of the Cibiogem Fond,<sup>109</sup> and the establishment of the Mexican GMO Monitoring Network along with the promulgation of its rules of operation.<sup>110</sup>
36. Finally, Mexico argues that the Submitters “have various channels and actions that they can pursue in order to raise the matters giving rise to their assertions in submission SEM-09-001 before the competent domestic authorities”<sup>111</sup> and that there are insufficient grounds for the preparation of a factual record pursuant to NAAEC Article 15(1).

### III. ANALYSIS

37. In accordance with NAAEC Article 15(1) and section 9.6 of the Guidelines, the Secretariat proceeds to set forth its reasons for not recommending the preparation of a factual record. It begins, however, by stating its considerations with respect to the statements in Mexico's response relating to the alleged ineligibility of the submission and to the existence of pending proceedings.

#### **A. Consideration of Mexico's response with respect to the alleged ineligibility of the submission pursuant to the Article 14(1) requirements**

38. On 2 March 2010, the Secretariat issued its determination that the submission met all the eligibility requirements of Article 14(1) and that, in accordance with NAAEC Article 14(2), it warranted requesting a response from Mexico. The Party considers that the Secretariat should not have allowed submission SEM-09-001 nor requested a response from Mexico since, it alleges, the Submitters did not cite environmental law in the sense of the NAAEC, the submission does not provide sufficient information to allow the

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<sup>102</sup> *Ibid.*, pp. 57–58.

<sup>103</sup> *Ibid.*, p. 58.

<sup>104</sup> *Ibid.*, p. 58.

<sup>105</sup> *Ibid.*, p. 59.

<sup>106</sup> *Ibid.*, pp. 59–60

<sup>107</sup> *Ibid.*, p. 60.

<sup>108</sup> *Ibid.*, p. 45.

<sup>109</sup> *Ibid.*, p. 60.

<sup>110</sup> *Ibid.*, p. 61.

<sup>111</sup> *Ibid.*, p. 62.

Secretariat to review it, and it is based on information contained in media reports. Mexico labeled its response pursuant to Article 14(3) *ad cautelam*.

39. While Mexico's observations on the admissibility of submission SEM-09-001 could, in certain circumstances, contribute to a better understanding of the Party's law, they cannot be addressed by the Secretariat. There is no provision in the NAAEC or the Guidelines allowing for a rejoinder by a Party or a submitter to a Secretariat determination. Nor does the Agreement contemplate a procedural stage of appeal to a Party response, nor any process of consultation between the Party and the submitter. In this connection, a recent determination the Secretariat noted 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 [any] response, determine whether to recommend a factual record.<sup>112</sup>

40. The Secretariat takes note of the Party's practice of including in its response procedural arguments on admissibility of a submission that would give rise to an additional period of consideration<sup>113</sup> not contemplated by the agreement, and reiterates that the Secretariat is not a court charged with the administration of justice, but rather that its function is to facilitate and administer the citizen submission process in an impartial and efficient manner, in accordance with the NAAEC and the Guidelines, by applying the Agreement consistently and being guided by the principles and practice of international law. In providing a response on enforcement matters where questions on the admissibility were initially raised, Mexico recalled that the purposes of the NAAEC "[...] are fulfilled as long as the signatory Parties collaborate by providing the requested information [through a Response] standing beyond legal formalities limitations."<sup>114</sup>

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<sup>112</sup> SEM-08-001 (*La Ciudadela Project*), Article 15(1) Determination (12 August 2010), §36. This is why, in the context of a retroactive modification concerning the eligibility of a submission, Mexico's designation of the response as *ad cautelam* lacks relevance.

<sup>113</sup> See, in this regard, SEM-08-001 (*La Ciudadela Project*), Party Response (26 September 2008), pp. 15-29; SEM-07-005 (*Drilling Waste in Cunduacán*), Party Response (12 May 2008), pp. 15-42; SEM-06-006 (*Los Remedios National Park*), Party Response (16 July 2007), pp. 17-21; SEM-06-003 (*Ex Hacienda El Hospital II*) and SEM-06-004 (*Ex Hacienda El Hospital III*, consolidated), Party Response (10 January 2007), pp. 7-18; SEM-05-003 (*Environmental Pollution in Hermosillo II*), Party Response (16 February 2006), pp. 3-30; SEM-05-002 (*Coronado Islands*), Party Response (10 January 2006), pp. 13-37; SEM-05-001 (*Crushed Gravel en Puerto Peñasco*), Party Response (24 October 2005); SEM-04-001 (*Hazardous Waste in Arteaga*), Party Response (24 September 2004), pp. 5-37; SEM-98-005 (*Cytrar I*), Party Response (5 July 1999), p. 2; SEM-03-003 (*Lago de Chapala II*), Party Response (31 March 2004), pp. 9-11; SEM-97-007 (*Lago de Chapala*), Party Response (15 December 1998), pp. 2-3; SEM-97-002 (*Río Magdalena*), Party Response (24 July 1998), pp. 11-13; SEM-96-001 (*Cozumel*), Party Response (20 March 1996), pp. 5-6; SEM-98-006 (*Aquanova*), Party Response (22 June 1999), pp. 2-3. Note that in the case of SEM-07-001 (*Minera San Xavier*), Party Response (25 September 2007), Mexico did not include procedural arguments.

<sup>114</sup> SEM-98-007 (*Metales y Derivados*), Party Response (1 June 1999), p. 3.

41. With due attention to the principles of transparency in the NAAEC, the Secretariat hereby expands on its reasoning with regard to admissibility matters raised by the response, and with no intent thereby to create a precedent nor to modify its determinations of 6 January and 3 March 2010.

**1) Mexico's assertions that the submission is ineligible for failing to cite environmental law in the sense of Article 45(2)**

42. In regard to the Cartagena Protocol, Mexico asserts that “as an international instrument arising under the Convention on Biological Diversity, [it] was incorporated into the domestic legal framework”<sup>115</sup> and that there is no need for a law formally incorporating the Protocol. As to the exposition of the reasons underlying the LBOGM bill, the Secretariat understands that, as the Mexican courts have stated, parliamentary considerations occurred during legislative debate are separate from the provision under consideration and have no legal weight.<sup>116</sup>

43. Concerning Mexico's statement to the effect that in the Mexican legal system, “the LBOGM ... is not considered environmental law”<sup>117</sup> since its object is “*to regulate the activities of contained use, experimental release, pilot program release, commercial release, marketing, import, and export of GMOs* [emphasis in original],” it should be noted that LBOGM Article 1 continues by stating that the law is enacted:

[...] *for the purpose of* preventing, averting, or reducing the risks that such activities may pose to human health or the environment and biodiversity or to animal, plant, and aquaculture health [emphasis added].

44. The foregoing text is consistent with the text of NAAEC Article 45(2), to wit, that the *primary* purpose of a provision must be environmental protection or the prevention of a danger to human life or health. Nevertheless, the Secretariat clarifies that it is not engaging in a “general consideration” of the provisions of the LBOGM, since LBOGM Articles 1 and 2 were cited and taken into consideration only:

[...] *to guide* the Secretariat in its analysis of enforceable provisions of the LBOGM noted in paragraph 15 of this determination, since the purpose of [...] is merely to define the nature, object, and scope of the LBOGM itself [emphasis added].<sup>118</sup>

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<sup>115</sup> Response, p. 14.

<sup>116</sup> EXPOSICIÓN DE MOTIVOS Y DEBATES DEL LEGISLADOR. NO FORMAN PARTE DE LA LEY. Tesis aislada; novena época; Tribunales Colegiados de Circuito; source: *Semanario Judicial de la Federación y su Gaceta*; XVIII, October 2003; tesis: I.7o.A. 55K; matter: common.

<sup>117</sup> Response, p. 27.

<sup>118</sup> SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §15, note 19.

