

Secretariat of the Commission for Environmental Cooperation

**Determination in accordance with Article 15(1) that
preparation of a factual record is not warranted**

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Party: United Mexican States
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Submission no.: SEM-15-002 (*Management of Analog TV Waste*)

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 nongovernmental organization or person in North America 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”)¹ initially

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC) signed on 13 September 1993 by Canada, Mexico, and the United States (the “Parties”) and published in the Official Gazette of the Federation (*Diario Oficial*)

considers submissions to determine whether they meet the requirements in NAAEC Article 14(1). Where the submission meets these requirements, the Secretariat then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party. In light of any response from the Party and in accordance with the NAAEC, if the Secretariat finds that the matter warrants the preparation of a factual record, it notifies the CEC Council and explains the reasoning underlying its recommendation, in accordance with Article 15(1).² By a two-thirds vote of its members, the Council may instruct the Secretariat to prepare a factual record.³

2. On 24 August 2015, several persons and non-governmental organizations (the “Submitters”) filed a submission with the CEC Secretariat in accordance with NAAEC Article 14(1).⁴ The Submitters assert that the governmental authorities of Mexico are failing to implement a management plan for analog television sets discarded as a result of the transition to digital terrestrial television (DTT) as prescribed by the country’s environmental law.
3. On 22 September 2015, the Secretariat found that submission SEM-15-002 (*Management of Analog TV Waste*) did not meet the requirements of Article 14(1) of the Agreement, since the submission did not cite the provisions that qualified as “environmental law.”⁵ Pursuant to section 6.1 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”),⁶ the Secretariat notified the Submitters that they had 60 working days in which to file a submission that met all the Article 14(1) requirements.
4. On 4 December 2015, the Submitters filed a revised submission clarifying their assertions and presenting additional information addressing the aspects noted by the Secretariat.⁷
5. On 1 March 2016, the Secretariat found that revised submission SEM-15-002 (*Management of Analog TV Waste*) meets all the eligibility requirements of NAAEC Article 14(1) and requested a response from Mexico in accordance with Article 14(2).⁸ On 30 May 2016, the Secretariat received Mexico’s response, which notified the existence of

of the Federation—DOF) on 21 December 1993. The constituent bodies of the CEC are its Council, Secretariat and the Joint Public Advisory Committee (JPAC).

² For detailed information on the various stages of the submission process, as well as on the Secretariat’s determinations and factual records, visit the CEC website at <www.cec.org/submissions>.

³ NAAEC Article 15(2), note 1 *supra* [NAAEC].

⁴ The Submitters requested in their submission that information serving to identify them not be disclosed. Pursuant to NAAEC Article 11(8)(a), the Secretariat must maintain the confidentiality of Submitters’ identification data where they so request.

⁵ SEM-15-002 (Management of Analog TV Waste), Article 14(1) Determination, 22 September 2015 [Article 14(1) Determination].

⁶ *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, online at <www.cec.org/Guidelines> (viewed 2 November 2015) [Guidelines].

⁷ SEM-15-002 (*Management of Analog TV Waste*), Article 14(1) Submission, 4 December 2015 [Revised Submission].

⁸ SEM-15-002 (*Management of Analog TV Waste*), Article 14(1) and (2) Determination (1 March 2016) [Article 14(1)(2) Determination].

pending proceedings and submitted information relating to the enforcement of the environmental law in question.⁹

6. Having reviewed the revised submission in the light of Mexico's response, the Secretariat finds that submission SEM-15-002 (*Management of Analog TV Waste*) does not warrant the preparation of a factual record. The Secretariat's reasoning is outlined below.

II. ANALYSIS

A) Preliminary matters

i) The Secretariat partially terminates the Submission with respect to domestic remedies relating to the matter raised in the submission

7. Mexico notifies the Secretariat of the existence of two amparo proceedings brought by one of the Submitters before the Federal Judicial Branch (*Poder Judicial de la Federación*) and argues that these concern the same matter as the matter raised in the submission¹⁰ The Party asks the Secretariat to keep the information relating to these proceedings confidential;¹¹ for this reason, paragraphs 12 to 15 of this notification are confidential, since they contain a review of the confidential information provided by Mexico.
8. Under NAAEC Article 14(3)(a), the submissions mechanism calls for a Party to give notice of "whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further." The Secretariat proceeds to perform the corresponding analysis, guided by the NAAEC Article 45(3) definition of "judicial or administrative proceeding."
9. A judicial or administrative proceeding is defined in NAAEC Article 45(3)(a) as:

a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order....
10. Mexico also requests that the Secretariat consider in its analysis sections 7.3(c) and 7.5 of the Guidelines.¹² The information attached to Mexico's response regarding the two amparo

⁹ SEM-15-002 (*Management of Analog TV Waste*), Article 14(3) Party Response (30 May 2016) [Response].

¹⁰ Response, at 3.

¹¹ *Ibid.*, at 4.

¹² Guidelines 7.3 (c) and 7.5 establish:

7.3 As set forth in Article 14(2) of the Agreement, the Secretariat will, in making that determination, be guided by whether: ...

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

...

