

Secretariat of the Commission for Environmental Cooperation

Notification of the Secretariat in accordance with Article 24.28 of the United States-Mexico-Canada Agreement

Submitter: The name of the Submitter is protected from disclosure in accordance with ECA Article 16(1)(a)

Party: United Mexican States

Date of original submission: 2 February 2023

Date of revised submission: 25 April 2023

Notification date: 25 September 2023

Submission no.: SEM-23-002 (*Avocado Production in Michoacán*)

Executive Summary

On 2 February 2023, a Mexican citizen (“the Submitter”), who requested the confidentiality of their data in accordance with ECA Article 16(1)(a), filed a submission with the Secretariat, in accordance with USMCA Article 24.27(1), which asserted that Mexico is failing to effectively enforce its environmental laws to protect forest ecosystems and water quality from the adverse environmental effects arising from avocado production in the state of Michoacán, Mexico.

On 6 March 2023, the Secretariat determined that submission SEM-23-002 (*Avocado Production in Michoacán*) did not meet all of the admissibility requirements stipulated in USMCA Article 24.27 and it notified the Submitter accordingly in its Article 24.27(2)(3) Determination, highlighting, among other reasons, that to satisfy Article 24.27(2)(e), the Submitter was obliged to provide supporting information to show that the matter had been communicated in writing to the Party. On 25 April 2023, the Secretariat took receipt of the additional information requested.

On 24 May 2023, the Secretariat determined that, with the additional information received, the submission met all of the admissibility requirements and criteria established in Article 24.27(1) and (2) of the Agreement, and determined that the submission merited a response from the Government of Mexico in accordance with Article 24.27(3).

On 24 July 2023, the Secretariat received Mexico’s response, in which the Party provided information regarding the conditions of the Michoacán forest, as well as the regulations applicable to avocado cultivation, the change of land use on forest lands and the sustainable use of water. In addition, the Party reports on some actions carried out to effectively enforce environmental law in relation to avocado production in Michoacán and notifies the existence of pending administrative proceedings to be resolved.

With respect to the pending proceedings reported by Mexico, the Secretariat believes that the risk of undue interference if a factual record is developed is minimal, since the subject matter of the submission relates to general environmental damage caused by avocado cultivation in Michoacán and not to damage caused to a specific farm or cultivation site. A factual record would present aggregated data, without specifying particular avocado farms or production sites; it would involve the compilation and analysis of aggregated information and it would provide an overall view of the problem raised by the Submitter.

Regarding the significant growth of avocado orchards in Michoacán and their alleged relationship to the increase in deforestation and land use change in the state, a factual record could provide factual information on this phenomenon raised by the Submitter and gather public information on the alleged existence of areas where, without proper authorization, the use of forest land has been changed to avocado cultivation. It would also clarify whether, in accordance with what the Submitter stated, some of the areas burned in recent years were regenerated with forest cover or were replaced with avocado orchards.

In relation to the alleged loss of environmental services and climate change impacts resulting from high rates of deforestation and forest land use change for avocado cultivation in the state of Michoacán, a factual record could shed light on the impacts related to the hydrological cycle and other natural processes, the area as a wildlife habitat, and carbon sinks.

The Secretariat could incorporate information about Mexico's efforts to analyze, break down and project the change in land use on forest lands and avocado cultivation in Michoacán through tools available to environmental authorities and the public into a factual record.

Finally, in relation to water use, a factual record could document the enforcement actions implemented by Conagua, census data, records or inventories of the “water storage ponds” that have been constructed and the use of captured rainwater to sustain avocado orchards, and the application of criteria established in the LAN and the LGEEPA for the extraction of national waters for avocado cultivation in Michoacán.

After its analysis in light of the Party's response, the Secretariat finds that there are central open questions regarding the subject matter of submission SEM-23-002 (*Avocado production in Michoacán*) and that the preparation of a factual record is warranted regarding the effective enforcement of environmental law relating to: i) change of land use on forest land and ii) sustainable utilization of water, in relation to avocado cultivation in Michoacán.

The Secretariat presents its reasoning below and thereby notifies the Council in accordance with USMCA Article 24.28(1).