45. Mexico further maintains that the LBOGM “establishes a comprehensive regulatory regime for GMO-related activities”<sup>119</sup> addressing “the protection of both the environment and human health simultaneously and not sector by sector.”<sup>120</sup> In this regard, the term “primary purpose” as used in the NAAEC does not exclude the possibility of examining provisions contained in the comprehensive regime for GMOs governed by the LBOGM, which expressly includes the environment and human health.
46. Concerning LBOGM Article 12 paragraphs II, III, IV, V, VI and VII, the Secretariat determined that these provisions do not constitute environmental law since they relate to powers of Sagarpa over matters having nothing to do with submission SEM-09-001, and not meeting the definition of environmental law contained in NAAEC Article 45(2).<sup>121</sup> For its part, LBOGM Article 12 paragraph I grants Sagarpa GMO-related powers in cases involving plants considered agricultural species, such as GM maize. Concerning Article 13 paragraphs III, V and VI, for whose enforcement Semarnat is responsible (as Mexico clarifies), the argument presented by the Party illustrates how the Act is implemented<sup>122</sup> but does not substantially alter the Secretariat’s determination, since these provisions nonetheless meet the definition of NAAEC Article 45(2).<sup>123</sup>
47. Concerning Mexico’s assertion to the effect that the Secretariat included “*motu proprio* (sic) [various paragraphs of LBOGM Article 9] that were not cited in the relevant section,”<sup>124</sup> it is evident from a perusal of the Secretariat’s determinations of 6 January and 3 March 2010 that only the paragraphs cited by the Submitters were given consideration, and nothing beyond.<sup>125</sup>
48. Concerning LBOGM Articles 17 and 117, which provide for institutional coordination in cases of accidental release of GMOs as well as a mechanism for notification thereof, Mexico asserts that the submission does not refer to such a situation;<sup>126</sup> however, SEM-09-001 contains the following assertion: “The government has not observed the provisions of the LBOGM” relating to “the taking of emergency measures to contain accidental releases.” Therefore, the Party’s argument does not affect the Secretariat’s

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<sup>119</sup> Response, p. 28.

<sup>120</sup> Report of the Joint Science and Technology, Environment, Natural Resources and Fisheries, and Legislative Studies Commissions of the Chamber of Senators (originating chamber), 23 April 2003, in Response, p. 28

<sup>121</sup> SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §15, note 22.

<sup>122</sup> Response, p. 31.

<sup>123</sup> However, it is possible that in a review of effective enforcement, the scope of the consideration of LBOGM Article 13 paragraphs III, V and VI may be limited to environmental matters.

<sup>124</sup> Response, p. 29, emphasis in original.

<sup>125</sup> The Secretariat wrote that the Submitters “state that the above Mexican authorities are failing to effectively enforce Articles ... 9 paragraphs I, II, III, IV, V, VIII, IX, X, XI, XIV, XV, XVI, XVII and XVIII”; SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §5 and Article 14(1) and (2) Determination (3 March 2010), §7.

<sup>126</sup> Response, pp. 33, 36.

determination to allow SEM-09-001 for further review with respect to the effective enforcement of LBOGM Articles 17 and 117.<sup>127</sup>

49. As to LBOGM Article 18 paragraphs I, II, IV and V, the Party argues that these provisions are not environmental law since their enforcement is the responsibility of the customs authorities, the exercise of whose powers does not have environmental protection as its primary purpose.<sup>128</sup> The Secretariat notes that the NAAEC Article 45(2) definition of environmental law offers no guidance whatsoever as to whether the authority responsible for enforcing a particular provision must be specifically environmental in nature. While the Party's arguments illustrate jurisdictional aspects relevant to the enforcement of the LBOGM, they do not form a part of the Secretariat's analysis of whether any particular provision qualifies as environmental law in the sense of the NAAEC. The Secretariat does not automatically discard any provision enforced by an authority other than Semarnat, unless a specific provision of NAAEC Article 45(2) or the Guidelines may require.
50. Concerning LBOGM Articles 60, 61, 62, 63, 64, and 65, establishing the criteria and mechanisms necessary to perform an assessment of risk to the environment, biological diversity, and human health for the purposes of obtaining a permit to release GMOs into the environment, Mexico objects to the Secretariat's review thereof since "no ... application for authorization has been submitted..."<sup>129</sup> The latter consideration is however irrelevant to whether the provisions in question should be considered environmental law. However, the Party's observation may shed light on whether SEM-09-001 warrants the preparation of a factual record.
51. As to the inclusion of LBOGM Article 101, Mexico objects to its inclusion in the review within the citizen submission mechanism since — the Party asserts — it establishes measures for human consumption of products containing GMOs and does not refer to matters of environmental protection or a danger to human life or health.<sup>130</sup> The Secretariat referred in its determination of 6 January 2010 to another section of the Article related to "the labeling requirements for GMOs intended for planting in Mexico" applicable to "seeds and vegetative material intended for planting, cultivation, and agricultural production."<sup>131</sup> As noted in the previous determination, the Secretariat reiterates that LBOGM Article 101, in its relevant section, meets the definition of environmental law contained in NAAEC Article 45(2), and may be further considered within the ambit of NAAEC Article 15(1).
52. As regards LGEEPA Article 15, Mexico maintains that the Submitters "do not link the alleged failure by the federal government with concrete facts" since this provision is not

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<sup>127</sup> See SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §21-23, for the assertions retained for further review.

<sup>128</sup> Response, p. 33. Cf. LBOGM, Article 18 paragraphs I, II, IV and V.

<sup>129</sup> Response, p. 34.

<sup>130</sup> *Ibid.*, pp. 34–35.

<sup>131</sup> Cf. LBOGM Article 101.

observed in the abstract but rather in applicable cases provided by the Act,<sup>132</sup> which are not addressed in *Transgenic Maize in Chihuahua*. Without claiming or intending to offer an interpretation of the Party's domestic law, the Secretariat observes that there is a distinction to be made between the phrases "formulation and guidance of environmental policy" and "promulgation of Mexican Official Standards and other instruments prescribed by this Act."<sup>133</sup> The Submitters do not make assertions relating to the "promulgation of Mexican Official Standards," nor do they address any "other instruments" contemplated in LGEEPA; however, they do express their disapprobation with regard to the observance of certain principles enumerated in LGEEPA Article 15.<sup>134</sup>

53. As to the provisions applicable to the public complaint procedure,<sup>135</sup> which in Mexico's view do not constitute environmental law,<sup>136</sup> the Secretariat has previously determined that they meet the Article 45(2)(a) definition.<sup>137</sup>

54. Mexico argues that the primary purpose of LBOGM Articles 32, 33, 34, 36, 38, 39, 40, 42, 43, 45, 46, 47, 48, and 49 is not environmental protection "but rather the creation of a comprehensive administrative framework" for the release of GMOs.<sup>138</sup> Similarly, in regard to LBOGM Articles 112, 113, 114, and 115, Mexico asserts that their purpose is to establish an administrative framework to support the enforcement of the Act.<sup>139</sup> In addition, the Party insists that the purpose of LBOGM Articles 119 and 120 "is not environmental protection or prevention of a danger to human life or health" but rather the definition of violations and sanctions.<sup>140</sup> In this regard, it should be noted that the establishment of a comprehensive administrative regime, comprising a legal-judicial framework on the one hand and a framework of sanctions for violations on the other,

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<sup>132</sup> "It is not evident in this case how the cited provisions are applicable, since the submission includes no assertions of alleged failures by Semarnat in respect of the formulation and conduct of environmental policy, the drafting of Mexican Official Standards prescribed by the LGEEPA, or the application of its instruments; i.e., environmental planning, land use planning, environmental regulation of human settlements, environmental impact assessment of works and activities under federal jurisdiction, economic instruments, Mexican official standards, environmental auditing, and self-regulation; the foregoing as prescribed by LGEEPA Title I Chapters II and IV, which set out the principles and instruments of environmental policy"; Response, p. 38.

<sup>133</sup> Cf. LGEEPA Article 15.

<sup>134</sup> For example, the submission refers to the lack of coordination among the authorities (p. 14), an aspect covered by LGEEPA Article 15 paragraph IX. It should be noted as well that the Secretariat clarified that it was allowing this article of the LGEEPA "to the extent [it concerns] assertions regarding alleged failure to effectively enforce LGEEPA"; SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010).

<sup>135</sup> LGEEPA Articles 189, 190, 191, 192, 193, 198, 201, and 202.

<sup>136</sup> Response, pp. 40–1.

<sup>137</sup> "In the case of this submission, the NAAEC [Article 45(2)] definition [of environmental law] is met because the provisions establishing the public complaint procedure and the powers of Profepa cited by the Submitters are procedural provisions whose primary purpose is environmental protection and because the substantive provisions on which the public complaint was based also have environmental protection as their primary purpose." SEM-97-007 (*Lago de Chapala*), Article 15(1) Determination (14 July 2000), p. 4.

<sup>138</sup> Response, p. 34. Cf. LBOGM Articles 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, and 49.

<sup>139</sup> Response, p. 36.

<sup>140</sup> *Ibid.*, p. 37.

does not appear to be conceived of in the LBOGM as an end in itself. From the text of the Act it is evident that its purpose is to prevent or reduce the risks that such activities (release of GMOs) may pose to human health or the environment<sup>141</sup> through control mechanisms and sanctions designed to guarantee biosafety.<sup>142</sup> The provisions in question have instrumental value in that they contribute to environmental protection<sup>143</sup> and, in any case, can be reviewed in conjunction with other relevant substantive provisions of law cited in submission SEM-09-001.

