

Secretariat of the Commission for Environmental Cooperation
Article 15(1) Notification by the Secretariat of the Commission for Environmental Cooperation

Submitters: Academia Mexicana de Derecho Ambiental, A.C.
La Voz de Polanco, A.C.
Party: United Mexican States
Date of receipt: 2 February 2018
Date of the determination: 17 December 2018
Submission no.: SEM-18-002 (*Metrobús Reforma*)

Executive Summary

On 2 February 2018 the Secretariat of the Commission for Environmental Cooperation received Submission SEM-18-002 asserting, among other matters, that the Mexico City government failed to properly address the environmental impacts of the Metrobús Reforma Mass Transit Corridor by not following the required environmental review process. Following a determination by the Secretariat, on 25 July 2018, Mexico filed its response which addresses the assertions raised by the Submitters and provides notification of a pending proceeding for certain issues.

Regarding the environmental review process, Mexico maintains that the environmental impact assessment process in Mexico City is conducted by the Mexico City Department of the Environment (*Secretaría de Medio Ambiente de la Ciudad de México*—Sedema) at the request of the project sponsor and that the environmental law in question does not require that any specific impacts must be disclosed or assessed (see paragraph 29 *infra*).

On the other hand, the Submitters argue that the applicable law requires that a project proponent must produce an environmental impact statement (EIS) and ultimately, conduct an impact assessment of a project. In this case, the project proponent is the Mexico City Department of Works and Services (*Secretaría de Obras y Servicios*—Sobse). The Submitters also contend that based on the EIS and the impact assessment, the competent approval authority (in this case, Sedema) may grant or deny the project's environmental impact authorization based upon the information contained in the EIS (see paragraph 32 *infra*). The Submitters contend that for the Metrobus project the EIS, assessment, and project approval were not in compliance with applicable law.

Based on the Submission and Mexico's response, including documents submitted to Mexico's point of contact by Sedema, the Secretariat finds central open questions remain with respect to the environmental review process and considers that Submission SEM-18-002 merits the development of a Factual Record on this issue. The Secretariat also finds that with respect to the other issues raised in the Submission, they do not merit the development of a Factual Record. In this notification to Council, and in accordance with Article 15(1) of the North American Agreement on Environmental Cooperation, the Secretariat explains the reasons for its recommendation.

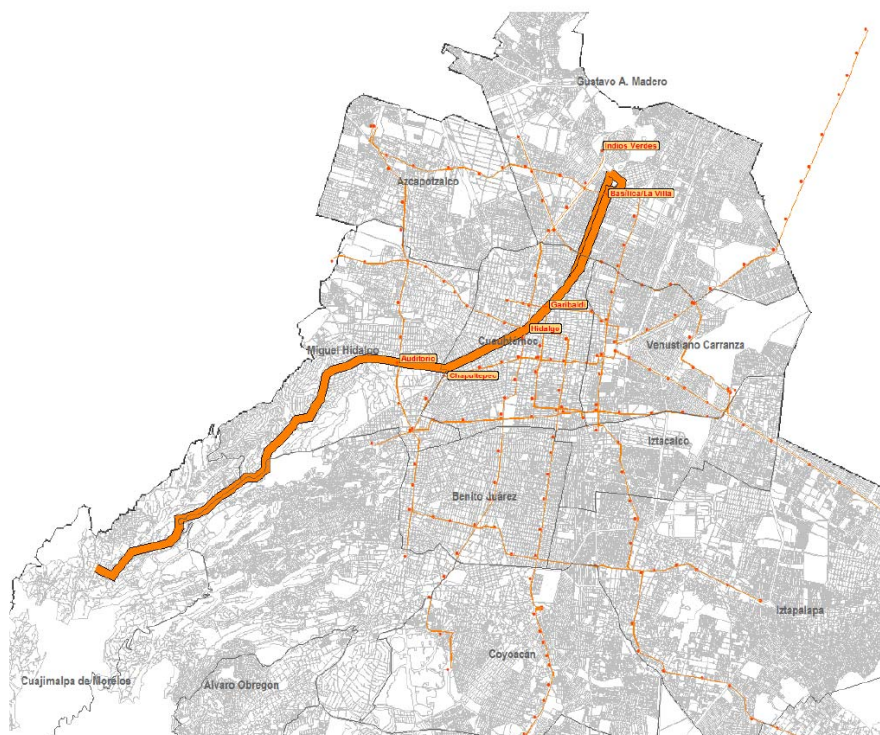
I. INTRODUCTION

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 residing or established in the territory of Canada, the United States, or Mexico to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law (the “submissions on enforcement matters” or “SEM” process). The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the “CEC”)¹ initially considers submissions to determine whether they meet the requirements of NAAEC Article 14(1). Where the Secretariat finds that a submission meets these requirements, it then determines, pursuant to 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 the 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, it then proceeds no further with the submission.²
2. On 2 February 2018, the organizations Academia Mexicana de Derecho Ambiental, A.C. and La Voz de Polanco, A.C. (the “Submitters”) filed a submission with the Secretariat under NAAEC Article 14(1). The Submitters assert that the approvals, permits, and concessions for line 7 of the Metrobús Reforma Mass Transit Corridor (the “Metrobús Reforma project”), developed by the government of Mexico City, were granted in the context of an “opaque and illegal” procedure. In particular, they maintain that the procedure established by law for the environmental impact assessment of the project was not followed. The Secretariat notes that the Metrobús Reforma project is now completed and that is under operation by the Mexico City government. (See, Figure 1 for the trajectory of the project).
3. Among other assertions raised in the Submission, the Submitters contend that the law in question requires that an environmental impact statement (*manifestación de impacto ambiental*—EIS) had to be prepared by the Mexico City Department of Works and Services (*Secretaría de Obras y Servicios*—Sobse). They contend that the EIS comprises an assessment of environmental impacts subject to review by the Mexico City Department of the Environment (*Secretaría de Medio Ambiente de la Ciudad de México*—Sedema) and that based on this EIS, Sedema must decide whether it can issue an environmental impact authorization (*autorización en materia de impacto Ambiental*—AIA or “Authorization”). The Submitters maintain that the EIS was deficient and that the Authorization should not have been granted by Sedema to Sobse for the Metrobús Reforma project.