7.5 In considering whether private remedies available under the Party's law, such as those identified in Article 6(3), have been pursued by the Submitter and others, the Secretariat will be guided by whether:

a) continuing with the submission process could duplicate or interfere with private remedies being pursued or that have been pursued, in particular those that involve the Party, and in such cases the Secretariat should consider terminating the process in whole or in part; and

b) reasonable actions have been taken by the Submitter to pursue private remedies prior to making a submission.

actions also indicates that Izarely Rosillo Pantoja appears as the counsel for the plaintiff and that she is also one of the Submitters. In this regard, it is noted that while this submitter is not a plaintiff in the amparo actions, and indeed none of the Submitters is a party therein,¹³ the Secretariat has previously found that Article 14(2)(c) and Guideline 7.5 leave open the possibility of this criterion being met where any person, whether or not they are a submitter, pursues remedies under the Party's law.¹⁴ In fact, Guideline 7.5 opens this possibility in the phrase "[i]n considering whether private remedies available under the Party's law...have been pursued by the Submitter and others." [emphasis added], and thus *other* than a submitter may pursue remedies in order to meet this criteria. On a related matter, the Secretariat clarifies that the request of a response from Mexico cannot have caused duplication of effort with respect to the matter raised in the submission, since the matter in litigation is different from the central assertions of SEM-15-002 (see paragraph 12 *infra*).

11. Regarding whether the two amparo actions constitute pending proceedings under NAAEC Articles 14(3) and 45(3)(a), the Secretariat finds that they are not —except as noted in the following section— and do not preclude further consideration of the submission by the Secretariat.

[Section confidential at Party's request]

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¹³ *Ibid.*; *Ibid.*, Appendix A, at 1, and Appendix E, at 1.

¹⁴ See SEM-06-003 and SEM-06-004 (*Ex Hacienda El Hospital II-III*), Article 15(1) Notification (17 May 2008), at 18 ("Nothing in the Guidelines or in Article 14(2)(c), which is written in the passive voice, indicates that the Secretariat can only consider matters in which submitters, and not other parties, pursued remedies available under the Party's law.").

¹⁵ [Redacted text block]

¹⁶ [Redacted text block]

¹⁷ [Redacted text block]

13. [Redacted]

14. [Redacted]

15. [Redacted]

16. [Redacted]

[End of confidential section]

17. The Secretariat concludes that the submission should not be terminated because the acts challenged in the amparos of which Mexico gives notice are not the same matters raised by the Submitters in SEM-15-002. Thus, the Secretariat continues with its analysis under Article 15(1) of the Agreement.

ii) Eligibility of the submission

18. In its response, Mexico maintains that “national policies and programs, including their compliance indicators, evaluation and diagnostic tools, allocation of public resources, etc.,

[Redacted]

cannot be included in the submissions process because they do not qualify as environmental law.”²²

19. The Secretariat agrees that neither the Discarded TVs Management Program for the Comprehensive Management of Television Sets Discarded due to the Transition to Digital Television Transmission (the “Discarded TVs Management Program”) nor the establishment of national policies and programs qualify as “environmental law”. However, when a submission cites an act or regulation which does meet the definition of “environmental law”, the Secretariat may address the question of whether there is effective enforcement of these provisions.

B) The assertions of submission SEM-15-001

20. The Secretariat proceeds to consider whether the preparation of a factual record is warranted in the light of Mexico’s response.

i) The Secretariat does not recommends a factual record with respect to the implementation of a management plan for analog TV waste

21. The Submitters assert that the work program for the DTT transition published in May 2014 (the “DTT Transition Work Program”) provided for the drafting of a TV waste management plan but that this plan has yet to be implemented.²³ They maintain that the DTT Transition Work Program has no legal basis in any waste management-related provision.²⁴
22. The Submitters state that after legal remedies were pursued to obtain a waste management plan and a timeline for its implementation,²⁵ the SCT and Semarnat decided that it needed a basis of collaboration in this regard²⁶ and issued the Discarded TVs Management Program, instead of a management plan, on 24 June 2015.²⁷ The Submitters maintain that this program is deficient because it does not satisfy the requirements of the act nor the commitment set out in the DTT Transition Work Program to develop a “management plan.” The Submitters assert that “what is implied is a change from the authorizing and verifying of an LGPGIR management and control tool to the creation of a public policy” (the Discarded TVs Management Program), “for which no budgetary resources have as yet been appropriated.”²⁸
23. The Secretariat requested a response from Mexico in regard to the effective enforcement of the General Law for the Prevention and Comprehensive Management of Waste (*Ley General para la Prevención y Gestión Integral de los Residuos—LGPGIR*) Articles 1 paragraphs I to VIII and X, 2 paragraphs I to VIII and X, 7 paragraph XXIV, 9 paragraphs

²² Response, at 10.

²³ Revised Submission, note 7 *supra*, at 5, §14.

²⁴ *Ibid.*

²⁵ See Article 14(1)(2) Determination, §56-9.

²⁶ SCT-Semarnat, *Base de cooperación en materia de protección al medio ambiente de los impactos negativos que pudieran ocasionar el manejo y destino final inadecuado de televisores analógicos desechados producto de la transición a televisión digital terrestre que celebran por una parte la Secretaría de Ambiente y Recursos Naturales y por otra la Secretaría de Comunicaciones y Transportes*, 22 May 2015.