## 2) Mexico's assertions concerning the submission's ineligibility pursuant to Article 14(1)(c)

55. Mexico asserts that the Secretariat should not have allowed submission SEM-09-001 since it allegedly contains neither sufficient information to allow the Secretariat to review it nor documentary evidence to support it, as required by NAAEC Article 14(1)(c).<sup>144</sup>
56. The Secretariat has previously determined the meaning of the requirement set forth in NAAEC Article 14(1)(c):

Article 14(1)(c) requires that a submission provides “*sufficient* information to allow the Secretariat to *review* the submission [emphasis added],” but Mexico in challenging the Secretariat’s decision to request a Response from Mexico, appears to be asking the Secretariat to apply deeper levels of review found in later stages of the process to an Article 14(1)(c) review. Article 14(1)(c) does not appear however, to be concerned with consideration of the merits of assertions raised in a submission, as Article 15(1) does for the purpose of determining whether a factual record is warranted. Moreover, there is no definition in the Guidelines or the Agreement for what constitutes either a “succinct account of the facts” or what “documentary evidence” might be necessary to review a submission. Here again, the Secretariat must use its discretion in interpreting the ordinary meaning of Article 14(1)(c). The requirement in Article 14(1) that a submission must contain “sufficient information” to allow the Secretariat to “review” it, appears to mean simply that the submission must include information such that the Secretariat can ascertain whether it satisfies the criteria in the checklist of Article 14(1)(a) through (f) or not; most of which criteria could reasonably be characterized as administrative in nature....<sup>145</sup>

57. It is necessary to address Mexico’s transcription of paragraph 28 of the Secretariat’s determination of 3 March 2010, since the Secretariat did not only refer to “documents

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<sup>141</sup> Cf. LBOGM Article 1.

<sup>142</sup> Cf. LBOGM Article 2 paragraph XIII.

<sup>143</sup> This does not mean that a law or a penalty may not constitute an end in itself. However, it has been noted that “to assume a conception of punitive power as a metajudicial ‘good’ ... is to justify maximalist models of criminal law with few or no limits on punishment”; Luigi Ferriajoli, *Derecho y razón* (Madrid: Trotta, 2001), p. 270.

<sup>144</sup> Response, p. 6.

<sup>145</sup> SEM-07-005 (*Drilling Waste in Cunduacán*), Article 14(3) Determination (8 April 2009), §25(b).

serving as background information” which in some cases “have no direct bearing on the assertions in the submission....”<sup>146</sup> The subsequent paragraphs in the cited determination indicate that sufficient information was submitted to the Secretariat to allow for review of the submission and to support the central assertions in *Transgenic Maize in Chihuahua*.<sup>147</sup>

29. The Submitters attach documents relating to the assertions on protection of local maize varieties from GM maize, including papers on crop domestication<sup>148</sup> and a paper on long-distance cross-pollination.<sup>149</sup> Also attached to the revised submission is a document by Conabio which states that “there is no scientific evidence of harm to biological diversity, the environment, or human health caused by the environmental release [of living modified organisms in agriculture]” but acknowledges that transgenic maize has certain particularities, since “it is open-pollinated yet is the agricultural species with the greatest known genetic diversity, allowing it to be grown in a wide range of environments.”<sup>150</sup> This document also states that given the high rates of gene flow between varieties of maize, if genetically modified varieties are released into the environment and allowed to flower, “there will be gene flow into native or criollo landraces.”<sup>151</sup>
30. Other studies attached to the revised submission relating to the assertion concerning the taking of measures to control the release of transgenic maize<sup>152</sup> note the difficulty of controlling the spread of transgenes towards centers of origin, even if the commercial release of transgenes is restricted to certain zones of industrialized agriculture,<sup>153</sup> and emphasize the difficulty in correctly interpreting results about the presence of transgenic protein in cultivated maize.<sup>154</sup>

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<sup>146</sup> SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) and (2) Determination (3 March 2010), §28.

<sup>147</sup> Footnotes from the original citation are indented and the footnote number is placed in brackets.

[<sup>148</sup>] Revised submission, compact disc appendix: Robin G. Allaby et al., “The Genetic Expectations of a Protracted Model for the Origins of Domesticated Crops,” *Proceedings of the National Academy of Sciences* 105(37): 13982–6 (2008).

[<sup>149</sup>] The conclusion to this paper states: “Although there are many factors that influence pollen dispersal, most pollen will settle down within short distances and will probably not get the chance to interact with most of these factors.” The paper makes the following recommendation: “The diffusely distributed cross-pollination events at longer distances still could require more detailed studies in cases where any cross-pollination has to be strictly avoided.” Revised submission, compact disc appendix: Michael Bannert and Peter Stamp, “Cross-Pollination of Maize at Long Distance,” *Europ. J. Agronomy* 27 (2007): 50.

[<sup>150</sup>] Revised submission, compact disc appendix: “Elementos base para la determinación de centros de origen y centros de diversidad genética en general y el caso de liberación experimental de maíz transgénico al medio ambiente en México,” background document on centers of origin and diversity in the case of maize in Mexico, Conabio, July 2006, §6.

[<sup>151</sup>] *Ibid.*, §25.

[<sup>152</sup>] Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §20-21.

[<sup>153</sup>] Revised submission, compact disc appendix: George A. Dyer et al., “Dispersal of Transgenes through Maize Seed Systems in Mexico,” *PLoS ONE* 4(5): e5734 (2009).

[<sup>154</sup>] Revised submission, compact disc appendix: José-Antonio Serratos-Hernández et al., “Transgenic Proteins in Maize in the Soil Conservation Area of Federal District, Mexico,” *Frontiers in Ecology*

31. On measures providing for the safe release of transgenic maize,<sup>155</sup> the Submitters attach a Conabio report recommending that a biosafety protocol be put in place and that the competent institutions be allowed to participate.<sup>156</sup>
32. Moreover, the Submitters attach various documents to support their assertions concerning the alleged lack of response to complaints and the alleged lack of capacity to investigate and prosecute offenses relating to the illegal presence of GM seeds in maize crops.<sup>157</sup> These documents include complaints filed with the PGR<sup>158</sup> and appearances by the complainant before the investigating body.<sup>159</sup>
58. The threshold for consideration of evidence that may support an assertion appears, in any case, to be lower than in an international judicial proceeding,<sup>160</sup> since submitters cannot be expected to present information that may already be in the Party's possession,<sup>161</sup> nor is it anticipated that submitters conduct an exhaustive "disclosure" search such as is common in many common and some civil law court systems,<sup>162</sup> since the citizen submission proceeding does not list means of proof,<sup>163</sup> nor does it establish rules for evidentiary proceedings.<sup>164</sup> The Secretariat has, in various determinations, recognized that Article 14(1) is not intended to establish insuperable procedural obstacles that place a heavy burden on the Submitters (or Parties).<sup>165</sup> It has however always maintained that the Article 14(1) requirements must not be given an unreasonably narrow interpretation and application.<sup>166</sup> The Secretariat considered the supporting information in submission SEM-09-001 with that perspective in mind.

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*and the Environment* 5(5): (2007); Piñeyro-Nelson, et al., "Transgenes in Mexican Maize: Molecular Evidence and Methodological Considerations for GMO Detection in Landrace Populations," *Molecular Ecology* 18(4): 750–61 (February 2009).

[<sup>155</sup>] Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §20-21.

[<sup>156</sup>] Revised submission, compact disc appendix: "Elementos base para la determinación de centros de origen y centros de diversidad genética en general y el caso de liberación experimental de maíz transgénico al medio ambiente en México," background document on centers of origin and diversity in the case of maize in Mexico, Conabio, July 2006, §54.

[<sup>157</sup>] Cf. SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010) §23.

[<sup>158</sup>] Original submission, Appendix 6: Complaint filed with the Specialized Unit for Investigation of Environmental Offenses and Offenses Defined in Special Laws, PGR, 2 October 2007; Appendix 10: Complaint filed with the state office of the PGR in Chihuahua, 29 September 2008.

[<sup>159</sup>] Original submission, Appendices 7, 8, 9, and 11: Appearance of complainant before the PGR, clarifying motion, presentation of evidence and addition to complaint filed with the Specialized Unit for Investigation of Environmental Offenses and Offenses Defined in Special Laws of the PGR.

<sup>160</sup> SEM-97-003 (*Quebec Hog Farms*), Article 15(1) Notification (29 October 1999), pp. 6–7.

<sup>161</sup> SEM-04-005 (*Coal-fired Power Plants*), Article 14(1) Determination (16 December 2004), p. 10.

<sup>162</sup> *Ibid.*, p. 11.

<sup>163</sup> Cf. Federal Code of Civil Procedure, Article 93.