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), signed by Canada, Mexico, and the United States (the “Parties”). The constituent bodies of the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee.

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 submissions on enforcement matters page of the CEC website at www.cec.org/submissions.

Figure 1. Trajectory of line 7 of the Metrobús Reforma project



Source: Estudio de Transporte Público del Corredor Reforma, Metrobús/Cetran (no date).

4. Submission SEM-18-002 (*Metrobús Reforma*) asserts that Mexico is failing to effectively enforce the Mexican Constitution (*Constitución Política de los Estados Unidos Mexicanos* (the “Constitution”)); the Mexico City Constitution (*Constitución Política de la Ciudad de México*); the Mexican Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA); the Federal District Environmental Protection Act (*Ley Ambiental de Protección a la Tierra en el Distrito Federal*—LAPT); international treaties signed by Mexico; Mexican federal laws governing forestry, integrated waste management, and climate change, among other legal instruments; Mexico City (CDMX) laws governing mobility, urban development, and solid waste, among other aspects; Mexican official standards, and CDMX environmental standards, as well as various administrative orders and notices.
5. On 1 May 2018, the Secretariat found that the submission met the requirements of Article 14(1) and requested a response from Mexico under NAAEC Article 14(2) as to the effective enforcement of the following provisions cited in the submission:³
 - a. Concerning the environmental impact assessment of the Metrobús Reforma project:
 - i. LAPT Articles 44; 46 paragraphs III, IV(a), VIII, and IX; 47; 48; 49; 50; 51; 52 *bis*; 53; 111, and 112 paragraph VIII;

³ SEM-18-002 (*Metrobús Reforma*), Article 14(1) and (2) Determination (1 May 2018), §91.

- ii. Articles 6(C) and (D) paragraphs I and II (no. 131); 14; 41; 44; 50; 52; 54; 62, and 63 of the Environmental Impact and Risk Regulation (*Reglamento de Impacto Ambiental y Riesgo—RIAR*), and
- iii. Article 7 paragraph V of the **Mobility Act (*Ley de Movilidad*)**;
- b. Concerning public participation during the environmental impact assessment of the Metrobús Reforma project:
 - i. Articles 6, 7, and 8 of Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (**ILO Convention 169**);
 - ii. LAPT Articles 13 and 85 paragraph VI, and
 - iii. RIAR Articles 45, 53 paragraph III, 57, 58 and 60.
- c. Concerning the anticipated management of vegetation and trees for the construction of the Metrobús Reforma project, as well as the protection of the land and the performance of activities on plots of land located in areas of environmental value (AVA) or protected natural areas (PNA) contiguous to the project:
 - i. LGEEPA Article 134 paragraph II of the Mexican Environmental Protection Act;
 - ii. LAPT Articles 88 *bis* 1, 89 *bis*, 93 *bis* 1, and 105 paragraph III, and
 - iii. Federal District Environmental Standard NADF-001-RNAT-2015, *Establishing the requirements and technical specifications to be met by physical persons, public or private legal persons, authorities, and, in general, all those who engage in the pruning, felling, transplanting, and/or restoration of trees in the Federal District (NADF-001)*.
- d. Concerning the management plans for hazardous waste, solid waste, and specially managed waste resulting from the construction and operation of the Metrobús Reforma project:
 - i. LGEEPA Articles 150 and 151 *bis* paragraph III;
 - ii. Articles 7 paragraph IX; 9 paragraphs III, IV, V, and VI; 31 paragraphs I to VII, and 42 of the Waste Prevention and Integrated Management Act (*Ley General para la Prevención y Gestión Integral de los Residuos—LGPGIR*);
 - iii. Articles 16, 17, 20, 21, 24, 26, and 29 of the **Regulation to the LGPGIR**;
 - iv. Articles 12 to 24 of the Federal District Solid Waste Management Act (*Ley de Residuos Sólidos del Distrito Federal—LRS*);
 - v. Mexican Official Standard NOM-161-SEMARNAT-2011, *Establishing the criteria for classifying waste as requiring special management and determining which shall be subject to a management plan; the list thereof, the procedure for inclusion or exclusion from said list, and the elements and procedures for the drafting of management plans (NOM-161)*, and Federal District Environmental Standard NADF-007-RNAT-2013, *Establishing the classification and the management specifications for construction and demolition waste in the Federal District (NADF-007)*.

- e. Concerning the anticipated air emissions from the Metrobús Reforma project:
 - i. LGEEPA Articles 109 *bis*, second paragraph, and 110.
- f. Concerning land use changes on presumably forested land in connection with the Metrobús Reforma project:
 - i. Article 117 of the Mexican Sustainable Forestry Act (*Ley General de Desarrollo Forestal Sustentable—LGDFS*), and
 - ii. Article 122 paragraph V of the **Regulation to the LGDFS**.
- 6. On 25 July 2018, the Secretariat received a response from the government of Mexico contending that the CDMX governmental authorities “strictly adhered to the applicable provisions” and that they acted within the legal framework giving them the power to issue the project Authorization).⁴ Mexico states that the public participation and consultation processes prescribed by the LAPT and the RIAR were applied during the environmental impact assessment process, that the waste generation related to the project was properly assessed, and that air pollution mitigation measures were put in place.⁵ Mexico further states that for the purpose of issuing the relevant Authorization, Sedema “certified and decreased the original number of trees to be affected by the project.”⁶ In addition, the Party asserts that one of the Submitters filed an amparo motion (e.g., citizen suit) that challenges some of the same matters raised by the submission.⁷
- 7. Having reviewed the submission in light of Mexico’s response, in accordance with Article 15(1) of the Agreement, and based on the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”), the Secretariat finds that submission SEM-18-002 (*Metrobús Reforma*) warrants the preparation of a factual record regarding the assertions concerning the environmental impact assessment of the Metrobús Reforma project (see, paragraph 5(a)(i) and (ii), above). The Secretariat also finds that other assertions raised by the submission do not warrant the preparation of a factual record. The Secretariat’s reasoning follows.