²⁷ Revised Submission, note 7 *supra*, at 6, §22.

²⁸ *Ibid.*, §23.

III and IV, 19 paragraph VIII, 20, 27 paragraph I, 28 paragraphs I and III, 30 paragraphs II to IV, 32, 34, and 64; Articles 16 paragraphs I-b, II-b and III-a, 17, 20, and 22 of the LGPGIR Regulations, and Official Mexican Standard NOM-161-SEMARNAT-2005 (NOM-161),²⁹ as regards the drafting and implementation of a management plan for analog television sets discarded further to the DTT transition.

24. In its response, Mexico states:

The Submitters appear to confuse the [Discarded TVs Management Program], a public policy instrument setting out the integrated management strategy for analog television sets discarded as a consequence of the DTT transition, with the concept of a “management plan,” the waste management instrument prescribed by the LGPGIR and applicable, *inter alia*, to waste requiring special management.³⁰

25. Mexico states that “the [Discarded TVs Management Program] is not a management plan in the sense of the LGPGIR” and that this instrument was always viewed as a program whose objective is to produce a strategy for the management of discarded analog television sets.³¹ In other words, it is an instrument that sketches out a strategy with a model for the management of analog television sets discarded as a consequence of the analog blackout.

26. On this matter, Mexico’s response states that:

The [Discarded TVs Management Program is] a hybrid collective-national program, in accordance with Article 16 of the LGPGIR Regulation, drafted in accordance with the national legal framework and international experience ...³²

27. LGPGIR Regulation Article 16 defines the characteristics of management plans establishing these may be mixed (with the participation of multiple authorities); collective (developed by several obligated parties), and national.³³ In other words, Mexico appears to assert that it was guided by Article 16 without acquiring an obligation to develop a management plan under LGPGIR Article 28 (see para 29 *infra*); further, Mexico states that Semarnat does not fall within LGPGIR Article 28 paragraph III which lists the entities legally obligated to develop waste management plans.

28. Mexico also maintains that Semarnat conducts actions to formulate, conduct and evaluate national waste policy and with that purpose, published Guidelines for the Integral Management of Analog TV Discarded as a Result [of the TDT], which define actions and responsibilities for state and municipal governments and according with their authority as defined in the LGPGIR.³⁴ Such actions from the Federal Government are, Mexico asserts, based on LGPGIR Article 7, paragraph I which gives Semarnat authority to design and implement national policies.

²⁹ NOM-161-SEMARNAT-2005 *Establishing the criteria for classification of those wastes requiring special management and determining which shall be subject to a management plan; the list thereof, the procedure for inclusion or exclusion therein, as well as the criteria and procedures for the formulation of management plans*

³⁰ Response, at 11.

³¹ *Ibid.*, at 14.

³² Response, at 7.

³³ LGPGIR Regulation, Article 16.

³⁴ Response, at 10.

29. According to the Submitters, the Discarded TVs Management Program should have been developed and implemented as a management plan in accordance with LGPGIR. On this, LGPGIR Article 28 cited in the submission establishes that:

The following are required to develop and execute management plans, as applicable:

[...]

III. Large generators and producers, importers, exporters and distributors of products that, when discarded, are converted in solid, urban or special management waste [...]

30. The Secretariat notes that the entities named in Article 28 are responsible for the preparation and implementation of management plans and that the States approve these plans in accordance with LGPGIR Article 9, paragraph III. The revised submission does not further elaborate on matters related with the companies charged with recollection, transfer, disassembling, recycling and final disposal of special management waste or on the States' role on this subject.

31. The Secretariat considers that a factual record addressing implementation of the Discarded TVs Management Program instead of a management plan (as required under LGPGIR Article 28) may provide information about how Semarnat is implementing a national program but it could not address the execution of management plans by the states, which are required by law to supervise such actions, because this issue was not raised in the submission.

32. In light of the foregoing, the Secretariat finds that development of a factual record is not warranted with respect to the effective enforcement of LGPGIR Articles 27 paragraph I, 28 paragraphs I and III, 30 paragraphs II, III, and IV, and 34 as well as Articles 16 and 22 of the LGPGIR Regulation and NOM-161.

33. However, in observance of the 2014 Ministerial Statement adopted in Yellowknife by the CEC Council at the Twenty-first regular session,³⁵ Mexico may provide information to the public, and particularly, to the Submitters, on the efforts undertaken by the Party to implement the Discarded TVs Management Program as well as implementation of management plans at the state level.

ii) The Secretariat does not recommend a factual record with respect to assertions on classification of TV waste, hazardous waste management

34. The Submitters assert that the enforcement of provisions relating to the classification of the electronic waste generated by discarded television sets is characterized by “opacity and inconsistencies,” maintaining that there are applicable provisions of equal hierarchical rank, one of which (NOM-052) considers them hazardous while another (NOM-161) considers them waste requiring special management.³⁶

³⁵ CEC Council, CEC Ministerial Statement – 2014, Twenty-first Regular Session of the CEC Council, Yellowknife, Northwest Territories, Canada (17 July 2014), available at <<https://goo.gl/MLnm35>> (retrieved 25 November 2016) [Ministerial Statement].