<sup>164</sup> *Ibid.*, Article 80.

<sup>165</sup> See, in this regard, SEM-97-005 (*Biodiversidad*), Article 14(1) Determination (26 May 1998), and SEM-98-003 (*Great Lakes*), Article 14(1) and (2) Determination (8 September 1999).

<sup>166</sup> SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §8.

59. As regards LGEEPA Articles 203 and 204 in respect of civil liability for alleged environmental harm, Mexico asserts that they are not applicable to submission SEM-09-001, since it is not evident “how the aforementioned provisions are applicable in the case at hand....” Mexico maintains that there is no information in the submission demonstrating that the Submitters pursued any actions in civil liability.<sup>167</sup> The submission refers to alleged environmental harm, and particularly harm to biodiversity, arising from the alleged growing of GM maize; it asserts that this harm was brought to the authorities’ attention by means of complaints filed with the investigating authorities, and it notes that “the authority itself admits that it is a complex case which, because of the magnitude of the harm that it may involve, should be studied by a specialized prosecutor.”<sup>168</sup> In addition, it should be noted that LGEEPA Article 203 provides that “anyone who pollutes or degrades the environment or affects natural resources or biodiversity shall be liable and obligated to repair the harm caused,” a matter that is addressed in *Transgenic Maize in Chihuahua*.

### **3) Mexico’s assertions regarding improper consideration of the submission in light of NAAEC Article 14(2)(d)**

60. Mexico maintains that the assertions in submission SEM-09-001 “are based exclusively on information provided in the media” and so, pursuant to Article 14(2)(d) of the Agreement, the submission does not meet the criteria for requesting a response from the Party in question. Mexico states that the complaints filed with Sagarpa and the PGR originated from information published in newspaper accounts,<sup>169</sup> and therefore the revised submission does not meet the requirement of Article 14(2)(d).

61. Article 14(2)(d) directs the Secretariat to consider the extent to which “other sources of information relevant to the assertions in the submission were reasonably available to the Submitter.”<sup>170</sup> The Secretariat found that the information presented in *Transgenic Maize in Chihuahua* was reasonable in view of the conditions of access to information about enforcement of the particular environmental laws in question. This is corroborated by observing the various sections of the response classified by Mexico as confidential, including those relating to enforcement of the environmental law in question. In addition, Mexico’s response states that one of the enforcement operations initiated by the Party’s authorities actually originated from a mass media source, perhaps illustrating that regarding the matters in assertion, access to information can be difficult.

62. The Secretariat reiterates its conclusion that the Submission, in accordance with Article 14(2)(d) is clearly not based “exclusively” on mass media reports.

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<sup>167</sup> Response, p. 41.

<sup>168</sup> Revised submission, p. 4.

<sup>169</sup> Response, p. 10

<sup>170</sup> Guidelines, section 7.6.

**B. Consideration of the response with respect to the alleged existence of pending proceedings pursuant to Article 14(3)**

63. NAAEC Article 14(3)(a) stipulates as follows:

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;...<sup>171</sup>

64. NAAEC Article 45(3)(a) defines “judicial or administrative proceeding” as:

[...] 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;...

65. The Secretariat has previously identified factors used to determine whether it should proceed no further with a submission where the matters raised are the subject of a pending judicial or administrative proceeding.<sup>172</sup> In analyzing Mexico’s notification of the existence of pending proceedings, the Secretariat must consider whether the proceeding was initiated by the Party;<sup>173</sup> whether it is timely in accordance with the Party’s law; whether it is related to matters of effective enforcement raised in the submission, and whether the proceeding has the potential to resolve the matter raised in the submission.<sup>174</sup>

66. Mexico maintains that the matters raised in the submission are the subject of pending proceedings initiated in a timely manner by the Party, and that their review could duplicate or interfere with the resolution of those proceedings.<sup>175</sup> According to the Party, the pending judicial or administrative proceedings concern the same matters as the assertions made in *Transgenic Maize in Chihuahua*, and addressing the matters raised in the submission poses “a risk of interfering with the Party’s judicial proceedings and duplicating their review.”<sup>176</sup> Therefore, Mexico asserts, the existence of such proceedings is cause for “automatic termination” of submission SEM-09-001.<sup>177</sup>

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<sup>171</sup> NAAEC Article 45(3)(a).

<sup>172</sup> SEM-07-001 (*Minera San Xavier*), Article 15(1) Determination (15 July 2009), §33.

<sup>173</sup> It should be clarified that the Secretariat also analyzed proceedings initiated by the Submitters.

<sup>174</sup> SEM-07-001 (*Minera San Xavier*), Article 15(1) Determination (15 July 2009), §33.

<sup>175</sup> Response, p. 2.

<sup>176</sup> *Ibid.*, p. 35, note 24.

<sup>177</sup> *Ibid.*, p. 2.

67. In this regard, while duplication of effort and interference with pending litigation must be taken into account during review of a Party response where the Party gives notice of the existence of a pending proceeding,<sup>178</sup> the Secretariat reiterates that the preparation of a factual record does not constitute an adversarial proceeding regarding the effective enforcement of environmental law, and the Secretariat has no curial powers. In addition, NAAEC Article 15(3)<sup>179</sup> leaves open the possibility of other subsequent measures being taken in regard to a submission, including proceedings under the Parties' domestic law.
68. The Secretariat analyzed the information received from Mexico concerning proceedings initiated by the Party in order to determine whether they in fact relate to the same matters of effective enforcement as those raised in the submission. In other words, it must be determined whether the matters addressed by the proceedings contained in Mexico's notification coincide with the submission. In this regard, Mexico emphasized that the term "judicial, quasi-judicial or administrative action" must be given a restrictive interpretation, in observance of the objectives of the NAAEC,<sup>180</sup> and that the Secretariat must, consequently, assess the possibility of duplication or interference with remedies pursued by the Submitter.<sup>181</sup> While Mexico's response does not cite these objectives, a reading of the NAAEC points up those relating to promotion of transparency and public participation<sup>182</sup> and enhancement of compliance with, and enforcement of, environmental laws and regulations.<sup>183</sup>
69. Section 9.4 of the Guidelines requires the Secretariat to state its reasons when considering the alleged existence of pending proceedings. However, Mexico classified the information relating to the pending proceedings and several enforcement actions as confidential pursuant to Article 19(2) of the Agreement and section 17.2 of the Guidelines. Although Mexico submitted a public version of its response to the Secretariat on 10 May 2010,<sup>184</sup> that version does not contain a summary of the confidential information that would allow the Secretariat to make public its considerations concerning the existence of pending proceedings and other enforcement actions pursuant to NAAEC Article 14(3). Therefore, and insofar as possible, in this determination the Secretariat makes public its reasoning concerning the pending proceedings notified by Mexico and other enforcement actions, taking care not to reveal information classified as confidential. Be it noted, then, that the segments made up of paragraphs 78 to 90, 100, 120 to 139 and 144 to 150 are confidential since it is based on information declared as such by the Party.

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<sup>178</sup> Cf. NAAEC Article 14(3).

<sup>179</sup> NAAEC Article 15(3): "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."

<sup>180</sup> Response (confidential version), p. 4.

<sup>181</sup> *Ibid.*

<sup>182</sup> Cf. NAAEC Article 1(h).

<sup>183</sup> Cf. NAAEC Article 1(g).

<sup>184</sup> Doc. 112.00002029 of 4 March 2010, issued by the Legal Affairs Coordinating Unit (*Unidad Coordinadora de Asuntos Jurídicos*) of Semarnat.

70. Guided by the objectives of the Agreement,<sup>185</sup> the Secretariat notes that section 17.3 of the Guidelines<sup>186</sup> invites the Parties to provide a summary of the confidential information, since the absence of such a summary limits the possibility of the Secretariat's making public its reasoning with respect to the existence of pending proceedings.

### 1) Preliminary considerations

71. Possible interference with pending proceedings is an issue of which the Secretariat must be mindful in its determinations. In this regard, the Secretariat must consider whether the proceedings of which Mexico gave notice do in fact coincide with assertions made in the submission, since the NAAEC does not allow the Secretariat to terminate a submission on the mere assertion of the existence of an ongoing proceeding.<sup>187</sup>

72. The Secretariat finds that in order to establish whether any proceedings initiated by the Party coincide with assertions on enforcement matters made in the submission, it is necessary to obtain information on the matter in dispute before the judicial and administrative bodies of Mexico.

73. The Secretariat has analyzed the information related to the proceedings of which Mexico gave notice and concludes that, in the absence of further information about the matters addressed in those proceedings, it is impossible to determine whether they may coincide with all the assertions made in *Transgenic Maize in Chihuahua*. In this case, the Secretariat interprets the references in the Guidelines to potential interference with or duplication of efforts in pending proceedings, as an admonishment to act *ex abundante cautela* when it is notified of such proceedings.

