
Secretariat of the Commission for Environmental Cooperation

Article 15(1) Notification to Council that preparation of a factual record is warranted

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Party: United Mexican States
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Wetlands in Manzanillo –
Article 15(1) Notification

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I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (“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). When the Secretariat finds that a submission meets these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the concerned Party, and in accordance with NAAEC, 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 Article 15(1). Where the Secretariat decides to the contrary, or where certain circumstances prevail, it then proceeds no further with the submission.¹
2. On 4 February 2009, Bios Iguana, A.C., represented by Gabriel Martínez Campos, and Esperanza Salazar Zenil (the “Submitters”) filed submission SEM-09-002 (Wetlands in Manzanillo) with the Secretariat pursuant to NAAEC Article 14(1).²
3. The Submitters assert that the Mexican authorities are failing to effectively enforce Article 4 of the Political Constitution of the United Mexican States (Constitución Política de los Estados Unidos Mexicanos; the “Federal Constitution”);³ Articles 1, 2, 3, and 4 of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (the “**Ramsar Convention**”);⁴ Articles 20 *bis* 2, 30, 35, and 35 *bis* of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*);⁵ Article 60 *ter* of the General Wildlife Act (*Ley General de Vida Silvestre—LGVS*);⁶ Article 32 *bis* of the Federal Public Administration Act (*Ley Orgánica de la Administración Pública Federal—LOAPF*);⁷ Article 60 of the Federal Administrative Procedure Act (*Ley Federal de Procedimiento Administrativo—LFPA*);⁸ Articles 2, 4 paragraph IV, 13 paragraph III, 22, and 46 of the Regulation to the LGEEPA respecting Environmental Impact

¹ Full details regarding the various stages of the process as well as previous Secretariat determinations and factual records can be found on the CEC website at <<http://www.cec.org/citizen/>> (viewed 15 August 2011).

² SEM-09-002 (Wetlands in Manzanillo) original submission pursuant to Article 14(1) (2 February 2009) <<http://goo.gl/EvCCm>> (viewed on 5 June 2012) [Original submission].

³ Original submission, *supra* note 2, pp. 1, 14; revised submission, *infra* note 19, pp. 1, 15. Cf. Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*), published in the Official Gazette of the Mexican Federation (DOF) on 5 February 1917.

⁴ Original submission, *supra* note 2, pp. 1, 14. Cf. *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, Executive Order published in the DOF on 29 August 1986.

⁵ Original submission, *supra* note 2, pp. 1, 8, 10, 12–13; revised submission, *infra* note 19, pp. 1, 15. Cf. General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*), published in the DOF on 28 January 1988.

⁶ Original submission, *supra* note 2, pp. 1, 11; revised submission, *infra* note 19, pp. 1, 12. Cf. General Wildlife Act (*Ley General de Vida Silvestre—LGVS*) published in the DOF on 3 July 2000.

⁷ Original submission, *supra* note 2, p. 1; revised submission, *infra* note 19, pp. 1, 8. Cf. Federal Public Administration Act (*Ley Orgánica de la Administración Pública Federal*), published in the DOF on 29 December 1976.

⁸ Original submission, *supra* note 2, pp. 1, 13. Cf. Federal Administrative Procedure Act (*Ley Federal de Procedimiento Administrativo*), published in the DOF on 4 August 1994.

Assessment (*Reglamento de la LGEEPA en materia de Evaluación del Impacto Ambiental—REIA*);⁹ Articles 6, 7 paragraph I, 8, 10, 13, 14, 36, 48, 49, and 50 of the Regulation to the LGEEPA respecting Environmental Land Use Planning (*Reglamento de la LGEEPA en materia de Ordenamiento Ecológico—ROE*);¹⁰ Articles 1 paragraph VII and 40 of the Environment Act for Sustainable Development of the State of Colima (*Ley Ambiental para el Desarrollo Sustentable del Estado de Colima—LADSEC*);¹¹ Articles 48 and 66 of the Human Settlements Act of the State of Colima (*Ley de Asentamientos Humanos del Estado de Colima—LAHEC*);¹² NOM-022-SEMARNAT-2003, *Establishing the specifications for the preservation, conservation, sustainable use, and restoration of coastal wetlands in mangrove areas* (“**NOM-022**”);¹³ and NOM-059-SEMARNAT-2001, *Environmental protection - Native species of Mexican wild flora and fauna - Risk classes and specifications for their inclusion, exclusion, or change - List of species at risk* (“**NOM-059**”).¹⁴

4. In addition, the Submitters assert that the following constitute environmental law not being effectively enforced by the Party in question: the Regional Environmental Land Use Plan for the Cuyutlán Lagoon Subwatershed (the “**Regional Environmental Land Use Plan**” or *PROETSLC*);¹⁵ the Manzanillo Urban Development Plan (*Programa de Desarrollo Urbano de Manzanillo—PDUM*),¹⁶ and the Coordination Agreement to Support the Formulation, Issuance, and Implementation of the Regional Environmental Land Use Plan for the Cuyutlán Lagoon (the “**Coordination Agreement**”).¹⁷

⁹ Original submission, *supra* note 2, pp. 1, 10–13; revised submission, *infra* note 19, pp. 1, 6, 9, 11–13. Cf. Regulation to the LGEEPA respecting Environmental Impact Assessment (*Reglamento de la LGEEPA en materia de Evaluación del Impacto Ambiental—REIA*), published in the DOF on 30 May 2000.

¹⁰ Original submission, *supra* note 2, pp. 1, 6; revised submission, *infra* note 19, pp. 1, 5–6. Cf. Regulation to the LGEEPA respecting Environmental Land Use Planning (*Reglamento de la LGEEPA en materia de Ordenamiento Ecológico—ROE*), published in the DOF on 8 August 2003.

¹¹ Original submission, *supra* note 2, pp. 1, 5–7, 9; revised submission, *infra* note 19, pp. 1, 6, 8. Cf. Environment Act for Sustainable Development of the State of Colima (*Ley Ambiental para el Desarrollo Sustentable del Estado de Colima—LADSEC*), published in the Official Gazette *El Estado de Colima* of the Constitutional Government of Colima (the “*Gazette El Estado de Colima*”), and the DOF on 15 June 2002.

¹² Original submission, *supra* note 2, p. 9; revised submission, *infra* note 19, p. 8. Cf. Human Settlements Act of the State of Colima (*Ley de Asentamientos Humanos del Estado de Colima*), published in the Gazette *El Estado de Colima* on 7 May 1994.

¹³ Original submission, *supra* note 2, pp. 1, 10–12; revised submission, *infra* note 19, pp. 1, 9–12, 15. Cf. NOM-022-SEMARNAT-2003, *Establishing the specifications for the preservation, conservation, sustainable use, and restoration of coastal wetlands in mangrove areas* (“**NOM-022**”), published in the DOF on 10 April 2003.

¹⁴ Original submission, *supra* note 2, pp. 1, 3–4, 10; revised submission, *infra* note 19, pp. 1, 3, 9, 14. Cf. NOM-059-SEMARNAT-2001, *Environmental protection - Native species of Mexican wild flora and fauna - Risk classes and specifications for their inclusion, exclusion, or change - List of species at risk*, published in the DOF on 6 March 2002.

¹⁵ Original submission, *supra* note 2, pp. 2, 5–6, 11; revised submission, *infra* note 19, pp. 1, 4–7, 11. Cf. Regional Environmental Land Use Plan for the Cuyutlán Lagoon Subwatershed (PROETSLC), published in the Gazette *El Estado de Colima* on 5 July 2003. The Executive order revising the PROETSLC was published in the Gazette *El Estado de Colima* on 3 May 2007.

¹⁶ Original submission, *supra* note 2, pp. 2, 6, 8; revised submission, *infra* note 19, pp. 4, 7–8. Cf. Manzanillo Urban Development Plan (PDUM), published in the Gazette *El Estado de Colima* on 4 November 2000. The Decision amending the PDUM was published in the Gazette *El Estado de Colima* on 12 June 2004.

¹⁷ Original submission, *supra* note 2, pp. 1, 4–6; revised submission, *infra* note 19, pp. 1, 3–6. Cf. Coordination Agreement to Support the Formulation, Issuance, and Implementation of the Regional

5. The Submitters assert that Mexico is failing to effectively enforce its environmental law in respect of the environmental impact assessment and authorization for the projects titled “Port Terminal for Receiving, Storage, and Distribution of LPG in the Western Zone” (*Terminal Portuaria de Recibo, Almacenamiento y Distribución de Gas LP en la Zona de Occidente*; the “**Manzanillo LPG Project**”), and the Manzanillo Liquefied Natural Gas Terminal (*Terminal de Gas Natural Licuado de Manzanillo*; the “**Manzanillo LNG Project**”) (together, the “**Projects**”), which, they assert, will affect water flow, flora and fauna in the area of the Cuyutlán Lagoon, located in the state of Colima. In addition, they maintain that the PROETSLC and the PDUM for that region were amended in violation of the environmental law cited in the submission.
6. On 9 October 2009, the Secretariat determined that certain assertions in the submission (the “**original submission**”) did not meet the requirements of Article 14(1)(c) and (e). On the basis of section 6.2 of the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “**Guidelines**”), the Secretariat notified the Submitters that they had 30 days to revise their submission.¹⁸ On 2 November 2009, the Submitters filed a revised version of the submission (the “**revised submission**”) with the Secretariat in accordance with NAAEC Article 14(1).¹⁹
7. On 13 August 2010, the Secretariat determined that the revised submission met the NAAEC Article 14(1) requirements, and requested a response from the Party pursuant to NAAEC Article 14(2),²⁰ which was received by the Secretariat on 14 October 2010.²¹
8. Further to the analysis of the revised submission in light of Mexico’s response, the Secretariat hereby determines pursuant to NAAEC Article 15(1) that submission SEM-09-002 (*Wetlands in Manzanillo*) warrants the preparation of a factual record. In this notification, and in accordance with section 10.1 of the Guidelines, the Secretariat explains below the reasons for its recommendation.

II. SUMMARY OF THE SUBMISSION

A. The original submission

9. The Submitters assert that the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*—**Semarnat**), the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—*Profepa*), the Office of the Attorney General of the Republic (*Procuraduría General de la República*—**PGR**), the government of the state of Colima, the Ministry of Urban Development and Environment of the state of Colima, the Office of the Attorney General of the State of Colima (*Procuraduría General de Justicia del Estado de Colima*) and the municipalities of Manzanillo and Armería are failing to effectively enforce the

Environmental Land Use Plan for the Cuyutlán Lagoon in the State of Colima, signed on 16 August 2000 [Coordination Agreement].

¹⁸ SEM-09-002 (*Wetlands in Manzanillo*) Determination pursuant to Article 14(1) (9 October 2009), <<http://goo.gl/5cPzU>> (viewed on 19 August 2013) [Article 14(1) Determination].

¹⁹ SEM-09-002 (*Wetlands in Manzanillo*) Revised submission pursuant to Article 14(1) (2 November 2009) <<http://goo.gl/ne5to>> (viewed on 4 June 2012) [Revised submission].

²⁰ SEM-09-002 (*Wetlands in Manzanillo*) Determination pursuant to Article 14(1)(2) (13 August 2010), <<http://goo.gl/VT1LR>> (viewed on 19 August 2013) [Article 14(1)(2) Determination].

²¹ SEM-09-002 (*Wetlands in Manzanillo*) Response pursuant to Article 14(3) (14 October 2010) <<http://goo.gl/8EEK4>> [Response].

environmental law applicable to the environmental management of the Cuyutlán Lagoon. The Submitters further assert that the Universidad de Colima, the Council of Mineral Resources (*Consejo de Recursos Minerales*; now the Mexican Geological Service (*Servicio Geológico Mexicano*)) and the Federal Electricity Commission (*Comisión Federal de Electricidad*—CFE) are all responsible for enforcing the environmental law in question.²²

10. The Submitters note that the Cuyutlán Lagoon represents the fourth largest coastal wetland in the country, with 1,500 hectares of mangrove area; considered by the National Biodiversity Commission (*Comisión Nacional de Uso y Aprovechamiento de la Biodiversidad*—Conabio) as a priority region for mangrove conservation.²³ They further state that this zone harbors 327 species of birds of which two are listed in NOM-059 as threatened and fifteen are classified as having special protection status.²⁴
11. The Submitters assert the existence of irregularities in the issuance of environmental impact authorizations (*autorización de impacto ambiental*—AIA) for two projects to build and operate works of infrastructure in the Cuyutlán Lagoon:²⁵ the authorization of the Manzanillo LPG Project (the “AIA-LPG”)²⁶ and the authorization of the Manzanillo LNG Project (the “AIA-LNG”).²⁷
12. The information annexed to the original submission indicates that the Manzanillo LPG Project developed by the company Zeta Gas del Pacífico, S.A. de C.V. (“Zeta Gas”) comprises the construction and operation of a port terminal for storage and distribution of liquefied petroleum gas (LPG) and propane gas.²⁸ The project includes 16 LPG spherical storage tanks and four propane gas tanks with a capacity of 43,380 barrels each.²⁹ According to information in the submission, the plant is designed to receive a total of 45,000 tons/month (559,325.89 barrels/month) of LPG and to distribute the equivalent of 10,000 barrels/day, sufficient to supply LPG in Manzanillo and neighboring municipalities.³⁰
13. As regards the Manzanillo LNG Project, the *original* submission and its appendices indicate that it is being developed by the CFE and comprises the construction of a

²² Original submission, *supra* note 2, p. 2.

²³ *Ibid.*, p. 3.

²⁴ *Ibid.*, pp. 3–4.

²⁵ *Ibid.*, pp. 7–9.

²⁶ Original submission, *supra* note 2, Appendix 8 (now 9): Environmental Impact and Risk Authorization (*autorización de impacto ambiental*—AIA) for the project titled “LP Gas Supply Plant in the Municipality of Manzanillo, Colima” (*Planta de Suministro de Gas L.P. en el municipio de Manzanillo, Colima*) is contained in Doc. no. S.G.P.A./DGIRA/DEI.-1443.04 (23 June 2004), issued by the Environmental Impact and Risk Branch (Dirección General de Impacto y Riesgo Ambiental—DGIRA) to Zeta Gas del Pacífico, S.A. de C.V. [AIA-LPG].

²⁷ Original submission, *supra* note 2, Appendix 10 (now 11): Environmental Impact and Risk Authorization for the project titled “Manzanillo Liquefied Natural Gas Terminal” (*Terminal de Gas Natural Licuado Manzanillo*) contained in Doc. no. S.G.P.A./DGIRA/DG.0465.08 (11 February 2008), issued by DGIRA to the CFE [AIA-LNG].

²⁸ Original submission, *supra* note 2, Appendix 7 (now 8): Executive summary, Environmental Impact Statement, regional form, for the Manzanillo LPG Project.

²⁹ Original submission, *supra* note 2, p. 7.

³⁰ Original submission, *supra* note 2, pp. 7–8, and Appendix 7 (now 8): Environmental Impact Statement, regional form, for the Manzanillo LPG Project, filed before DGIRA on 24 February 2004 [EIS-LPG].

receiving, storage, and regasification terminal for liquefied natural gas (LNG).³¹ The Manzanillo LNG Project plans to build and operate three LNG storage tanks of 165,000 m³ each and a regasification capacity of 1 billion ft³ of natural gas per day, according to the submission.³² The submission states that the Manzanillo LNG Project will supply natural gas to the Manzanillo Thermal Power Complex and to the thermal power plants in the central-western part of the country.³³

14. The Submitters assert that during the environmental impact assessment process for both Projects, the Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*—**DGIRA**) of Semarnat failed to conduct an analysis in accordance with the applicable environmental law, yet – according to the Submitters – improperly issued environmental impact authorizations for both Projects.³⁴ The Submitters assert in particular that: i) deficiencies in the environmental impact statements (**EIS**) for the Projects were not penalized;³⁵ ii) compliance with the Manzanillo LPG Project with the PROETSLC was not assessed;³⁶ iii) compliance of both Projects with Mexican law and Mexican official standards (**NOM**) in relation to the observance of the levels of protection established for wetlands and protected species in the Cuyutlán Lagoon was not assessed;³⁷ iv) deadlines and conditions established for the environmental impact assessment process of the Manzanillo LNG Project were not complied with,³⁸ and v) violation of the conditions set out in the AIA-LNG was not penalized.³⁹
15. In addition, the Submitters assert that prior to authorizing the Manzanillo LPG Project, the local authorities amended the PDUM, changing the zoning of the site from “ecotourism” to “heavy industry,” which, the Submitters allege, constitutes a violation of the environmental criteria of the PROETSLC.⁴⁰ Similarly, they assert that prior to the authorization of the Manzanillo LNG Project, the government of the state of Colima illegally amended the PROETSLC in order to adapt it to the requirements of the project.⁴¹ The Submitters maintain that an environmental registry was not implemented as part of the amendment of the PROETSLC in order to record progress on the environmental land-use planning process.⁴²

B. The revised submission

16. In response to the Secretariat’s determination of 9 October 2009, on 2 November 2009 the Submitters filed a revised version of their submission in which, in addition to assertions found in the original submission, they made clarifications regarding certain facts and aspects of the environmental law in question, which are summarized below.

³¹ Original submission, *supra* note 2, Appendix 10 (now 11): Executive summary, Environmental Impact Statement, regional form, for the Manzanillo LNG Project filed before DGIRA on 11 November 2006 [EIS-LNG].

³² Original submission, *supra* note 2, p. 9.

³³ EIS-LNG, *supra* note 33.

³⁴ Original submission, *supra* note 2, p. 2.

³⁵ *Ibid.*, pp. 8–13.

³⁶ *Ibid.*, p. 6.

³⁷ *Ibid.*, p. 11.

³⁸ *Ibid.*, p. 12.

³⁹ *Ibid.*, p. 14.

⁴⁰ *Ibid.*, p. 6.

⁴¹ *Ibid.*, pp. 5–7.

⁴² *Ibid.*

17. With regards to the environmental law cited in the submission, the Submitters make clarifications regarding the citation of REIA Article 2 and LADSEC Article 1 paragraph VII,⁴³ and state that the Coordination Agreement is an agreement signed under LGEEPA Article 20 *bis* 2 and ROE Articles 7 paragraph I, 8, and 10.⁴⁴ The Submitters affirm that, pursuant to ROE Article 10, coordination agreements are public law and are binding on the parties entering into them; therefore, according to the Submitters, the Coordination Agreement is clearly enforceable on Semarnat, and DGIRA should have verified its compliance status when conducting the environmental assessment of the Projects.⁴⁵
18. The Submitters specify that in 2008 the Cuyutlán Lagoon was identified by Conabio as a mangrove ecosystem of biological relevance, requiring ecological rehabilitation,⁴⁶ and that Semarnat, in a document of September 2008, placed the Cuyutlán Lagoon at number 12 on the list of priority wetlands for shorebirds and winter bird counts.⁴⁷
19. Concerning the assertion relating to the amendment of the PDUM, the Submitters maintain that the government of Colima, in allowing the amendment of the PDUM, improperly validated the construction and operation of the Manzanillo LPG Project.⁴⁸
20. In relation to the Secretariat's observation that the LADSEC is applicable with respect to the authorities of the state of Colima and not to the federal authorities, the Submitters argue that since the provision in question is a law relating to natural resources and the environment, it is applicable to Semarnat by virtue of the powers vested in it under LOAPF Article 32 *bis*.⁴⁹
21. Concerning the assertion of an alleged failure by Semarnat to require compliance with applicable requirements to the Environmental Impact Statement of the Manzanillo LNG Project ("EIS-LNG"), the Submitters relate that on 2 February 2007, subsequent to the filing of the environmental impact application with DGIRA, the authority requested the developer (the CFE) to provide information about the consistency of the project with NOM-022, demanding "scientific and technical evidence"⁵⁰ to demonstrate that the work on the Manzanillo LNG Project "preserves the level of water flow required to maintain or improve the existing hydrodynamic in the various basins of the Cuyutlán Lagoon."⁵¹
22. The Submitters provide information on a request for information issued by DGIRA on 4 October 2007 in which DGIRA specifies the following:

... complement the information relating to the exchange of seawater volumes that will enter the entire system and the direct impact that this will have on the potential variations in the average level of the Lagoon and, collaterally, on the various plant communities (particularly mangrove communities) and animal

⁴³ The above seek to answer a note from the Secretariat regarding deficiencies in the original submission. See: Article 14(1) Determination, *supra* note 18 §21 and Revised submission, *supra* note 19, p. 6.

⁴⁴ Revised submission, *supra* note 19, pp. 5-6.

⁴⁵ *Ibid.*, p. 6.

⁴⁶ *Ibid.*, p. 3, and Conabio, *Sitios de manglar con relevancia biológica y con necesidades de rehabilitación ecológica*, Comisión Nacional para el Conocimiento y Uso de la Biodiversidad, 2009, online at <<http://goo.gl/YutGR>> (viewed 8 August 2011).

⁴⁷ Revised submission, *supra* note 19, p. 3.

⁴⁸ *Ibid.*, p. 4.

⁴⁹ *Ibid.*, p. 8.

⁵⁰ *Ibid.*, p. 10.

⁵¹ *Ibid.*, p. 11.

communities living in it, indicating compellingly the manner in which current conditions will be improved and specifying how this could occur.⁵²

23. On 11 February 2008 DGIRA authorized the Manzanillo LNG Project conditional, *inter alia*, to the submission of a hydrodynamic study “comprehensively demonstrating the manner in which the water flow will impact the four basins of the Lagoon through the opening of the Tepalcates Canal.”⁵³
24. The Submitters maintain with regard to the Manzanillo LNG Project that DGIRA “never obtained the studies necessary to carry out its assessment.”⁵⁴ They argue that DGIRA should have required a study – which it did indeed request – to be submitted before authorizing the Project.⁵⁵ They maintain that in order to assess the environmental impact of the Manzanillo LNG Project, it was necessary to know the hydrodynamics of the site in question, since that determines the viability of any coastal wetland.⁵⁶ The Submitters refer to NOM-022 in order to demonstrate the relationship between hydrodynamics and the conservation of coastal wetlands, and support their assertion regarding the alteration of hydrodynamics caused by the construction of such infrastructure in natural watercourses.⁵⁷
25. The Submitters maintain that the hydrodynamic study is “the most important study needed to determine the impact on the Cuyutlán Lagoon caused by alteration of water flows” and that it had still not been performed six months after the environmental impact authorization for the Manzanillo LNG Project was issued.⁵⁸ They maintain that a total of 16 conditions identified by Semarnat in a document dated 28 May 2008 have not been complied with, including the one requiring the hydrodynamic study to be performed. The Submitters specify that the CFE began work on the Manzanillo LNG Project on 15 June 2008 – as attested by the First Semiannual Administrative Report (*Primer Informe Administrativo Semestral*) of the CFE dated 6 August 2008 – without the compulsory conditions for the performance of the work having been met.⁵⁹
26. The Submitters reiterate that the Universidad de Colima and the CFE were in charge of producing the environmental impact statement for the EIS-LNG, and that it was therefore their responsibility to assess the environmental impact and to establish the relationship between the Project and the various relevant legal provisions.⁶⁰
27. Concerning the status of the LPG Project, the Submitters note that its construction began in September 2004 and that, while the Project has already entered its operational phase, the construction phase has not been fully completed.⁶¹ The appendices provide photos of the construction of the spherical storage tanks that the Submitters assert affected the habitat of various species listed in NOM-059. According to the Submitters, the project is considering the installation of a 327-km gas pipeline that will pass through

⁵² *Ibid.*, p. 10.

⁵³ *Ibid.*, p. 11.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, p. 10.

⁵⁷ *Ibid.*, pp. 10–11.

⁵⁸ *Ibid.*, p. 14

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, p. 15.

⁶¹ *Ibid.*, p. 14.