³⁶ Revised Submission, note 7 *supra*, at 6-7, §23.

35. The Submitters argue that due to the characteristics of analog television sets, these fall within the purview of LGPGIR Article 31 paragraphs VII and X and NOM-052. In the Submitters' opinion, "the LGPGIR specifically lists these components 'inside of' television sets as hazardous." They maintain that there is evidence that the leaching of lead from cathode ray tubes exceeds the limit of 5.0 mg/l established in Table 2 of NOM-052, which would make them hazardous waste.³⁷ They further argue that 91.39% of the average weight of television sets – i.e., the sum of the weights of the CRT, the plastic housing, and the circuit board – consists of materials containing lead and/or persistent organic compounds.³⁸ The Submitters maintain that there are approximately 40,000 tons of lead oxides in analog television sets that will become unusable due to the analog blackout.³⁹
36. The Secretariat requested a response from Mexico in regard to the effective enforcement of LGPGIR Articles 2 paragraphs I, II, III, IV, V, VI, VIII, and X and 31 paragraphs VII and X as well as Mexican Official Standard NOM-052, in relation to the implementation of the DTT transition, the classification of TV waste and, as applicable, the application of hazardous waste provisions to those components of television sets possessing the hazardousness characteristics defined by Mexican law.
37. Mexico states that NOM-052:
- makes express reference to *hazardous waste* treatment and recycling processes, which situation is likewise not specifically applicable to analog television sets, since they are considered waste requiring special management when intact... Therefore, the Submitters' conclusion is incorrect, since while it is true that analog television sets contain components that can be classified as hazardous waste, these items are not exposed because they are contained inside a television set and the television sets are discarded intact...⁴⁰
38. Mexico concludes that the Submitters' assertion in reality derives from an incorrect interpretation of Mexican Official Standards NOM-161 and NOM-052 and not from a matter of effective environmental law enforcement.
39. Analog television sets are categorized as a waste requiring special management and are in fact included in the NOM-161 "list of technological wastes from the computer and electronics manufacturing industries," which includes "monitors with cathode ray tubes (including television sets)."⁴¹ That is, pursuant to NOM-161, they are considered waste requiring special management and, in Mexico's view, cannot be classified as hazardous as long as they are intact, inside a television, and not exposed.

³⁷ Townsend *et al.* (1999), *Characterization of Lead Leachability from Cathode Ray Tubes using the Toxicity Characteristic Leaching Procedure*, Florida Center for Solid and Hazardous Waste Management, 19 pp [Townsend].

³⁸ Revised Submission, note 7 *supra*, at 7, §23; L.S. Morf *et al.* (2005), "Brominated Flame Retardants in Waste Electrical and Electronic Equipment: Substance Flows in a Recycling Plant," *Environ. Sci. Technol.*, Table 3; D. Zumbuehl (2006), *Mass Flow Assessment (MFA) and Assessment of Recycling Strategies for Cathode Ray Tubes (CRTs) for the Cape Metropolitan Area (CMA)*, South Africa, Swiss Federal Laboratories for Materials Science and Technology, Table 4.

³⁹ L.A. Macías Raya (no date), *Cálculo de óxido de plomo (PbO) en televisiones analógicas de México*, Vías Verdes, A.C., at 10.

⁴⁰ *Ibid.*, at 13.

⁴¹ NOM-161, Appendix, paragraph VIII(a).

40. The LGPGIR defines waste requiring special management as “that which is generated in production processes and does not possess the characteristics to be considered hazardous or urban solid waste, or which is produced by large generators of urban solid waste.”⁴² Again, waste requiring special management “does not possess the characteristics to be considered hazardous,” and along these same lines, NOM-161 lists television sets as intact units; that is, television sets must be specially managed in accordance with NOM-161.
41. Hazardous waste, for its part, is “that which possesses any of the characteristics of corrosivity, reactivity, explosivity, toxicity, or flammability or contains infectious agents rendering it hazardous, as well as packaging, containers, and soils contaminated during transfer to another site, in accordance with the provisions of this Act.”⁴³
42. The act applies the term “hazardousness” to those wastes possessing the characteristics of the LGPGIR definition, which are set out in NOM-052. The latter establishes that a waste is an “environmental toxin” where the leachate from which the toxic components of the waste are determined (termed the “PECT extract”)⁴⁴ exceeds the limit established in Table 2 of NOM-052, which in the case of lead is 5.0 mg/l.⁴⁵
43. The waste classification system adopted by Mexico is clear with respect to discarded TV sets and on that matter, NOM-161 categorizes TV sets as special management waste. Mindful of government enforcement actions listed in NAAEC Article 5, the Secretariat has dismissed assertions in previous submissions that challenged standard-setting actions as these do not fall within the question of “failure to effectively enforce”.⁴⁶ The Secretariat considers that the response clarifies the question of how special management waste is categorized under Mexican law and thus a factual record would not render information on enforcement actions but rather on how Mexico has decided to categorize special management waste.
44. For the aforementioned reasons, the Secretariat does not recommend the development of a factual record with respect to TV waste classification in accordance with NOM-161.

iii) The Secretariat does not recommend a factual record with respect to the principle of waste generation principle

⁴² LGPGIR Article 5 paragraph XXX.