II. ANALYSIS

A) Preliminary issues

- 8. Pursuant to NAAEC Article 14(3)(a), the submissions mechanism stipulates that a NAAEC Party shall give notice “whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further.” The mechanism stipulates that the Party may, in its response, indicate whether the matter has previously been the subject of a judicial or administrative proceeding, or whether private remedies in connection with the matter are available to the person or organization making

⁴ Response at 28.

⁵ *Ibid.* at 28–9.

⁶ *Ibid.* at 29.

⁷ *Ibid.*

the submission.⁸ The Secretariat presents the corresponding analysis in this section, guided in this by the NAAEC Article 45(3) definition of “judicial or administrative proceeding.”

9. A judicial or administrative proceeding is defined by 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...

i) Enforcement measures implemented by the Mexico City Environmental Attorney

10. Mexico notified the Secretariat of the existence of administrative proceedings brought by the Mexico City Environmental Attorney (*Procuraduría Ambiental y de Ordenamiento Territorial de la Ciudad de México*—PAOT), as well as various measures taken to enforce the environmental law in question.
11. On 20 July 2015, the PAOT initiated an investigation of alleged environmental violations in connection with the Metrobús Reforma project. The PAOT received approximately 15 public complaints relating to the project and its activities. According to the information received from Mexico, the PAOT conducted 26 official inspections to verify compliance with environmental and zoning-related legal obligations. The PAOT also verified compliance with the conditions of the Authorization for the project as regards trees, green spaces, noise, and particle emissions.⁹
12. In the document prepared by, the PAOT¹⁰ notes the existence of activities that are not within its purview, such as environmental impact assessment and matters relating to public participation and public consultation, since these fall outside the scope of its jurisdiction.¹¹
13. While the purpose of the PAOT investigation was to ascertain compliance by the City with environmental impact-related conditions, actions undertaken by PAOT did not result in the implementation of an administrative proceeding or the type of actions included in the definition of judicial or administrative proceeding as defined in NAAEC Article 45(3)(a); thus, they do not in and of themselves constitute sufficient grounds for the Secretariat to proceed no further. Nevertheless, the information provided by Mexico indicates that the local authority took steps to verify compliance with the environmental impact-related conditions imposed on the Metrobús Reforma project.

ii) Amparo motion filed by one of the Submitters

14. Mexico further gave notice of the existence of an amparo motion filed by one of the Submitters that is being processed under file no. 841/2017 in the 8th District

⁸ NAAEC Article 14(3)(b).

⁹ Environmental and Land Use Attorney of Mexico City (PAOT), file no. PAOT-05-300/500-599-2018 (15 June 2018), at 2.

¹⁰ *Idem*.

¹¹ *Ibid.* at 9.

Administrative Court of Mexico City.¹² Mexico argues that the matters addressed in this judicial action are the same matters raised in submission SEM-18-002, since the amparo action addresses the construction of the Metrobús Reforma project, the ensuing impact on Bosque de Chapultepec and Paseo de la Reforma, and the felling of 640 trees to make way for the project.¹³

15. The amparo motion filed by one of the Submitters does in fact constitute a judicial proceeding under NAAEC Article 45(3)(a) since redress is being sought in a judicial forum via the amparo proceeding.
16. The Secretariat finds, however, that the matters addressed by the amparo proceeding only partially coincide with the various matters addressed by the submission; specifically, those matters are the effective enforcement of the provisions relating to the management of vegetation and trees and the conduct of activities in the AVA contiguous to the project: LGEEPA Article 134 paragraph II, LAPT Articles 88 *bis* 1, 89 *bis*, 93 *bis* 1, and 105 paragraph III, and standard NADF-001. While the relevant information provided in Mexico's response is presented below (see section B(iii)), the Secretariat finds that it should not continue with the review of these aspects of the submission.
17. Mexico's Article 14(3)(a) notification does not provide any additional information that the remaining matters raised by the Submitters are the subject of any pending proceedings. Therefore, the Secretariat finds that it should continue with its review under Article 15(1) of the following issues raised in the submission: the environmental impact assessment process; the lack of public participation; the conduct of works contiguous to an AVA; the preparation of hazardous waste and solid waste management plans; the estimation of air emissions, and land use changes on forested land.

B) The remaining assertions of submission SEM-18-002

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

i) The Secretariat recommends a Factual Record with respect to the preparation of an environmental impact statement of the Metrobús Reforma project

19. The Submitters contend that in the case of the Metrobús Reforma project the legally established procedure to prepare an environmental impact statement was not followed by Sobse. The Submitters assert that the EIS filed by Sobse did not have sufficient information to identify the measures necessary to prevent and mitigate the negative environmental impacts of the project. They state that the developer (the government of the CDMX through Sobse) "provided information that is contradictory, incomplete, disjointed, without clear conclusions, and delivered in installments."¹⁴ According to the Submitters, the EIS for the project did not consider impacts relating to water, air, and soil pollution; generation of vibrations; earthmoving; modification of the urban landscape; modification of the configuration of green spaces; reduction of vegetated areas; displacement of urban

¹² *Ibid* at 11.