- 25 communities of Colima and Jalisco, which, they assert, will affect two wetlands of high biological value.⁶²
28. Concerning the status of the Manzanillo LNG Project, the Submitters state that the construction phase began in June 2008 with the clearing of vegetation and the filling of the lagoon in an area of approximately 4 hectares, starting from one edge of the mangrove area in the Cuyutlán Lagoon.⁶³ They assert that this “has caused severe harm to species of fish, crustaceans, and mollusks as well as the benthos, with a considerable impact on inshore fishing, added to the irreversible alteration of water flow with concomitant damage to the entire wetland.”⁶⁴ According to the Submitters, the project is considering opening the Tepalcates Canal and dredging both the canal and the lagoon to a depth of 16 m, which they assert would modify water flow and salinity, affecting the mangrove ecosystem.⁶⁵
29. The revised submission mentions various administrative and judicial proceedings that were not identified in the original version, and attaches copies of correspondence with the authorities concerning the alleged failures of enforcement related to the LPG Project.⁶⁶ The Submitters state that an administrative appeal (*recurso de revisión*) was filed with Semarnat against the AIA-LPG and, subsequent to an *amparo* action, was decided on 10 June 2009 in favor of the authority.⁶⁷ The Submitters also present information about the response of the competent authorities to a letter relating to both Projects.⁶⁸
30. Concerning the assertion that the Universidad de Colima, the Mexican Geological Service, and the CFE should have been considered as authorities responsible for the enforcement of the environmental law in question, the Submitters no longer refer to the Mexican Geological Service in the revised submission, although they do maintain that the Universidad de Colima and the CFE are failing to enforce the environmental law since they were in charge of producing the EIS for each of the Projects.⁶⁹

III. SUMMARY OF THE RESPONSE

31. Mexico filed its response to submission SEM-09-003 on 11 October 2010. The response alleges that the submission is inadmissible; gives notice of the existence of pending proceedings in Mexico, and presents information in response to the Submitters’ assertions.

A. Preliminary issues

32. Mexico states that on the basis of NAAEC Article 14(3)(a), the Secretariat should proceed no further with the processing of the submission since the matter is the subject of an ongoing criminal investigation, a pending administrative proceeding, and a

⁶² *Ibid.*

⁶³ *Ibid.*, p. 14.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, pp. 14–15.

⁶⁶ *Ibid.*, pp. 13–14.

⁶⁷ *Ibid.*, p. 14.

⁶⁸ Revised submission, *supra* note 19, Appendix 20: Office of the Deputy Minister of Management for Environmental Protection doc. no. S.G.P.A./DGIRA/DDT/1495/05 (9 December 2005).

⁶⁹ Revised submission, *supra* note 19, pp. 2, 16.

pending judicial proceeding, which, it asserts, deal with the same issues raised in the submission.⁷⁰ Mexico requests that the Secretariat maintain the information relating to these proceedings as confidential.⁷¹

33. Mexico maintains that certain assertions in the revised submission do not meet the requirements of the first paragraph of NAAEC Article 14(1) since they deal with failures to enforce provisions that are allegedly not environmental law in the sense of NAAEC Article 45(2). In particular, the Party asserts that the Submitters did not demonstrate that the primary purpose of the Coordination Agreement is the protection of the environment or the prevention of a danger to human life or health, and that its effective enforcement by Mexico is a matter that should not be reviewed by the Secretariat.⁷² Concerning LAHEC Article 48 paragraph I, Mexico asserts that this provision only mentions one environmental policy instrument along with other planning instruments the consistency of which must be analyzed, and that it is not therefore a provision of environmental nature.⁷³ The Party states that the same situation prevails in regard to the PDUM, which cannot be considered environmental law because the incorporation of environmental protection criteria is only a part of its objectives and not the primary purpose.⁷⁴ Regarding REIA Article 4 paragraph IV, the Party maintains that it cannot be considered environmental law since it is a jurisdictional provision and not substantive in the sense of protecting the environment or preventing a danger to health as required by NAAEC Article 45(2).⁷⁵ Finally, in regard to REIA Articles 22 and 46, LGEEPA Article 35 bis, and LFPA Article 60, the Party is of the view that they do not have the protection of the environment, but rather the establishment of procedures, deadlines, and relevant sanctions within the framework of an environmental impact assessment process, as their primary purpose.⁷⁶
34. Mexico also maintains that the revised submission still fails to meet the requirement of NAAEC Article 14(1)(c) because it does not provide sufficient information to allow the Secretariat to review it. In particular, the Party asserts that the revised submission: i) does not indicate the degree to which the Ramsar Convention is related to the assertions in the submission;⁷⁷ ii) does not explain why the ROE – a federal regulation – should be applicable to the environmental land-use planning process under the LADSEC, a state-level instrument; iii) only cites Article 1 paragraph VII of the LADSEC and not its last paragraph, which deals with the suppletivity of federal regulations,⁷⁸ and iv) does not provide information that would allow for review of Semarnat's alleged failure to effectively enforce LADSEC Article 40 or LOAPF Article 32 *bis* paragraph V.⁷⁹ Mexico also asserts that Submitters do not specify the act of authority whereby the state of Colima allegedly improperly validated the construction and operation of the Manzanillo LPG Project.⁸⁰

⁷⁰ Response, *supra* note 21, p. 4.

⁷¹ *Ibid.*

⁷² *Ibid.*, pp. 5, 8.

⁷³ *Ibid.*, p. 12.

⁷⁴ *Ibid.*, pp. 12–13.

⁷⁵ *Ibid.*, p. 48.

⁷⁶ *Ibid.*, p. 70.

⁷⁷ *Ibid.*, pp. 3, 31.

⁷⁸ *Ibid.*, p. 6.

⁷⁹ *Ibid.*, pp. 6–7.

⁸⁰ *Ibid.*, pp. 7–8.

35. The Party is of the view that the revised submission is not admissible under NAAEC Article 14(2)(a) since, at no point in the submission, does it allege harm to the person or organization making the submission. Mexico asserts that the Submitters base their arguments solely on their own subjective perception and that they do not provide documents attesting to environmental harm arising from the authorization of the Projects in question.⁸¹

B. The assertions in submission SEM-09-002

i. Effective enforcement of LAHEC Article 48 paragraph I in respect of the amendment of the PDUM

36. Mexico states that the decision amending the PDUM explicitly refers to the land use change application filed by the developer of the Manzanillo LPG Project. It also affirms that the amendment of the PDUM was made further to the provisions of chapter XXXVI of the Zoning Regulation of the State of Colima, and maintains that a portion of the Manzanillo LPG Project lots were under a regime (the “ecotourism use”) that lacked a legal basis since it is not contemplated in the applicable state provisions. It concludes that the amendment of the PDUM by the municipal and state authorities in any case reflects the reasonable exercise of their regulatory discretion.⁸²

ii. Effective enforcement of ROE Articles 6, 13, 14, 36, 48, 49, and 50 in respect of the amendment of the Regional Environmental Land Use Plan

37. The Party states that the Secretariat overstepped its authority by giving consideration to the argument that Articles 6, 13, 14, 36, 48, 49 and 50 of the ROE is suppletive to those provisions of the LADSEC that relate to the amendment of state environmental land use plans, maintaining that this argument was not put forward by the Submitters.⁸³ Mexico maintains that jurisprudence relating to Article 89 paragraph I of the Federal Constitution has subjected the regulatory power of the Federal Executive Branch to principles whereby: (1) the delegation of regulatory power in matters reserved to the legislative branch is prohibited, and (2) every regulation must be preceded by an act the provisions of which it develops, complements, or details. In this regard, Mexico affirms that the ROE only regulates the LGEEPA since, if it regulated the LADSEC, it would create institutions not governed by this state statute, thus violating the two aforementioned principles.⁸⁴ According to the Party, ROE Articles 6, 13, 14, 36, 48, 49, and 50 are applicable to environmental land use plans under federal jurisdiction exclusively, and are therefore not applicable to the PROETSLC established pursuant to the first paragraph of LGEEPA Article 20 bis 2, even suppletively.⁸⁵
38. Mexico states that the provisions governing regional or state environmental land use plans include the corresponding amending procedure, as these are categorized pursuant to LGEEPA Articles 7 paragraph IX and 20 *bis* 2⁸⁶ and that only LADSEC Articles 16

⁸¹ *Ibid.*, pp. 9–10.

⁸² *Ibid.*, p. 14.

⁸³ *Ibid.*, pp. 6, 15–16.

⁸⁴ *Ibid.*, pp. 17–18.

⁸⁵ *Ibid.*, p. 20.

⁸⁶ *Ibid.*, p. 20.

paragraphs I and II, 17 paragraph VIII, 34 paragraph II, and 38 paragraph V are therefore applicable to the amending procedure for the PROETSLC.⁸⁷ After stating that the order of 3 May 2007 revising the PROETSLC gave rise to a comprehensive revision and not merely to the modification of Environmental Management Units (*Unidades de Gestión Ambiental—UGA*), Mexico affirms that this revision falls within the exercise of discretionary powers by the state authorities.⁸⁸

39. The Party then describes the stages in the process that led to the revision of the PROETSLC.⁸⁹ Mexico states that the revision is founded on the need for a new model of environmental management to mitigate the effects of the pressure deriving from urban and port development.⁹⁰ As a result, Mexico states that the area of the subwatershed covered by a protection policy increased from 6,233.9 hectares to 11,930 hectares, while the area devoted to human use decreased from 36,397 hectares to 16,985.4 hectares. The Party states that new criteria were included in the UGAs where the Manzanillo LNG Project is sited, and these promote the mitigation and restoration of the environmental impacts caused by the works permitted therein. Finally, Mexico indicates that the order requires the creation of an environmental registry, which is currently being created.⁹¹

iii. Effective enforcement of LGEEPA Article 20 *bis* 2 and ROE Articles 7, 8, and 10 in respect of the alleged failure to implement the Coordination Agreement

40. Mexico argues that ROE Article 7, which provides for the existence of coordination agreements, is inapplicable to the matter raised in submission SEM-09-002 since that provision refers to environmental land use planning under federal jurisdiction, which is not the case of the PROETSLC because this program encompasses part of the territory of one state only.⁹² Concerning ROE Articles 8 and 10, Mexico similarly concludes that the latter only apply to coordination agreements relating to environmental land use plans under federal jurisdiction and only the first paragraph of LGEEPA Article 20 *bis* 2 is relevant.⁹³ For these reasons, according to the Party, the Secretariat cannot review the Coordination Agreement as an instrument for the enforcement of ROE Articles 7, 8 and 10.⁹⁴

iv. Effective enforcement of Articles 1, 2, 3, and 4 of the Ramsar Convention in respect of alleged harm to wetlands in the Cuyutlán Lagoon

41. Mexico maintains that Article 2 of the Ramsar Convention gives to each Contracting Party the discretionary power to designate suitable wetlands within its territory for inclusion in a “List of Wetlands of International Importance” (the “**List**”). Mexico indicates that it has to date designated 130 wetlands as “Ramsar sites,” being the

⁸⁷ *Ibid.*, pp. 15, 17–21, 24.

⁸⁸ *Ibid.*, p. 24.

⁸⁹ *Ibid.*, pp. 25–26.

⁹⁰ *Ibid.*, p. 27.

⁹¹ *Ibid.*, pp. 27–30.

⁹² *Ibid.*, p. 22. The response textually refers to an inexistent “LGEEPA Article 2° *bis* 2” while it clearly meant LGEEPA, Article 20 *bis* 2.

⁹³ *Ibid.*, pp. 23–24.

⁹⁴ *Ibid.*, p. 22.

country with the second-most designated sites in the world. Mexico states that the Cuyutlán Lagoon is not included, and that certain obligations of the Ramsar Convention are therefore inapplicable.⁹⁵

42. Concerning the obligation in Article 3 of the Ramsar Convention for the Contracting Parties to formulate and implement their planning so as to promote the conservation of the wetlands included in the List and the wise use of all wetlands, e.g. the Cuyutlán Lagoon, the Party refers to LGEEPA Article 28 paragraph X, which prescribes the environmental impact assessment procedure for works and activities that may cause ecological instability in wetlands, and also to LGVS Article 60 *ter*, which prohibits works or activities that affect the integrity of water flow or other aspects of a mangrove area. Likewise, Mexico maintains that it considered the objectives of Article 3 of the Ramsar Convention when amending the PROETSLC, since the revised plan provides for the declaration of basins III and IV⁹⁶ as protected natural areas, their inclusion on the List, and for compliance with recommendations produced by the Wildlife Branch (Dirección General de Vida Silvestre) of Semarnat for the conservation and management of beach areas.⁹⁷
43. Mexico asserts that it is also compliant with the obligation set out in Article 4 paragraph 1 of Ramsar to promote the conservation of wetlands by establishing nature reserves on wetlands. It states that 56 of the 130 Mexican Ramsar sites are within protected natural areas, and specifies that Article 4 paragraph 2 is only applicable to Ramsar sites. It maintains that Mexico is compliant with paragraphs 3 and 5 of Article 4 of the Convention requiring the Contracting Parties to encourage research, exchange of data, and training for the protection of wetlands, and it presents examples of mangrove monitoring, international cooperation, and institutional capacity building.⁹⁸
44. Finally, Mexico states that on 9 March 2010, the Secretariat of the Ramsar Convention gave Mexico an award for excellence in the implementation of the Ramsar Convention.⁹⁹

v. Effective enforcement of LADSEC Article 40 and LGEEPA Article 35 in respect of the alleged violation of the Regional Environmental Land Use Plan through the authorization of the Manzanillo LPG Project

45. Mexico reiterates that in its determinations issued on 9 October 2009 and 13 August 2010, the Secretariat found that the alleged failure to effectively enforce LADSEC Article 40 did not warrant further analysis, and considers the request for a response from the Party in regard to this provision (paragraph 71(d) of the second Secretariat determination) to be inconsistent.¹⁰⁰
46. Mexico states that it properly enforced LGEEPA Article 35, since Semarnat included information on the relationship to the PROETSLC in the AIA-LPG, which it had requested from the developer previously. Mexico cites part of the decision in which

⁹⁵ *Ibid.*, pp. 30–2.

⁹⁶ Page 33 of the response makes reference to basins II and III, while page 27 mentions basins III and IV. Cf. Response, *supra* note 21, pp. 27, 33. The Executive order revising the PROETSLC, *supra* note 15, p. 460, leaves no doubt about the matter, since it mentions basins III and IV of the Cuyutlán Lagoon.

⁹⁷ Response, *supra* note 21, pp. 32–3.

⁹⁸ *Ibid.*, pp. 34–6.

⁹⁹ *Ibid.*, p. 36.

¹⁰⁰ *Ibid.*, pp. 36–7.

DGIRA affirms that the area where the project is to be carried out does not contradict the land use policies set out in the PDUM, and determines that the developer must apply to the local authorities, which “shall determine the appropriate procedure in accordance with the applicable legal provisions.”¹⁰¹

vi. Effective enforcement of LGEEPA Articles 30 and 35 and REIA Articles 2, 4 paragraph IV, and 13 in respect of the environmental impact statements for the Projects

47. After stating that the Submitters only refer to the first paragraph of LGEEPA Article 30,¹⁰² Mexico proceeds to respond to the alleged failure to enforce this and other provisions relating to the environmental impact statements (**EIS**) for both Projects.
48. Concerning the Manzanillo LPG Project, Mexico states that the Submitters make a subjective appraisal of the enforcement of the first paragraph of LGEEPA Article 30 in asserting that no “serious and realistic description” of the environmental impact of the project was produced. Mexico maintains that the actual Environmental Impact Statement of the Manzanillo LPG Project (the “**EIS-LPG**”) includes a description of the environmental impacts that would be generated as well as the preventive, mitigation, and other measures necessary to avert or reduce these impacts. Mexico states that the EIS-LPG includes a detailed risk analysis produced in accordance with a guide published by Semarnat for this type of project. The Party further states that the developer, in response to a request from DGIRA, provided additional information about the impacts, the preventive measures, and the specific risks entailed by the project. Apart from the name of the project, Mexico states that the project did not undergo any modifications, and the third paragraph of LGEEPA Article 30 is therefore not applicable.¹⁰³
49. Mexico asserts that DGIRA effectively enforced the second paragraph of LGEEPA Article 35 in respect of the Manzanillo LPG Project, since the EIS-LPG presented a discussion of the project’s relationship with the applicable legal provisions, considering among them the “local and regional environmental land use plans,” stating that DGIRA adhered to the provisions of these plans in issuing the AIA-LPG. Mexico maintains that DGIRA also adhered to the third paragraph of Article 35 by giving detailed consideration to the possible environmental impacts of the project on the dunes, soil, flora and fauna, water quality, and hydrology, based on the information contained in the EIS-LPG and the additional information provided.¹⁰⁴
50. In relation to the enforcement of REIA Article 4 paragraph IV in respect of the Manzanillo LPG Project, Mexico states that the holding of a public consultation is a discretionary power of the environmental authorities, and that DGIRA did not hold such a consultation because it did not receive such a request from the public for this project.¹⁰⁵
51. As regards to the effective enforcement of the first two paragraphs of LGEEPA Article 30 in respect of the Manzanillo LNG Project, Mexico asserts that the EIS-LNG describes environmental impacts and includes prevention and mitigation strategies as

¹⁰¹ *Ibid.*, pp. 38–9.

¹⁰² *Ibid.*, p. 40.

¹⁰³ *Ibid.*, pp. 40–5.

¹⁰⁴ *Ibid.*, pp. 44–7.

¹⁰⁵ *Ibid.*, p. 48.

well as a risk study. Since the project did not undergo any subsequent modification, Mexico considers the third paragraph of this article to be inapplicable. Irrespective of the foregoing, Mexico indicates that based on the second paragraph of LGEEPA Article 35 *bis* as well as REIA Article 22, DGIRA requested and obtained additional information from the developer on various subjects on the project.¹⁰⁶

52. Mexico asserts that it has also complied with the second paragraph of LGEEPA Article 35 and with REIA Article 13 paragraph III concerning the relationship with the other applicable legal provisions in the assessment of the Manzanillo LNG Project. It maintains that the EIS-LNG included consideration of relevant legal instruments including PDUM and PROETSLC and that under further analysis it was concluded that the area planned for the project was located in UGAs whose criteria do not prohibit the execution of such infrastructure works. Mexico is also of the view that it is enforcing the third paragraph of LGEEPA Article 35 in that it has analyzed in detail the possible impact of the project on biodiversity, the marine ecosystem, and hydrology and concluded that Alternative 2 (Omega) not only does not jeopardize the functional integrity of the ecosystem but also, by virtue of leaving open the Tepalcates Canal, would contribute to the rehabilitation of the Cuyutlán Lagoon.¹⁰⁷
53. Finally, Mexico asserts that REIA Article 4 paragraph IV was enforced by virtue of the public consultation process carried out during the environmental impact assessment for the Manzanillo LNG Project, noting that Submitters participated, and whose results culminated in requesting additional information from the developer of the Manzanillo LNG Project.¹⁰⁸

vii. Effective enforcement of LGVS Article 60 *ter*, NOM-022, and NOM-059 in respect of the environmental impact authorizations for the Projects

54. Mexico states that LGVS Article 60 *ter* is not applicable to the Manzanillo LPG Project since it came into force more than two years after the environmental impact authorization for this project was issued.¹⁰⁹
55. As to NOM-059, Mexico maintains that it was enforced during the assessment of the Manzanillo LPG Project. It states that the environmental impact authorization concluded that the marine turtle nesting areas protected by the standard would not be directly affected and that the measures proposed in order to mitigate possible impacts on other listed species are in any case complemented by conditions imposed by DGIRA on the developer.¹¹⁰
56. The Party affirms that the AIA-LNG establishes the project's relationship with NOM-059 and identifies the main environmental impacts and risks to flora and fauna, with particular attention to the species listed in this standard. Mexico indicates that the authorization concludes that the project will not have a direct impact on the nesting of marine turtles protected by NOM-059, which are —asserted to be— rare at the site in question. Mexico asserts that the authorization also validates various prevention and

¹⁰⁶ *Ibid.*, pp. 49–50.

¹⁰⁷ *Ibid.*, pp. 51–4.

¹⁰⁸ *Ibid.*, pp. 55–7.

¹⁰⁹ *Ibid.*, p. 58.

¹¹⁰ *Ibid.*, pp. 58–60.

mitigation measures proposed by the developer of the Manzanillo LNG Project in relation to NOM-059, and complements them with conditions.¹¹¹

57. Concerning the enforcement of NOM-022 in respect of the Manzanillo LNG Project, for which – according to the Submitters – a hydrodynamic study was required in order to assess compliance with the standard, Mexico argues that there is no provision requiring such a study to be included in environmental impact statements, and states that in any case, the entirety of the water flow must be contemplated. It maintains that as part of the conditions imposed in the AIA-LNG, the authorities required the developer to submit a hydrodynamic study in order to avert, lessen, or compensate for environmental impacts.¹¹² Mexico asserts that in order to verify compliance with NOM-022, DGIRA requested additional information from the Manzanillo LNG Project developer, which Mexico has designated as confidential in its response.¹¹³
58. Revisiting the applicability of LGVS Article 60 ter to the Manzanillo LNG Project, the Party states that it does not contain any absolute prohibition on the performance of activities in mangrove areas, but creates an obligation for the administrative authority to ensure that works and activities do not affect “the integrity of the water flow in the mangrove area, the ecosystem, and its area of influence. Mexico thus asserts that LGVS Article 60 ter does not automatically generate legal effects; rather, it is applied in the context of the environmental assessment mechanism. In the specific case of the Manzanillo LNG Project, Mexico affirms that, further to a detailed analysis, DGIRA concluded in its authorization that Alternative 2 (Omega) would not affect the functional structure of the mangrove area, and that on the contrary it would promote restoration of the hydrodynamic therein.¹¹⁴

viii. Effective enforcement of LGEEPA Article 35 bis, REIA Articles 22 and 46, and LFPA Article 60 in respect of the environmental impact assessment timeline for the Manzanillo LNG Project

59. Mexico considers baseless the Submitters’ argument that DGIRA should have declared the environmental impact assessment process for the Manzanillo LNG Project to have expired. The Party states that the second paragraph of REIA Article 22 provides that Semarnat may declare the expiry of the process “pursuant to [LFPA] Article 60” only where the authority has notified the applicant that expiry will occur after three months have elapsed. Mexico states that in the case of the Manzanillo LNG Project, there is no evidence in this specific case that Semarnat so notified the developer of the expiration of the process, and therefore this provision is inapplicable. It further maintains that the additional information requested from the Manzanillo LNG Project developer was submitted within the time period allotted.¹¹⁵

¹¹¹ *Ibid.*, pp. 60–4.

¹¹² *Ibid.*, pp. 64–5.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, pp. 65–8.

¹¹⁵ *Ibid.*, pp. 70–2.

ix. Effective enforcement of REIA Article 47 in respect of alleged noncompliance with conditions of the AIA-LNG

60. Although Mexico responded to this assertion, it requested that this part of its response be kept confidential and thus no summary is presented in this section.¹¹⁶

IV. ANALYSIS

61. In accordance with NAAEC Article 15(1) and section 10.1 of the Guidelines, the Secretariat proceeds to state its reasons for recommending to the Council the preparation of a factual record, and addresses the statements in Mexico's response as to the alleged inadmissibility of the revised submission and the existence of pending proceedings.

A. Consideration of Mexico's response as regards the alleged inadmissibility of the submission pursuant to the Article 14(1) requirements

62. On 13 August 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), a response from Mexico was warranted. The Party is of the view that the Secretariat should not have admitted submission SEM-09-002 nor requested a response from Mexico and states that it is responding to the submission *ad cautelam*.
63. Once the Secretariat has determined that a submission is in fact admissible and requested a response from the Party in question, there is no procedure contemplated in the NAAEC for the Secretariat to amend its determination retroactively pursuant to a Party's objections concerning the submission's admissibility.¹¹⁷ At this stage in the SEM process, the Secretariat proceeds to consider information provided by Mexico regarding its enforcement of the environmental law in question, and to consider whether the submission, in light of the response, merits the development of a factual record.