⁴³ *Ibid.*, paragraph XXXII.

⁴⁴ Pursuant to paragraph 5.4 of NOM-052, the PECT extract is “the leachate from which the toxic components of the waste and their concentration are determined with a view to identifying whether they are hazardous due to their toxicity in the environment.”

⁴⁵ NOM-052, paragraph 7.5.1.

⁴⁶ See: SEM-98-003 (*Great Lakes*), Determination pursuant to Articles 14(1) and 14(2) (8 September 1999) (“Based on our review of the Agreement, we conclude that whatever the outer bounds of ‘enforcement’ under Article 14(1) may be, enforcement does not include government standard-setting”), at 3, and SEM-04-005 (*Coal-fired Power Plants*), Determination pursuant to Article 14(1) (16 December 2004), (“However, mindful of the government enforcement actions that are included in Article 5 of the NAAEC, the Secretariat has also dismissed assertions in previous submissions that challenged the kind of standard-setting that the NAAEC Parties reserved to themselves, as contrasted with assertions of a “failure to effectively enforce.”) at 4.

45. The Submitters state that the decree establishing measures to bring about the DTT transition was published on 2 September 2010.⁴⁷ This decree provided for economic assistance to purchase receivers or decoders.⁴⁸ The Submitters further assert that the DTT Transition Work Program was published on 13 May 2014 and that this program mentions for the first time the distribution of digital television sets instead of decoders.⁴⁹ The Submitters maintain that during the DTT transition process, the federal government replaced ... distributi[on of] decoders for use with old television sets ... by distribut[ion of] free digital televisions.”⁵⁰ The Submitters maintain that the DTT transition is an indication of “non-compliance with the principle of preventing and minimizing waste generation.”⁵¹
46. LGPGIR Article 2 paragraph III establishes that for the taking of measures pursuant to the enforcement of the Act, the principle of waste prevention and minimization shall be observed. In addition, Articles 20 paragraph II and 22 of the LGPGIR Regulation provide that the manner in which waste is to be minimized shall be given consideration in the drafting of waste management plans. For its part, Article 22 paragraph II of the LGPGIR Regulation provides that Semarnat shall promote waste minimization in conjunction with “the authorities of the federative entities and municipalities, as well as with other federal agencies and entities.” The Secretariat requested a response from Mexico with regard to these provisions.
47. In its response, Mexico maintains that this is not relevant to the analysis of the Discarded TVs Management Program because “it is beyond the scope of the SEM process” but that nonetheless, “the [Discarded TVs Management Program], whose objective is to establish a *comprehensive strategy for the management* of analog television sets, was issued with strict adherence to these LGPGIR principles...”⁵² Mexico maintains that the DTT transition process and the distribution of television sets does not entail an immediate waste generation because the public may decide different uses to such devices.⁵³
48. In addition, Mexico maintains that the characterization of analog television sets as waste requiring special management “is consistent with the principle of waste minimization, recovery, and use” since this characterization allows for the recycling and reuse of TV components as well as the final disposal and containment of their non-reusable components.⁵⁴
49. LGPGIR Article 2 paragraph III provides that

In the formulation and conduct of policy concerning the prevention, recovery, and integrated management of the waste contemplated in this Act, the promulgation of legal provisions, and the taking of measures ensuing from them, as well as in the

⁴⁷ Decree establishing the measures to be taken by the Federal Public Administration to bring about the transition to digital terrestrial television, published in the DOF on 2 September 2010.

⁴⁸ Revised Submission, note 7 *supra*, at 2, §2.

⁴⁹ *Ibid.*, at 4, §14.

⁵⁰ *Ibid.*, at 4, §13-14.

⁵¹ *Ibid.*, at 13, fourth item in list of alleged violations.

⁵² Response, at 17 (emphasis in original).

⁵³ *Ibid.*, at 17.

⁵⁴ *Ibid.*, at 17-18.

generation and integrated management of waste, as the case may be, the following principles shall be observed:...

III. The prevention and minimization of the generation of the waste, its release into the environment, and its transfer from one medium to another, as well as its integrated management to prevent health risks and harm to ecosystems...

50. The Secretariat notes that Mexico addresses the implementation of the principle of waste recovery and use when it refers to the “recycling and reuse of the components of these television sets, as well as the final disposal and containment of the non-reusable components.” Although the Party in question does not discuss matters of waste minimization before it implemented the national policy that changed the signal from analog to digital, Mexico’s response includes information on actions currently being implemented in order to classify and recover waste during recollection, dismantling and recycling processes.

51. Mexico also maintains that those obligated to observe the principle of minimization in their management plans are the producers, importers, exporters, and distributors of products that become waste requiring special management when discarded, and adds that:

these parties, and not Semarnat or another body of the Government of Mexico, are those who, pursuant to Article 20 paragraph II of the LGPGIR Regulation, must comply with the principles of minimization, recovery, and use of waste under management plans registered with Semarnat.⁵⁵

52. The Secretariat considers that the revised submission does not address directly the obligations of digital TV distributors including preparation and authorization of plans for sound management for end-of-life digital TVs.

53. For the above reasons, the Secretariat does not recommend preparation of a factual record with respect to implementation of LGPGIR Article 2, paragraph III.