I. INTRODUCTION

1. On 1 July 2020, the United States-Mexico-Canada Agreement (USMCA or “the Agreement”) and the Environmental Cooperation Agreement (ECA) entered into force. Since that date, the mechanism for submissions on the enforcement of environmental law (the “SEM process”), originally established by Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), has been governed in accordance with USMCA Articles 24.27 and 24.28, whilst the implementation and administration of the SEM process remains the responsibility of the Secretariat of the Commission for Environmental Cooperation (CEC or “the Commission”)¹ as is now stipulated in the ECA.²
2. The SEM process allows any person or entity legally established in Canada, Mexico or the United States to file a submission asserting that a Party is failing to effectively enforce its environmental laws.³ The CEC Secretariat (“the Secretariat”) initially reviews submissions based on the criteria and requirements set out in USMCA Article 24.27(1) and (2). Should the Secretariat find that a submission meets these requirements, it then determines, in accordance with the criteria of USMCA Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party’s response, the Secretariat then determines whether the matter warrants the preparation of a factual record and, if so, it so notifies the CEC Council and the Environment Committee,⁴ while providing its reasons in accordance with USMCA Article 24.28(1); otherwise, it terminates its review of the submission.⁵
3. On 2 February 2023, a Mexican citizen (“the Submitter”), who requested the confidentiality of their data in accordance with ECA Article 16(1)(a), filed a submission with the Secretariat, in accordance with USMCA Article 24.27(1), in which it asserted that Mexico is failing to

¹ The Commission for Environmental Cooperation was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), an instrument signed by Canada, Mexico and the United States (the “Parties”). Under Article 2(3) of the Environmental Cooperation Agreement between the governments of the United Mexican States, the United States of America and Canada (the “Environmental Cooperation Agreement” or ECA), the CEC “will continue to operate under the modalities in place as of the entry into force of this Agreement, including its rules, policies, guidelines, procedures, and resolutions, to the extent these modalities are consistent with [the ECA].” The constituent bodies of the CEC are its Council, the Secretariat and the Joint Public Advisory Committee (JPAC).

² Although the provisions governing the functioning of the SEM process are now set forth in chapter 24 of the USMCA, certain related procedures are also established in the ECA, including: the Secretariat’s role in the implementation of the submissions process; the Council’s role in exchanging information with the Environment Committee; the preparation and publication of factual records; and the Council’s cooperation activities arising from such factual records. See: ECA, Articles 2(3), 4(1)(l), 4(1)(m), 4(4) and 5(5).

³ USMCA Article 24.27(1) establishes that a submission may be filed by “any person of a Party,” understood—in accordance with the general definitions of Article 1.5—as “a national [physical person with citizenship or permanent residence status] or enterprise [any entity or private, public or social organization established or constituted in accordance with the applicable law] of a Party.

⁴ Established by virtue of USMCA Article 24.26(2), the Environment Committee is charged with overseeing the implementation of Chapter 24 of the Agreement.

⁵ For detailed information on the various stages of the submissions on enforcement matters process, as well as on the public register of submissions and the Secretariat’s determinations and factual records, please consult the CEC website <<http://www.cec.org/submissions>>.

effectively enforce its environmental laws to protect forest ecosystems and water quality from the adverse environmental effects arising from avocado production in Michoacán, Mexico.⁶

4. According to the Submitter, Mexico is failing to effectively enforce various legal provisions in force in Mexico:
 - i) the Political Constitution of the los United Mexican States (“**the Constitution**” or **CPEUM**);
 - ii) the General Ecological Balance and Environmental Protection Act (**LGEEPA**);
 - iii) the General Law on Sustainable Forestry Development (**LGDFS**);
 - iv) the National Waters Act (**LAN**);
 - v) the Sustainable Rural Development Act (**LDRS**);
 - vi) the General Wildlife Act (**LGVS**); and
 - vii) the General Climate Change Act (**LGCC**).
5. On 6 March 2023, the Secretariat determined that submission SEM-23-002 (*Avocado Production in Michoacán*) did not meet all of the admissibility requirements established under USMCA Article 24.27 and it so notified the Submitter in its Article 24.27(2)(3) Determination.⁷
6. The Secretariat determined that in accordance with Article 24.27(2)(e), the submission did not satisfy the requirement to provide supporting information to show that the matter had been communicated in writing to the Party.⁸
7. On 25 April 2023, the Secretariat received additional information not contained in the original submission, which the Submitter provided to satisfy subparagraph e) of USMCA Article 24.27(2).⁹
8. On 24 May 2023, the Secretariat determined that, with the additional information received, the submission met all of the relevant admissibility criteria and requirements (as established in paragraphs (1) and (2) of Article 24.27 of the Agreement) and determined that the submission merited a response from the Government of Mexico in accordance with Article 24.27(3) in relation to the effective enforcement of the following legal provisions:¹⁰
 - i) Article 4 paragraphs five and six of the Constitution;
 - ii) LGEEPA Articles 5 sections II and IX, 15 sections III, IV, IX and XII, 19 sections I, II, III, V and VII, 20 *bis* 1, 21, 78, 79 sections I, II, VI and IX, 88 sections I, III and IV, 89 sections II, III, V and XI, 98 and 99 sections IV, V, VII, IX and XII;
 - iii) LGVS Articles 1, 4, 5 sections II and V, 6, 9 sections I, II, IV, XVIII and XXI, 18, 19, 20, 70 and 106;

⁶ SEM-23-002 (*Avocado Production in Michoacán*), Submission filed in accordance with USMCA Article 24.27(1) (2 February 2023) <http://www.cec.org/wp-content/uploads/wpallimport/files/23-2-sub_en_redacted.pdf> [Submission].