1. Mexico's assertions concerning the inadmissibility of the submission due to the alleged failure to cite environmental law in the sense of Article 45(2)

64. Mexico maintains that the Coordination Agreement,¹¹⁸ LAHEC Article 48 paragraph I,¹¹⁹ the PDUM,¹²⁰ REIA Article 4 paragraph IV,¹²¹ REIA Articles 22 and 46, LGEEPA Article 35 *bis*, and LFPA Article 60¹²² are not environmental law.
65. Concerning the Coordination Agreement, the Secretariat found in its first determination that "the extent to which the Coordination Agreement is an environmental law is

¹¹⁶ *Ibid.*, p. 73.

¹¹⁷ SEM-08-001 (*La Ciudadela Project*), Determination pursuant to Article 15(1) (12 August 2010), §36, <<http://goo.gl/mTTuY>> (viewed 19 August 2013). This is why, in the context of a retroactive modification concerning the validity of a submission, the designation of Mexico's response as *ad cautelam* is of no relevance.

¹¹⁸ Response, *supra* note 21, pp. 5, 8.

¹¹⁹ *Ibid.*, p. 12.

¹²⁰ *Ibid.*, pp. 12–13.

¹²¹ *Ibid.*, p. 48.

¹²² *Ibid.*, p. 70.

unclear.”¹²³ In light of the revised submission, the Secretariat determined that the Coordination Agreement is not environmental law.¹²⁴ The Secretariat noted however that it has the status of an *enforcement instrument* for LGEEPA Article 20 *bis*, ROE Article 7, and LADSEC Article 40 – the latter being legislation the primary purpose of which is environmental protection – and therefore, a response from Mexico concerning the effective enforcement of those provisions may make reference to the implementation of the Coordination Agreement.¹²⁵ The Coordination Agreement is an instrument for enabling the effective enforcement of the legislation in question; the submitters’ assertion regarding the failure to implement it thus qualifies for review under the citizen submission mechanism. For this reason, the Secretariat requested a response concerning the effective enforcement of LGEEPA Article 20 *bis* 2 and ROE Articles 7, 8, and 10 in relation to the terms of the Coordination Agreement, since the purpose of the latter is “to carry out activities and coordinate resources with a view to supporting the drafting, issuance, and implementation of the Environmental Land Use Plan.”¹²⁶

66. Concerning LAHEC Article 48 paragraph I, the Secretariat determined that this provision “provides a basis for understanding the enforcement of LAHEC with respect to the Manzanillo Urban Development Program.”¹²⁷ Mexico maintains that the primary purpose thereof is to “establish the content of the municipal urban development plans, including an analysis of their compatibility with other state land planning instruments.”¹²⁸ Concerning the PDUM, Mexico maintains that the Secretariat cannot consider the environmental aspects of this instrument and that “it cannot be considered environmental law since its primary purpose is not related to the criteria of NAAEC Article 45(2).”¹²⁹
67. The Secretariat however determined that the PDUM is an enforcement instrument and not a law¹³⁰ in the sense of Article 45(2) NAAEC.¹³¹ The Secretariat clarifies that what is being reviewed is not the effective enforcement of the PDUM itself; rather, the Secretariat is considering the fact that the PDUM arose as an instrument for the enforcement of LAHEC Article 48 paragraph I, which is “environmental law”.¹³² In conducting the review of this latter provision, the Secretariat observed whether any acts of effective enforcement, such as the development and implementation of environmental land use plans, have occurred, and found that the PDUM in its environmental aspects is an instrument for enforcement of LAHEC Article 48 paragraph 1.

¹²³ Determination pursuant to Article 14(1), *supra* note 18, §29.

¹²⁴ Determination pursuant to Article 14(1)(2), *supra* note 20, §35.

¹²⁵ *Ibid.*, §35 paragraph c).

¹²⁶ Coordination Agreement, *supra* note 17, history, paragraph VIII. Furthermore, the Secretariat has clarified that inter-government administrative agreements do not generally appear to be environmental law. Cf. SEM-10-002 (*Alberta Tailings Ponds*) Determination pursuant to Article 14(1) (3 September 2010), §34.

¹²⁷ Determination pursuant to Article 14(1), *supra* note 18, §25.

¹²⁸ Response, *supra* note 21, p. 12 (emphasis in original).

¹²⁹ *Idem.*

¹³⁰ Article 14(1) determination, *supra* note 18, §27-28.

¹³¹ “...‘**environmental law**’ means any statute or regulation of a Party, or provision thereof ...”; North American Agreement on Environmental Cooperation (NAAEC), published in the DOF on 21 December 1993, Article 45(2)(a) (emphasis in original).

¹³² Though Mexico opines the opposite. *See* Response, *supra* note 21, p. 16.

68. That the PDUM is an enforcement instrument can be verified by consulting the definition of environmental land use planning found in LAHEC:

Article 3. For the purposes of this Act, the following definitions apply: ...

LXII. Environmental and other land use planning: The environmental policy instrument for sustainable development designed to evaluate and plan land use, economic activity, and natural resource management on the state's territory and in areas over which the state exercises its sovereignty and jurisdiction, for the preservation and restoration of ecological stability and the protection of the environment; ...

69. The consistency issues of the environmental features of the environmental land use plans contemplated in LAHEC Article 48 paragraph I may also be considered further with respect to the PDUM and PROETSLC since these, having as their purpose *the restoration of ecological stability and the protection of the environment*, have a clearly identified environmental purpose in accordance with NAAEC Article 45(2). Clearly ecological land use planning may encompass other issues than environmental protection, thus only environmental consistency matters were considered for further review.¹³³ A response to such matters was requested of Mexico in the Secretariat's determination of 13 August 2010.
70. Mexico maintains that the Secretariat exceeded the scope of the NAAEC by mentioning provisions that were not cited in the submission and that in certain instances it attempts to interpret the Party's domestic law.¹³⁴ However, Mexican legal provisions as well as judgments of the Federal Judicial Branch (Poder Judicial de la Federación) —often referred by a submitter or the Party— were cited merely to guide the Secretariat in its consideration of the submission's eligibility. The term “environmental law” in NAAEC Article 45(2) must be a law “of a Party”, i.e. a law that exists within the domestic legal system of one of the Parties. A law's “primary purpose” can only be ascertained by looking at the law's substance, which necessarily exists in a domestic legal context. Laws do not exist in a vacuum, and they interact with one another to achieve whatever purpose they may have. The Secretariat is thus obligated by the Agreement to consider fully a law at issue's locus in a legal system, and how it interacts with other laws to achieve its “primary purpose”.¹³⁵ The Secretariat is thus not exceeding its mandate under the Agreement as it exercises its discretion in considering whether a law is an environmental law as defined by Article 45(2), merely by considering a law's legal context. By the same token, references to legal opinions and articles may serve to inform the Secretariat's determination, but they do not supplant it, nor does the citation of such sources in any way violate the Agreement or fall outside of the Secretariat's discretionary power. The Secretariat is cautious however not to give its opinion on the domestic legal order of a Party when determining whether a law is an environmental law for the purposes of Article 45(2), and it recognizes that it is not a court or tribunal, and that its determinations are non-judicial in character.¹³⁶

¹³³ Determination pursuant to Article 14(1), *supra* note 18, §38.

¹³⁴ Response, *supra* note 21, p. 12.

¹³⁵ Indeed, domestic legal concepts must not be divorced from the context of the legal system which gives meaning and affects its application. Cf.: Inter-American Court of Human Rights, Advisory Opinion OC-6/86 (9 May 1986), at para. 20, <<http://goo.gl/AlxwmI>> (viewed on 19 August 2013).

¹³⁶ See: SEM-07-001 (*Minera San Xavier*), Determination pursuant to Article 15(1) (15 July 2009), §44, <<http://goo.gl/zSgJx>> (viewed on 19 August 2013).

71. Concerning REIA Article 4 paragraph IV, Mexico maintains that this is a jurisdictional provision and cannot therefore be reviewed further by the Secretariat. REIA Article 4 paragraph IV provides that Semarnat is competent to “Organize, in coordination with the local authorities, the public meeting to which [LGEEPA] Article 34 paragraph III refers.” For its part, LGEEPA Article 34 paragraph III provides as follows:

Article 34. Upon receiving an environmental impact statement and after opening the file to which Article 35 refers, the Ministry shall make it available to the public, so that it may be consulted by any person.

[...]

Upon request from a person of the nearby community, the Ministry may conduct a public consultation, according to the following basis:

III. In the case of works or activities that may cause severe ecological instability or harm to public health or ecosystems, pursuant to the provisions of the regulation to this Act, the Ministry, in coordination with the local authorities, may hold a public information meeting in which the Developer shall explain the technical environmental aspects of the work or activity in question;...¹³⁷

72. The Secretariat finds that even if REIA Article 4 paragraph IV is a jurisdictional provision, its effective enforcement can be reviewed. Such analysis is limited to the use of functions with respect to requirements and conditions for the holding of a public information meeting in relation to the Projects.
73. Concerning REIA Articles 22 and 46, LGEEPA Article 35 bis and LFPA Article 60, Mexico maintains that they are not environmental law because they establish the procedure for requesting additional information necessary to assess a project and timelines for the issuance of environmental impact decisions, and moreover authorize Semarnat to declare a procedure to have expired. Thus, the Party concludes, their purpose is not that of environmental protection. In this regard, the Secretariat has previously found that provisions establishing an administrative framework may be reviewed further, provided that they are in accordance with Article 45(2), and are necessary for the operation of an environmental law,¹³⁸ which is the case for REIA Articles 22 and 46, LGEEPA Article 35 *bis*, and LFPA Article 60.

2. Mexico’s assertions concerning the inadmissibility of the submission pursuant to Article 14(1)(c)

74. Mexico asserts that the Secretariat should not have admitted submission SEM-09-002 since —allegedly— it does not contain sufficient information to allow the Secretariat to review it, nor does it provide documentary evidence to support it, pursuant to NAAEC Article 14(1)(c).¹³⁹
75. The requirement established by NAAEC Article 14(1)(c) obliges the submitter to provide a succinct account of the facts along with documentary evidence to meet the requirements listed in Article 14(1)(a) to (f).¹⁴⁰ Furthermore, the Secretariat has consistently determined that: requirements of Article 14(1) have a relatively low

¹³⁷ LGEEPA, *supra* note 5, Article 34 paragraph III.

¹³⁸ SEM-09-001 (*Transgenic Maiz in Chihuahua*), Determination pursuant to Article 15(1) (20 December 2010), §54 <<http://goo.gl/WKR9Gi>> (viewed on 19 August 2013).

¹³⁹ Response, *supra* note 21, pp. 4–5.

¹⁴⁰ SEM-07-005 (*Drilling Waste in Cunduacán*), Determination pursuant to Article 14(3) (8 April 2009), §25(b), <<http://goo.gl/5SoXW>> (viewed on 19 August 2013).

threshold as compared to an international legal proceeding;¹⁴¹ submitters should not be expected to present information that may be in the possession of a Party;¹⁴² it is not anticipated that submitters conduct an exhaustive search for information akin to “discovery” in litigation;¹⁴³ and that the submission procedure does not list means of proof,¹⁴⁴ nor does it establish rules for conducting evidentiary proceedings.¹⁴⁵

76. Bearing in mind the foregoing considerations, the Secretariat analyzed the supporting information in the submission and found that it met the requirements of NAAEC Article 14(1)(c), and the relevant Guidelines.

B. Consideration of Mexico’s response as regards the existence of pending proceedings pursuant to Article 14(3)

77. 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;...¹⁴⁶

78. For purposes of Article 14(3), NAAEC Article 45(3)(a) defines the term “judicial or administrative proceeding” as follows:

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; ... [emphasis in original]

79. The Response cites the factors to be considered in determining whether the processing of a submission should be terminated where it is the subject of a pending judicial or administrative proceeding and maintains that the procedure in question must be initiated by the Party in question.¹⁴⁷

80. Such factors have been identified by the Secretariat for determining whether it should terminate the processing of a submission, when the Party notifies it of a pending judicial or administrative proceeding.¹⁴⁸ In reviewing a notice from Mexico of the existence of such ongoing proceedings, the Secretariat considers whether the proceeding was initiated by the Party;¹⁴⁹ whether it is timely in accordance with the Party’s law; whether it relates to the matters of effective enforcement raised in the submission; whether its

¹⁴¹ SEM-97-003 (*Quebec Hog Farms*), Notification pursuant to Article 15(1) (29 October 1999), pp. 6–7, <<http://goo.gl/PCOIS>> (viewed on 6 January 2006).

¹⁴² SEM-04-005 (*Coal-fired Power Plants*), Determination pursuant to Article 14(1) (16 December 2004), p. 10, <<http://goo.gl/ea4eH>> (viewed on 19 August 2013).

¹⁴³ *Ibid.*, p. 11.

¹⁴⁴ SEM-09-001 Article 15(1) Determination, *supra* note 138, §58.

¹⁴⁵ *Ibid.*

¹⁴⁶ NAAEC, *supra* note 131, Article 45(3)(a).

¹⁴⁷ Response (confidential version), *supra* note 21, p. 4.

¹⁴⁸ SEM-07-001 Article 15(1) Determination, *supra* note 136, §33.

¹⁴⁹ It should be clarified that the Secretariat also analyzed the proceedings initiated by the Submitters.

proceeding could interfere with or duplicate judicial efforts; and in the latter connection, whether the proceeding has the potential to resolve the matter raised in the submission.¹⁵⁰

81. Section 9.4 of the Guidelines in effect at the time of the submission and which apply to this notification, obligate the Secretariat to state its reasons when considering the alleged existence of pending proceedings. Mexico classified the information relating to the pending proceedings as confidential, in accordance with Article 19(2) of the Agreement and section 17.2 of the Guidelines. Therefore, and insofar as possible, in this notification the Secretariat provides for the public and for the other NAAEC Parties, its reasoning with respect to the pending proceedings of which Mexico gave notice, taking care not to reveal information classified as confidential.
82. Guided by the transparency objectives of the Agreement, which are also given expression in Article 14,¹⁵¹ the Secretariat recalls that section 17.3 of the Guidelines¹⁵² invites the Parties to provide a summary of confidential information, so that it may make public the reasoning relating to the existence of pending proceedings, while also preserving the integrity of any confidential information.
83. Regarding the possibility of interference with ongoing proceedings, the Secretariat assesses whether the proceedings of which Mexico gave notice coincide with the assertions made in the submission.¹⁵³
84. To substantiate that they have pursued the remedies available under the Party's law,¹⁵⁴ the Submitters refer, *inter alia*, to a complaint filed with the PGR in Colima on 14 May 2008,¹⁵⁵ and a writ of amparo filed in the Second Court of the State of Colima on 6 August 2008.¹⁵⁶

¹⁵⁰ SEM-07-001 (*Minera San Xavier*), *supra* note 136, §33.

¹⁵¹ NAAEC, *supra* note 131, Article 1(h): "The objectives of this Agreement are to: ... promote transparency and public participation in the development of environmental laws, regulations and policies;"

¹⁵² Guidelines, paragraph 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...

¹⁵³ The Secretariat recalls that it has always thoroughly considered Party responses pursuant to Article 14(3); see, for example, SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) (13 June 2001), p. 5 <<http://goo.gl/8iHTW>> (viewed on 19 August 2013):

In view of the commitment to the principle of transparency pervading the NAAEC, 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.

Cf. SEM-97-001 (*BC Hydro*), Notification pursuant to Article 15(1) (27 April 1998), pp. 6-13, <<http://goo.gl/d6YkZ>> (viewed on 19 August 2013); SEM-03-003 (*Lake Chapala II*), Notification pursuant to Article 15(1) (18 May 2005), pp. 16-18, <<http://goo.gl/170IN>> (viewed on 19 August 2013); SEM-04-005 (*Coal-fired Power Plants*), Notification pursuant to Article 15(1) (5 December 2005), pp. 13-15, <<http://goo.gl/kn0yK>> (viewed on 19 August 2013); SEM-05-002 (*Coronado Islands*), Notification pursuant to Article 15(1) (18 January 2007), pp. 12-14, <<http://goo.gl/TqxSZ>> (viewed on 19 August 2013).

¹⁵⁴ Cf. NAAEC, *supra* note 131, Article 14(2)(c).

¹⁵⁵ Revised submission, *supra* note 19, p. 13; original submission, *supra* note 2, Appendix 19 (now Appendix 27): Complaint filed by Esperanza Salazar Zenil with the PGR, 14 May 2008.

¹⁵⁶ Original submission, *supra* note 2, unnumbered complementary appendix: Writ of amparo filed by María Vanessa Gómez Pizano with the Second District Court of the state of Colima, 6 August 2008.

85. According to the response, both proceedings are pending and the Party classified information therein as confidential.¹⁵⁷ As a result, the Secretariat's reasoning in this connection is not public.

[START OF CONFIDENTIAL SECTION]

¹⁵⁷ Response (confidential version), *supra* note 21, pp. 5–7.

97. Upon analysis of confidential information provided by Mexico, the Secretariat found that effectively, there is one pending proceeding, which may cause the risk of interference. Consequently, the Secretariat continues its review of the submission in light of the response, excepting the assertion relating to compliance with Particular Conditions 4(e) and (h) of the AIA-LNG.

C. Consideration of the Submitters' assertions in light of Mexico's response pursuant to NAAEC Article 15(1)

98. Having determined in accordance with NAAEC Article 14(3) that the proceedings adduced by Mexico in its response do not prevent further review of the assertions made in submission SEM-09-002, the Secretariat proceeds to consider whether, in light of Mexico's response, the submission warrants the development of a factual record.

99. NAAEC Article 15(1) stipulates as follows:

If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

100. In accordance with NAAEC Article 15(1) and section 10.1 of the Guidelines, the Secretariat presents in following an explanation of its reasoning as to why submission SEM-09-002 warrants the preparation of a factual record.¹⁷² The analysis of whether a factual record is warranted in regard to the various issues raised in submission SEM-09-002 is organized into the following sections:

Section I. Concerning the environmental land use and urban development plans:

1. alleged failure to effectively enforce LAHEC Article 48 paragraph I in respect of the amendment of the PDUM;
2. alleged failure to effectively enforce ROE Articles 6, 13, 14, 36, 48, 49, and 50 in respect of the amendment of the PROETSLC;
3. alleged failure to effectively enforce LGEEPA Article 20 *bis* 2 and ROE Articles 7 and 8 in relation to the implementation of the Coordination Agreement.

Section II. Concerning the Manzanillo LPG Project:

4. alleged failure to effectively enforce LGEEPA Article 30 and REIA Article 4 paragraph IV in relation to the alleged deficiencies in the description of environmental impacts in the environmental impact statement for the Manzanillo LPG Project and the alleged lack of public consultation on the project;

¹⁷² Guidelines, paragraph 10.1:

If the Secretariat considers that the submission, in light of any response provided by the Party or after the response period has expired, warrants developing a factual record, the Secretariat will so inform the Council. When the Secretariat informs the Council that it considers that a factual record is warranted, the Secretariat *will provide sufficient explanation of its reasoning to allow the Council to make an informed decision*. In addition, it will provide a copy of the submission, the supporting information provided with the submission, and any other relevant information, when these items have not been provided to the Council. The Council may request further explanation of the Secretariat's reasons, which the Council will receive prior to taking its decision under Article 15(2) of the Agreement concerning whether or not a factual record will be prepared. [Emphasis added].

5. alleged failure to effectively enforce LGEEPA Article 35 and REIA Article 13 paragraph III in respect of the alleged failure to establish the relationship of the Manzanillo LPG Project with the environmental land use plan in force at the time when environmental impact authorization for the project was requested;
6. alleged failure to effectively enforce NOM-059 in respect of the assessment of species at risk in the EIS-LPG.

Section III. Concerning the Manzanillo LNG Project:

7. alleged failure to effectively enforce LGEEPA Article 35 and REIA Article 13 paragraph III in respect of the relationship of the Manzanillo LNG Project to the environmental land use plan;
 8. alleged failure to effectively enforce NOM-059 in relation to the assessment of species at risk in the Manzanillo LNG Project; and,
 9. alleged failure to effectively enforce LGEEPA Article 30, LGVS Article 60 *ter*, and NOM-022 in respect of assessment of the impact of the Manzanillo LNG Project on water flow in the coastal wetland of the Cuyutlán Lagoon, as well as alleged failure to effectively enforce REIA Article 47 in respect of compliance with the conditions of the AIA-LNG.
101. By way of preamble, the Secretariat finds that Mexico's clarification about the status of the Cuyutlán Lagoon, as well as the actions mentioned by the Party in its response regarding the implementation of Articles 1, 2, 3, and 4 of the Ramsar Convention, are sufficient and do not warrant further consideration in a factual record. The Secretariat did not identify further assertions in SEM-09-003 specifying how Mexico allegedly failed to effectively enforce this international instrument in connection with the Cuyutlán Lagoon.
102. Similarly, the Secretariat has taken into account the Party's observation to the effect that the Submitters do not assert a failure to effectively enforce LGVS Article 60 *ter* or NOM-022 with respect to the Manzanillo LPG Project¹⁷³ and notes that this finding should not have been included in paragraph 44 of its determination of 9 October 2009.¹⁷⁴ Therefore, no further review of this matter is presented.

Section I. Concerning the environmental land use and urban development plans

1. A factual record is recommended in regard to the alleged failure to effectively enforce LAHEC Article 48 paragraph I in respect of the amendment of the PDUM

103. The Submitters assert that the PDUM was amended on 12 June 2004 to change the classification of the area in question from Forestry (AR-FOR) to Medium-Term Urban Reserve (RU-MP) and from Ecotourism (TE) zoning to High-Impact/Risk Heavy Industrial zoning (I-3), which contradicts the provisions of the PROETSLC.¹⁷⁵ The Submitters maintain that from the time of the amendment, the PDUM came into conflict with the ecological criteria set out in the PROETSLC.

¹⁷³ Response, *supra* note 21, p. 57.

¹⁷⁴ Article 14(1) Determination, *supra* note 18 §44.

¹⁷⁵ Revised submission, *supra* note 19, pp. 7–8.

104. Mexico asserts that the amendment of the PDUM by the municipal and state authorities in any case reflects the reasonable exercise of their discretion “with respect to regulatory matters”¹⁷⁶ and cannot therefore be considered a failure to effectively enforce the environmental law of Mexico.
105. Concerning matters of effective enforcement, Mexico maintains that when the PDUM was published on 4 November 2000, the PROETSLC had not yet been issued;¹⁷⁷ that the Manzanillo LNG Project had nothing to do with the amending process for the PDUM;¹⁷⁸ that the amendment of PDUM gave rise to compliance with the provisions of chapter XXXVI of the Zoning Regulation of the State of Colima, and that a portion of the project lots were under the ecotourism regime, which lacked a legal basis since it is not contemplated in the applicable state laws.
106. For the reasons set out below, the Secretariat finds that the reasonable exercise of discretion adduced by Mexico does not in itself represent an impediment to further consideration of the assertion regarding the effective enforcement of LAHEC Article 48 paragraph I pursuant to NAAEC Article 15(1) and its possible inclusion in a factual record.

i Consideration of the response with reference to NAAEC Article 45(1)(a) in respect of the reasonable exercise of a Party’s discretion

107. NAAEC Article 45(1)(a) stipulates that:

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;...

108. Article 45(1) sets out in what situations there has not been a failure to effectively enforce environmental law or in what situations Party officials have complied with Article 5(1). The Secretariat has been admonished on numerous occasions by the Council not to make any conclusions or determinations regarding the Parties’ respective effective enforcement of environmental law, and to rather only provide objective factual information in factual records and determinations.¹⁷⁹ In practice, if the Secretariat were to proceed no further with a submission as a result of information presented by a Party purporting to satisfy Article 45(1)(a) or (b), the Secretariat could be charged with having drawn a conclusion about the Party’s effective enforcement of

¹⁷⁶ Response, *supra* note 21, p. 14.

¹⁷⁷ *Ibid.*, p. 13. *N.b.* PROETSLC was published on 5 July 2003.

¹⁷⁸ Response, pp. 13–14.