74. Mexico cites a determination in which the Secretariat terminated its review of a submission pursuant to Article 14(3), finding that "the writ of amparo can be an adequate proceeding for resolving the matters raised by the Submitters..."<sup>188</sup> While in the case of submission SEM-09-001 the proceedings of which Mexico gave notice appear to fit the NAAEC definition, it was not possible for the Secretariat to determine in all cases

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<sup>185</sup> NAAEC Article 1(h): "The objectives of this Agreement are to ... promote transparency and public participation in the development of environmental laws, regulations and policies;..."

<sup>186</sup> Guidelines, section 17.3: "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..."

<sup>187</sup> The Secretariat emphasizes that it has always analyzed Party responses in accordance with Article 14(3) and that "the commitment to the principle of transparency pervading the NAAEC [means that] the Secretariat 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 (*Lago de 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).

<sup>188</sup> SEM-04-002 (*Environmental Pollution in Hermosillo*), Article 14(2) Determination (27 January 2005), p. 9.

whether the pending proceeding in question had the potential to resolve the matter raised in the submission, since — in the majority of cases — it lacked information relating to the content of these proceedings.

75. In order to elucidate the importance of obtaining the information necessary to determine the matter to which pending proceedings relate, and hence the existence of possible interference or duplication of effort, it is indispensable to make reference to the concept of *lis pendens*.<sup>189</sup> There is *lis pendens* “[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different States...,”<sup>190</sup> i.e., “where a party brings an action before a court in a contracting state for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another contracting state.”<sup>191</sup>
76. In line with the Guidelines, the key aspect to consider in assessing whether or not to proceed further with a submission in the face of pending proceedings is whether the preparation of a factual record *could*, under the circumstances, represent a duplication of judicial or administrative effort. Mexico asserts that for the purpose of enforcing its law, it is carrying out acts coinciding with the measures listed in NAAEC Article 45(3)(a) and exercising acts of enforcement listed in NAAEC Article 5(1). In this situation, so the Party, if the Secretariat produces a factual record, it could unintentionally compromise or cause the reassignment of additional resources of a Party, or even interfere with the procedural strategies of the parties to a dispute. Thus, to determine whether there exists a risk of duplication, the Secretariat would necessarily need to obtain information about the matter at issue in the proceedings in question. Otherwise, the possibility exists that a submission could be terminated without presenting the required *reasons* why such decision was made.<sup>192</sup>
77. The response transcribes the factors that the Secretariat takes into consideration when applying Article 14(3), stating that the proceeding in question must relate to the same matter as the one raised in the submission.<sup>193</sup> Among the factors which the Secretariat must consider is then, *the matter* addressed by the submission. However, it is not possible to identify that factor in all cases covered by Mexico’s response, and in Appendix 1 thereto. The Secretariat proceeds to explain the reasons for this finding, yet subject to the confidentiality of such information indicated by the Party under the NAAEC.

[Confidential section from paragraph 78 to 90]

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<sup>189</sup> Cf. SEM-07-005 (*Drilling Waste in Cunduacán*), 8 April 2009, §23–4.

<sup>190</sup> Article 27 of the *Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*; *Official Journal of the European Union*, 21 December 2007. Emphasis added.

<sup>191</sup> *Gubisch Maschinenfabrik KG v. Giulio Palumbo*, Case C-144/86, Court of Justice of the European Communities (emphasis added).

<sup>192</sup> Cf. Guidelines, section 9.4.

<sup>193</sup> Response (confidential version), p. 4.

91. In view of the discussion in the preceding confidential section, the Secretariat finds that the Submitters' assertions concerning the alleged illegal importation of GMOs;<sup>207</sup> the alleged lack of measures to control and supervise seed storage, distribution, marketing, and import centers,<sup>208</sup> and the alleged failure by the Mexican authorities to put in place a permitting system for the planting of transgenic maize<sup>209</sup> cannot be reviewed because of the existence of relevant pending proceedings.<sup>210</sup>

**C. Consideration of the response with reference to NAAEC Article 45(1)(a)**

92. Mexico argues that since LBOGM Articles 112, 113, 114, 115, 119, and 120 and LGEEPA Articles 160, 161, 164, 165, 166, 170, 170 Bis, and 182 "refer to the reasonable exercise of the Party's discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters,"<sup>211</sup> their effective enforcement is not subject to review under the NAAEC.

93. NAAEC Article 45(1)(a) stipulates as follows:

1. For purposes of this Agreement:

A Party has not failed to "**effectively enforce its environmental law**" or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

(a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters;...

94. It must be clarified at the outset that pursuant to the NAAEC and the Guidelines, NAAEC Article 45(1) to which the Party refers is not on its face directly linked to the procedure set forth in NAAEC Articles 14 and 15, and the Secretariat does not at any stage make a determination or finding on whether a Party has "failed to effectively enforce its environmental law". Such a determination may be contemplated in procedures set out in Part V of the NAAEC, but there as well, it would not be the Secretariat making such a determination. The Secretariat may in a response from the Party further to NAAEC Article 14(3), appraise the Party's arguments to the effect that "there is no failure to effectively enforce"<sup>212</sup> and determine whether or not there is any "point in going forward."<sup>213</sup> The

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<sup>207</sup> Revised submission, p. 8 and Appendix 6, p. 5. Cf. LBOGM Articles 9 paragraph III and 18 paragraphs I, II, IV and V, and SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §20.

<sup>208</sup> Revised submission, Appendix 10, p. 4. Cf. LBOGM Article 18 paragraphs I, II, IV and V.

<sup>209</sup> Revised submission, p. 10 and Appendix 6, p. 2. Cf. LBOGM Article 13 paragraph III, 34, 42, 45, 46, 47, 48, and 49, and SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination (6 January 2010), §21.

<sup>210</sup> For the purposes of the Article 15(1) review, the Secretariat considered the information on effective enforcement presented by Mexico. In this regard, it was not certain that the files listed in the confidential version of the response in fact coincided with those of the annexes, since the numbering of the latter is confidential and is redacted in the copies Mexico provided to the Secretariat.

<sup>211</sup> Response, pp. 36–7, 39–40, 63.

<sup>212</sup> SEM-99-002 (*Migratory Birds*), Article 15(1) Notification (15 December 2000), pp. 14–15.

<sup>213</sup> *Ibid.*

Secretariat may, in light of a response from the Party, consider information reflecting the reasonable exercise of the Party's discretion, and NAAEC Article 45(1)(a) elucidates what such exercise may entail.<sup>214</sup>

**D. Consideration of Mexico's response to the Submitters' assertions pursuant to NAAEC Article 15(1)**

95. Having determined in accordance with NAAEC Article 14(3) that the proceedings invoked by Mexico in its response do not stand in the way of further review of certain assertions made in submission SEM-09-001, the Secretariat proceeded to consider whether, in light of Mexico's response, the submission warrants developing a factual record.
96. Mexico classified as confidential certain sections concerning measures taken by Mexico in relation to the Submitters' assertions. The Secretariat presents here its reasoning based on the information that Mexico made available to the public. Where this determination refers to confidential information, that fact is indicated accordingly, and the information in question is redacted.
- 1) Consideration of the alleged lack of measures to control and supervise seed storage, distribution, and marketing centers supplying the region's growers; the taking of measures to prevent the entry of GM maize seeds into Mexico, particularly those bound for the state of Chihuahua; the operation of safeguard mechanisms; the establishment of the special protection regime for maize; the determination of centers of origin and genetic diversity; the implementation of a permitting system for experimental planting, and the corresponding risk analysis and assessment**
97. As stated in the section above on pending proceedings, the Secretariat found that the assertion concerning the alleged lack of measures to control and supervise seed storage, distribution, and marketing centers supplying Chihuahua's growers coincides with a pending proceeding. The Secretariat will proceed no further with its consideration of this assertion.<sup>215</sup>
98. The Submitters assert that Mexico is failing to take measures to prevent the entry of GM maize into the country, and particularly into the state of Chihuahua. The LBOGM empowers the customs authority to take inspection measures at points of entry;<sup>216</sup> to inspect the

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<sup>214</sup> In this regard, in prior situations, the Secretariat has noted that factual records can be an adequate means of presenting information enabling the public to reach its own conclusions as to whether, as established by Article 45(1), a Party has exercised its discretion reasonably, such that there has been no failure to effectively enforce its environmental law. In all cases, information was available from the Party in question on environmental law enforcement measures taken. SEM-97-006 (*Oldman River II*), Article 15(1) Notification (19 July 1999), p. 22; SEM-99-002 (*Migratory Birds*), Article 15(1) Notification (15 December 2000), p. 13; SEM-05-003 (*Environmental Pollution in Hermosillo II*), Article 15(1) Notification (4 April 2007), p. 24.