54. Finally, and as a side note to this notification, Mexico’s response centers around the enforcement of the principle of minimization at the stage of collection and recycling of analog television sets, without addressing the distribution of digital television sets to homes with scarce resources as part of the DTT transition process.

55. In any event, the Party may provide information to the public, and particularly, the Submitters, on Mexico’s efforts to implement the principle of waste minimization with respect to the matter raised in the revised submission (see paragraph 33 *supra*).⁵⁶

iv) The Secretariat does not recommend a factual record with respect to assertions related to communication, access to information, and citizen participation

56. The Submitters assert that no public information was disseminated “on the risks to health and the environment of improper disposal of analog television waste” in the course of the DTT transition.⁵⁷ They maintain that the press releases issued by the Federal Institute of Telecommunications (*Instituto Federal de Telecomunicaciones*) as regards the “blackouts”

⁵⁵ Response, at 18.

⁵⁶ 2014 Ministerial Statement, note 34 *supra*.

⁵⁷ Revised Submission, note 7 *supra*, at 12, §39.

do not provide information on the management of disused analog television sets⁵⁸ and that the implementation of the www.depositatutele.gob.mx website does not include “any vast awareness campaign concerning the risks of improper management of analog television sets.”⁵⁹ The Submitters point out that according to the basis of collaboration between the SCT and Semarnat, the latter is apparently responsible for conducting “environmental education, communications and awareness campaigns.”⁶⁰

57. The Submitters cite LGPGIR Article 2 paragraph VII, concerning the promotion of public access to information relating to waste,⁶¹ while LGPGIR Article 7 paragraph XXIV establishes that the Federation, in cooperation and coordination with the state and municipal governments, is responsible for awareness campaigns on the risks deriving from waste generation. In addition, NOM-161 provides for the implementation of waste management awareness campaigns. The Secretariat finds that these provisions qualify as environmental law. Nevertheless, as regards LGPGIR Articles 2 paragraph VII and 7 paragraph XXIV, since they refer to general policy guidelines, the Secretariat found that they would serve as a guide to the review of the provisions relating to the implementation of such campaigns.⁶²

58. The Secretariat requested a response from Mexico as regards the effective enforcement of LGPGIR Articles 2 paragraph VII and 7 paragraph XXIV as well as NOM-161 in relation to awareness raising about the risks entailed by the alleged improper disposal of analog television sets.

59. Mexico maintains that it can be concluded from the analysis of the objectives of NOM-161 as well as its scope of application “that its provisions do not refer to measures to be taken by the Government of Mexico in relation to awareness raising about the risks of improper disposal of analog television sets.”⁶³ However, the Secretariat observes that NOM-161 actually prescribes the implementation of awareness raising and communication mechanisms directed at the general public as part of those obligated to develop management plans for waste requiring special management.⁶⁴

60. In its response, Mexico maintains in regard to Article 7 paragraph XXIV that:

LGPGIR Article 7 paragraph XXIV is unrelated to their assertions, since this provision refers exclusively to the Federation’s power to issue Mexican Official Standards for the prevention of contamination by waste whose final disposal may cause salinization or excessive increases in the organic load of soils and bodies of water, but makes no reference to information, environmental education, or training for prevention of waste generation or sustainable waste management.⁶⁵

61. The Secretariat observes that LGPGIR Article 7 paragraph XXIV establishes the power of the Federation — in coordination with the state and municipal orders of government — to

⁵⁸ *Ibid.*, at 8, §28, and 12, §39.

⁵⁹ *Ibid.*, at 10, §37.

⁶⁰ *Ibid.*, at 6, §22.

⁶¹ See also Article 14(1) Determination, note 5 *supra* at §16.

⁶² Article 14(1)(2) Determination, §13.

⁶³ Response, at 19.

⁶⁴ NOM-161, paragraph 9.1.8.

⁶⁵ Response, at 19.

promote, disseminate, and facilitate public access to information about waste-related environmental and human health risks and effects.⁶⁶

62. In relation to the effective enforcement of LGPGIR Article 2 paragraph VII,⁶⁷ Mexico “discusses some of the measures taken by the Government of Mexico in relation to awareness raising about the risks of improper management of analog TV waste.”⁶⁸ While Mexico’s response provides no further information on the measures taken during the period of the Mexican analog blackout, from 18 July 2013 to its conclusion in December 2015, it does include information on measures taken to raise public awareness through dissemination of information and distribution of graphic materials offering simple tips on what to do with these television sets.
63. The Secretariat finds that the measures described by Mexico address the Submitters’ central concerns as regards public education about what to do with analog television sets and that, according to the information provided in the response, these are measures that it has been implementing. For this reason, there is no need for the Secretariat to recommend a factual record on this issue.

v) The Secretariat does not recommend a factual record with respect to the effective enforcement of the Stockholm Convention

64. The Submitters cite provisions of the Stockholm Convention on Persistent Organic Pollutants, adopted 22 May 2001. Mexico, one of 152 signatory countries, ratified the Convention on 10 February 2003.⁶⁹ The Convention came into force in Mexico on 17 May 2004.⁷⁰ The Submitters cite Articles 7(1)(a)(c) and 7(3), which read as follows:

Article 7. Implementation Plans

1. Each Party shall:

- a. Develop and endeavour to implement a plan for the implementation of its obligations under this Convention;[...]
- c. Review and update, as appropriate, its implementation plan on a periodic basis and in a manner to be specified by a decision of the Conference of the Parties.