¹⁷⁹ See Guideline 12.2 Regarding the Council’s admonitions see for example: SEM-04-007 (*Quebec Automobiles*) Council Resolution 06-07 (14 June 2006) which reads: “FURTHER REAFFIRMING that a factual record thus contains neither an assessment of a Party’s policy choices made in the exercise of its discretion in respect of investigatory, prosecutorial, regulatory or compliance matters, nor an assessment of a Party’s decisions to allocate and prioritize its resources for the enforcement of environmental matters” and SEM-05-003 (*Environmental Pollution in Hermosillo II*) Council Resolution 12-04 (15 June 2012) which reads: “MINDFUL that the purpose of the final factual record is to present facts pertinent to assertions that a Party is failing to effectively enforce its environmental law”.

environmental law. The Secretariat thus does not have a mandate to determine whether the Party “is failing to effectively enforce its environmental law”, and whether or not information presented by a Party comports with Article 45(1)(a) and/or (b). Such a determination, if it were to be made at all, might be made for example by an arbitral panel constituted pursuant to Part Five of the Agreement¹⁸⁰ when considering whether there were a “persistent pattern of failure to effectively enforce” environmental law, but is beyond the Secretariat’s purview in any case.¹⁸¹

109. The Secretariat has noted that factual records are an adequate means for presenting information to allow the public to reach its own conclusions as to whether a Party has exercised its discretion in a reasonable manner and thus has, or has not, failed to effectively enforce its environmental law, but has refrained from applying Article 45(1) to make such a determination.¹⁸² The newly revised Guidelines provide a solution to the conundrum of the Secretariat’s having to draw a conclusion about the substance of a Party’s invocation of Article 45(1). Guideline 9.5 now provides that the Secretariat must merely focus on whether the Party has provided “sufficient information” in its response. In the instant case, the Secretariat has determined that the response did not provide sufficient information in regard to the Party’s statement that its actions do not constitute a failure to effectively enforce environmental law.

110. Concerning the exercise of the authority’s discretion in amending the PDUM, Mexico states that:

- It secured compliance with provisions of Chapter XXXVI of the Zoning Regulation of the State of Colima;
- Industrial and service uses are not new, since they were considered for the area in question; and

¹⁸⁰ NAAEC Article 22(1), *supra* note 131, reads:

Any Party may request in writing consultations with any other Party regarding whether there has been a persistent pattern of failure by that other Party to effectively enforce its environmental law.

Whereas Article 33 NAAEC, *supra* note 131, reads:

If, in its final report, a panel determines that there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law,...

¹⁸¹ Cf. NAAEC, *supra* note 131, Article 33: “...The disputing Parties shall promptly notify the Secretariat and the Council of any agreed resolution of the dispute.”

¹⁸² In SEM-09-005 (*Skeena River Fishery*) Notification pursuant to Article 15(1) (12 August 2011) p. 14, <<http://goo.gl/pEkiu>> (viewed on 20 June 2013), the Secretariat did not opine on arguments raised by the Party that it had made “good-faith” enforcement efforts pursuant to Article 45(1), rather focused only on the probative value of information provided. Likewise, in SEM-99-002 (*Migratory Birds*), Notification pursuant to Article 15(1) (15 December 2000), p. 26, <<http://goo.gl/dWkuj>> (viewed on 19 August 2013), the Secretariat stated “If the Secretariat were obliged to accept at face value every assertion by a Party that it is not failing to effectively enforce its environmental laws because it qualifies for one of the Article 45(1) defenses, a Party could unilaterally force the termination of every single citizen submission simply by asserting such a defense. The effect would be the nullification of the opportunities nominally afforded by Articles 14 and 15 for citizen participation in the environmental enforcement process. Such a result would seriously undermine the utility of the submission process in promoting the Agreement’s other goals, including fostering the protection and improvement of the environment in the territories of the Parties and enhancing compliance with and enforcement of environmental laws.” See also SEM-97-006 (*Oldman River II*), Notification pursuant to Article 15(1) (19 July 1999), p. 22, <<http://goo.gl/b5D4k>> (viewed on 19 August 2013); and, SEM-05-003 (*Environmental Pollution in Hermosillo II*), Notification pursuant to Article 15(1) (4 April 2007), p. 24, <<http://goo.gl/T3RIW>> (viewed on 19 August 2013).

- Ecotourism (TE) land use regime lacks a legal basis under applicable state laws.¹⁸³
111. Chapter XXVI of the Zoning Regulation of the State of Colima – regulates “Service or gasoline stations,” which shall follow the ‘General Specifications for the Design and Construction of Service Stations’ issued by Pemex.¹⁸⁴ A perusal of Chapter XXXVI of the Zoning Regulation and Pemex’ General Specifications indicates that they relate to the construction and operation of gas stations —franchised by Pemex—without any reference to LPG terminals.¹⁸⁵
112. With respect to planning future industrial, commercial and service uses, the amendment states:
- That the company Zeta Gas del Pacífico, S.A. de C.V. ... applied to the municipality for the assignment, in the Urban Development Plan of Manzanillo, Colima, of a High-Impact Industry designation, with which the activity intended to be carried out would be compatible.¹⁸⁶
113. Future industrial, commercial and service uses were modified in response to Zeta Gas del Pacífico, S.A. de C.V. which considered the current ecotourism and forest reserve use to be incompatible with this project.¹⁸⁷ The PDUM amendment is consistent with the developer’s needs.¹⁸⁸
114. Regarding the purported lack of legal basis for Ecotourism (TE) land use¹⁸⁹ defined in the PDUM, it should be noted that the Zoning Regulation does include a land use category defined as “Ecotourism, code TE”.¹⁹⁰
115. Forested Area (AR-FOR) and Ecotourism (TE) designations were replaced by Medium-Term Urban Reserve (RV.MP) and High-Impact Industry (I-3) uses, respectively.
116. Analysis of the response shows the pre-amendment PDUM posed an obstacle to obtaining approval of the project at the time the statement was filed, yet this obstacle was overcome during the environmental impact authorization process through the amendment of the PDUM by the municipal and state authorities. The Secretariat concludes that there is not sufficient information in the response to elucidate the Party’s Article 45(1) assertions regarding the PDUM amendment and the EIS-LPG approval, and considers there are still central open questions concerning the

¹⁸³ Response, *supra* note 21, p. 14.

¹⁸⁴ Zoning Regulation of the State of Colima, Article 401; PDUM, *supra* note 16, p. 4.

¹⁸⁵ A. Ruíz Méndez, *Revista Octanaje*, “Especificaciones generales para proyecto y construcción de estaciones de servicio”, Petróleos Mexicanos, <<http://goo.gl/thnfd>> (viewed on 10 June 2012).

¹⁸⁶ Submission, Appendix 6 (formerly 5): Decision amending the PDUM, consideration 6.

¹⁸⁷ *Ibid.*

¹⁸⁸ See *supra* note 186.

¹⁸⁹ Response, *supra* note 21, p. 14, in relation to the Decision amending the PDUM, consideration 5. See also: *supra* paragraphs 36, 105 and 110.

¹⁹⁰ Zoning Regulation of the State of Colima, Article 20 paragraph VI(a):

The primary zones, and the codes identifying them, for preparation of the State and Regional Urban Development Plans, are: ... VI. Tourism, code T: ... For the purposes of the Regional Urban Development Plans, they are subdivided into the following classes: a) Ecotourism, code TE: those for which, by reason of the high value of their natural environment, require the establishment, further to analysis of the site, of areas and degrees of conservation of the natural elements of value, as well as the degree of compatibility with tourism that can be achieved without disrupting said elements.

Submitter's assertions that the PDUM was allegedly amended in order to adapt it to the Manzanillo LPG Project.¹⁹¹

117. The Secretariat now continues with its review of the response in relation to the assertion of a failure to effectively enforce LAHEC Article 48 paragraph I in respect of the modification of the environmental aspects of the PDUM, allegedly in order to accommodate one of the Projects.

ii The alleged failure to effectively enforce LAHEC Article 48 paragraph I in respect of the amendment of the PDUM warrants the preparation of a factual record

118. LAHEC Article 48 paragraph I, cited by the Submitters, provides that:

Article 48. Municipal urban development plans shall contain ... the following:

I. The consistency of the municipal urban development plan with the national, state, and municipal development plans, the state urban development plan, and the environmental land use plan; [...].

119. The PDUM was published in the Official Gazette of the State of Colima on 4 November 2000.¹⁹² The original land use designation for Ejido de Campos (i.e. the Manzanillo LPG Project site) was that of Forested Area (AR-FOR) and Ecotourism (TE).¹⁹³ The PROETSLC, issued on 5 July 2003, established the current site of the Manzanillo LPG Project as terrestrial natural areas covered under both protection (UGA Ent5 39) and conservation (UGA Ent4 40) policies. The PROETSLC states that these areas “have significant value that warrants the establishment of natural areas ... [or] the strengthening of existing ones.”¹⁹⁴ In accordance with PROETSLC, the area must be studied in greater detail in order to classify the protected natural area in question in the appropriate category and propose a management plan. This policy provides for the reorientation of economic activity in accordance with ecological criteria that are being developed for these areas. A fundamental criterion in any conservation policy is “to refrain from changing the current land use.”¹⁹⁵
120. Mexico argues that issuance of the PDUM precedes that of the PROETSLC, but the Secretariat observes that actually the amendment of the former took place subsequent to the issuance of the latter. It is evident from the submission and the response that at the time when the PROETSLC was approved, policies and land use established therein provided for consistency with the uses determined by the PDUM. Thus, the PDUM provided for the drafting of an environmental land use plan for the Cuyutlán Lagoon,¹⁹⁶

¹⁹¹ Original submission, *supra* note 2, p. 8:

This is so by virtue of the fact that the PDUM was amended subsequent to the filing of the EIS to favor the interests of the company Z Gas del Pacífico, without considering the characteristics and the due protection of the zone; it was reclassified from forested area to medium-term urban reserve and its zoning was changed from ecotourism to high-impact/risk heavy industry.

¹⁹² Government of the State of Colima, Summary of the Urban Development Masterplan of the State of Colima, *El Estado de Colima*, 4 November 2000, online at <<http://goo.gl/E5xh4>> (viewed 18 May 2010).

¹⁹³ Decision amending the PDUM, *supra* note 16, p. 4.

¹⁹⁴ Executive order approving the PROETSLC, *supra* note 15, Article 3.

¹⁹⁵ *Ibid.*

¹⁹⁶ “Short-term environmental aspects... IX: Environmental land use planning for the Cuyutlán Lagoon”; PDUM, *supra* note 16, Article 25.

which denotes an intention to implement the environmental land use plan (i.e., the PROETSLC) in a manner consistent with the PDUM.¹⁹⁷

121. The amendment to the PDUM was published on 12 June 2004. With regard to Ejido de Campos, the amendment changed the Forested Area (AR-FOR) and Ecotourism (TE) use designations to Medium-Term Urban Reserve (RV.MP) and High-Impact Industry (I-3), respectively.
122. Instead of establishing a land use consistent with ecotourism, the PDUM amendment changed the land use to High-Impact Industry. Even though a portion of the lots in Ejido de Campos were under a regime not contemplated in the Zoning Regulation (i.e. Ecotourism), it does not necessarily follow that any zoning change would be permitted under the law, and there are thus central open questions concerning the environmental law in question and this land use change.
123. Furthermore, the decision amending the PDUM does not evince any considerations seeking to incorporate consistency with the PROETSLC or any other motivations relating to the existing land use on the lots in question at that time. Rather, the reasoning employed adduces the incompatibility between the use defined originally for the area in question –stating that “it lacks a legal basis”–¹⁹⁸ and the future use intended by the developer of the Manzanillo LPG Project, which includes industry and services to industry but not tourism.¹⁹⁹ The cited Decision maintains that it was the owner of the lot who requested the land use change because the designated use did not correspond to its development plans.²⁰⁰
124. The Secretariat’s reasoning is also informed by jurisprudence²⁰¹ issued by the plenum of the Mexican Supreme Court of Justice (Suprema Corte de Justicia de la Nación), which confirms that Municipal zoning must be consistent with State and Federal zoning:

...In this sense, when municipal urban development plans have an effect on areas included in federal or local environmental land use plans...municipal urban development plans must be consistent with the Federal and Local environmental land use plans. Municipalities neither have an exclusive nor definitive authority with respect to human settlements and environmental protection matters, as these are constitutionally concurrent issues. Thus, this genre of municipal planning authority must be interpreted as restricted under Federal and Local law principles and formalities and never interpreted as an

¹⁹⁷ PROETSLC, *supra* note 15:

To assess and *plan land uses*, natural resource use, economic activity, and urban development *from an environmental perspective* with a view to making biodiversity conservation, environmental protection, and sustainable development of natural resources and features compatible with urban and rural development as well as with the economic activity being carried out, serving as a basis for the preparation of any development programs and projects intended to be executed, based on an analysis of the state of deterioration and the potential for use thereof, contained in the corresponding program. [Emphasis added.]

¹⁹⁸ Decision amending the PDUM, *supra* note 16, consideration 1.

¹⁹⁹ *Ibid.*, consideration 2.

²⁰⁰ *Ibid.*, consideration 8.

²⁰¹ In the Mexican legal system, “jurisprudence” refers to legal interpretation, that, when issued by the Supreme Court, is binding on all domestic tribunals and courts. Following the court’s debate, when voted favorably by no less than eight votes of Supreme Court justices —at plenary sessions— reasoning included in rulings on constitutional controversies (*controversias constitucionales*) becomes jurisprudence. Cf. Article 45 of the Statutory Law to Sections I and II of the Article 105 of the Mexican Constitution.

exclusive and isolated power of the Municipality without consistency with the two other levels of government planning.²⁰²

125. The Secretariat considers that the response leaves central open questions regarding the alleged absence of consistency between the PDUM and the PROETSLC and therefore, recommends the development of a factual record with regard to the alleged failure to effectively enforce LAHEC Article 48 paragraph I in respect of the lack of consistency between the PDUM and the PROETSLC subsequent to amendment of the PDUM.

2. A factual record is not recommended in regard to the alleged failure to effectively enforce ROE Articles 6, 13, 14, 36, 48, 49, and 50 in respect of the amending procedure for the PROETSLC

i Concerning the assertion that the ROE is suppletive to the LADSEC

126. The Submitters assert that Mexico is failing to effectively enforce ROE Articles 6, 36, 48, 49, and 50 in conformity with LADSEC Article 1 paragraph VII in relation to the amendment of the PROETSLC, since – they assert – the government of Colima and the municipalities would only be authorized to amend the PROETSLC in order to decrease the adverse environmental impacts caused by economic activity, not to increase them.²⁰³ Likewise, the Submitters maintain that Mexico is failing to enforce ROE Articles 7, 13, and 14, which are applicable pursuant to LADSEC Article 1 paragraph VII and require the implementation of an environmental registry for purposes of environmental land use planning.²⁰⁴

127. In its response, Mexico maintains that: the Secretariat incorporated an argument not presented in submission SEM-09-002, thus modifying the Submitters' complaint;²⁰⁵ it is impossible for a federal regulation to be suppletive to a local provision;²⁰⁶ that in any case the ROE is not a legal provision that could be applicable to matters on which the LADSEC is silent, since the PROETSLC is not an instrument under federal jurisdiction;²⁰⁷ and that the drafting and issuance of environmental land use plans are governed by specific provisions not cited by the Submitters. Mexico concludes that the state authorities were neither obligated to observe the criteria of ROE Article 6, nor to implement the environmental registry as prescribed by ROE Articles 13 and 14. Moreover, Mexico states their power to amend environmental land use plans was not limited by ROE Articles 48 and 49, nor by making such amendments were they obligated under ROE Article 50 to follow the same rules that applied to the issuance of the instrument.²⁰⁸

²⁰² CONCURRENT POWERS REGARDING HUMAN SETTLEMENTS, ENVIRONMENTAL PROTECTION AND PRESERVATION, AND RESTORATION OF ECOLOGICAL BALANCE. MUNICIPAL URBAN DEVELOPMENT PLANS MUST BE CONSISTENT WITH FEDERAL AND LOCAL ENVIRONMENTAL LAND USE PLANS. Jurisprudence, Tenth Period, Supreme Court of Justice, plenary session, *Semanario Judicial de la Federación y su Gaceta*, book I, October 2011, T. 1, p. 288 [unofficial translation].

²⁰³ Revised submission, *supra* note 19, p. 6. Emphasis added.

²⁰⁴ *Ibid.*, p. 6.

²⁰⁵ Response, *supra* note 21, pp. 15–16.

²⁰⁶ *Ibid.*, pp. 17–18.

²⁰⁷ *Ibid.*, pp. 18–19.

²⁰⁸ *Ibid.*, p. 20.

128. The relevant part of LADSEC Article 1 provides as follows:

Article 1. This Act is for public order and the societal interest, its provisions require mandatory compliance, apply within the scope of jurisdiction of the State, and have as their object the preservation and restoration of ecological stability, the protection of the environment, and the promotion of sustainable development, establishing the basis for: [...]

VII. Regulating liability for harm to the environment and establishing adequate mechanisms to guarantee the incorporation of environmental costs into production processes, as well as mechanisms for repair of harm to the environment.

Where this Act is silent on any matter, the provisions contained in other laws, regulations, standards, and other applicable federal or state legal instruments that relate to the matters governed by this provision shall apply.

129. Mexico maintains that the Submitters only cited paragraph VII of LADSEC Article 1 and not the last paragraph of that article, and that at no time did they invoke the suppletivity of the ROE,²⁰⁹ which, the Party asserts, the Secretariat is doing on behalf of the Submitters.

130. With reference to LADSEC Article 1, the original submission indicated that the relevant paragraph was “VIII,”²¹⁰ which does not exist in LADSEC Article 1, but which in the eyes of the Submitters must have comprised the last paragraph of that article. The Secretariat noted this defect of form in its first determination,²¹¹ which the Submitters believed to have been corrected in their revised submission, considering the relevant paragraph to be VII, however this paragraph does not refer to the application of other provisions where the LADSEC is silent, a matter that is in fact addressed in the last (unnumbered) paragraph of the article in question.

131. Guideline 5.2, in force at the time of the submission, required the Submitters to “identify the applicable statute or regulation, or provision thereof.” Thus, the requirement of identifying the applicable provision was deemed by the Secretariat to be satisfied with the citation of LADSEC Article 1, which consists of an initial unnumbered paragraph, a list with seven numbered paragraphs, and a final unnumbered paragraph. Paragraph VII must be read in conjunction with the initial and final paragraphs, which is cited by the Submitters in their assertion that the federal regulation may fill a gap in the local law.²¹²

132. In principle, citizen submissions “should be processed in a timely and efficient manner in order to meet the public’s expectations regarding the process.”²¹³ The Secretariat finds that the reference to the final paragraph of LADSEC Article 1 is unequivocal. In further consideration of this —and consistent with transparency²¹⁴ and public

²⁰⁹ *Ibid.*, p. 16.

²¹⁰ Original submission, *supra* note 2, p. 6.

²¹¹ Determination pursuant to Article 14(1), *supra* note 18, §36.

²¹² Cf. Determination pursuant to Article 14(1)(2), *supra* note 20, §34.

²¹³ Council Resolution 01–06 (29 June 2001), Response to the Joint Public Advisory Committee (JPAC) Report on Lessons Learned regarding the Articles 14 and 15 Process.

²¹⁴ NAAEC Article 1: “The objectives of this Agreement are to: ... (h) promote transparency and public participation in the development of environmental laws, regulations and policies”.

participation principles in NAAEC—²¹⁵ Guideline 6.1 does not authorize the Secretariat to terminate a submission based solely on a minor error of form.

133. As to the language specifically used by the Submitters to characterize the application of the ROE in a situation not contemplated in the LADSEC, the following argumentation is found in the submission:

In accordance with paragraph VII ... of Article 1 of the LADSEC, Articles 6, 36, 48, 49, and 50 of the Regulation to the LGEEPA *are applicable*.²¹⁶

134. The Submitters use the phrase “are applicable,” which in the Secretariat’s view is tantamount to stating that the local provision authorizes the application of the federal regulation. The Party clearly acknowledges the existence of this argument in the submission when it states that:

... the Submitters reiterate the interpretation contained in the original submission to the effect that the federal regulation to the LGEEPA *is applicable* to the environmental land use planning processes developed on the basis of local law.²¹⁷

135. But the Party proceeds to state that the Secretariat studied issues different from those raised in the submission since “at no time do they mention the suppletivity of the federal regulation in the case at hand, much less do they cite the last paragraph of Article 1.”²¹⁸

136. The Secretariat finds that there is no doubt the executive order promulgating the law in question uses the word “suppletive” and explains the reason for this usage.²¹⁹ In fact, a perusal of the appendices to the submission shows that the action in nullity (*demanda de nulidad*) against the Executive order revising the PROETSLC confirms the reference to LADSEC Article 1 as a basis of the argument for the suppletive application of the federal regulation.²²⁰ Furthermore, the Submitters employ the term “are applicable,”²²¹ in a manner similar to the use of “shall apply,”²²² in the Article in question, and Mexico begins its response noting that such is the case,²²³ but it was not done with the sufficient legal precision which, in the Party’s estimation, is to be expected in a citizen submission.²²⁴

137. The Parties to the NAAEC have stated on numerous occasions that the SEM process is non-adversarial, most recently in the revised Guidelines, and thus a submitter need not be, nor consult with a lawyer in order to make a citizen submission.²²⁵ It is therefore

²¹⁵ NAAEC, Preamble: “**EMPHASIZING** the importance of public participation in conserving, protecting and enhancing the environment;...” [emphasis in original].

²¹⁶ Revised submission, *supra* note 19, p. 6, point 1.7 (emphasis added).

²¹⁷ Response, *supra* note 21, p. 6 (emphasis in original).

²¹⁸ *Ibid.*, p. 16.

²¹⁹ Executive order no. 216, Environmental Act for Sustainable Development of the State of Colima reads: “Whereas: ... Five: Title One of the initiative consists of a single chapter and five articles determining the object of the act, the cases in which it applies, the suppletivity...” [emphasis added].

²²⁰ Revised submission, *supra* note 19, Appendix 21: Action in nullity No. 450/07 (24 May 2007) against the order approving the revision of the PROETSLC, p. 5.

²²¹ Revised submission, *supra* note 19, p. 6, point 1.7 (emphasis added).

²²² LADSEC, *supra* note 12, Article 1.

²²³ Response, *supra* note 21, p. 6.

²²⁴ *Ibid.*, p. 16.

²²⁵ “As a fact-finding, non-adversarial procedure, the SEM process is not a dispute resolution mechanism nor can it result in a Party being required to take specific remedial action. Although filing a public submission does not require any special expertise, submissions should include an

curious to require a high burden for the submitter in terms of identifying the “elementary cause of action” in the manner Mexico has stated, especially in light of the fact that the SEM process is indeed not a judicial proceeding subject to the rules of evidence or burden of proof common in civil litigation.

138. While the Submitters did identify “the applicable statute or provision thereof”, they cannot expected to produce scholarly legal argument identifying the meaning and scope of legal concepts such as “suppletivity”.
139. It is evident from a perusal of the original submission and its revised version that the reference to the last paragraph of LADSEC Article 1 was unequivocal. The Secretariat confirms that the citation of the provision in question conforms to the criteria of NAAEC and the Guidelines and may be considered further in a factual record.

ii Concerning the suppletivity of a federal regulation with respect to a state law

140. In its response, Mexico maintains that it:

...does not concur with the Secretariat’s interpretation regarding the suppletivity of a *federal regulation* in the area of environmental land use planning vis-à-vis the provisions contained in *state law*.²²⁶

141. Mexico affirms that the ROE is exclusively applicable to the LGEEPA and to environmental land use planning under federal jurisdiction since “in no way can it be interpreted to be a regulation, even a suppletive regulation, to the LADSEC.”²²⁷ The Party adds that, pursuant to the last paragraph of LADSEC Article 1, the ROE does not represent a legal device applicable to matters on which the LADSEC is silent, since it is a regulatory provision issued by the Federal Executive. Mexico concludes that to allow what the Submitters argue, would be to countenance an encroachment upon jurisdiction under LGEEPA Article 20 *bis* 2, exceed the regulatory powers of the Federal Executive, and improperly apply the legal institution of suppletivity, since in order for the enforcement of the law to be effective, “it must in the first place respect the distribution of powers provided by the Constitution and the national laws.”²²⁸
142. The response to SEM-09-002 invokes a judgment relating to the limits of the regulatory powers of the Federal Executive Branch²²⁹ according to which, Mexico argues, a federal regulation cannot be applied as suppletive to state or municipal laws.²³⁰
143. The Secretariat construes the Party’s arguments about the environmental law in question as having great force, and the Secretariat does not purport to have the authority to make dispositive statements regarding a Party’s legal system, whether concerning jurisdiction, suppletivity, or the distribution of powers. The Secretariat only considers the environmental law in question in order to determine whether and

accurate and clear presentation of the relevant facts.” Introduction to the Guidelines issued on 11 July 2012.