<sup>215</sup> See paragraph 90 of this determination.

<sup>216</sup> LBOGM Article 18 paragraph I.

documentation of GMOs entering the country;<sup>217</sup> to notify other authorities where violations related to GMO imports are committed,<sup>218</sup> and to prohibit the entry of GMOs lacking the necessary authorization,<sup>219</sup> which is under a pending proceeding notified by Mexico summarized above.<sup>220</sup>

99. Mexico presents information relating to instructions given to Mexican customs administrators to monitor compliance with the LBOGM.<sup>221</sup>

[Confidential section at paragraph 100]

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<sup>217</sup> *Ibid.*, Article 18 paragraph II.

<sup>218</sup> *Ibid.*, Article 18 paragraph IV.

<sup>219</sup> *Ibid.*, Article 18 paragraph V.

<sup>220</sup> See paragraph 89 of this determination.

<sup>221</sup> Response, p. 57.

101. In light of Mexico's response to the assertion concerning the enforcement of LBOGM Article 18 paragraphs I, II, IV and VI and bearing in mind the pending proceedings notified by Mexico and given that the submission is no more specific on the alleged entry of GM maize into the territory of the Party in question, the Secretariat does not find it necessary to recommend a factual record in this regard.
102. The Submitters assert that safeguard mechanisms are not operating, that the special protection regime for maize has not been implemented, that centers of origin and genetic diversity have not been determined, and that the geographical distribution of the various species in question has not been identified.<sup>224</sup> They add that there is no permitting system for experimental planting of GM maize.<sup>225</sup>
103. LBOGM Articles 86, 87, and 88 establish the obligation to identify centers of origin and genetic diversity as well as to formulate criteria to be observed and restrictions on the release of GMOs at such sites. Meanwhile, LBOGM Articles 2 paragraphs VII and VIII, 13 paragraph III, 34, 36, 42, 45, 46, 47, 48, and 49 grant powers to Sagarpa to rule on permit applications and issue permits for GMO-related activities, as well as establishing the basis for the granting of authorizations. Likewise, they contain provisions applicable to the granting of permits for the experimental release of GMOs, including the conditions thereof and the criteria that applications must meet; the obligations arising in risk situations subsequent to granting of a permit; the obligation to report the results of an experimental release, and the cases in which a permit's period of validity may be limited, matters that in part are under a pending proceeding notified by Mexico.<sup>226</sup>
104. Mexico responds that it "has enacted the provisions making up the Special Protection Regime for Maize"<sup>227</sup> by means of an executive order amending, adding, and repealing various provisions of the LBOGM Regulation.<sup>228</sup> According to the Party, the revision of the LBOGM Regulation "establishes a sufficient legal basis for the immediate issuance of permits for the various phases of release of GM maize."<sup>229</sup> Mexico adds that the revision of the LBOGM Regulation has established requirements additional to those contemplated in LBOGM Article 16 for decision-making on permit applications for experimental release of GM maize<sup>230</sup> — in particular the requirement of the nonexistence of an alternative conventional variety — as well as a system for monitoring the effectiveness of measures set out in permits;<sup>231</sup> it prohibits experimentation with or release of GM maize whose characteristics prevent or limit its human or animal use or consumption;<sup>232</sup> it provides for the implementation of subsidy programs for conservation of native maize landraces and varieties

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<sup>224</sup> Revised submission, p. 10.

<sup>225</sup> *Ibid.*

<sup>226</sup> See paragraph 89 of this determination.

<sup>227</sup> Response, p. 42.

<sup>228</sup> *Ibid.*, p. 42. This order was published in the DOF on 6 March 2009.

<sup>229</sup> *Ibid.*, p. 47.

<sup>230</sup> LBOGM Regulation, Article 66.

<sup>231</sup> *Ibid.*, Article 68.

<sup>232</sup> *Ibid.*, Article 67.

and their wild relatives;<sup>233</sup> it provides for specific measures to monitor GM maize laboratories,<sup>234</sup> and it establishes measures to eliminate, control, and mitigate the illegal presence of GM maize.<sup>235</sup>

105. Mexico's response also provides information about the participation of one of the Submitters in the consultation process on the Regulatory Impact Statement (*Manifestación de Impacto Regulatorio—MIR*)<sup>236</sup> that ultimately gave rise to the order amending the LBOGM Regulation. The Party emphasizes that the observations made by the legal representative of Greenpeace México served as a basis for the incorporation of the special protection regime into the LBOGM Regulation.<sup>237</sup> The Party notes that it was during the public consultation process for the MIR that Sagarpa initiated the procedure leading to the issuance of the order amending the LBOGM Regulation, which provided for the establishment of a transitory permitting system for experimental releases of GM maize.<sup>238</sup> In referring to the order, the Federal Regulatory Improvement Commission (*Comisión Federal de Mejora Regulatoria—Cofemer*) stated that:

It represents a significant regulatory improvement given that this measure establishes a solid legal foundation affording greater legal certainty to private parties...<sup>239</sup>

106. In referring to special biosafety measures for maize, Cofemer noted that:

Mechanisms are established that will do more to decrease the loss of diversity in traditionally bred varieties.<sup>240</sup>

107. While the Submitters' assertions focus on the effective enforcement of provisions relating to the special maize regime, according to Mexico's response, such a regime was established by means of the revisions to the LBOGM Regulation, which affords a different enforcement framework from the one considered in submission SEM-09-001. The revised submission only makes the following reference: "on 6 March 2009, the 'Order amending, adding, and repealing various provisions of the LBOGM Regulation' was published in the DOF," but it does not include statements concerning the effective enforcement of this regulation.<sup>241</sup> Therefore, the review of these assertions can proceed no further. Likewise, the Secretariat is aware of a pending proceeding related to the GMO permit regime.

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<sup>233</sup> *Ibid.*, Article 70.

<sup>234</sup> *Ibid.*, Article 71.

<sup>235</sup> Response, pp. 45-6, 49.

<sup>236</sup> The regulatory impact statement contemplated in Article 69H of the Federal Administrative Procedure Act (*Ley Federal de Procedimiento Administrativo—LFPA*) is a mandatory prerequisite to the promulgation of a law, regulation, or provision of a general nature.

<sup>237</sup> Response, p. 45.

<sup>238</sup> *Ibid.*, p. 47.

<sup>239</sup> Response, Appendix 9: File no. COFEME/08/37/3768 of 11 December 2008, issued by the Sectoral Regulatory Improvement Coordinating Unit (*Coordinación General de Mejora Regulatoria Sectorial*) of Cofemer, p. 4.

<sup>240</sup> Response, p. 7.

<sup>241</sup> Revised submission, p. 3.

108. As the Secretariat has previously determined, the NAAEC does not bear upon failures to enact environmental law,<sup>242</sup> nor does it contemplate the possibility of addressing regulatory improvement matters through the citizen submission mechanism. Mexico's response shows that implementation of the special protection regime for maize and aspects related to it, such as experimental release, safeguard mechanisms, and the permitting system for experimental planting of GM maize took the form of amendments to the LBOGM Regulation. In light of Mexico's response and the existence of a new regime, and given the lack of more specific assertions, the Secretariat decides not to continue with the review of these assertions by the Submitters.<sup>243</sup>

**2) The alleged lack of timely response to complaints filed by the Submitters, with what is allegedly a delay in the application of justice and, correspondingly, an alleged systematic pattern of illegal planting of transgenic maize**

*a. Preliminary consideration of Mexico's response*

109. The Submitters assert that illegal planting of transgenic maize is taking place in the state of Chihuahua<sup>244</sup> and that they filed complaints with the PGR and Sagarpa without obtaining a satisfactory response.<sup>245</sup> They note that on 26 September 2007, representatives of the Submitters filed a complaint with the Sagarpa officer in Chihuahua — referred to Profepa for processing<sup>246</sup> — in which they requested an investigation of the impacts of transgenic seeds on various lots in the state of Chihuahua.<sup>247</sup> They state that on 3 October 2007, Greenpeace México filed a complaint with the PGR for the possible commission of the offense defined in CPF Article 420 Ter,<sup>248</sup> and that it appeared before the investigative arm of the public prosecutor's office on 25 October<sup>249</sup> and 1 November 2007,<sup>250</sup> as well as on 29 January,<sup>251</sup> 25 September,<sup>252</sup> and 21 November 2008.<sup>253</sup> They assert that, despite their

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<sup>242</sup> SEM-98-003 (*Great Lakes*), Article 14(1) Determination, p. 3.

<sup>243</sup> See paragraph 105 of this determination.