¹³ Response at 27–8.

¹⁴ Submission at 10.

fauna; destruction of urban habitat, and urban impact.¹⁵ The Submitters assert that, at the time of filing of the EIS, even the definitive route of the project was still unknown.¹⁶

20. The Submitters further assert that “the CDMX government improperly and retroactively regularized certain administrative procedures that should have been dealt with before the EIA [environmental impact assessment for the project]” was requested.¹⁷ They cite as an example the fact that it was the environmental authority (i.e., Sedema), and not the project developer, that produced the project land use plan based on the authority’s own calculations. As regards air emissions, the Submitters emphasize that Sedema obligated itself to produce emissions estimates instead of imposing that condition on the developer.¹⁸
21. In addition to discussing the alleged deficiencies of the EIS, the Submitters maintain that the developer commenced work on the project without taking the prior measures required in order to comply with the conditions included in the project’s approval.

Mexico’s Response

22. Concerning some of the provisions cited in the submission in relation to the environmental impact assessment of the Metrobús Reforma project, Mexico argues that they are not applicable to the project (LAPT Articles 48, 111, and 112; RIAR Articles 6 [C and D paragraphs I and II], 14, and 63), that some of the provisions establish a discretionary power (LAPT Article 52 *bis*, RIAR Article 52), or that they do not constitute environmental law (Mobility Act, Article 7 paragraph V).
23. Mexico also argues that the land area on which the Metrobús Reforma project is constructed is urban land occupied by urban equipment and infrastructure. Therefore, it is not providing ecological services and is not subject to special regulation, as is the case with conservation areas, so LAPT Articles 111 and 112 are not applicable. From the information contained in the response, it is evident that Mexico argues that the Metrobús Reforma project is being carried out on a totally urbanized area that is not likely to be conserved, restored, protected, or used sustainably, and hence these provisions certainly do not apply.
24. As to LAPT Articles 48 and RIAR Articles 6(C) and (D) paragraphs I and II and 14, with respect to the conditions applicable to projects carried out in a PNA or AVA or contiguous to a PNA, Mexico argues that these provisions are not applicable because the project is not located within a PNA or an AVA, nor does it border a PNA.¹⁹ For this reason, the Secretariat finds that Articles 48 and RIAR Articles 6(C) and (D) paragraphs I and II and 14 do not warrant further review (see also, paragraphs 48-54 below).
25. Concerning RIAR Article 63, Mexico argues that it should not qualify for review since it refers to high-risk activities, a category to which the Metrobús Reforma project does not correspond. The Secretariat finds that, indeed, this provision does not warrant further

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.* at 11.

¹⁹ In any case, the project abuts the Bosque de Chapultepec AVA, as discussed below in section B(iii) of this notification.

study, since nothing in the submission suggests that the project involves high-risk activities.

26. As to LAPT Article 52 *bis* and RIAR Article 52, establishing the discretionary power to conduct technical inspections or visits, the Secretariat observes that — irrespective of the nature of these provisions — the PAOT did in fact conduct 26 fact-finding visits and procedures to assess compliance with environmental and zoning provisions;²⁰ thus, the Secretariat finds that a factual record is not warranted with respect to these laws..
27. Mexico contends that contrary to Secretariat’s determination, Article 7 paragraph V of the Mobility Act is not environmental law because the provision establishes the criteria that the authorities must consider when regulating mobility-related matters in Mexico City, and its primary purpose is not environmental protection. The Secretariat concurs and amends its determination, finding that this provision should not be retained for further study.

The assertions regarding preparation of an EIS warrant the development of a Factual Record

28. The Secretariat finds that the preparation of a factual record is warranted in relation to the effective enforcement of those LAPT and RIAR provisions that concern the preparation of an environmental impact statement. The Secretariat’s reasoning follows.
29. As to the adequacy of the EIS, Mexico argues that “the environmental impact assessment process in Mexico City is conducted following a request from the project proponent of a program, works or activities” and that “from the LAPT provisions cited by the Submitters...do not comprise a specific catalogue of environmental impacts that Sedema has to follow when issuing an environmental impact authorization.”
30. Thus, according to Mexico, the competent authority, Sedema, is the one that assesses — based on the information presented by the applicant or developer of a project in the EIS — the environmental impacts arising from works or activities subject to the environmental review requirements under LAPT Article 46.²¹ Mexico also states that none of the various stages relating to the environmental impact assessment procedure under LAPT Article 47 paragraph V, require a specific list of environmental impacts that must be disclosed or assessed. Mexico stresses though that impacts must be identified in a “logical, measurable, and quantifiable,” manner, considering “the cumulative effect that [a project] could have given all the impacts identified.”²² Mexico stresses that the environmental impact study must “identify, describe, and assess the environmental impacts.”²³
31. In authorizing the project, the Authorization issued by Sedema referred to the Guidelines for the Production of the Environmental Impact Statement – Specific Form (*Lineamientos para elaborar la manifestación de impacto ambiental – modalidad específica*; the “EIS Guidelines”), which the Secretariat consulted in developing this Notification.²⁴ The EIS

²⁰ Response at 7.

²¹ *Ibid.* at 5.

²² *Ibid.* at 6.