²²⁶ *Ibid.*, p. 15 (emphasis added).

²²⁷ *Ibid.*, p. 18.

²²⁸ *Ibid.*, p. 21.

²²⁹ REGULATORY AUTHORITY OF THE FEDERAL EXECUTIVE BRANCH. PRINCIPLES AND LIMITATIONS. Ninth Period. *Semanario Judicial de la Federación y su Gaceta*, XXX, August 2009, p. 1067 [unofficial translation].

²³⁰ Response (public version), *supra* note 21, p. 17.

how to proceed with regard to a submitter's assertions, in accordance with Article 14(1) and Article 45(2). With this in mind, a response to another citizen submission, the Party in question argued that the suppletivity of a federal regulation with respect to a state law is in fact possible:

It should be noted that pursuant to the Fourth Transitory Article of the Ecological Balance and Environmental Protection Act of the Free and Sovereign State of Sonora, the regulations of the General Ecological Balance and Environmental Protection Act shall be applied as relevant until such time as the state governor and the mayors of the municipalities in a federated entity issue the regulations and other mandatory compliance provisions to which said Act refers, so it cannot therefore be alleged that there exists a regulatory vacuum arising from the alleged failure by the state and municipal authorities to issue such instruments, since they are supplemented by those issued at the federal level in accordance with the provisions of the LGEEPA, its regulations, and the Mexican Official Standards.²³¹

144. In reviewing the arguments on suppletivity put forward by the Party in its notification in regard to submission SEM-05-003, the Secretariat found that:

...Mexico presents a list of air pollution-related legislation enacted by the federal government. It argues that there are no legal gaps in local and municipal law since, pursuant to Transitory Article 4 of the [Ecological Balance and Environmental Protection Act of the Free and Sovereign State of Sonora], the LGEEPA and the provisions flowing from it apply in the state of Sonora and the municipality of Hermosillo where local and municipal law are silent on any issue.²³²

And so:

The Secretariat finds that the enactment of laws, regulations, and standards in Sonora and Hermosillo is a matter that LEES addresses through the supplemental applicability of LGEEPA and other legal provisions arising from it. Therefore, the Secretariat declines to include this aspect in a factual record.²³³

145. Consideration of LADSEC Article 1 in light of response to submission SEM-09-002 and the criteria expressed by the Party applied in SEM-05-003 appears helpful in reconciling the apparent discrepancy of reasoning between the aforementioned responses, and helps guide the Secretariat in determining whether to request a factual record:

Article 1...

Where this Act is silent on any matter, the provisions contained in other laws, regulations, standards, and other applicable *federal or state* legal instruments that relate to the matters governed by this provision shall apply.²³⁴

²³¹ SEM-05-003 (*Environmental Pollution in Hermosillo II*), Response pursuant to Article 14(3), p. 37, <<http://goo.gl/A2Ip6>> (viewed on 19 August 2013).

²³² SEM-05-003 Notification pursuant to Article 15(1), *supra* note 182, p. 23.

²³³ *Ibid.*, pp. 23–4. In this regard, Transitory Article Four of the Ecological Balance and Environmental Protection Act of the Free and Sovereign State of Sonora (*Ley de Equilibrio Ecológico y Protección al Ambiente del Estado Libre y Soberano de Sonora*) provides:

Until such time as the holder of executive power and the municipalities of the state issue the regulations and other generally applicable provisions to which this Act refers, the regulations to the General Ecological Balance and Environmental Protection Act shall apply as relevant.

²³⁴ LADSEC, *supra* note 12, Article 1 (emphasis added).

LADSEC Article 1 authorizes the application of “laws, regulations, standards, and other applicable federal or state legal instruments” “where [the LADSEC] is silent,” but only for matters covered by the LADSEC.

146. Therefore, it is unclear from the instant response how “encroachment upon jurisdiction” by the Federal Executive with respect to the state could occur, since the referral to federal law comes from Colima state law – the LADSEC – which was enacted by Colima’s Congress and passed into law by its Governor.
147. Notwithstanding the foregoing, in practice the Secretariat has acted cautiously when considering the inclusion of a disputed or ambiguous legal interpretation in a factual record. A perusal of LADSEC Article 1 in light of one jurisprudential judgment and two non-jurisprudential judgments (*tesis aisladas*)²³⁵ indicates that the suppletive application of the ROE to the amending procedure for the PROETSLC is not settled law, also in light of the fact that there is no express referral to the ROE. The instrument being supplemented, the LADSEC, expressly allows for the possibility of a suppletive application of a federal regulation where the LADSEC *is silent on any issue*. However, the jurisprudence consulted by the Secretariat is consistent in that it requires in every case that the applicable provision be specifically mentioned; otherwise the referral does not obtain. Since there is no explicit reference to the suppletive statute – the ROE – in the text of LADSEC Article 1, the Secretariat cannot review the effective enforcement thereof, since there is an issue in law that remains unresolved.
148. The Secretariat has previously determined that when faced with unsettled law, it should not recommend a factual record.²³⁶ The Secretariat has also determined that a factual record should present only factual information relevant to alleged failures to effectively enforce environmental law²³⁷ and not legal interpretation, which is a matter for the bodies of government.²³⁸ The explicit referral by the LADSEC to the federal regulation in question is a missing element identified by the Secretariat as it considered the preparation of a factual record in this case. An investigation into the facts would be impeded if there were no local law indubitably referring to the application of the ROE and obligating the state of Colima and the municipalities of Armería and Manzanillo to

²³⁵ “The requirements for the existence of the suppletivity of one provision with respect to others are: a) that the provision to be supplemented expressly allows this, and *indicates the suppletive statute*”; SUPPLETIVITY OF THE LAW. REQUIREMENTS FOR ITS OPERATION. Jurisprudence, Eighth Period, Circuit Tribunals, *Semanario Judicial de la Federación y su Gaceta* LXXVI, April 1994, p. 33. “Thus, in order for suppletivity to operate it is necessary that: a) the legal provision to be supplemented expressly establishes this possibility, *indicating the law or provisions that may be applied suppletively*, or that a provision establishes that it applies suppletively, in whole or in part, with respect to other provisions”; SUPPLETIVITY OF THE LAWS. REQUIREMENTS FOR ITS OPERATION. Thesis, Ninth Period, Supreme Court (2nd Court-Room), *Semanario Judicial de la Federación y su Gaceta* XXXI, March 2010, p. 1054. “The necessary conditions for one law to be considered suppletive to another are as follows: 1.- That the provision to be supplemented expressly allows this and *indicates the applicable law*”; SUPPLETIVITY OF A LAW TO ANOTHER. Thesis, Ninth Period, Circuit Tribunals, *Semanario Judicial de la Federación y su Gaceta* III, April 1996, p. 480 (Emphasis added and unofficial translation in all cases).

²³⁶ SEM-02-002 (*Mexico City Airport*), Determination pursuant to Article 15(1) (25 September 2002), p. 14, <<http://goo.gl/32GYD>> (viewed on 19 August 2013).

²³⁷ “Depending on the circumstances, the information may focus on particular actions, omissions or events casting light on the alleged ‘failure.’” SEM-95-002 (*Logging Rider*), Determination pursuant to Article 14(1) (8 December 1995), p. 5, <<http://goo.gl/b7lvX>> (viewed on 19 August 2013).

²³⁸ “Development of a Factual Record does not entail a legal restatement or interpretation, application, or revision of how domestic courts and/or a branch of government interpret domestic environmental laws.” SEM-07-001 Article 15(1) Determination, *supra* note 136, §68.

carry out, *inter alia*, the amendment of the PROETSLC in a manner that decreases the adverse environmental impacts caused by economic activities. Therefore, the Secretariat finds that it should not recommend a factual record in respect of ROE Articles 6, 13, 14, 36, 48, 49, and 50 as applied suppletively to the amending procedure for the PROETSLC prescribed by the LADSEC.

3. A factual record is recommended in regard to the alleged failure to effectively enforce LGEEPA Article 20 *bis* 2 and ROE Articles 7 8 and 10 in respect of the implementation of the Coordination Agreement.

149. The Submitters assert that Mexico is failing to effectively enforce LGEEPA Article 20 *bis* 2 and ROE Articles 7, 8, and 10²³⁹ in respect of compliance with and implementation of the Coordination Agreement by the state of Colima and the municipalities of Armería and Manzanillo.²⁴⁰ The Submitters affirm that coordination agreements are public law instruments and mandatory compliance for Semarnat (particularly DGIRA), the state of Colima, and the municipalities of Armería and Manzanillo.²⁴¹

150. In the response, Mexico confirms that the first paragraph of LGEEPA Article 20 *bis* 2 is applicable to the Coordination Agreement²⁴² in that it provides as follows:

Article 20 *bis* 2. The Governments of the States and the Federal District, pursuant to the applicable local laws, shall draft and issue regional environmental land use plans encompassing the entirety or a part of the territory of a federated entity.²⁴³

Since the PROETSLC encompasses part of the territory of a federated entity, it appears incumbent upon the state of Colima to draft and issue an environmental land use plan for the Cuyutlán Lagoon.

151. As regards ROE Articles 7, 8, and 10, Mexico notes that this regulation came into force on 9 August 2003, subsequent to the signing of the Coordination Agreement, and hence the provisions cited did not serve as a legal basis for the Coordination Agreement. Moreover, Mexico maintains in regard to the three ROE provisions in question, that they are applicable to environmental land use planning under federal jurisdiction, but not planning under state jurisdiction.²⁴⁴ Concerning ROE Article 8, Mexico notes that it merely provides discretion to Semarnat.²⁴⁵

152. Concerning ROE provisions Mexico maintains are not applicable to the content and scope of the Coordination Agreement and the factors necessary to implement the PROETSLC, the Secretariat, in its Article 14(1)(2) determination, considered the Second Transitory Article of the ROE,²⁴⁶ which prescribes the following mechanism for the preparation of environmental land use plans:

SECOND. Those regional or local environmental land use plans in which the Ministry participates and the preparation of which began prior to the publication

²³⁹ Revised submission, *supra* note 19, pp. 5–6.

²⁴⁰ *Ibid.*, p. 4.

²⁴¹ *Ibid.*, pp. 5–6.

²⁴² Response, *supra* note 21, p. 22.

²⁴³ LGEEPA, *supra* note 5, Article 20 *bis* 2.

²⁴⁴ Response, *supra* note 21, pp. 22–4.

²⁴⁵ *Ibid.*, p. 23.

²⁴⁶ Determination pursuant to Article 14(1), *supra* note 20, note 78.

of this Regulation, shall be incorporated into the environmental land use planning process as set out in Article 7 hereof.²⁴⁷

153. Thus, pursuant to this transitory provision, regional land use plans such as the PROETSLC are incorporated into environmental land use planning according to the mechanism set out in ROE Article 7, cited below in relevant part:

Article 7. Environmental land use planning under federal jurisdiction shall be carried out by means of the environmental land use planning process and shall have as its outcome the following products:

I. Coordination agreements, which may be signed by:

[...]

b. The federated entities, their municipalities, the Federal District, and its boroughs in the study area.

II. Environmental land use plans [...]

a. [...]

b. [...]

III. The environmental registry.

[...] ²⁴⁸

154. The PROETSLC applies only within a part of the territory of the state of Colima and does not encompass any other federated entity. In this regard, as Mexico clarifies, its drafting and issuance are under state jurisdiction.²⁴⁹ In addition, both the Coordination Agreement and the PROETSLC were issued prior to the ROE, and so the latter does not constitute a legal requirement for the former's preparation. Nevertheless, the transitory provision of the ROE allows for the incorporation of the environmental land use planning process, the Coordination Agreement, the PROETSLC, and the environmental registry, but which incorporation according to the Submitter did not take place.²⁵⁰

155. The Second Transitory Article of the ROE identified by the Secretariat in its Article 14(1)(2) determination is not addressed by Mexico in its response. Nor does the response argue whether, in any case, there was a process of integration between the Coordination Agreement, the PROETSLC, and its amendment (i.e. comprehensive revision).

156. ROE Article 8 provides for the revision of existing coordination agreements contemplated in ROE Article 7 paragraph I.²⁵¹ The first paragraph of the provision in question reads as follows:

Article 8. The Ministry shall promote the signing of such coordination agreements as may be required pursuant to paragraph I of the preceding article or, in any case, *the revision of those already existing as a basis for any*

²⁴⁷ ROE, Second Transitory Article.

²⁴⁸ ROE, *supra* note 10, Article 7.

²⁴⁹ Response, *supra* note 21, p. 22.

²⁵⁰ Revised submission, *supra* note 19, pp. 5-6.

²⁵¹ As discussed above, ROE Article Second Transitory provides for the integration of regional and local programs to the ecological land use planning issued before the law came into force.

environmental land use plan in force with a view to adapting them to the provisions of this Regulation.²⁵²

157. The revision of the Coordination Agreement could have preceded the amendment of the PROETSLC, since the former served as a basis for the preparation of the original version of the latter. Thus, it is not evident from the response that there are any mechanisms for integration among the Coordination Agreement, the PROETSLC and the act that amended the PROETSLC. Mexico maintains the discretionality of the revision process contemplated in the article in question and does not present factual information about acts of enforcement.²⁵³
158. ROE Article 8 also provides that coordination agreements shall establish “actions, deadlines, and commitments.” It lists minimum implementation criteria²⁵⁴ and covers the designation of authorities responsible for the furtherance of the environmental land use planning process,²⁵⁵ the formation of an oversight body;²⁵⁶ and sanctions and responsibilities,²⁵⁷ among other items. The submission does not allege deficiencies in the contents of the Coordination Agreement and this issue does not merit further investigation in a factual record.
159. ROE Article 10 establishes that coordination agreements “are considered matters of public law and mandatory compliance for the Parties entering into them”²⁵⁸ and, as such, Article 10 guides the Secretariat in its enforcement analysis.

(i) Why a Factual Record is Warranted

160. Having stated its reasoning for continuing its NAAEC Article 15(1) review, the Secretariat now proceeds to state the reasons why it finds that a factual record could shed light on acts of effective enforcement of the instruments ensuing from LGEEPA Article 20 *bis* 2 and ROE Articles 7, 8 and 10.
161. The Coordination Agreement, a mandatory device subject to public law,²⁵⁹ is an instrument of environmental policy the purpose of which is “regulating or inducing land-use practices and economic activities with a view to achieving environmental protection...”²⁶⁰ It lays the groundwork for the drafting, issuance, and implementation of the regional environmental land use plan for the Cuyutlán Lagoon²⁶¹ that ultimately took the form of the PROETSLC.
162. The Coordination Agreement was issued pursuant to provisions that establish a national planning system,²⁶² establish the concept of environmental land use planning and assign the powers to implement it,²⁶³ and provide that the instrument is a matter of

²⁵² ROE *supra* note 10, Article 8, first paragraph (emphasis added).

²⁵³ Response, *supra* note 21, p. 23.

²⁵⁴ ROE, *supra* note 10, Article 8 paragraph II.

²⁵⁵ *Ibid.*, Article 8 paragraph III.

²⁵⁶ *Ibid.*, Article 8 paragraph IV.

²⁵⁷ *Ibid.*, Article 8 paragraph VIII.

²⁵⁸ *Ibid.*, Article 10.

²⁵⁹ *Idem.*

²⁶⁰ LGEEPA, *supra* note 5, Article 3 paragraph XXIII (now paragraph XXIV), DOF 28 January 2011.

²⁶¹ Coordination Agreement, *supra* note 17, first clause.

²⁶² Political Constitution of the United Mexican States, *supra* note 3, Articles 25, first and sixth paragraphs, and 26.

²⁶³ LGEEPA, *supra* note 5, Articles 7 paragraphs I, II, and IX; 8 (in particular paragraphs I and II); 17, 19, 20 *bis* I first paragraph, and 20 *bis* II first paragraph.

public utility²⁶⁴ of a regional nature.²⁶⁵ Thus, the provisions forming the legal basis of the Coordination Agreement establish that regional environmental land use plans shall include, *inter alia*, “guidelines for their implementation, assessment, monitoring, and amendment”²⁶⁶ as well as the ecological regulation criteria set out in the LGEEPA.²⁶⁷ The instrument is framed as part of the effort whereby “each federated entity and each specific critical region adopts an environmental land use plan that *has the force of law*”²⁶⁸ since it constitutes “the bedrock of the environmental policy,”²⁶⁹ which “must contain means and mechanisms to make its objects possible, be set out in legal provisions, and provide long-term certainty.”²⁷⁰ The Coordination Agreement specifies that the three levels of government (federal, state, and municipal) are conscious of the environmental implications that may arise if no preventive or corrective measures are taken in the region of the Cuyutlán Lagoon.²⁷¹

163. The undertakings entered into by Semarnat, the state of Colima, and the municipalities of Manzanillo and Armería in the Coordination Agreement included the *a posteriori* implementation of the PROETSLC,²⁷² the adaptation of the local environmental land use plans in order to ensure their compatibility,²⁷³ and the observance of the PROETSLC in the issuance of authorizations by federal authorities²⁷⁴ and local authorities.²⁷⁵
164. Mexico contends that in any case, the local and municipal authorities carried out a comprehensive revision and not an amendment.²⁷⁶ Mexico maintains that from 2003 to 2007, the area intended for protection increased from 6,233.9 to 11,930.8 hectares while the area governed by a policy of use decreased from 36,397 hectares to 16,985.5 ha.²⁷⁷
165. In addition, the response makes reference to acts of enforcement of LADSEC Article 38, which prescribes the procedure for the amendment of environmental land use plans. However, the Secretariat does not include in its analysis acts of enforcement of LADSEC Article 38 since the Submitters made no assertion of a failure to effectively enforce this provision.

²⁶⁴ *Ibid.*, Article 2 paragraph I.

²⁶⁵ *Ibid.*, Article 19 *bis* paragraph II:

Environmental land use planning for the national territory and for areas over which the nation exercises sovereignty and jurisdiction shall be carried out through the:...

II. Regional environmental land use plans...

²⁶⁶ *Ibid.*, Article 20 *bis* 3 paragraph III.

²⁶⁷ See: General Human Settlements Act (*Ley General de Asentamientos Humanos*), DOF July 21 1993, Article 19, which requires that land use plans shall include ecological regulation criteria in LGEEPA Articles 23–27.

²⁶⁸ Coordination Agreement, *supra* note 17, Background, I (emphasis added).

²⁶⁹ *Ibid.*, Background, II.

²⁷⁰ *Ibid.*, Background, II.

²⁷¹ *Ibid.*, Background, VIII.

²⁷² *Ibid.*, fifth clause.

²⁷³ *Ibid.*, sixth clause, paragraph c).

²⁷⁴ *Ibid.*, third clause, paragraph b).

²⁷⁵ *Ibid.*, fifth clause, paragraph c).

²⁷⁶ Response, *supra* note 21, p. 24.

²⁷⁷ *Ibid.*, p. 27.

166. The “comprehensive revision” of the PROETSLC adduced by Mexico does not present further information about the 40% reduction in areas devoted to conservation,²⁷⁸ nor does it elaborate on the 15,862.4 hectare reduction in the area comprised by the environmental land use plan.²⁷⁹ A preliminary analysis of the area comprised by the PROETSLC in 2003 makes clear that the areas on the edges of the study area that were covered by a localized use policy are no longer included in the amended PROETSLC of 2007.²⁸⁰ In other words, while it would appear from a perusal of the response that the areas subject to use were reclassified under some protection, conservation, or restoration policy, the maps provided by Mexico indicate that a large area subject to use was simply left out of the regional environmental land use plan.
167. Concerning the environmental viability criterion incorporated into the infrastructure works – which were made conditional on the stability of the coastal dunes, the hydrodynamics in the lagoon, and the ecosystem functions – as well as into the design and operation phases (which in turn were made conditional on the generation of positive synergistic effects with other projects) it is not clear how such criteria were implemented in the EIS-LNG.
168. A factual record would shed light on the process of integration of the environmental land use planning into the project and how this meets the requirements imposed on the project. Further, while Mexico argues²⁸¹ that the updated environmental land use plan incorporates the obligation to assess environmental impact as a condition for infrastructure development,²⁸² in fact the Manzanillo LNG Project also remains legally subject to the environmental impact assessment procedure prescribed by the LGEEPA and the REIA.
169. The Secretariat finds that a factual record could shed light on the amendment of the environmental land use plan for the Cuyutlán Lagoon, and in particular: i) whether the areas reclassified under a policy of protection were originally areas devoted to use; ii) whether the 3,242 hectares that are no longer classified for conservation now fall under a policy of use; and iii) whether the redistribution of areas addresses the ecological requirements of the wetlands in basins III and IV of the Cuyutlán Lagoon.
170. Similarly, the Secretariat finds that the assertion regarding the amendment of the PDUM and the PROETSLC to accommodate the Projects merits further consideration in a factual record. In the case of both latter instruments, the amendment (or revision) process took place during the review of the environmental viability of the Projects: the PDUM was amended on 12 June 2004, a few days before the AIA-LPG was issued, while the comprehensive revision of the PROETSLC took place during the assessment procedure for the EIS-LNG on 9 January 2007. The alleged “consent” by the municipalities of Armería and Manzanillo, to which the submission refers, has to do with the role they played during the amending process for both instruments. The response does not show that the documents relating to the amendment of the regional

²⁷⁸ Response, *supra* note 21, p. 28. In 2003 there were 7,787.6 hectares devoted to conservation while in 2006 this was reduced to 4,543.8 ha.

²⁷⁹ Response, *supra* note 21, Appendix 3: Cuyutlán Lagoon (Colima) Regional Environmental Land Use Plan. Comparison chart, 2003 Order vs. 2007 Revision.

²⁸⁰ *Idem*.

²⁸¹ Response, *supra* note 21, p. 29.

²⁸² For example, under criterion INF 3, “The construction of works of infrastructure and services is permitted, conditional upon the environmental impact assessment carried out in accordance with the applicable state and federal laws.” Response, *supra* note 21, p. 29.

and local environmental land use plans ever refer to the Coordination Agreement, which is mandatory and subject to public law.²⁸³

171. A factual record could address how LGEEPA Article 20 *bis* 2 and ROE Articles 7, 8 and 10 were applied and how the Coordination Agreement is the instrument for the effective enforcement of the law in question.

Section II. Concerning the Manzanillo LPG Project

4. A factual record is not recommended in regard to the alleged failure to effectively enforce LGEEPA Article 30 and REIA Article 4 paragraph IV in respect of the alleged deficiencies in the description of environmental impacts in the EIS-LPG, and the alleged lack of a public consultation process for the project

172. The Submitters assert that Mexico is failing to effectively enforce provisions applicable to the production of the EIS-LPG and to the environmental impact assessment procedure for the Manzanillo LPG Project being developed by Zeta Gas. The Secretariat's reasoning in regard to matters of effective enforcement of LGEEPA Article 30 and REIA Article 4 paragraph IV addressed by Mexico is set out below.