<sup>244</sup> Revised submission, p. 3.

<sup>245</sup> *Ibid.*, p. 5.

<sup>246</sup> *Ibid.*

<sup>247</sup> Revised submission, pp. 3–4 and Appendix 5: Letter to the governor of the state of Chihuahua, the Minister of Rural Development, and the Sagarpa official, dated 21 September 2007.

<sup>248</sup> Revised submission, p. 3 and Appendix 6: Complaint of 3 October 2007, filed by the Greenpeace México representative with UEIDAPLE. It is clarified that the complaint filed 29 September 2008 with the state office of the PGR (submission, p. 5) refers to the alleged commission of offenses “arising from the possible importation, distribution, and release for agricultural purposes and/or illegal planting of GM maize varieties in the state of Chihuahua.” For the reasons set out in paragraph 88, this assertion is not reviewed in this determination.

<sup>249</sup> Original submission, Appendix 6: Declaration by the Greenpeace México representative to UEIDAPLE, 25 October 2007.

<sup>250</sup> Original submission p. 4; Appendix 7: Declaration by the Greenpeace México representative to UEIDAPLE, 1 November 2007.

<sup>251</sup> Original submission, Appendix 8: Declaration by the Greenpeace México representative to UEIDAPLE, 29 January 2008.

complaints, they have not observed or been informed of any progress on the investigations.<sup>254</sup> The Submitters assert that there has been no timely response to their complaints in the state of Chihuahua, which allegedly demonstrates “delays in the operation of the justice system”<sup>255</sup> that have “given rise to failures of effective environmental law enforcement.”<sup>256</sup> Furthermore, the Submitters assert that a lack of action has given rise to “a systematic pattern of illegal planting of transgenic maize seeds.”<sup>257</sup>

110. Articles CPF 420 Ter, 421, and 422 establish penalties and safety measures as well as rules for their application to anyone introducing into or removing from the Party’s territory, marketing, transporting, storing, or releasing into the environment any GMO that alters or may negatively affect the components, structure, or functioning of natural ecosystems.

111. The revised version of the submission includes an appendix containing a recommendation of the National Human Rights Commission (*Comisión Nacional de los Derechos Humanos—CNDH*) referring to the necessity for the investigative and prosecutorial authorities to accomplish their tasks within a reasonable time.<sup>258</sup> This recommendation cites a decision of the Inter-American Court of Human Rights that reads in part:<sup>259</sup>

The right to access justice implies that the solution of the controversy be reached in a reasonable time;[<sup>260</sup>] a prolonged delay may constitute, in itself, a violation to the right to a fair trial.[<sup>261</sup>]

112. The CNDH recommendation elaborates on the arguments of the Inter-American Court of Human Rights<sup>262</sup> and stresses the importance of acting with diligence in the conduct

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<sup>252</sup> Original submission, Appendix 9: Declaration by the Greenpeace México representative to UEIDAPLE, 25 September 2008.

<sup>253</sup> Original submission, Appendix 9: Declaration by the Greenpeace México representative to UEIDAPLE, filed 21 November 2008 (the document is dated 30 September 2008).

<sup>254</sup> Revised submission, p. 6.

<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> *Ibid.*

<sup>258</sup> Revised submission, unnumbered appendix: General recommendation 16 in re time period for completing a criminal investigation, issued by the CNDH and published in the DOF on 4 June 2009.

<sup>259</sup> López Álvarez v. Honduras, decision of 1 February 2006, Inter-American Court of Human Rights, §128, online at <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_141\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_141_ing.pdf)> (viewed 15 September 2010). Footnotes from the original citation are indented and the footnote number is placed in brackets.

[<sup>260</sup>] Cf. *Case of Myrna Mack-Chang*. Judgment of September 25, 2003. Series C No. 101, para. 209; *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 114; and *Case of Hilaire, Constantine, and Benjamin et al.* Judgment of June 21, 2002. Series C No. 94, paras. 142 through 145.

[<sup>261</sup>] Cf. *Case of García-Asto and Ramírez-Rojas*, supra note 7, para. 166; *Case of Gómez-Palomino*, supra note 7, para. 85; *Case of the Moiwana Community*. Judgment of June 15, 2005. Series C No. 124, para. 160.

<sup>262</sup> “...[O]pportunity for protection ... may be useless, inefficient, or deceptive if it is not offered on time, in the understanding that ‘arriving on time’ means operating with maximum efficiency in the protection and minimum infringement of the individual’s rights, promptness that does not mean riding roughshod, rashness, or thoughtlessness. These stipulations take into consideration the concerns that preside the

of criminal investigations in which the outcome may affect legally protected interests. The recommendation suggests that:

Guidelines be issued in order to minimize the number of tasks that public prosecutors must carry out in order to substantiate the existence of an offense and assemble the evidence necessary to make probable the responsibility of the persons involved, so as to avoid a finding of *nolle prosequi* or the archiving of criminal investigations in respect of which not all lines of investigation have been exhausted.<sup>263</sup>

113. Mexico notes in its response that the Submitters do not cite any provision obligating the PGR to provide complainants with information concerning progress on an investigation,<sup>264</sup> in addition, it emphasizes the duty not to disclose information that could jeopardize ongoing criminal investigations.<sup>265</sup> The response refers, in this regard, to provisions requiring that information *not* be provided “*to the Submitters unless they are also defendants, their representatives, or victims...*”<sup>266</sup>

114. In light of Mexico’s response, it is critical to distinguish between i) the assertion concerning the Party’s alleged failure to give notice of progress on a criminal investigation, and ii) the alleged lack of timely response to complaints filed in relation to the matter raised in the submission.

115. The first of these does not warrant further review. The Secretariat clarified that the original submission did not cite provisions obligating the PGR to keep complainants informed of progress on an investigation and that if none were cited in a revised submission, this assertion would not be subject to review.<sup>267</sup> As to the second point, concerning timely response to complaints, the Secretariat finds it necessary to review the assertion concerning the alleged “delay” of over two years in processing complaints from the time they were filed with Sagarpa (and referred to Profepa) and with the PGR. In this regard, Mexico presents information in its response concerning enforcement measures that “do not ensue from any complaint, request, or information filed by the Submitters.”<sup>268</sup> The Secretariat finds that it is necessary to consider the matter of the alleged delays since it is relevant with respect to one of the central assertions in the submission: the alleged illegal cultivation of transgenic maize in the state of Chihuahua.

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aphorism ‘delayed justice is denied justice.’” Concurring Opinion of Judge Sergio García Ramírez in the Judgment of the Inter-American Court of Human Rights in the Case of López Álvarez v. Honduras of February 1, 2006, online at <[http://www.corteidh.or.cr/docs/casos/votos/vsc\\_garcia\\_141\\_ing.doc](http://www.corteidh.or.cr/docs/casos/votos/vsc_garcia_141_ing.doc)> (viewed 15 September 2010).

<sup>263</sup> Revised submission, unnumbered appendix: General recommendation 16 in re time period for completing a criminal investigation, issued by the CNDH and published in the DOF on 4 June 2009.

<sup>264</sup> Response, p. 4.

<sup>265</sup> Response, p. 4. Cf. PGR Act (*Ley Orgánica de la Procuraduría General de la República*), Article 5 paragraph IX.

<sup>266</sup> Response, p. 5, emphasis in original. Cf. CFPP Article 16.

<sup>267</sup> SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(1) Determination NAAEC (6 January 2010), §22. However, it appears that the Party in question did not consider that premise in its arguments. Cf. Response, p. 4.

<sup>268</sup> Response, p. 54.

*b. The alleged delay in taking measures to inspect sites where transgenic maize is allegedly being planted and in applying safety measures in such cases*

116. The Submitters assert that on 19 September 2008, Senasica “detected and scientifically confirmed the presence of genetically modified maize” in the rural development district of Valle de Cuauhtémoc, Chihuahua.<sup>269</sup> They further assert that despite the detection of this situation, and in spite of their complaints, the authorities “took no effective measures to stop this planting in the state of Chihuahua.”<sup>270</sup>
117. LGEEPA Articles 160, 161, 164, 165, and 166 establish the formalities for carrying out acts of inspection and surveillance. As to LBOGM Articles 9 paragraphs III and XV, 113, 114, 115, 117, 119, and 120 and CPF Article 420 Ter, these establish that the purpose of biosafety is to guarantee an adequate level of protection in the use of GMOs; they enumerate the forms of application of the LBOGM, including inspection and surveillance procedures; they provide for the acts of inspection necessary for enforcement of the LBOGM; they allow for the suppletive application of provisions of the Federal Administrative Procedure Act (*Ley Federal de Procedimiento Administrativo—LFPA*); they establish the rules applying to the performance of inspection visits; they establish safety and urgent enforcement measures, violations, and fines applicable to violations; they determine the measures to be taken in the event of accidental release of GMOs, as well as in those cases where a person commits administrative violations ensuing from GMO-related activities without the required authorization; and they establish administrative sanctions for violations of the LBOGM and penalize the illegal release of GMOs into the environment.
118. For their part, LGEEPA Articles 170, 170 Bis, 182, 189, 190, 191, 192, 193, and 198 establish safety measures in case of imminent risk of ecological instability or harm to or degradation of natural resources; they authorize Semarnat to file criminal complaints in connection with environmental offences; they establish a private right to file complaints of violations of environmental law, and they determine the formalities for processing of such complaints.
119. The following section is made up of information provided by Mexico and declared confidential under NAAEC Article 39(2).