²³ *Ibid.*

²⁴ “Likewise, it was submitted the following technical information applicable to the Project in accordance with [...] the Guidelines for the Production of the Environmental Impact Statement – Specific Form” in: Submission, note 38: Sedema, file no. SEDEMA/DGRA/DEIA/014363/2016 (30 November 2016),

Guidelines, published by Sedema and available on its website,²⁵ present the information, content, and structure requirements for the “specific” form of the EIS,²⁶ the type used for the Metrobús Reforma project. These guidelines establish that for the construction phase of a project, the relevant impacts relating to air emissions and to waste and noise generation, among others, must be identified,²⁷ and that the MIA has to disclose the anticipated impacts for the operation phase of the project: air emissions — indicating type, volumes, and estimates — the solid, hazardous, and domestic waste generation, and noise generation must be identified, among other impacts.²⁸ In addition, these guidelines establish that where a project falls within or contiguous to a protected natural area or conservation area, the EIS must include a map of the principal ecosystems existing on the site and their current status, and must also establish the locations of the PNAs and/or conservation areas and their relationship to the project in question.²⁹

32. The Secretariat finds that the environmental law in question, requires that the Project proponent (Sobse) must submit sufficient information to the project authority (Sedema) so that it can determine whether the EIS of a project disclosed impacts “logically, measurably, and quantifiably,”³⁰ and that the project authority considers these environmental impacts deriving from the project in the Authorization. It is not evident from Mexico’s response and its appendices that this was done.
33. The provisions cited by the Submitters establish that the obligation to produce an EIS rests with those who engage in “works or activities that entail or may entail environmental impacts or that may generate risks requiring environmental impact assessment” and, in particular, works or services intended for the provision of public services as well as roads under the city’s jurisdiction (LAPT Article 46 paragraphs VIII and IX). Thus, the EIS must describe the works; specify the relationship to the applicable legal provisions; identify, describe, and assess the environmental impacts, and propose prevention and mitigation measures (LAPT Article 47). Sedema has the power to deny approval where the environmental impact assessment performed on the basis of the EIS does not guarantee the integrity of the environment (LAPT Article 53 paragraph III(d)).
34. Mexico confirms in its response that the specific form of the EIS was prepared and that the project’s Authorization was issued as a result of “the request by the Mexico City Department of Works and Services (Sobse) for the specific form of the environmental

containing the environmental impact approval for the project titled “Construction of the Road Corridor of Metrobús Line 7 [“AIA”], at 3.

²⁵ Sedema, *Lineamientos para elaborar el environmental impact statement – modalidad específica*, online at http://www.registrocdmx.df.gob.mx/statics/formatos/TSEDEMA-DGRA_LINEISE.pdf (viewed 5 October 2018) [EIS Guidelines].

²⁶ A “specific” form of EIS differs from a “general” EIS in that, due to the project anticipated impacts, the EIS discloses more detailed information. See LAPT, Article 44 and RIAR, Article 41.

²⁷ EIS Guidelines, paragraph II.3, “Etapas de preparación del sitio y construcción.”

²⁸ *Ibid.*, paragraph II.4.8, “Contaminantes al ambiente.”

²⁹ *Ibid.*, paragraph II.6: “Where the project is located within or contiguous to a protected natural area, conservation area, or on the bed of a river or stream, the following information shall be included.”

³⁰ Response at 6.

impact approval.”³¹ Various sections of Sedema’s Authorization refer to the specific form of the EIS that was produced .³²

35. RIAR Article 41 provides that, in addition to the information contained in the general form of the EIS, the specific form must contain: the technical report for the project; a detailed description of the biological characteristics, ecosystems, and landscape of the project area; a description of the modified environmental scenario, including alternative solutions and scenarios for the possible modification of the original project conditions. The RIAR also enumerates the documents that must be attached to an EIS (Article 44); it provides for the possibility of submitting clarifications on a project “one time only,” as well as the manner in which such modifications are considered (Articles 50 and 54), and it gives the authority the power to conduct technical visits to the project site (Article 52). Moreover, when reviewing an EIS, the authority must consider the proposed preventive and mitigation or compensation measures and the proposed alternatives for adapting or modifying the original project (RIAR Article 62).
36. Mexico’s response does not include information that sheds light on how the LAPT and RIAR provisions applicable to the EIS were enforced. In fact, the response does not include a copy of the project EIS, or a link to it, nor does it refer to any section thereof. In any case, the arguments put forward by the Party in its response are supported by references to the project Authorization, about which Mexico maintains that there is no “specific catalogue of environmental impacts that Sedema must consider when issuing environmental impact approval.”³³
37. The Submitters’ assertions center around an alleged absence of consistency in the documents apparently making up the project EIS, as well as inadequacies in the identification of the environmental impacts arising from the construction and operation of the project. Mexico’s response does not address the alleged deficiencies in the EIS and, in any case, confirms that it was Semade which produced the identification of the project’s environmental impacts.
38. Mexico’s response leaves central open questions in regard to one of the Submitters’ main assertions: that the EIS for the project was presented in an incomplete and disjointed manner, without proper assessment of impacts on water, air, and soil, and with no discussion of the impacts of blasting and earthmoving, impacts on the urban landscape and green spaces, and other alleged deficiencies. Ultimately, the Secretariat finds that the submission warrants the preparation of a factual record with respect to the assertion concerning alleged failures to effectively enforce LAPT Articles 44; 46 paragraphs IV(a), VIII, and IX; 47, and 53, as well as RIAR Articles 6(D) paragraph II (no. 131), 41, 44, 50, 52, 54, and 62.
39. Although Mexico’s response appears to suggest that the deficiencies of the EIS were subsequently corrected by Semade, both the legislation cited by the Submitters and the administrative directives consulted by the Secretariat establish that it is the project developer who has the obligation of identifying the environmental impacts.

³¹ *Ibid.* at 5.

³² AIA at 1, 3–4.