(i) Effective enforcement of LGEEPA Article 30

173. The first paragraph of LGEEPA Article 30²⁸⁴ establishes the obligation for anyone proposing to carry out any of the works or activities listed in LGEEPA Article 28 – e.g., the Manzanillo LPG Project – to submit an EIS. The EIS is then subjected to assessment and, as applicable, gives rise to the issuance of an environmental impact authorization by Semarnat. LGEEPA Article 30 further provides that the EIS shall contain, at least:

... a description of the possible effects on the ecosystem or ecosystems that may be affected by the work or activity in question, considering the total sum of the elements making up said ecosystems, as well as the preventive, mitigation, and other measures necessary to avert and/or minimize the negative effects on the environment.²⁸⁵

174. The Submitters assert that in assessing the environmental impact of the Manzanillo LPG Project, Semarnat ignored the provisions of the first paragraph of LGEEPA Article 30, maintaining that: (i) there were deficiencies in the preparation of the EIS-LPG, since there was no “serious, realistic description of the possible effects on the ecosystem that could be affected”²⁸⁶ by the activities planned, and (ii) “no consideration was given to the sum total of the elements making up said ecosystems,

²⁸³ ROE, *supra* note 10, Article 10.

²⁸⁴ Mexico addresses third and fourth paragraphs of LGEEPA Article 30 and maintains that they are not applicable to the Submitters' assertions; in this regard, it should be mentioned that the Submitters only refer to the failure to enforce the first paragraph of LGEEPA Article 30. Cf. Response, *supra* note 21, p. 42, and Original submission, *supra* note 2, p. 8.

²⁸⁵ LGEEPA, *supra* note 5, Article 30, first paragraph.

²⁸⁶ Revised submission, *supra* note 19, p. 7.

nor the preventive, mitigation, or other measures necessary to avert and/or minimize the negative effects on the environment.”²⁸⁷

175. Mexico states in its response that “regardless of any perception the Submitters may have of what would constitute a ‘serious, realistic’ description ... what is certain is that the [EIS-LPG] contains ... sections that meet the requirements of the first paragraph of LGEEPA Article 30.”²⁸⁸ The response includes a list of the contents of chapters V and VI of the EIS-LPG,²⁸⁹ titled respectively “Identification, Description, and Assessment of Impacts” and “Strategies for the Prevention and Mitigation of the Cumulative and Residual Environmental Impacts on the Regional Environmental System,” for the purpose of substantiating that the EIS-LPG does contain the elements required by the environmental law cited in the submission.
176. The Party states that with a view to providing further information for the proper assessment of the Manzanillo LPG Project, on 12 April 2004 DGIRA requested additional information from the developer with regard to environmental impact prevention and mitigation measures.²⁹⁰ The additional information was submitted by the developer on 18 May 2004.²⁹¹ Mexico states that “DGIRA obtained specific information about the environmental characterization of the project site and detected the main environmental impacts and risks to the coastal dunes, soil, vegetation and plant cover, flora, fauna, and hydrology.”²⁹²
177. From a perusal of the EIS-LPG, the additional information provided by the developer, and the AIA-LPG,²⁹³ and considering that Mexico states that it conducted the required analysis of the possible environmental impacts and risks that would occur as a result of the development of the project,²⁹⁴ it is evident that the EIS-LPG appears to contain the minimum elements described by the first paragraph of LGEEPA Article 30. The Secretariat notes the analysis of LGEEPA Article 35 and REIA Article 13, paragraph III presented in part 5) in this section.
178. In light of the content of the EIS-LPG and its additional information, the AIA-LPG, and Mexico’s response, and considering that the Submitters assert the lack of a “serious, realistic description”²⁹⁵ of the possible impacts on the environment and the elements making up “said ecosystems,”²⁹⁶ and given the lack of specificity about which elements allegedly were not considered in the environmental impact prevention and mitigation measures for the project, the Secretariat finds that the assertion concerning a failure to effectively enforce the first paragraph of LGEEPA Article 30 in relation to the Manzanillo LPG Project, does **not** warrant the preparation of a factual record. Pursuant to NAAEC Article 15(1) and section 9.6 of the Guidelines, the

²⁸⁷ *Ibid.*, p. 7.

²⁸⁸ Response, *supra* note 21, p. 40.

²⁸⁹ *Ibid.*, pp. 40–1.

²⁹⁰ *Ibid.*, p. 42 and Appendix 8: DGIRA, Doc. no. SGPA/DGIRA/DEI.0605/04 (12 April 2004) [LPG Additional Information Request].

²⁹¹ Response, *supra* note 21, Appendix 10: Z Gas del Pacífico, Doc. no. OFI-ZETA-004/04 “Delivery of documents for clarification” (18 May 2004) [ZGas Additional Information].

²⁹² Response, *supra* note 21, pp. 44–5.

²⁹³ The decision states that it “only refers to the environmental aspects of the works and activities described”, AIA-LPG, *supra* note 26, p. 43.

²⁹⁴ Response, *supra* note 21, p. 32.

²⁹⁵ Revised submission, *supra* note 19, p. 7.

²⁹⁶ *Ibid.*

Secretariat therefore does not recommend the preparation of a factual record in regard to this assertion.

(ii) Effective enforcement of REIA Article 4 paragraph IV

179. REIA Article 4 paragraph IV provides that Semarnat is competent to carry out the public consultation process during the EIS procedure. REIA Article 40 paragraph I provides that in order for the public consultation process to take place, a person from the community in question must request it within the ten days following the date when Semarnat makes the EIS available to the public. In any case, the assessing authority – DGIRA – has the power to decide whether or not to hold the requested consultation in accordance with the procedure prescribed by the REIA.²⁹⁷
180. The AIA-LPG²⁹⁸ states that on 26 February 2004, “the initiation of the environmental impact assessment procedure for the project was published in the Environmental Gazette [*Gaceta Ecológica*]”²⁹⁹ and that once the administrative file was opened, it was made available to the public at Semarnat’s documentation centre in Mexico City. Both Mexico’s response³⁰⁰ and the AIA-LPG³⁰¹ expressly state that no requests for a public consultation or meeting were received, and therefore, in the Party’s opinion, “the criterion of REIA Article 4 paragraph IV is not met.”³⁰²
181. Submission SEM-09-002 does not present further arguments about the public consultation process for the Manzanillo LPG Project, and Mexico’s response appears to respond adequately to the assertion about the effective enforcement of REIA Article 4 paragraph IV. The Secretariat finds no grounds to recommend a factual record on this matter.

5. A factual record is recommended with respect to effective enforcement of LGEEPA Article 35 and REIA Article 13 paragraph III regarding the alleged failure to establish the relationship between the Manzanillo LPG Project and the environmental land use plan in force at the time the EIS was filed

182. The Submitters assert a failure to effectively enforce LGEEPA Article 35 and REIA Article 13 paragraph III. The Submitters maintain that there were deficiencies in the preparation of the EIS-LPG since it allegedly did not contemplate the relationship of the project to the environmental land use plan in force.³⁰³
183. The relevant part of LGEEPA Article 35 provides that:

For the authorization of the works and activities to which Article 28 refers, the Ministry shall adhere to the provisions of the aforementioned instruments, *as well as the urban development and environmental land use plans*, protected

²⁹⁷ For further information about the public consultation procedure, see REIA, *supra* note 9, ch. VI, “Public participation and the right to information.”

²⁹⁸ AIA-LPG, *supra* note 26, p. 1.

²⁹⁹ See: Environmental Gazette of Semarnat no. DGIRA/008/04 (26 February 2004).

³⁰⁰ Response, *supra* note 21, p. 48.

³⁰¹ AIA-LPG, *supra* note 26, p. 5.

³⁰² Response, *supra* note 21, p. 48.

³⁰³ Revised submission, *supra* note 19, p. 8.

natural area declarations, and such other legal provisions as may be applicable.³⁰⁴

184. Likewise REIA Article 13 paragraph III reads:

The environmental impact statement, in its regional form, shall contain the following information: ...

III. Relationship to the applicable planning instruments and legal provisions; ...

185. The Submitters maintain that the EIS-LPG did not establish the relationship with the applicable regional environmental land use plan and that, in addition, the EIS states that “there is no specific regional environmental land use plan that includes the project site,”³⁰⁵ which statement allegedly does not correspond to the facts.³⁰⁶ They further maintain that the environmental impact authorization expressly admitted that the project conflicted with land use and zoning policies³⁰⁷ and that the authority did not take into consideration that the PDUM was amended subsequent to the filing of the EIS-LPG before DGIRA.³⁰⁸

186. Regarding the alleged non-existence of a regional environmental land use plan that includes the project site,³⁰⁹ the Submitters assert that the EIS-LPG was submitted for assessment on 24 February 2004 while the PROETSLC was published on 5 July 2003.³¹⁰ The Submitters maintain that the developers’ statement in the EIS-LPG does not correspond to the facts, since there was clearly an environmental land use plan regulating the area comprising the Manzanillo LPG Project.

187. As regards the alleged contradiction between the land use and zoning policies which, according to the Submitters, were acknowledged by DGIRA in the environmental impact decision,³¹¹ they affirm that no account was taken during the environmental impact assessment that the PDUM was amended “nearly four months after the [developer] filed the EIS.”³¹²

188. In this connection, the Party maintains in its response that chapter III of the EIS-LPG elaborates on the relationship of the project with the applicable environmental legal provisions and to the regulation of land use in accordance with the provisions of the second paragraph of LGEEPA Article 35, and REIA Article 13 paragraph III.³¹³ It adds that in the fifth clause of the preamble to the AIA-LPG, DGIRA analyzed the viability of the project with respect to the Land Use Plan of the State of Colima (*Programa de Ordenamiento Territorial del Estado de Colima—POETEC*), the PROETSLC, and the PDUM, concluding that the Manzanillo LPG Project did not violate “the land use policies set out in the applicable legal provisions or instruments, in accordance with the considerations established”³¹⁴ in the Decision amending the PDUM. Mexico maintains that, in any case, DGIRA “included a discussion of the relationship of the Project to the

³⁰⁴ LGEEPA, *supra* note 5, Article 35 (emphasis added).

³⁰⁵ EIS-LPG, *supra* note 30, p. 188.

³⁰⁶ Revised submission, *supra* note 19, p. 8.

³⁰⁷ AIA-LPG, *supra* note 26, p. 11.

³⁰⁸ Revised submission, *supra* note 19, pp. 7–8.

³⁰⁹ *Ibid.*, p. 8.

³¹⁰ *Ibid.*, p. 7.

³¹¹ AIA-LPG, *supra* note 26, p. 46.

³¹² Revised submission, *supra* note 19, p. 8.

³¹³ Response, *supra* note 21, p. 45.

³¹⁴ *Ibid.*, p. 46.

applicable regional land use planning instruments.”³¹⁵ Moreover, the Party states that on 18 May 2004, the developer of the Manzanillo LPG Project replied to a request from DGIRA in which it “situated its project within the PDUM, stating that the applicable land use was that of Forested Area with Low-Density Ecotourism Land Use.”³¹⁶

189. In its response, Mexico makes reference to the effective enforcement of the third paragraph of LGEEPA Article 35, stating that DGIRA considered “the possible effects of the works or activities on the ecosystems existing in the project area, considering the sum total of the elements of which it is composed and not merely any resources that might be subject to use or impact.”³¹⁷

190. Having identified chapter III of the EIS-LPG,³¹⁸ the Secretariat proceeded to analyze the effective enforcement of LGEEPA Article 35 and REIA Article 13 paragraph III in respect of the alleged failure to relate the EIS-LPG to the applicable regional environmental land use plan. In this regard, the developer stated:

... taking into account the foregoing basis, this document includes the State of Colima regional environmental land use plan and the regional environmental land use plan for the Cuyutlán Lagoon, Colima, since *these are the ones that must be considered given the siting of the project and the characteristics of its facilities* [emphasis added].³¹⁹

While further along in the document the developer stated:

...there is no regional environmental land use plan that includes the project site.³²⁰

Upon request from DGIRA to prove the Project compatibility with the land use plan, on 18 May 2004, the developer submitted additional information³²¹ acknowledging that:

In accordance with the Manzanillo Urban Development Masterplan [*Programa Director de Desarrollo Urbano de Manzanillo*], the study area is identified as a Forested Area with Low-Density Ecotourism Land Use.³²²

The foregoing puts in context the Submitters’ assertion as to the alleged inconsistency of the Manzanillo LPG Project with the environmental land use plans.

191. On 18 May 2004, the developer filed additional information before DGIRA, stating that the municipality of Manzanillo had plans to amend the PDUM so the project’s

³¹⁵ *Ibid.*, p. 39.

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*, p. 47.

³¹⁸ The Secretariat did not identify chapter III of the EIS-LPG in Appendix 8 (formerly Appendix 7) of the submission, nor in Appendix 7 (compact disc) of the response, nor it was found on the Semarnat website by entering the project code. Responding to a request for this information, the Submitters stated that “we downloaded the [EIS-LPG] document from the Semarnat website and it did not contain chapter 3, which you request from us” (e-mail from Esperanza Salazar to the Legal Officer of the Secretariat on 5 April 2011). The Secretariat requested the information from the Party and it was received under Doc. no. 112.00001766 (26 April 2011) issued by the Legal Affairs Coordinating Unit.

³¹⁹ EIS-LPG, *supra* note 30, p. 188.

³²⁰ *Ibid.*, p. 152 (emphasis added).

³²¹ LPG Additional information Request, *supra* note 290.

³²² ZGas Additional Information, *supra* note 291, p. 5.

compatibility with the land use designation would be ensured.³²³ In this regard, the AIA-LPG states that the developer submitted, as information additional to the EIS-LPG, certified copies of the minutes of a City Council (*Cabildo*) of Manzanillo session during which it was decided to authorize the land use change from Ecotourism to High-Impact Industry, as well as a copy of the document whereby the municipality of Manzanillo requested the state Ministry of Urban Development to publish the Decision to amend the PDUM.³²⁴

192. The publication of the amendment to the PDUM was subsequent to the filing of the developer's additional information, and the entry into force of the Decision to amend the PDUM—published on 12 June 2004—occurred few days prior to the issuance of the AIA-LPG released on 23 July 2004.³²⁵
193. Concerning the alleged failure to establish the relationship of the Manzanillo LPG Project to the PROETSLC, in both the additional information for the EIS-LPG and the AIA-LPG, it is stated that the project will be sited within UGA Ent5 39 and UGA Ent4 40, which are defined as follows:

UGA Ent5 39.- Classified as a terrestrial natural area; it is covered by a policy of protection. It is designated “coastal dunes.” The landscape in which it is located is no. 1.2: steep-sloped, high (10-25 m), unconsolidated dunes with halophytic vegetation characteristic of sandy shores. This unit exhibits great fragility and constitutes the supply of beach sand for the entire sand bar forming the southern boundary of the Cuyutlán Lagoon. The compatible use is that of flora and fauna, the conditional use is that of low-impact tourism.

UGA Ent4 40. – Classified as a terrestrial natural area. It is covered by a policy of conservation. It consists of the beach of the entire sand bar forming the southern boundary of the Cuyutlán Lagoon (landform 1.1). This UGA is highly fragile, with very high-energy natural events (waves) taking place in close proximity. It constitutes the egg-laying site for various species of turtles. It is not highly recommendable for typical beach tourism because of the danger represented by the waves. The recommended type of tourism is low-impact (ecotourism).³²⁶

194. The UGAs where the Manzanillo LPG Project is sited are covered by a policy of protection (Ent5 39), under which the compatible use is that of flora and fauna, or low-impact tourism and conservation (Ent4 40), and under which the use is that of low-impact tourism. DGIRA thus confirms that the project is sited in a “terrestrial natural area covered by a protection policy (Ent5 39) and a conservation policy (Ent4 40).”³²⁷
195. DGIRA maintains that its “scale of analysis is very broad; it defines the zone as being covered by a policy of protection, indicating that the compatible activities may only be carried out on a highly restricted basis.”³²⁸ The latter criterion is ratified in the opinion of the Department of Environment (*Dirección de Ecología*) of the state of Colima

³²³ *Ibid.*, Appendix 7: Document submitted to DGIRA on 18 May 2004 by the company Zeta Gas del Pacífico S.A. de C.V., titled “Information Attached for Clarification of EIS-R and ADR,” p. 5. *Ibid.*, p. 5.

³²⁴ AIA-LPG, *supra* note 26, pp. 9–10.

³²⁵ Transitory Article One: “This Order shall enter into force on the day of its publication in the Official Gazette of the State of Colima.” PDUM, *supra* note 16.

³²⁶ LPG Additional Information Request, *supra* note 290, p. 6.

³²⁷ AIA-LPG, *supra* note 26, p. 11.

³²⁸ *Ibid.*

which provides that “the lot where the project is intended to be carried out is located within the dry tropical zone ... with a policy of protection.”³²⁹

196. The Secretariat notes that the AIA-LPG reads, “In accordance with the land use policies established in the various regulatory instruments cited previously [POETEC, PROETSLC, and PDUM], this Administrative Unit detected that the site where the project is to be built exhibits *conflicts* [*controversias*] with respect to the application of said provisions.”³³⁰ However, based exclusively on the (amended) PDUM, DGIRA concludes that the “Project is not inconsistent with the land use policies established in the applicable regulatory provisions or instruments.”³³¹
197. In this connection, the submission, in light of the response, leaves several central open questions concerning the effective enforcement of LGEEPA Article 35 and REIA Article 13 paragraph III, and the relationship of the Manzanillo LPG Project to the environmental land use plan in force. A detailed presentation of the facts could help understand how the project relates to the planning instruments and legal provisions in force; how the environmental impact assessment procedure and issuance of the AIA-LPG adhered to the provisions of the urban development and environmental land use plans, and whether there were land use-related differences between the environmental land use plans designated in the PROETSLC and the PDUM. In light of the foregoing, the Secretariat recommends a factual record with respect to the alleged failure to effectively enforce LGEEPA Article 35 and REIA Article 13, and paragraph II with respect to the alleged inconsistency between the Manzanillo LPG Project with land use plans at the moment the authorization was issued.

6. A factual record is not recommended in regard to the alleged failure to effectively enforce NOM-059 in respect of the assessment of species at risk in the EIS-LPG

198. The Submitters assert that Mexico failed to effectively enforce NOM-059 by authorizing the EIS-LPG. They maintain that the project has altered the habitat for species of mammals and reptiles (including green and black iguanas and three species of marine turtle) listed in the standard.³³²
199. Concerning the possible direct or indirect impact on the species listed in NOM-059, Mexico maintains that DGIRA assessed the mitigation measures proposed in the EIS-LPG and in the additional information provided by the developer. Even if sporadic nesting has been detected in the project site, it was determined in the AIA-LPG that the project’s works or activities would not directly affect endangered marine turtles’ nesting areas as per NOM-059.³³³
200. Mexico adds that DGIRA assessed the mitigation measures proposed by the developer through the Salvage, Protection, and Conservation Program for Species of Wild Flora and Fauna (*Programa de Rescate, Protección y Conservación de las Especies de Flora y Fauna Silvestre*)³³⁴ and the Endangered Species Protection Program (*Programa de*

³²⁹ *Ibid.*, p. 15.

³³⁰ AIA-LPG, *supra* note 26, p. 11 (emphasis added).

³³¹ *Ibid.*, p. 12.

³³² Revised submission., *supra* note 19, pp. 1, 3, 14.

³³³ Response, *supra* note 21, p. 58; AIA-LPG, *supra* note 26, p. 20.

³³⁴ Response, *supra* note 21, Appendix 9: Information Attached for Clarification of EIS-R and ADR, pp. 24–5.

Protección de Especies en Peligro de Extinción).³³⁵ Furthermore, it maintains that DGIRA required the developer to produce a prospective study of wild fauna and flora, a program or agreement to support marine turtle conservation, and a coastal dune restoration and monitoring program.³³⁶

201. On the basis of the foregoing, the Secretariat finds that the preparation of a factual record is not warranted with regard to the assertion concerning the alleged failure to effectively enforce NOM-059 in the environmental impact assessment procedure for the Manzanillo LPG Project. The Secretariat finds that the Party provided sufficient information about the assessment of species listed in NOM-059 and, given the lack of specificity in the Submitters' assertions as to how the failure to enforce NOM-059 allegedly occurred, the Secretariat accordingly does not recommend that this matter be further reviewed in a factual record.

Section III. Concerning the Manzanillo LNG Project

7. A factual record is recommended in regard to the alleged failure to effectively enforce LGEEPA Article 35 and REIA Article 13 paragraph III in respect of the relationship of the Manzanillo LNG Project to the environmental land use plan

202. The Submitters assert a failure to effectively enforce LGEEPA Article 35 and REIA Article 13 paragraph III in respect of the relationship of the Manzanillo LNG Project to the environmental land use plan. In this regard, they maintain that during the environmental impact assessment procedure, Semarnat did not ascertain whether the EIS-LNG adhered to the laws, regulations and other applicable legal provisions.³³⁷ In particular, they maintain that the EIS “does not establish any relationship to the applicable planning instruments and legal provisions.”³³⁸

203. The relevant part of LGEEPA Article 35 provides as follows:

... For the authorization of the works and activities to which Article 28 refers, the Ministry shall adhere to the aforementioned provisions, *as well as the urban development and environmental land use plans*, protected natural area declarations, and such other legal provisions as may be applicable.³³⁹

204. REIA paragraph III Article 13 provides that:

The regional form of the environmental impact statement shall contain the following information: ...

III. Relationship to the applicable planning instruments and legal provisions; [...].

205. The Submitters maintain that the Manzanillo LNG Project was incompatible with UGAs **Ent5 39** and **Ent4 40**, which allegedly establish conservation and protection policies that are incompatible with human settlements, infrastructure and equipment.³⁴⁰

³³⁵ Response, *supra* note 21, pp. 21–2.

³³⁶ Response, *supra* note 21, pp. 58–9; AIA-LPG, pp. *supra* note 26, 46–8.

³³⁷ Revised submission, *supra* note 19, p. 10.

³³⁸ *Ibid.*

³³⁹ LGEEPA, *supra* note 5, Article 35 (emphasis added).

³⁴⁰ Revised submission, *supra* note 19, p. 4.

The submitters state that “the EIS does not establish any relationship to the applicable legal instruments, such as the [PROETSLC],” and they point out that during the environmental impact assessment procedure, DGIRA did not request information on the relationship of the project to the environmental land use plan “until the government of the state of Colima amended the PROETSLC,”³⁴¹ which, in their view, highlights the alleged failure to effectively enforce REIA Article 13 paragraph III. The submission further states that the amendment of the PROETSLC “consisted in changing the UGAs, which had conservation, protection, and restoration status, to industrial and port status,” which indeed correspond to those of the Manzanillo LNG Project.³⁴²

206. In its response, Mexico asserts that on the basis of the review of chapter III of the AIA-LNG and the additional information submitted by the developer, the environmental impact assessment “included an assessment of its relationships” to various instruments, among them the PROETSLC.³⁴³ Mexico maintains that DGIRA requested from the developer “additional information concerning the relationship between the works and activities of the Project and the Executive order revising the PROETSLC,”³⁴⁴ and that it may be observed that in the AIA-LNG, DGIRA gave due consideration to the additional information requested.³⁴⁵ The response also notes that in the AIA-LNG:

[T]he DGIRA reviewed the information in Chapter III of the Project EIS and the additional information submitted by the Developer, and concluded that the project was located under the following UGAs and policies:

- Industrial and service use (**39, A, A, Ei**).
- Restoration for conservation, natural area without oak groves or moist deciduous forest (*selva mediana*) (**47 R, Rc, Ent2**);
- Conservation, coastal natural area with limited activities and low-impact ecotourism (**41 C, C EncLe**).³⁴⁶

207. Mexico concludes that as a result, DGIRA stated in the AIA-LNG that the UGA criteria do not prohibit the execution of project-related works and/or activities; but that on the contrary, these were allowed.³⁴⁷

208. The PROETSLC was issued by means of an order published on 5 June 2003³⁴⁸ and amended on 3 May 2007.³⁴⁹ The PROETSLC – version in force at the time when the AIA-LNG was issued – stated that one consideration for its amendment was:

...pressure on the study area arising from existing development processes and the construction of new facilities and infrastructure that are projected in the short, medium, and long run, such as...: the **regasification plant**, the new rail line, the construction of a new gas pipeline, and the creation of a port in Basin II of the lagoon.³⁵⁰

³⁴¹ *Ibid.*, p. 11.