...

⁶⁶ LGPGIR Article 7 paragraph XXIV:

The following are powers of the Federation: to promote, disseminate, and facilitate access to information by all sectors of society about the environmental and human health risks and effects of materials, containers, and packaging which becomes waste when discarded, in collaboration and coordination with the governments of the federative entities, the municipalities, and other agencies and entities involved.

⁶⁷ LGPGIR Article 2 paragraph VII:

In the formulation and conduct of policy on the prevention, recovery, and integrated management of the waste to which this Act refers, the promulgation of legal provisions and the taking of measures deriving from it, and the generation and integrated management of waste, whichever applies, the following principles shall be observed:... public access to information, environmental education, and training, to bring about the prevention of waste generation and the sustainable management of waste...

⁶⁸ Response, at 20.

⁶⁹ Ministry of Foreign Relations (*Secretaría de Relaciones Exteriores*), International Treaties, *Stockholm Convention on Persistent Organic Pollutants*, online at <<http://goo.gl/BCujP7>> (viewed 18 January 2016).

⁷⁰ *Stockholm Convention on Persistent Organic Pollutants*, published in the DOF on 17 May 2004.

3. The Parties shall endeavour to utilize and, where necessary, establish the means to integrate national implementation plans for persistent organic pollutants in their sustainable development strategies where appropriate.

65. The Secretariat found that these provisions are consistent with the NAAEC definition of environmental law in that they are “aimed at the control of environmentally hazardous or toxic chemicals, substances, materials and waste.”⁷¹ As a result, the Secretariat requested a response from Mexico with regards to the effective enforcement of Articles 7(1)(a)(c) and 7(3) of the Stockholm Convention on Persistent Organic Pollutants in relation to the control and minimization of the persistent organic compounds deriving from the disposal of analog television sets.

a. Enforcement of international treaty provisions

66. Concerning the nature of the Stockholm Convention provisions mentioned by the Submitters, the Secretariat found that these go into force directly without any legislative or regulatory action being necessary.⁷² In this regard, Mexico maintains that:

While it is true that the provisions of the Stockholm Convention adduced by the Submitters go into force automatically, the absence of enabling legislation for these obligations is precisely the reason why these obligations cannot be considered in the SEM process, since there is no legislation (this being unnecessary in this case, given the nature of the Stockholm Convention) meeting the NAAEC Article 45(2)(a) definition for which a failure of effective enforcement can be adduced.⁷³

67. The Party further contends that it is of the view that the Stockholm should not be reviewed since, in its opinion, while they do form a part of the domestic legal order, “this is different from being considered a *statute* or *regulation* in the sense of the NAAEC.”⁷⁴

68. Mexico suggests that because the Supreme Court of Mexico set a new precedent with regard to the hierarchical level of international treaties vis-à-vis statutes, the first must be construed as being different in nature from the second. The Party argues that this being a problem of hierarchy with respect to the Constitution and federal statutes, treaties do not have the same rank as federal statutes, and therefore does not correspond to the meaning of the word “statute” in the NAAEC. Mexico appears to be suggesting that the use of the word “statute” in the NAAEC only refers to an act of Congress.

69. However, despite the Supreme Court of Mexico decision of 1999 concerning the hierarchical level of international treaties,⁷⁵ both the Secretariat and the Party have previously held that international treaties adopted pursuant to a constitutional mechanism

⁷¹ Article 14(1)(2) Determination, paragraph 37.

⁷² *Ibid.*

⁷³ Response, at 22.

⁷⁴ *Ibid.*, at 21-2.

⁷⁵ “International treaties. They are hierarchically superior to federal statutes and hierarchically inferior to the Federal Constitution.” Tesis aislada no. 192867. P. LXXVII/99. Plenum. Ninth Judicial Epoch. *Semanario Judicial de la Federación y su Gaceta*. Vol. X, November 1999, at 46.

constitute laws of the Republic of Mexico.⁷⁶ Therefore, Mexico's construction of the Supreme Court's more recent stance as to the hierarchical level of treaties in the domestic legal order⁷⁷ does not support the notion that international treaties are not *environmental law* in the sense of the NAAEC. Nor does the Party explain how it is that international treaties cannot be considered law when Article 133 of the Constitution establishes that federal statutes, treaties, and the Constitution constitute the "supreme law" of the land.