³³ *Ibid.*

40. The CEC Council has previously instructed the Secretariat to prepare factual records relating to alleged deficiencies in environmental impact assessment procedures, particularly where the corresponding EIS lacked information about components of the project or where the environmental impacts were not duly identified by the developer.³⁴
41. A factual record would help citizens understand the manner in which the EIS for the Metrobús Reforma project was prepared and submitted to the authority, as well as the manner in which the impacts identified by the project's developer were considered.

The Secretariat does not recommend the preparation of a Factual Record for the remaining issues raised in the Submission.

ii) Public participation during the environmental impact assessment of the Metrobús Reforma project

42. The Submitters assert that the original peoples of Mexico City were not consulted on the Metrobús Reforma project, as required by ILO Convention 169. In addition, they state that Sedema did not hold prior public consultations on the environmental impact approval of the Metrobús Reforma project and that, in any case, the authority conducted a survey after the project was approved.³⁵
43. In this regard, Mexico contends that ILO Convention 169 is not applicable because the construction and operation of the project “are not occurring on lands that are the property of, or are inhabited by, indigenous communities, and that therefore, no direct harm is being caused to any such community”; therefore, the Party asserts, the right possessed by indigenous communities under Convention 169 is not applicable to this case.
44. The Party contends that throughout the environmental impact assessment process, the authorities adhered to the LAPT and RIAR provisions governing public participation and consultation.³⁶ Mexico explains the phases of the process whereby a consultation was held under LAPT Article 50:
 - a. The publication of a summary of the EIS in a national newspaper (LAPT Article 51 and RIAR Article 45), in this case *El Sol de Mexico*, on 2 September 2016.
 - b. The making available to the public of the EIS and its appendices for consultation at the offices of Sedema (LAPT Article 49 and RIAR Articles 46, 57, and 58 first paragraph). In this regard, Mexico reports that it did not receive comments or observations from members of the public.
 - c. The publication of a list of environmental impact statements subject to assessment on the Sedema website (RIAR Article 58 second paragraph).

³⁴ See, for example: SEM-96-001 (*Cozumel*), Factual Record (25 October 1997) (in relation to the alleged fragmentation of environmental impacts), and SEM-10-004 (*Wetlands in Manzanillo*), Factual Record (7 September 2016) (addressing the alleged deficiencies in the water balance studies conducted as part of a project's EIS).

³⁵ Submission at 11.

³⁶ Response at 11.

45. Mexico concludes that Sedema applied the participation processes prescribed by the LAPT and the RIAR and that “the fact that the citizens did not make use of these instruments and did not exercise their right to participate in the environmental impact assessment proceeding” does not mean that Sedema “failed to effectively enforce the applicable law.”³⁷
46. Having reviewed Mexico’s response and considered the scope of the Catalogue of Original Settlements and Peoples of the Federal District (*Catálogo de colonias y pueblos originarios del Distrito Federal*) (the “Catalogue”) for the year 2010, cited by the Submitters for the purpose of establishing the nature of the tribal peoples whom they assert to live in Mexico City, the Secretariat finds that there are no grounds for reviewing the assertion regarding consultation of indigenous communities. The Catalogue — available on the website of the Electoral Institute of Mexico City³⁸ — does not identify any indigenous peoples or nations on the land through which the project is routed.³⁹ Furthermore, even if the Catalogue did identify tribal peoples in the sense of ILO Convention 169, as adduced by the Submitters, Article 13 of the Public Participation Act (*Ley de Participación Ciudadana*) contains the list of original peoples of Mexico City in which the figure of traditional authority is maintained in accordance with their norms, procedures, and practices,⁴⁰ and none of these is found along the project’s trajectory.⁴¹
47. For this reason, the Secretariat concurs with Mexico’s argument as to the absence of indigenous communities along the project’s trajectory and does not recommend the preparation of a factual record with respect to the alleged failure to effectively enforce Articles 6, 7, and 8 of ILO Convention 169 in relation to the Metrobús Reforma project.
48. Concerning the asserted absence of public consultation on the project, the Secretariat finds that the means by which to exercise the right provided by the provisions of the LAPT (Articles 13, 49, 50, 51, and 85 paragraph VI) and the RIAR (Articles 45, 53 paragraph III, 57, 58, and 60) were available to the public, as Mexico’s response indicates.
49. In conclusion, the Secretariat does not recommend the preparation of a factual record with respect to the effective enforcement of LAPT Articles 13, 49, 50, 51, and 85 paragraph VI and RIAR Articles 45, 53 paragraph III, 57, 58, and 60 RIAR in regard to public

³⁷ *Ibid.* at 14.

³⁸ Instituto Electoral de la Ciudad de México, *Catálogo de colonias y pueblos originarios del Distrito Federal*, at <<https://portal.iedf.org.mx/SCMGPC2016/catalogo.html>>.

³⁹ Article 1 of ILO Convention 169 reads as follows:

1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

⁴⁰ See Article 6 paragraph V of ILO Convention 169 and Transitory Article Thirteen of the Public Participation Act (*Ley de Participación Ciudadana*).