[Confidential section from paragraph 120 to 139]

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<sup>269</sup> Revised submission, p. 5.

<sup>270</sup> *Ibid.*, p. 8.

140. Concerning the assertion of “delays” on the part of the authorities, the Secretariat notes that the legislation in question does not establish statutory deadlines and that neither the submission nor the response provides any further information in this respect. However, the Secretariat observes that the amount of time elapsed between the first complaint (*queja*) filed with Sagarpa, which was not formally a public complaint (*denuncia popular*), and the first inspection operation by Senasica, as well as the two operations carried out by Profepa, does not appear to be unreasonable or to have impeded the forensic work or the enforcement of the LBOGM.
141. From Mexico’s response it is evident that in those cases where violations of the LBOGM were substantiated, measures were taken as prescribed by the Party’s law. The foregoing appears to respond to the Submitters’ central concerns, and therefore the Secretariat does not recommend a factual record concerning those assertions.<sup>305</sup>

**3) The alleged lack of capacity to inspect and verify the presence of GM seeds in maize crops; the alleged lack of capacity to conduct adequate sampling, and the alleged lack of coordination among the authorities responsible for biosafety in Mexico**

142. The Submitters refer to a lack of capacity to inspect and verify the presence of GM seeds in maize crops.<sup>306</sup> They assert that Profepa inspectors lack the capacity to carry out proper sampling and that there is inadequate coordination with the specialized biosafety authorities.<sup>307</sup> They add that investigation by the PGR and Profepa was not timely, evidence gathering was deficient, and investigative and intelligence capacity was lacking. As a consequence of the alleged lack of technical and legal capacity, the Submitters assert, the investigations did not yield results,<sup>308</sup> nor was there any order of safety measures prescribed by law, such as closing of facilities or establishments, seizure, or neutralization, given the alleged risk of release of GMOs.<sup>309</sup>
143. LGEEPA Article 15 paragraph IX and LBOGM Articles 17 and 117 establish the importance of coordination among the authorities in order to ensure the effectiveness of ecological measures implemented. These provisions guide the authorities, within the scope of their jurisdiction, to coordinate their work in the case of accidental environmental release of GMOs. LBOGM Article 9 paragraph XIV, for its part, contains the principle of institutional capacity to avert the accidental release of GMOs. Elsewhere, LGEEPA Articles 201, 202,

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<sup>305</sup> It must be noted that the citizen submission mechanism does not investigate violations of environmental law but rather the alleged lack of effective enforcement thereof. This becomes relevant in cases where it is substantiated that the environmental law promulgated by the Party in question has in fact been violated.

<sup>306</sup> Submission, pp. 6, 10–11. Cf. LBOGM Articles 9 paragraph XV, 13 paragraphs VII and VIII, 112, 113, 114, and 115.

<sup>307</sup> Submission, pp. 5–6. Cf. LBOGM Articles 17, 18 paragraph IV, 66, and 86, and LGEEPA Article 15 paragraph IX.

<sup>308</sup> Submission., p. 6.

<sup>309</sup> Submission, p. 13. Cf. LBOGM Articles 115, 117, and 120; LGEEPA Articles 160, 161, 164, 165, 166, 170, 170 Bis, and 202, and CPF Article 421.

and 204 establish the obligation of public servants to provide Profepa with relevant information where they find themselves involved in matters within the latter's purview; they empower Profepa to bring actions before the judicial authorities where it takes cognizance of acts constituting violations of environmental law; they establish the responsibility to repair harm to the environment, and they define the concept of the technical report.

[Confidential section from paragraph 144 to 150]

151. In addition to the confidential information on measures taken by Mexico, the Party presents information on the implementation of the GMO inspection and surveillance strategy by Profepa with a view to monitoring compliance with the legal provisions applicable to the handling of GMOs.<sup>325</sup> The inspection and surveillance strategy includes targets in the area of training, permit verification, coordinated operations within protected natural areas, and response to contingencies and complaints.<sup>326</sup> Training targets include training for two employees of each Semarnat state office; implementation of online courses, and national-level accreditation for GMO inspectors.<sup>327</sup> As to interinstitutional coordination, the strategy provides for interaction among agencies under Semarnat, i.e., Conanp, Conabio, the Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*), and Profepa, as well as with other institutions through Cibiogem.<sup>328</sup> In addition, the strategy provides for the identification of priority regions for support with regard to teosinte species in the Cerro de Mohinora and the municipalities of Guadalupe and Calvo,<sup>329</sup> and for native maize species in the regions of Campo Verde, Basaseachic Falls, Tutuaca, Sierra Tarahumara, Cerro de Mohinora, and Papigochic, all in the state of Chihuahua.<sup>330</sup>
152. Among the documents annexed to the response, the Secretariat notes documents indicating the appointment and training of inspectors as well as the taking of specific coordination measures among Sagarpa, Senasica, Profepa, INE, Conanp, Cofepris, and the PGR. In addition, the acts of enforcement described in paragraphs 120 to 139 reveal that inspection, verification, and sampling were carried out on lots located in the state of Chihuahua. The foregoing appears to respond to the Submitters' concern regarding the alleged lack of capacity on the part of the authorities to enforce the environmental law in question. Therefore, the Secretariat finds that it should terminate the review of the Submitters' assertions in this regard.

#### IV. DETERMINATION

153. The Secretariat has reviewed submission SEM-09-001 (*Transgenic Maize in Chihuahua*), filed by Frente Democrático Campesino, El Barzón, A.C., Centro de Derechos Humanos de las Mujeres, A.C., and Greenpeace México, A.C. in accordance with NAAEC Articles 14 and 15.
154. In light of the Party response, the Secretariat finds that the enforcement measures taken by Mexico appear to respond to the central assertions in *Transgenic Maize in Chihuahua* and notes that they correspond to various government enforcement action

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<sup>325</sup> Response, p. 55.

<sup>326</sup> Response, Appendix 17: "GMO inspection and surveillance strategy," p. 4.

<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid.*, pp. 1–4.

<sup>329</sup> *Ibid.*, p. 14.

<sup>330</sup> *Ibid.*, p. 16.

listed in NAAEC Article 5(1), such as appointing and training inspectors,<sup>331</sup> initiating administrative proceedings to seek sanctions;<sup>332</sup> seizing the product in question,<sup>333</sup> and issuing administrative orders.<sup>334</sup>

155. In accordance with NAAEC Article 15(1) and section 9.6 of the Guidelines, the Secretariat concludes that submission SEM-09-001 (*Transgenic Maize in Chihuahua*) does not warrant the preparation of a factual record.

156. In the spirit of transparency pervading the NAAEC<sup>335</sup> and given the importance of disclosing the reasons to arrive at a recommendation not to prepare a factual record in regard to submission SEM-09-001, the Secretariat invites the Party in question to consider summarizing for the public, information cited in the confidential sections of this determination.

157. In accordance with NAAEC Article 39(2),<sup>336</sup> the Secretariat sends the complete version of this determination containing confidential information only to the government of Mexico.

Respectfully submitted for your consideration,

**Secretariat of the Commission for Environmental Cooperation**

(*signature in original*)  
per: Evan Lloyd  
Executive Director

cc: Mr. Enrique Lendo, Alternate Representative for Mexico  
Mr. David McGovern, Alternate Representative for Canada  
Ms. Michelle DePass, Alternate Representative for the United States  
Submitters

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<sup>331</sup> NAAEC Article 5(1)(a).

<sup>332</sup> *Ibid.*, Article 5(1)(j).

<sup>333</sup> *Ibid.*, Article 5(1)(k).

<sup>334</sup> *Ibid.*, Article 5(1)(l).

<sup>335</sup> *Ibid.*, Article 1(h).

<sup>336</sup> NAAEC Article 39(2): “If a Party provides confidential or proprietary information to another Party, the Council, the Secretariat or the Joint Public Advisory Committee, the recipient shall treat the information on the same basis as the Party providing the information.”