³⁴² *Ibid.*, p. 6.

³⁴³ Response, *supra* note 21, p. 51.

³⁴⁴ *Ibid.*, p. 52.

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.* (emphasis added).

³⁴⁷ *Ibid.*

³⁴⁸ PROETSLC, *supra* note 15.

³⁴⁹ Executive order revising the PROETSLC, *supra* note 26.

³⁵⁰ *Ibid.*, p. 460.

And it therefore:

... puts forward environmental management measures to mitigate the effects of this pressure according to the time horizons of the development initiative, in the form of a special legal framework for the study area.³⁵¹

209. The EIS-LNG was filed with DGIRA on 8 November 2006.³⁵² On 4 October 2007, DGIRA requested additional information from the developer, stating that “given the entry into force of the Executive order revising the PROETSLC, its provisions are applicable to the project,”³⁵³ and it is therefore noted, “with a view to granting the guarantee of a hearing”:³⁵⁴

...that it is evident from the review of the information contained in the [EIS-LNG] and from additional information requested on 23 January 2007 ... that *nowhere in any part of these documents* does the Developer adequately establish the relationship between the project works and activities with the referred legal instruments (the Decree that reforms the Regional Environmental Land Use Plan for the Cuyutlán Lagoon Subwatershed and Article 60 TER to [sic] the General Wildlife Act) [...].³⁵⁵

210. In fulfillment of DGIRA’s request, the developer submitted information with a view to establishing the relationship between its project and the PROETSLC, which had just been amended. In the additional information, the developer stated that the UGAs in which the project would be developed are **UGA 26 A Apc**, with a land use designation of “Restricted Port Activities,” and **UGA 39 A Ei**, with a land use designation of “Industrial Area.”³⁵⁶ The developer stated that “there is total consistency between the policy defined for UGAs **26** and **39** and the intention to develop [the Manzanillo LNG Project] therein”³⁵⁷ and stated that “there is total compatibility of the characteristics and consequences of the project with the objectives and intentions of the PROETSCL [sic].”³⁵⁸

211. However, it was DGIRA that actually noted the applicable UGA and that these were different from those presented by the developer. The AIA LNG Manzanillo reads in this regard:

...in the additional information filed by the developer, it maintained that the project and its alternatives are located within UGA 26 and 39. However, after a comparative analysis between the location map of the project and the ecological zoning map of the PROETSLC, it is noted that for the proposed sites the following UGA and policies are applicable [...]

DGIRA then quotes the following UGAs: 39 A, A1, Ei, 47 R, Rc Ent2 and 41 C, C EncLe.

³⁵¹ *Ibid.* (Emphasis added).

³⁵² EIS-LNG Manzanillo, *supra* note 31.

³⁵³ Revised submission, *supra* note 19, Appendix 16: DGIRA, Doc. no. S.G.P.A./DGIRA/DG/2343/07 (4 October 2007), p. 1 [LNG Manzanillo Second Information Request]. The latter is also available through the Infomex System to Access to Information No. 0001600040912 (20 February 2012).

³⁵⁴ *Ibid.*, p. 2.

³⁵⁵ *Ibid.* (Emphasis added).

³⁵⁶ Original submission, *supra* note 2, Appendix 15: Comisión Federal de Electricidad, Doc. no. 7B/2007/JMRA-00533 “Additional information” (9 October 2007) [the “Second Additional Information for the LNG Project”].

³⁵⁷ *Ibid.*, p. 20 (emphasis added).

³⁵⁸ *Ibid.*

212. Further to those clarifications as to which UGAs were applicable to the project, DGIRA determined that:

it was identified that said criteria do not prohibit the execution of project-related works and/or activities; on the contrary, the criteria coded **IN4** and **IN5** allow for the construction of fuel storage infrastructure and gas pipelines in accordance with the applicable provisions....³⁵⁹

213. The following table summarizes the analysis of the UGA classifications applicable to the project contained in the EIS-LNG, the additional information submitted by the developer, and the AIA-LNG:

³⁵⁹ AIA-LNG, *supra* note 27, p. 37 (emphasis added).

Table 1. Information concerning the development of the UGAs applicable to the Manzanillo LNG Project

PROETSLC (5 June 2003)	EIS-LNG (8 November 2006)	PROETSLC (3 May 2007)	Additional information (9 October 2007)	AIA-LNG³⁶⁰ (11 February 2008)
Ff4 3: Protection policy, with forested land use, low-impact tourism infrastructure subject to conditions, and incompatible with industry, mining, and human settlements.	Ff4 3: Protection policy, with forested land use, low-impact tourism infrastructure subject to conditions, and incompatible with industry, mining, and human settlements.	39 A Ei: Industrial and service use policy ³⁶¹	39 A Ei Policy of use with criterion of environmental regulation for industrial area.	39A A Ei: Industrial and service use.
Ent5 39: Ecological protection policy, with land use for flora and fauna, tourism subject to conditions, and incompatible with human settlements, infrastructure and equipment, agriculture, livestock, or mining.	Ent5 39: Ecological protection policy, with land use for flora and fauna, tourism subject to conditions, and incompatible with human settlements, infrastructure and equipment, agriculture, livestock, or mining.	41C, C EncLe: Conservation policy, coastal terrestrial natural area with limited economic activities (ecotourism). ³⁶²	26 A Apc: Policy of use with criterion of environmental regulation for restricted port activities.	41C, C EncLe: Conservation, coastal natural area with limited low-impact activities.
Mi3 11: Environmental use policy, with land use allowing for equipment, infrastructure subject to conditions, and incompatible with human settlements.	Mi3 11: Environmental use policy, with land use allowing for equipment, infrastructure subject to conditions, and incompatible with human settlements.			47R, Rc Ent2 (sic): Restoration for conservation, natural area without oak groves or moist deciduous forest.

³⁶⁰ *Ibid.*, pp. 32, 37.

³⁶¹ Executive order revising the PROETSLC, *supra* note 15, p. 465.

³⁶² *Ibid.*, p. 464.

214. In light of the table above, it is clear that at the moment the EIS was filed it was not consistent with the PROETSLC in force at that moment. The Submitters maintain that DGIRA did not only verify whether the project was consistent with the 2003 PROETSLC, but instead, informed the developer that a new PROETSLC was in force in 2007. After this fact, the developer allegedly – incorrectly – categorized the UGA applicable to the project, as noted by DGIRA in the AIA LNG Manzanillo. It was at that point that DGIRA conducted the compatibility analysis and not in light of PROETSLC, five months after the EIS was filed.
215. It is more relevant that the designation determined by DGIRA in the AIA-LNG exhibits certain differences, in particular as regards UGA **47R, Rc Ent2**, which is not identified in the catalogue of environmental management units of the PROETSLC issued in 2007. As can be noted in Table 1 *supra*, even if the PROETSLC of 3 May 2007 includes UGAs 39 A Ei and 41 C, C EncLe, it does not include UGA 47R, Rc Ent2, referred to by DGIRA in its decision.
216. As well, a perusal of environmental regulation criteria **IN4** and **IN5** tends to show that they are indeed applicable to infrastructure such as that of the Manzanillo LNG Project:

Table 2: Environmental regulation criteria for each environmental guideline in the PROETSLC³⁶³

Code	Criteria
IN4	Prevention measures and emergency response measures for fuel storage-related accidents as well as natural disaster risks (earthquakes, floods, hurricanes, tsunamis, etc.) shall apply. An emergency evacuation plan in case of accidents, as well as emergency response plans for spills and/or explosions of fuels and solvents, shall be adopted in accordance with Mexican Official Standards.
IN5	It shall be ensured that the construction of gas and other pipelines complies with the technical specifications and environmental mitigation measures during construction, so as to avoid impacts on coastal systems.

217. However, in reviewing whether the UGAs mentioned in the AIA-LNG “allow the construction of fuel storage infrastructure and gas pipeline construction,”³⁶⁴ it is evident that the UGAs **IN4** and **IN5** criteria in fact correspond to unit **39A Ei**³⁶⁵ and are not applicable to units **47R Rc Ent2** (since, as noted above, these units do not exist within the PROETSLC of May 2007) nor to **41C EncLe**, which has a designated conservation policy with a criterion of environmental regulation as a coastal natural area having limited low-impact activities.³⁶⁶
218. In light of the submission and the response, the Secretariat observes: **i)** that at the time when the EIS-LNG was filed for assessment, it was not consistent with the PROETSLC in force, since it was located within environmental management units classified for conservation;³⁶⁷ **ii)** that DGIRA did not assess the conformity of the project with the PROETSLC published in 2003, but rather, it notified the developer of

³⁶³ *Ibid.*, p. 485.

³⁶⁴ AIA-LNG, *supra* note 27, p. 37.

³⁶⁵ Executive order revising the PROETSLC, *supra* note 15, p. 491.

³⁶⁶ *Ibid.*, pp. 467–92.

³⁶⁷ Revised submission, *supra* note 19, p. 11.

the existence of an updated version;³⁶⁸ **iii)** that even with such notification, the developer apparently failed to correctly identify the UGA applicable to the project according to the 2007 PROETSLC; and that **iv)** it was DGIRA —and not the developer— that proceeded to conduct a compatibility analysis only when the PROETSLC was amended in 2007, five months after the submission of the EIS.³⁶⁹ Even with the amendments to the PROETSLC of 2007, a cursory analysis of the Manzanillo LNG Project reveals apparent inconsistencies with respect to the relationship that a developer was required to demonstrate pursuant to REIA Article 13 paragraph III and with regard to the assessment process implemented by DGIRA pursuant to LGEEPA Article 35 concerning UGA 47 R, Rc Ent2, and the codes IN4 and IN5.

219. LGEEPA Articles 35 and REIA 13 paragraph III provide that the *onus* to prove the consistency of the Project with the ecological zoning lies with the developer, not the authority. The above-referenced facts leave central open questions about the method for effectively enforcing these provisions. A factual record is warranted, as it would allow more transparency with respect to alleged deficiencies in the identification of the UGAs in the MIA LNG Manzanillo; the compatibilities of the Manzanillo LNG Project with the ecological criteria published in the amended PROETSLC; the relationship of the environmental management units conducted by the LNG Manzanillo Project developer when required by DGIRA; and, the compatibility of the Manzanillo LNG Project with the corresponding UGAs filled by DGIRA in the AIA-LNG.
220. The Secretariat finds that the preparation of a factual record would shed light on the issue of the effective enforcement of LGEEPA Article 35 and REIA Article 13 paragraph III in respect of the relationship between the Manzanillo LNG Project and the PROETSLC, and the assessment procedure implemented by DGIRA. In addition, relevant factual information would be presented on key aspects of the processing of the EIS-LNG.³⁷⁰

8. A factual record is not recommended in regard to the alleged failure to effectively enforce NOM-059 in respect of the species at risk assessment conducted for the Manzanillo LNG Project

221. The Submitters assert a failure to enforce NOM-059 in respect of the environmental impact assessment procedure for the Manzanillo LNG Project, asserting that the Project's environmental impact statement did not note the harm that the construction and operation of the terminal would cause to the species of flora and fauna listed in NOM-059.³⁷¹
222. In its response, the Party asserts that DGIRA established the relationship between the project and NOM-059 during the environmental assessment process.³⁷² It is evident

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

³⁷⁰ REIA Article 22, *supra* note 9, cited in the revised submission, reads: "In cases where the environmental impact statement exhibits insufficiencies that hinder the assessment of the project, the Ministry may, a single time and within the 40 days following the opening of the file, request clarification, correction, or elaboration from the developer on the content thereof..." In this regard, DGIRA requested information from the developer on two occasions: 4 October 2007 and 23 January 2007; the latter in regard to the relationship between the project and the PROETSLC.

³⁷¹ Revised submission, *supra* note 19, p. 9.

³⁷² Response, *supra* note 21, pp. 60–1.

from the analysis of the EIS-LNG that the document included an assessment of the relationship between the project and NOM-059,³⁷³ as well as an identification of the main environmental impacts and risks to flora and fauna on the project site,³⁷⁴ including the coastal dune vegetation,³⁷⁵ amphibians,³⁷⁶ birds,³⁷⁷ marine turtles,³⁷⁸ and crocodiles.³⁷⁹ Based on the foregoing, the EIS-LNG assessed the preventive and mitigation measures proposed in Alternative 2 (Omega) that would apply to the impacts arising from the works and/or activities of the Manzanillo LNG Project,³⁸⁰ such as impacts on the dune vegetation,³⁸¹ possible direct or indirect impacts on species listed in NOM-059; possible impact on endangered marine turtles; light-induced impacts on the behavior of marine turtles and birds; and possible noise-related impacts on marine fauna.

223. Mexico maintains that on the basis of the analysis presented in the EIS-LNG, it decided to authorize the project conditional upon obligations imposed on the developer to develop an environmental quality monitoring program that must contain, *inter alia*, a report on marine biota indicating the presence or absence of species having any protected status under NOM-059³⁸² for the purpose of preparing a prospective study for protection and conservation of biodiversity.³⁸³
224. The information provided by Mexico in its response shows that the EIS-LNG considered the enforcement of NOM-059, its relationship to the project, the identification of affected species, and the preventive measures incorporated *a posteriori* into the conditions of the AIA-LNG. The submission does not contain further details as to how, specifically, the Party in question allegedly failed to effectively enforce its environmental law. The Secretariat accordingly does not recommend a factual record in this regard.

9. A factual record is recommended in regard to the alleged failure to effectively enforce LGEEPA Article 30, LGVS Article 60 *ter* and NOM-022 in respect of the part of the environmental impact assessment for the Manzanillo LNG Project relating to water flow in the coastal wetland of the Cuyutlán Lagoon, as well as the alleged failure to effectively enforce REIA Article 47 in respect of compliance with the conditions of the AIA-LNG

225. The Submitters assert that during the environmental impact assessment procedure for the Manzanillo LNG Project, Mexico failed to effectively enforce LGVS Article 60 *ter*³⁸⁴ and NOM-022.³⁸⁵ The Submitters maintain that despite DGIRA having made two

³⁷³ AIA-LNG, *supra* note 27, p. 44, and EIS-LNG, *supra* note 31, ch. III, p. 81.

³⁷⁴ AIA-LNG, *supra* note 27, pp. 84–9.

³⁷⁵ EIS-LNG, *supra* note 31, ch. II, p. 28.

³⁷⁶ Second Additional information for the LNG Project, *supra* note 356, ch. III, p. 119.

³⁷⁷ *Ibid.*, ch. III, p. 90.

³⁷⁸ EIS-LNG, *supra* note 31, ch. VI, p. 14; ch. VII, p. 51.

³⁷⁹ Second Additional information for the LNG Project, *supra* note 356, ch. III, p. 120.

³⁸⁰ AIA-LNG, *supra* note 27, pp. 112–14.

³⁸¹ Second Additional information for the LNG Project, *supra* note 356, ch. III, p. 126.

³⁸² Response, *supra* note 21, p. 63; and AIA-LNG, *supra* note 27, p. 130.

³⁸³ Response, *supra* note 21, p. 63; AIA-LNG, *supra* note 27, p. 138.

³⁸⁴ LGVS, *supra* note 6, Article 60 *ter* was added on 1 February 2010 and therefore did not figure among the considerations regarding the relationship between the Manzanillo LNG Project and such Article of

requests to the developer for additional information in which it asked for information concerning the relationship between the project and NOM-022, cited in the submission,³⁸⁶ DGIRA never obtained “the studies necessary to demonstrate that the project will preserve the integrity of the mangrove ecosystem or avert the fragmentation of the coastal wetland.”³⁸⁷ They assert that “this information should have been submitted in the body of the EIS as an indispensable requirement for the assessment of a project of this scale”³⁸⁸ and that it was essential to ascertain the hydrodynamic of the Cuyutlán Lagoon, since the ecological viability of a coastal wetland depends on it.³⁸⁹ They conclude, however, that the hydrodynamic study was established as a condition in the AIA-LNG, despite this being information which was essential to have before an authorization could be granted.³⁹⁰

226. Mexico maintains that LGVS Article 60 *ter* “does not establish an absolute prohibition but rather an obligation for the administrative authority to ensure that any work or activity intended to be executed in mangrove areas does not affect the integrity of the ecosystem”³⁹¹ and states that the only way to know whether there is such an impact or not is through the environmental impact assessment.³⁹²

227. Mexico affirms that further to a detailed analysis, DGIRA concluded that Alternative 2 (Omega) of the Manzanillo LNG Project would not affect the functional structure of the mangrove area in question. On the contrary, DGIRA stated that:

[I]t does not affect the integrity of the water flow in the mangrove area forming a part of said lagoon system.

This is so because the alternative under analysis, by widening the Tepalcates Canal, increases sea water flow into the Cuyutlán Lagoon, pushing currents towards the centre and thereby inducing circulation towards basins II, III and IV and minimizing the physiological stress currently being experienced by the mangrove area of the Cuyutlán Lagoon system due to the lack of water movement, the low rate of water exchange, the accumulation of sediments, and the alteration of the hydroperiod.³⁹³

228. LGEEPA Article 30 establishes the inclusion of “a description of the possible effects on the ecosystem or ecosystems that may be affected by the work or activity in question, considering the sum total of the elements making up said ecosystems” as a requirement for issuing an environmental impact authorization.³⁹⁴ As for LGVS Article 60 *ter*, it provides that:

The following acts are prohibited: removal, filling, transplanting, cutting, or any work or activity that affects the integrity of water flow in the mangrove area; the

the LGVS at the time the EIS was filed with DGIRA. This fact was borne in mind during the preparation of this notification.

³⁸⁵ Revised submission, *supra* note 19, pp. 9–13.

³⁸⁶ *Ibid.*, pp. 9–10.

³⁸⁷ *Ibid.*, p. 9.

³⁸⁸ *Ibid.*, p. 10.

³⁸⁹ *Ibid.*, p. 11.

³⁹⁰ *Ibid.*, p. 11.

³⁹¹ Response, *supra* note 21, p. 66.

³⁹² *Ibid.* In support of this, the Party cites the judgment in amparo proceeding no. 438/2007-II in the Third District Court of the state of Quintana Roo.

³⁹³ Response, *supra* note 21, p. 67.

³⁹⁴ LGEEPA, *supra* note 5, Article 30.

ecosystem and its area of influence; its natural productivity; the natural carrying capacity of the ecosystem for tourism projects; any nesting, breeding, refuge, feeding, and spawning grounds; or interactions between the mangrove area, the rivers, the dune, the adjacent marine zone, and the corals, or that cause changes in ecological characteristics and services.

Works or activities whose purpose is to protect, restore, research, or conserve mangrove areas shall be excepted from the prohibition set out in the preceding paragraph.³⁹⁵

229. Similarly, NOM-022 provides that an environmental impact assessment shall preserve the integrity of water flow and the balance between water flow from the continental basin and from tides.³⁹⁶ Among other aspects, NOM-022 provides that:

The following shall be considered in environmental impact studies: ... the balance between water flow from the continental basin and from tides, which determines the mixing of fresh and salt water necessary to restore the brackish conditions critical to coastal wetlands and the plant communities they support.³⁹⁷

230. The EIS-LNG includes information on the integrity of water flow in the mangrove area, the ecosystem, and its area of influence;³⁹⁸ the integrity and natural productivity of the mangrove ecosystem, and the integrity of nesting, breeding, refuge, feeding, and spawning grounds;³⁹⁹ the integrity of interactions between the mangrove ecosystem, the rivers, the dune, the adjacent maritime zone and corals;⁴⁰⁰ and, changes in ecological characteristics and services in the mangrove area.⁴⁰¹
231. Mexico maintains that the hydrodynamic study mentioned by the Submitters “was not requested from the developer prior to the issuance of the environmental impact authorization,”⁴⁰² and refers to documents filed by the Submitters in SEM-09-003⁴⁰³ that expressly request – on two occasions – the filing of studies guaranteeing that the hydrodynamic of the site in question will be preserved, prior to the AIA-LNG.⁴⁰⁴
232. It should be noted that Mexico designated the documents included by the Submitters in SEM-09-003 as confidential. With a view to presenting sufficient information to allow the Council to make an informed decision, the Secretariat also takes care not to disclose information classified as confidential under NAAEC Article 39(2). The

³⁹⁵ LGVS, *supra* note 6, Article 60 *ter*.

³⁹⁶ NOM-022, *supra* note 22, sections 4.0, 4.12, and 4.42.

³⁹⁷ *Ibid.*, section 4.12.

³⁹⁸ AIA-LNG, *supra* note 27, p. 94; EIS-LNG, *supra* note 31, ch. III, p. 2; ch. III, p. 46; ch. III, p. 47 and ch. III, p. 79. See also: Second Additional information for the LNG Project, *supra* note 356, p. 3.

³⁹⁹ AIA-LNG, *supra* note 27, pp. 95–6, and EIS-LNG, *supra* note 31, ch. IV, p. 83.

⁴⁰⁰ AIA-LNG, *supra* note 27, pp. 97–9, and EIS-LNG, *supra* note 31, ch. VI, p. 83.

⁴⁰¹ AIA-LNG, *supra* note 27, pp. 99–100, and EIS-LNG, *supra* note 31, ch. VII, p. 49.

⁴⁰² Response, *supra* note 21, p. 65.

⁴⁰³ LNG Manzanillo Second Information Request, *supra* note 353, and Appendix 17: DGIRA, Doc. no. S.G.P.A./DGIRA/DG/0175/07 (2 February 2007) requesting additional information in regard to the Manzanillo LNG Project [LNG Manzanillo First Information Request].

⁴⁰⁴ LNG Manzanillo First Information Request, *supra* note 403 and LNG Manzanillo Second Information Request, *supra* note 353.

Secretariat only includes in the public version of this notification information that is already in the public domain.⁴⁰⁵

233. As may be observed from the correspondence between DGIRA and the developer, the authority requested:

...a presentation of the relationship to NOM-022, establishing the manner in which the project adheres to and/or complies with its provisions...⁴⁰⁶

a presentation, in accordance with the provisions of REIA Article 36, of the technical and scientific evidence, as well as similar experiences, demonstrating that said works preserve the water flow required in order to maintain or improve the existing hydrodynamic in the different basins of the Cuyutlán Lagoon.⁴⁰⁷

234. On 4 October 2007, in response to the submission of additional information, DGIRA again asked the developer:

to complement the information relating to the exchange of sea water volumes that will flow into the entire system and the direct impact that they will have on potential variations in the mean level of the Lagoon and, collaterally, on the various plant communities (particularly mangrove communities) and animal communities inhabiting it, presenting compelling evidence of the manner in which the current conditions will improve and specifying how this could occur.⁴⁰⁸

Based upon documents consulted by the Secretariat in the SEM-09-002 files, it cannot be determined whether such information was filed by the developer.

235. Nonetheless, the Secretariat must consider whether the requirement to file a hydrodynamic study was met when included as a condition in the AIA-LNG.

236. On 11 February 2008 DGIRA authorized the LNG Project on a conditional basis and requested a hydrodynamic study “comprehensively demonstrating the impact that the water flow induced by the opening of the Tepalcates Canal will have on the four basins of the Lagoon.”⁴⁰⁹ Thus, the absence of a study with the characteristics required by the authority during the environmental impact assessment process did not create an obstacle for issuance of the authorization, since it was finally required *ex post facto* as a “condition”.