⁴¹ The original peoples recognized in the Public Participation Act are located in Xochimilco, Tláhuac, La Magdalena Contreras, Cuajimalpa de Morelos, and Tlalpan.

participation during the environmental impact assessment of the Metrobús Reforma project.

iii) Management of vegetation and trees during the construction of Metrobús Reforma, protection of soil, and conduct of activities in the Bosque de Chapultepec area of environmental value, contiguous to the Metrobús Reforma project

50. The submission asserts that for the construction of the Metrobús Reforma project, the felling of 640 trees was approved without a supporting study or a forested land use change approval,⁴² in violation of LAPT Articles 88 *bis* 1, 89 *bis*, 93 *bis* 1, and 105 paragraph III, which establish a prohibition on land use changes in areas with any vegetation along public roads (LAPT Article 88 *bis* 1); the approval by variance of tree felling in conservation areas, areas of environmental value, and protected natural areas (LAPT Article 89 *bis*); permitted and prohibited activities in protected natural areas (LAPT Article 93 *bis* 1), and protection of wooded lands and areas in order to help maintain the integrity of the natural factors involved in the water cycle (LAPT Article 105 paragraph III).
51. In its response, Mexico contends that these provisions are not applicable to the Metrobús Reforma project because no part of it is routed through a protected natural area or an area of environmental value. The project in question is being developed on urbanized land in Mexico City and, in any case, abuts a part of the First Section of Bosque de Chapultepec, which is an AVA but is not categorized as a PNA.⁴³
52. Mexico contends that the pruning, felling, or transplanting of trees was not authorized within the AVA of the First Section of Bosque de Chapultepec and that all the trees felled were located outside of Bosque de Chapultepec AVA on existing roads.⁴⁴
53. As to the applicability of standard NADF-001, Mexico's view is that it is not environmental law because it refers exclusively to urban trees and not to wildlife in the sense of NAAEC Article 45(2)(a)(iii).⁴⁵ The Party states that standard NADF-001 applies to the forestation of urban areas and that it is not applicable to specially protected trees such as those found in AVAs and PNAs.
54. Concerning impacts on trees located in urban areas, Mexico states that Sedema established restitutory and compensatory measures through the Agreement on Trees (*Acuerdo Relativo al Arbolado*), an instrument derived from the Authorization, but not from the enforcement of NADF-001, whereby compensatory provisions are imposed in order to counteract the environmental impact.⁴⁶

⁴² Submission at 12.

⁴³ Response at 16–17.

⁴⁴ *Ibid.* at 17.

⁴⁵ NAAEC Article 45(2):

For purposes of Article 14(l) and Part Five:

(a) “**environmental law**” means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:...

(iii) the protection of wild flora or fauna,...

⁴⁶ *Cf.* LAPT Articles 53 (penultimate and last paragraphs), 88, and 119.

55. Moreover, as noted in section A(ii) of this notification, Mexico give notice of the existence of a pending proceeding in the sense of NAAEC Article 45(3)(a).
56. For the foregoing reasons, the Secretariat finds that it should not pursue its review of the assertions concerning the effective enforcement of LGEEPA Article 134 paragraph II, LAPT Articles 88 *bis* 1, 89 *bis*, 93 *bis* 1, and 105 paragraph III, and standard NADF-001.

iv) Preparation of management plans for hazardous waste, solid waste, and specially managed waste during the construction and operation of the Metrobús Reforma project

57. The Submitters assert that the government of the CDMX is failing to effectively enforce the environmental law corresponding to the management of hazardous waste, solid waste, and specially managed waste, since these were not included in the EIS for the Metrobús Reforma project.
58. In this regard, Mexico states that as a result of the conditions established in the Authorization, an administrative agreement was issued on 14 July 2017⁴⁷ whereby a plan to manage the waste ensuing from the project was approved. This plan defined the volume (in cubic meters) of waste approved for the demolition, preparation, excavation, and construction processes associated with the project, in accordance with standards NADF-007 and NOM-161. Mexico reiterates that the environmental impact assessment process for the construction of Metrobús Reforma “correctly estimated the amount of waste generated in connection with this project.”⁴⁸ In addition, the Party contends that the construction of the project “does not entail the generation or management of hazardous waste,” which fall under federal jurisdiction and are governed by the LGPGIR and its regulation.
59. The Secretariat finds that Mexico’s response addresses the statements relating to alleged deficiencies of the project in connection with the management of waste generated during construction. Therefore, the Secretariat does not recommend the preparation of a factual record in regard to the alleged failure to effectively enforce NADF-007 or LRS Articles 12 to 24.
60. However, the Party gave no response to the assertion of alleged deficiencies in the EIS as regards the estimation of the impacts of hazardous waste generation during the operational phase of the project.
61. For the foregoing reasons, the Secretariat finds that the preparation of a factual record is not warranted with respect to the effective enforcement of LGEEPA Articles 150 and 151 *bis* paragraph III; LGPGIR Articles 7 paragraph IX, 98 paragraphs III, IV, and VI, 31 paragraphs I to VII, and 42; Articles 16, 17, 20, 21, 24, 26, and 29 of the Regulation to the LGPGIR, and NOM-161, except anything that may relate to the environmental impact assessment, as per section B(i) of this notification.

⁴⁷ Sedema, administrative agreement no. SEDEMA/DGRA/DEIA/008469/2017, Mexico City Department of the Environment (14 July 2017).

⁴⁸ Response at 23.

v) Projected air emissions from the Metrobús Reforma project

62. The Submitters assert that during the environmental impact assessment procedure for the Metrobús Reforma project, the government of the CDMX failed to effectively enforce the environmental law governing air emissions in that Sedema did not require the developer to produce a study of the emissions that would be generated as a result of the construction and operation of the project. The Submitters cite LGEEPA Articles 109 *bis* second paragraph and 110 paragraphs I and II; the first establishes the obligation of parties responsible for air pollution sources to provide information for inclusion in the emissions registry;⁴⁹ the second provides that for the protection of the atmosphere, satisfactory quality criteria shall be considered throughout the country, as well as the reduction and control of pollutant emissions.⁵⁰
63. Mexico contends that Sedema ordered measures to prevent, mitigate, and offset environmental impacts pursuant to environmental standard NADF-018-AMBT-2009,⁵¹ including the suspension of work where an environmental contingency is declared and the use of lead- and solvent-free paints and coatings, as well as adherence to the specifications of NADF-018.⁵²
64. According to the Party, the operation of the Metrobús Reforma project will give rise to an annual 19,000-ton decrease in CO₂ pollution thanks to the retirement of 180 vehicles, which will be replaced by 90 double-decker buses and the latest technology for transporting 130,000 persons per day. In addition, the project includes 10 km of bicycle paths.
65. Mexico further states that it is taking the relevant steps to register the Mexico City Metrobús lines with the clean development mechanism of the United Nations Framework Convention on Climate Change. It asserts that the project surpasses the standards of NOM-044-Semarnat-2017⁵³ and constitutes a benchmark in the field of mass transit.⁵⁴
66. Finally, Mexico contends that the emissions from the Metrobús Reforma fleet have been certified by the International Council on Clean Transportation.
67. Mexico's response addresses the concern about the environmental impacts arising from the construction and operation of the project. However, one of the Submitters' main assertions refers to the consideration of such impacts in the EIS for the project, to which there is no reference in the response, nor in the documentary information provided by Mexico.