70. The Secretariat has consistently held that where international obligations have been incorporated into the domestic legal order of a Party, they qualify for consideration and, as applicable, review under NAAEC Articles 14 and 15.⁷⁸ In addition, the Council has previously instructed the Secretariat to draft factual records addressing international obligations incorporated into domestic law by means of enabling mechanisms in the cases of the United States and Canada.⁷⁹ Mexico, unlike Canada and the United States, does not require domestic enabling legislation in order for international treaties it has ratified to become law, since Article 133 of the Constitution provides for automatic enabling thereof. In conclusion, the Stockholm Convention, having been signed, approved, and ratified in accordance with the Constitution, has been incorporated into the domestic legal order, and its provisions may therefore constitute "environmental law" in the sense of the NAAEC.

b. The Stockholm Convention

71. Notwithstanding the foregoing, the Secretariat concludes that the assertions relating to the Stockholm Convention do not warrant a factual record, since Mexico responds to these and addresses the Submitters' concerns in its response. The Secretariat's reasoning is as follows.
72. The Submitters assert that Mexico is failing to effectively enforce the referenced provisions of the Stockholm Convention in that "it has yet to implement the specific action plans established in the National Implementation Plan for the Stockholm Convention" and that it has likewise failed to take account of national implementation plans relating to persistent organic pollutants as part of the DTT transition.⁸⁰
73. The Secretariat requested a response from Mexico as regards the effective enforcement of Articles 7(1)(a)(c) and 7(3) of the Stockholm Convention in relation to the implementation and updating of a plan to enforce the obligations relating to control and minimization of persistent organic compounds deriving from the disposal of analog television sets.

⁷⁶ See SEM-13-001 (*Tourism Development in the Gulf of California*), Article 15(1) Notification (5 September 2014), at 11; SEM-09-002 (*Wetlands in Manzanillo*), Article 14(3) Response (12 October 2010), at 30; SEM-09-001 (*Transgenic Maize in Chihuahua*), Article 14(3) Response (3 May 2010), at 14-15.

⁷⁷ "International treaties. They form an integral part of the Supreme Law of the Union and are hierarchically superior to general, federal, and local statutes. Interpretation of Article 133 of the Constitution." Tesis 172650. P. IX/2007. Plenum. Ninth Judicial Epoch. *Semanario Judicial de la Federación y su Gaceta*. Vol. XXV, April 2007, at 6.

⁷⁸ SEM-01-002 (*AAA Packaging*), Article 14(1) Determination (24 April 2001), at 3.

⁷⁹ SEM-99-002 (*Migratory Birds*), Council Resolution 01-10 (16 November 2001); SEM-04-006 (*Ontario Logging II*), Council Resolution 04-03 (12 March 2004).

⁸⁰ Revised Submission, note 7 *supra*, at 13, third item in list of alleged violations.

74. In its response, Mexico maintains that Semarnat, in conjunction with the United Nations Industrial Development Organization (UNIDO), is in the process of updating the National Implementation Plan (NIP) and that the draft update includes proposed measures to eliminate or reduce the risks of new POPs. In particular:

The NIP proposes to include a specific action aimed at identifying the existence of plastics containing polybrominated diphenyl ethers, which are a class of brominated compounds widely used as flame retardants, which result from the management and recycling of electronic waste and must be disposed of in an environmentally correct manner, in accordance with the Stockholm Convention.⁸¹

75. In addition, the Party states that the UNIDO consultants “assisting with the project to update the NIP believe that some 20 million television sets and other quantities of electronic waste ... are coming to the end of their useful life.”⁸² The Party maintains that the NIP will include specific measures to address the possible generation of 242,000 tonnes of plastics containing flame retardants.⁸³
76. The Secretariat notes that a review of the effective enforcement of the provisions of an international environmental treaty to which Mexico is a party, such as the Stockholm Convention, does not aim to ascertain compliance with this Party’s international obligations, but rather to assess the effective enforcement thereof as part of the domestic legal order. All things considered, the Secretariat finds that because Mexico has reported ongoing measures to implement the provisions of the Stockholm Convention through the NIP, there is no need for the Secretariat to recommend a factual record in this regard.

III. DETERMINATION

77. The Secretariat has reviewed submission SEM-15-002 (*Management of Analog TV Waste*) in the light of the response of the United Mexican States.
78. Further to its review, the Secretariat finds that the pending proceedings of which Mexico gives notice do not entirely preclude the preparation of a factual record.
79. The Secretariat finds that, having considered both the revised submission and response, no central questions remain open and that a factual record is not warranted with respect to the assertions in submission SEM-15-002 concerning Mexico’s alleged failure to effectively enforce provisions of LGPGIR, its regulations, NOM-052, NOM-161 and the Stockholm Convention cited in the revised submission.
80. In accordance with NAAEC Article 39(2),⁸⁴ the Secretariat is sending the complete version of this notification — containing the confidential information provided by the Party in its response — only to the Government of Mexico.
81. Taking note of the 2014 Ministerial Statement adopted in Yellowknife by the CEC Council at the Twenty-first regular session,⁸⁵ Mexico may provide information to the

⁸¹ Response, at 22-3.

⁸² *Ibid.*, at 23.

⁸³ *Ibid.*

⁸⁴ NAAEC, note 1 *supra*, 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.”

⁸⁵ 2014 Ministerial Statement, note 35 *supra*.

public, and particularly, to the Submitters, on the efforts undertaken by the Party to implement the Discarded TVs Management Program and implementation of management plans at the state level.

Respectfully submitted for the consideration of the Council on 2 December 2016.

Secretariat of the Commission for Environmental Cooperation

(original signed)
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Executive Director, Commission for Environmental Cooperation

cc: Enrique Lendo, Mexico Alternate Representative
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Submitters