237. Moreover, the Submitters assert that on 15 June 2008, the developer began construction work of the project without having complied with condition 3 of the AIA-LNG – the hydrodynamic study – and 16 other conditions included in the AIA-LNG.⁴¹⁰ This, in their view, amounts to a failure to effectively enforce REIA Article 47. Also, they maintain that six months after the issuance of the AIA-LNG, “the most important study for determining impact on the Cuyutlán Lagoon” had not yet been obtained, “nor

⁴⁰⁵ CEC Secretariat, Doc. no. A14/SEM/09-002/93/COM (24 August 2011), and E. Salazar Zenil, email to the CEC Secretariat (30 August 2011), where the Secretariat confirmed publicity of the information of Doc. no. S.G.P.A./DGIRA/DG/0175/07 (23 January 2007) and Doc. no. S.G.P.A./DGIRA/DG/2343/07 (4 October 2007), both issued by DGIRA, also available through the Infomex System to Access to Information No. 0001600040912 (20 February 2012).

⁴⁰⁶ LNG Manzanillo First Information Request, *supra* note 403, p. 3.

⁴⁰⁷ *Ibid.*, p. 5.

⁴⁰⁸ LNG Manzanillo Second Information Request, *supra* note 353, p. 7.

⁴⁰⁹ AIA-LNG, *supra* note 27, pp. 140–3.

⁴¹⁰ Revised submission, *supra* note 19, p. 14.

had the conditions been complied with.”⁴¹¹ They maintain that the works consisting of clearing of palm trees, fruit trees, and native species as well as filling of the lagoon have caused “severe harm to species of fish, crustaceans, and mollusks as well as the benthos, with a considerable impact on inshore fishing, added to the irreversible alteration of water flow with concomitant damage to the entire wetland.”⁴¹²

238. REIA Article 47 provides that the execution of a work or the performance of any activity subject to the environmental impact assessment under federal jurisdiction, as is the case of the Manzanillo LNG Project, “shall adhere to the provisions of the corresponding decision”;⁴¹³ that is, it shall adhere to the provisions of the environmental impact authorization that is issued.
239. Condition number three of the AIA-LNG orders the developer to perform a hydrodynamic study comprehensively demonstrating the impact that the water flow induced by the opening of the Tepalcates Canal will have on the four basins of the Lagoon. It further states that the developer shall demonstrate the ecological importance of, and the environmental services provided by, each of the basins making up the lagoon.⁴¹⁴ According to the AIA-LNG, the purpose of the hydrodynamic study is to assess the environmental behavior that would occur in the lagoon system, mentioning alternative measures or options for expansion of the Tepalcates Canal or another type of hydraulic infrastructure that would promote water exchange among the four basins of the lagoon in a sustainable manner.⁴¹⁵
240. Mexico classifies the information in the aforementioned response relating to the alleged failure to effectively enforce REIA Article 47 in respect of compliance with the conditions imposed in the AIA-LNG as confidential.⁴¹⁶ Pursuant to section 17.2 of the Guidelines, this notification to Council includes only Mexico’s assertion, that DGIRA has assessed compliance with the terms and conditions of the AIA-LNG on an ongoing basis.⁴¹⁷
241. It is evident from the appendices to submission SEM-09-002 that on 21 April 2008 the developer submitted technical information relating to compliance with the terms and conditions of the AIA-LNG.⁴¹⁸ Further to its review of the information submitted by the developer, DGIRA notified it that, as regards condition 3, the information submitted “did not evidence adherence” to condition 3 and therefore determined that there was noncompliance with this condition.⁴¹⁹
242. Submission SEM-09-003 attaches the “First Semiannual Report,” filed on 11 August 2008 by the developer with the Profepa office in the state of Colima, in relation to compliance with condition 8 of the AIA-LNG. The document notes that while the hydrodynamic study was submitted to DGIRA on 21 April 2008, the study did not comply with what had been requested, and therefore the non-compliance with this

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ REIA, *supra* note 9, Article 47.

⁴¹⁴ AIA-LNG, *supra* note 27, p. 140.

⁴¹⁵ *Ibid.*

⁴¹⁶ Director of the Legal Affairs Coordinating Unit of Semarnat, Doc. no. 112/00004537 (14 October 2010).

⁴¹⁷ Response *supra* note 21, (confidential version), p. 78.

⁴¹⁸ Revised submission, *supra* note 19, Appendix 23: DGIRA, Doc. no. SGPA/DGIRA/DESEI/0591/08 (28 May 2008).

⁴¹⁹ *Ibid.*, p. 3.

condition persisted. The developer concludes that the hydrodynamic study is being adapted for resubmission at a later date.⁴²⁰

243. With respect to compliance with condition 3 of the AIA-LNG, the Secretariat notes that in fact, as is evident from the information provided by the Submitters, DGIRA notified the CFE on 28 May 2008 that the hydrodynamic study did not adhere to what had been requested (in other words, condition 3 “was not met” – *see* paragraph 241 *supra*).⁴²¹
244. The response presents no information about compliance with condition 3 as it relates to the hydrodynamic study, which figures significantly in the submitters’ assertions, as explained above. On the other hand, it is unknown whether DGIRA ever determined that this condition was satisfactorily fulfilled, assuming a new study was ever submitted.
245. The Secretariat bears in mind the restrictive nature of LGVS Article 60 *ter* which Mexico clarified in its response,⁴²² and observes that a study to “compellingly” substantiate the manner in which the condition of the lagoon’s four basins would be improved by the opening of the Tepalcates Canal, was requested twice by the Party’s authorities.⁴²³ After consulting information in the response, the Secretariat did not identify such a study. Mexico stated that “the hydrodynamic study mentioned by the Submitters was not required,”⁴²⁴ but it is unclear then why DGIRA requested “scientific and technical evidence ... to demonstrate that said works preserve the level of water flow required to maintain or improve the existing hydrodynamic”⁴²⁵ and required “information relating to the exchange of seawater volumes that will enter the entire system and the direct impact that this will have,”⁴²⁶ so that this request was then incorporated as a condition of the AIA-LNG.⁴²⁷
246. Moreover, it is noted that the developer stated in response to a request for information from DGIRA that:⁴²⁸
- ...any of the three alternatives for the development [of the Manzanillo LNG Project] would generate conditions allowing for the maintenance of the Cuyutlán wetland ecosystem and would afford favorable conditions for the continuity of the processes that maintain the mangrove biotic community as well as the environmental services offered by the system.⁴²⁹
247. This is reiterated in the AIA-LNG where it states that “the integrity of the water flow in the mangrove area forming a part of said lagoon system is not affected,”⁴³⁰ yet this statement is made without having in hand the hydrodynamic study required as a condition of the authorization.

⁴²⁰ Revised submission, *supra* note 19, Appendix 23: Comisión Federal de Electricidad, Doc. no. ROMZ-341/08 “Semiannual Report” (6 August 2008).

⁴²¹ Response, *supra* note 21, Appendix 23: Chart, “Compliance with Terms and Conditions of AIA CFE,” p. 11.

⁴²² Response, *supra* note 21, p. 66.

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*, p. 65.

⁴²⁵ LNG Manzanillo First Information Request, *supra* note 403, p. 5.

⁴²⁶ LNG Manzanillo Second Information Request, *supra* note 353, p. 7.

⁴²⁷ AIA-LNG, *supra* note 27, pp. 140–3.

⁴²⁸ LNG Manzanillo Second Information Request, *supra* note 353.

⁴²⁹ Second Additional Information for the LNG Project, *supra* note 356, p. 20.

⁴³⁰ AIA-GNL Manzanillo, *supra* note 27, p. 94.

248. In addressing the restrictive nature of LGVS Article 60 *ter*, the Party maintains that “only works or activities that do not affect the integrity of the elements contemplated in LGVS Article 60 *ter* may be carried out, and *the only* way to know whether there is such an impact or not is through the environmental impact assessment.”⁴³¹ The response does not address the reason why it was not considered necessary to emphasize the need for the study prior to the issuance of the AIA-LNG and why it was incorporated as a condition of the project. The response from Mexico also does not resolve central questions raised in SEM-09-002, such as: why the authorization was issued without evidence that the developer filed additional information required by the authority (*supra* paragraphs 233 and 234), given the conditional prohibition in LGVS Article 60 *ter* and the absence of compelling studies, and why the authority did not insist on the study as a requirement before issuing AIA-GNL. Alternatively, if the study was not a pre-requisite to authorize the Manzanillo LNG Project, why did it appear again in the authorization as a condition?
249. The response also leaves open central questions with respect to the effective enforcement of REIA Article 47, since there is no information to substantiate compliance with condition three of the AIA-LNG with respect to the preparation of a hydrodynamic study. According to information in the submission, DGIRA gave notice that information filed by the Developer “did not evidence adherence [...] to the aforementioned condition”, and then it was decided that such condition “was not met”⁴³².
250. The Secretariat finds that the assertions concerning the alleged failure to effectively enforce LGVS Article 60 *ter*, NOM-022, and REIA Article 47 warrant the preparation of a factual record. A factual record i) would shed light on the manner in which the activities proposed in the EIS-LNG were assessed with regard to the integrity of water flow in the mangrove area of the Cuyutlán Lagoon before the AIA-LNG was issued, and ii) would yield public information about compliance with condition three of the AIA-LNG, which is critical for realizing effective enforcement of LGVS Article 60 *ter*, REIA Article 47 and NOM-022.
251. In reference to the Submitters’ assertion concerning non-compliance with 16 other conditions imposed in the AIA-LNG,⁴³³ due to the generality of the assertion and the lack of information provided, the Secretariat finds that it should not recommend the preparation of a factual record in this regard.

⁴³¹ Response, *supra* note 21, p. 66 (emphasis added).

⁴³² Revised submission, *supra* note 19, annex 23: Appendix 23: DGIRA, Doc. no. SGPA/DGIRA/DESEI/0591/08 (28 May 2008), p. 3. See *supra* paragraph 19.

⁴³³ Revised submission, p. 14, *supra* note 19, p. 14.

V. DETERMINATION

252. The Secretariat finds that in light of the response of the government of Mexico, submission SEM-09-002 (*Wetlands in Manzanillo*) warrants the preparation of a factual record in relation to the alleged failure to effectively enforce the following provisions:
- i. LAHEC Article 48 paragraph I with respect to the amendment of the PDUM (para. 103-125 *supra*);
 - ii. LGEEPA Article 20 *bis* 2 and ROE Articles 7, 8 and 10 with respect to the implementation of the Coordination Agreement (para. 149-171 *supra*);
 - iii. LGEEPA Article 35 and REIA Article 13 paragraph III with respect to the alleged failure to establish the relationship between the Manzanillo LPG Project and the environmental land use plan (para. 182-197 *supra*);
 - iv. LGEEPA Article 35 and REIA Article 13 paragraph III with respect to the alleged failure to establish the relationship between the Manzanillo LNG Project and the environmental land use plan (para. 202-220 *supra*); and,
 - v. LGEEPA Article 30, LGVS Article 60 *ter* and NOM-022 with respect of the environmental impact assessment for the Manzanillo LNG Project, and with specific reference to the hydrodynamic flow in the coastal wetland of the Cuyutlán Lagoon and REIA Article 47, concerning compliance with conditions of the AIA-LNG related to such study (para. 225-251 *supra*).
253. In accordance with NAAEC objectives, pursuant to Article 15(1) of the Agreement, and for the aforementioned reasons set out herein, the Secretariat hereby informs the Council of its recommendation that a factual record be developed for this submission.⁴³⁴ Following Council Resolution 01-06⁴³⁵ and Council Resolution 12-06,⁴³⁶ the Secretariat will make its best effort to produce the factual record in as timely a manner as is practicable, should the Council decide to instruct it to prepare a factual record.
254. The revised submission, the response of the government of Mexico, and the environmental law in question of which the preparation of a factual record is recommended, are attached to this notification, which is submitted to the Council, and these documents are made public in the official languages of the CEC (except for the confidential section of the response).

⁴³⁴ The Secretariat clarifies to interested persons and to the Submitters that neither this notification, nor any factual record that may be published, constitutes a finding on the effective enforcement of environmental law of Mexico.

⁴³⁵ Council Resolution 01-06 Response to the Joint Public Advisory Committee (JPAC) Report on Lessons Learned regarding the Articles 14 and 15 Process (29 June 2001).

⁴³⁶ Council Resolution 12-06 Adoption of revised Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (11 July 2012).

255. In accordance with NAAEC Article 39(2),⁴³⁷ the Secretariat sends the complete version of this determination containing confidential information only to the government of Mexico.

Respectfully submitted for your consideration this 19th day of August 2013.

Secretariat of the Commission for Environmental Cooperation

(signature in original)

Per: Irasema Coronado, Ph.D.
Executive Director

⁴³⁷ 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.”

APPENDICES
SEM-09-002 (Wetlands in Manzanillo)
NAAEC Article 15(1) Notification

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Appendix I. Environmental law covered by the factual record

Ecological Balance and Environmental Protection Act

Article 20 bis 2. The Governments of the States and the Federal District, in accordance with the applicable local laws, may draft and promulgate regional environmental land use plans encompassing the entirety or a portion of the territory of a federal entity.

...

Article 30. In order to obtain the authorization contemplated in Article 28 of this Act, interested persons shall submit to the Ministry an environmental impact statement which shall contain, at least, a description of the possible effects on the ecosystem or ecosystems that may be affected by the work or activity in question, considering the sum total of the elements making up said ecosystems as well as the preventive, mitigation, and other measures necessary to avert and/or minimize the negative effects on the environment.

Where the activities in question are considered high-risk pursuant to this Act, the statement shall include the applicable risk study.

Where modifications are made to the plan for the work or activity in question subsequent to the filing of an environmental impact statement, the interested persons shall notify the Ministry thereof so that the latter may, within a period not to exceed ten days, notify them whether the submission of any additional information is necessary in order to assess the potential environmental impacts of the modifications, as prescribed by this Act.

The contents of the preventive report as well as the characteristics and modalities of the environmental impact statements and risk studies shall be established by the Regulation to this Act.

Article 35. Upon the filing of an environmental impact statement, the Ministry shall initiate the assessment procedure, for which purpose it shall verify that the application meets the formalities prescribed by this Act, its Regulation, and the applicable Mexican official standards, and shall open the corresponding file within a period not to exceed ten days.

For the authorization of the works and activities to which Article 28 refers, the Ministry shall adhere to the provisions of the aforementioned instruments, as well as the urban development and environmental land use plans, protected natural area declarations, and such other legal provisions as may be applicable.

In addition, for the authorization to which this article refers, the Ministry shall assess the possible effects of the said works or activities on the ecosystem or ecosystems in question, considering the sum total of the elements of which they are composed and not only the resources that would be subject to use or impact.

Having assessed the environmental impact statement, the Ministry shall, with a basis in law and fact, issue the corresponding decision in which it may:

- I. Authorize the work or activity in question, as per the application;
- II. Authorize the work or activity in question, conditional upon the modification of the project or the establishment of additional prevention and mitigation measures aimed at preventing, lessening, or offsetting the adverse environmental impacts likely to be produced during construction and normal operation or in the event of an accident. In the case of conditional authorizations, the Ministry shall specify the requirements to be observed in the performance of the planned work or activity, or
- III. Deny the requested authorization, where:
 - a. it involves a violation of this Act, its regulations, the Mexican official standards, or any other applicable provisions;
 - b. the work or activity in question could lead to one or more species being declared threatened or endangered or where there is any impact on such species, or
 - c. the information provided by the applicants in regard to the environmental impacts of the work or activity in question is false in any way.

The Ministry may require the posting of security or bonds to ensure compliance with the conditions set out in the authorization, in those cases expressly enumerated in the regulation to this Act, where serious harm to ecosystems could occur while the works are being carried out.

The decision of the Ministry shall refer only to the environmental aspects of the works and activities in question.

General Wildlife Act

Article 60 *ter*. The following are prohibited: removal, filling, transplanting, cutting, or any activity that affects the integrity of water flow in the mangrove area; the ecosystem and its area of influence; its natural productivity; the natural carrying capacity of the ecosystem for tourism projects; any nesting, breeding, refuge, feeding, and spawning grounds; or interactions between the mangrove area, rivers, dunes, the adjacent coastal zone, and corals or that cause changes in ecological characteristics and services. Works or activities whose purpose is to protect, restore, research, or conserve mangrove areas shall be excepted from the prohibition contained in the preceding paragraph.

Human Settlements Act of the State of Colima

Article 48. Municipal urban development plans shall contain the following, in addition to the basic elements to which Article 43 of this Act refers:

- I. The consistency of the Municipal Urban Development Plan with the National, State, and Municipal Development Plans, the State Urban Development Plan, and the Environmental Land Use Plan;...

Environmental Impact Assessment Regulation to the General Ecological Balance and Environmental Protection Act

Article 22. In those cases where the environmental impact statement has deficiencies that impede the assessment of the project, the Ministry may ask the applicant, a single time and within the forty days following the opening of the file, for clarification, rectification, or elaboration on the content thereof and in such case, the term of sixty days to which Article 35 bis of the Act refers shall be suspended.

The suspension may not exceed sixty days as from the date that it is declared. Where this period lapses without the information being submitted by the applicant, the Ministry may declare the process to have expired pursuant to Article 60 of the Federal Administrative Procedure Act.

Article 46. The period within which to issue the assessment decision on the environmental impact statement shall not exceed sixty days. Where justified due to the dimensions or complexity of the work or activity, the Ministry may, exceptionally and with a basis in law and fact, extend the period for up to sixty more days and shall notify the applicant of its determination in the following manner:

- I. Within the forty days following the receipt of the application for authorization, where no additional information was requested, or
- II. Within a period not to exceed ten days from the date the additional information was submitted, where such additional information was requested.

The power to extend the period may be exercised only once during the assessment process.

Article 47. The performance of the work or activity in question shall adhere to the provisions of the corresponding decision, the applicable Mexican official standards, and any other applicable legal and regulatory provisions.

In any case, the applicant may request the inclusion in the decision of any additional permits, licenses, or authorizations that are necessary to carry out the projected work or activity and whose issuance is within the purview of the Ministry.

Environment Act for Sustainable Development of the State of Colima

Article 40. Works or activities carried out in the State, as well as the issuance of land use or construction permits and zoning certificates, shall be subject to the provisions of the corresponding environmental and other land use plans.

Environmental Land Use Planning Regulation to the General Ecological Balance and Environmental Protection Act

Article 7. Environmental land use planning under federal jurisdiction shall be carried out by means of the environmental land use planning process and shall have as a result the following products:

- I. Coordination agreements, which may be signed by:

- a. Those agencies and entities of the Federal Public Administration that are competent to carry out activities having an impact on the study area; and
- b. The federated entities, their municipalities, the Federal District, and its boroughs in the study area.

II. Environmental land use plans, which shall contain:

- a. The environmental land use planning model that contains the regionalization or the determination of ecological zones, as the case may be, and the ecological guidelines applicable to the study area and, as applicable, the order promulgated them, and
- b. The ecological strategies applicable to the environmental land use planning model; and

III. The environmental registry.

The Ministry may move to initiate any stage of the environmental land use planning process, as required.

Article 8. The Ministry shall promote the signing of such coordination agreements as may be required pursuant to paragraph I of the preceding article or, in any case, the revision of those already existing as a basis for any environmental land use plan in force with a view to adapting them to the provisions of this Regulation.

The purpose of coordination agreements shall be to determine the actions, time periods, and commitments that make up the agenda of the environmental land use planning process, which shall contain the following, at a minimum:

- I. The basis for the specification of the study area to be encompassed by the environmental land use planning process;
- II. The guidelines, criteria, and strategies that allow for the implementation of the environmental land use planning process;
- III. The identification and designation of the authorities and institutions that shall carry out the actions ensuing from the coordination agreements, as well as the involvement and responsibility resting with each of them for the conduct and implementation of the environmental land use planning process;
- IV. The creation of the entity that shall implement and supervise the environmental land use planning process;
- V. The initial actions to be taken by each party to the agreement in order to ensure the initiation and effective deployment of the environmental land use planning process;
- VI. The determination of the products to be obtained as a result of the environmental land use planning process;
- VII. Any other matters to be included as schedules to the coordination agreements;
- VIII. The penalties and liabilities to be engendered for the parties in the event of non-compliance or default; and
- IX. Any other stipulations that the parties may consider necessary for the proper fulfillment of undertakings under the agreement.

Article 10.- Coordination agreements referred to in this Chapter, their annexes and cooperation agreements signed within the environmental land use planning process, shall be considered as public law and their compliance shall be mandatory for the signing parties.

For the purposes of the last paragraph, coordination and cooperation agreements shall establish the consequences and sanctions resulting from the breach of the agreement, in order to assure the general interest and guarantee their execution in due time and manner.

The agreements signed in accordance with this article shall be published in the Federal Official Gazette and, when applicable, in the local diffusion body of the federative entities or of the Federal District.

Mexican Official Standard NOM-022-SEMARNAT-2003, Establishing the specifications for the preservation, conservation, sustainable use, and restoration of coastal wetlands in mangrove zones

[Only the relevant sections of the standard are cited.]

...

1.0 Object and scope of application

The scope of application of this Standard is mandatory for every user in the watershed, within the framework of the overall management plan for the watershed.

1.1 The object of this Mexican Official Standard is to establish the specifications that shall regulate sustainable use in coastal wetlands with a view to preventing their deterioration and promoting their conservation and, as applicable, their restoration.

1.2 For the purposes of this Standard, coastal wetlands are understood to be the complete hydrological units that contain mangrove plant communities.

1.3 The provisions of this Mexican Official Standard shall be observed by the persons responsible for the performance of those works or activities that are intended to be sited in coastal wetlands or that, by virtue of their characteristics, may have negative impacts on coastal wetlands.

...

4.0 Specifications

The mangrove woodland shall be preserved as a plant community. In the assessment of applications related to land use change, wildlife harvest authorization, or environmental impact, in every case the integrity of the mangrove woodland shall be guaranteed, and for such purpose the following points shall be contemplated:

- The integrity of the water flow of the coastal wetland;
- The integrity of the ecosystem and its zone of influence on the continental shelf;
- Its natural productivity;
- The natural carrying capacity of the ecosystem for tourists;
- The integrity of nesting, breeding, refuge, feeding, and spawning areas;
- The integrity of the functional interactions among coastal wetlands, rivers (surface and underground), dunes, the adjacent marine zone, and corals;
- Change of ecological characteristics;

- Ecological services;
- Ecological and ecophysiological aspects (structural aspects of the ecosystem such as depletion of primary processes, physiological stress, toxicity, high incidence of migration and mortality, as well as population decline, primarily for those species having status, among others).

4.1 Any canal building, flow interruption, or water diversion work that jeopardizes the ecological dynamics and integrity of coastal wetlands shall be prohibited, except in such cases where the described works are designed to restore circulation and promote the regeneration of the coastal wetland.

4.3 The developers of a project requiring the existence of canals shall perform prospecting with the intention of detecting existing canals that may be used so as to avoid ecosystem fragmentation, saline intrusion, silting, and alteration of water balance.

4.12 The environmental impact studies and the ecological land use plans shall consider the balance between water inflow from the continental watershed and water inflow from tides, which determines the mixture of fresh and salt water that creates the estuarine conditions essential to the survival of coastal wetlands and the plant communities they support.

4.23 In cases where canal building is authorized, the mangrove area to be deforested shall be exclusively restricted to that which is approved in the environmental impact decision and the forest land use change authorization. The diversion or straightening of natural channels or of any portion of a hydrological unit, whether or not it contains mangrove vegetation, is prohibited.

...

4.33 The construction of canals shall ensure that the ecosystem is not fragmented and that the canals will allow for its continuity; preference shall be given to works or infrastructure development that strive to reduce the number of canals in mangrove woodlands.

4.37 The natural regeneration of the hydrological unit and of plant and animal communities shall be favored by means of the restoration of the water balance and of continental water flows (surface and underground rivers, year-round and intermittent streams, sheet-flow runoff, water table contributions), the elimination of dumping of untreated wastewater protecting those areas showing potential for it.

4.38 Programs and projects for mangrove restoration shall have a sound scientific and technical basis and shall be approved in the environmental impact decision after consultation with a panel of experts. Such projects shall have a protocol serving as a guideline for determining the actions to be carried out.

...

4.42 Environmental impact and land-use planning studies shall consider a comprehensive study of the hydrological unit in which the coastal wetlands are located.

Appendix II: Timeline