⁴⁹ LGEEPA Article 109 *bis*, second paragraph.

⁵⁰ *Ibid.*, Article 110 paragraphs I and II.

⁵¹ Environmental Standard NADF-018-AMBT-2009, *Establishing the technical guidelines to be observed by persons engaging in construction and/or demolition work in the Federal District in order to prevent air emissions of PM₁₀ and smaller particles*.

⁵² Response at 24–5.

⁵³ Mexican Official Standard NOM-044-Semarnat-2017, *Establishing the maximum permissible limits for emissions of carbon monoxide, nitrogen oxides, non-methane hydrocarbons, non-methane hydrocarbons plus nitrogen oxides, particles, and ammonia in the exhaust gases from new motors using diesel as a fuel and providing the motive force for motor vehicles of gross weight greater than 3,857 kilograms, as well as in the exhaust gases from new motor vehicles with gross vehicle weight over 3,857 kilograms equipped with this type of motor*, published in the Official Gazette of the Federation (*Diario Oficial de la Federación*—DOF) on 19 February 2018.

⁵⁴ Response at 26.

68. The information on the project EIS does not evidence the measures taken, nor does it contain any reference standard governing the control of emissions from the mass transit system (see section B(i) *supra*).
69. For all the foregoing reasons, the preparation of a factual record is not recommended in regard to the alleged failure to effectively enforce LGEEPA Articles 109 *bis* second paragraph and 110 paragraphs I and II, nor in regard to Environmental Standard NADF-018-AMBT-2009, except as regards the environmental impact assessment, as noted in section B(i) of this notification.

vi) Land use change on presumably forested land in relation to the Metrobús Reforma project

70. The Submitters contend that the Mexico City Department of Works and Services (*Secretaría de Obras y Servicios*—Sobse) failed to apply for a land use change on forested land with Sedema under both LGDFS Article 117 as well as Article 122 paragraph V of the Regulation to the LGDFS. The Submitters assert that this land use change approval is “indispensable” to the Metrobús Reforma project because it is routed over national property on which forest vegetation is maintained.⁵⁵
71. In its response, Mexico states that the vegetation situated along the route of line 7 of the Metrobús Reforma project is not forest vegetation and that therefore, “the obligation to make such an application” did not exist.⁵⁶
72. The Secretariat finds that, in light of Mexico’s response, no central issues remain unresolved in regard to the Submitters’ assertion of an obligation in relation to land use changes on forested land, and therefore does not recommend the preparation of a factual record in this regard.

III. NOTIFICATION

73. The Secretariat has reviewed submission SEM-18-002 (*Metrobús Reforma*) in the light of the response of the United Mexican States.
74. Further to its review, the Secretariat finds that the amparo proceeding of which Mexico gives notice terminates the review of the submission as regards the assertion concerning the failure to effectively enforce LGEEPA Article 134 paragraph II; LAPT Articles 88 *bis* 1, 89 *bis*, 93 *bis* 1, and 105 paragraph III, and standard NADF-001.
75. In addition, having considered the submission in the light of Mexico’s response, the Secretariat finds that there are central issues unresolved in relation to the alleged deficiencies in the environmental impact statement for the Metrobús Reforma project and recommends a factual record in regard to the effective enforcement of LAPT Articles 44; 46 paragraphs IV(a), VIII, and IX; 47, and 53, as well as RIAR Articles 6(D) paragraph II (no. 131), 41, 44, 50, 52, 54, and 62.

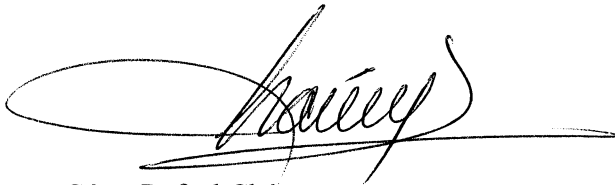
⁵⁵ Submission at 9.

⁵⁶ Response at 27.

76. For the reasons set out herein and in accordance with NAAEC Article 15(1), the Secretariat hereby notifies the Council of its determination that, for the purposes of advancing the goals of the Agreement, the preparation of a factual record is recommended in regard to submission SEM 18-002. Pursuant to section 19.4 of the Guidelines, “[t]he Council should vote on whether to instruct the Secretariat to prepare the factual record normally within 60 working days of receiving the Secretariat’s recommendation”; i.e., by 2 April 2019.

Respectfully submitted for the consideration of the Council on 17 December 2018.

Secretariat of the Commission for Environmental Cooperation

A handwritten signature in black ink, appearing to read 'César', with a large, sweeping horizontal stroke underneath.

Per: César Rafael Chávez
Executive Director, Commission for Environmental Cooperation

ccp: Norma Munguia Aldaraca, Alternate Representative, Mexico
Jane Nishida, Interim Alternate Representative, United States
Isabelle Bérard, Alternate Representative, Canada
Submitters