⁷ SEM-23-002 (*Avocado Production in Michoacán*), USMCA Article 24.27(2)(3) Determination (6 March 2023) <http://www.cec.org/wp-content/uploads/wpallimport/files/23-2-det_translation_en.pdf> [Initial Determination].

⁸ *Idem*, §§ 6 and 81.

⁹ SEM-23-002 (*Avocado Production in Michoacán*), Revised Submission filed in accordance with USMCA Article 24.27(1) (25 April 2023) <https://bit.ly/RSUB_en> [Revised Submission].

¹⁰ SEM-23-002 (*Avocado Production in Michoacán*), USMCA Article 24.27(2) and (3) Determination (24 May 2023) <https://bit.ly/DET_en> [Second Determination].

- iv) LGDFS Articles 93, 94, 96, 97, 98 and 99;
 - v) LAN Articles 7 *bis* section XI, 9 section XXXVI, 14 *bis* 5 sections IX, X, XI and XII, and 119 sections III, VIII, XVII and XVIII;
 - vi) LDRS Articles 165, 170 and 172; and
 - vii) LGCC Article 26 sections I, III, IV and XI.
9. On 24 July 2023, the Secretariat received a response from Mexico (“the Party”),¹¹ which provided information on conditions in Michoacán’s forests, as well as on the laws and regulations applicable to avocado cultivation, land use change on forest lands and sustainable water use. In addition, Mexico informed the CEC of some actions carried out to effectively enforce environmental law in relation to avocado production in Michoacán and notifies the existence of pending administrative proceedings related to the effective enforcement of Article 4 paragraph five of the Constitution; LGEEPA Articles 5 sections II and IX, 15 sections III, IV, IX and XII, 19 sections I, II, III, V and VII, 21, 78 and 79 sections I, II, VI and IX; and LGVS Articles 1, 9 sections IV and XXI and 19.¹² Due to the existence of such pending proceedings, and in accordance with the terms of the provisions of USMCA Article 24.27(4)(a), the Party asked the CEC Secretariat to proceed no further with its review of this submission.¹³
10. In accordance with USMCA Article 24.28(1), the CEC Secretariat examined whether, in light of the Party’s response, submission SEM-23-002 (*Avocado Production in Michoacán*) warrants the preparation of a factual record.
11. Upon reviewing this response, the Secretariat found that none of the citizen complaints reported by the Party as pending administrative proceedings, were initiated by the Party or pursued by it, and that the matters at issue in said proceedings do not coincide with the questions raised in the submission (because the Submitter does not refer to specific plots of land), and that it is not clear that the ongoing citizen complaints could potentially resolve the matters at issue in submission SEM-23-002.
12. In sum, having examined the submission in light of the response, the Secretariat concludes that the response leaves important questions unanswered, which **warrant the preparation of a factual record** regarding the effective enforcement of environmental law in relation to: i) land use changes on forest lands and ii) sustainable water use.

II. ANALYSIS

a. Preliminary questions

13. Mexico argues that LAN Articles 7 *bis* section XI, 9 section XXXVI, 14 *bis* 5 sections IX, X, XI and XII and 119 sections III, VIII, XVII and XVIII, as well as LGEEPA Article 89 sections II, III, V and XI, are not applicable to the matters raised in the submission, since the object of those provisions is the regulation of “national waters.”¹⁴

¹¹ SEM-23-002 (*Avocado Production in Michoacán*), Mexico’s Response in accordance with Article 24.17 (2)(3) (24 July 2023) <<https://bit.ly/3PNjLeo>> [Response].

¹² Id. at § 78.

¹³ Id. at § 81.

¹⁴ Id. at §§6-7.

14. In its response, the Party indicates that the structures known as “water storage ponds” are made for the purpose of capturing rainwater to irrigate avocado production and that the waters in question are not considered national waters in the terms of Article 27 of the Constitution and, as a consequence, these provisions are not applicable to such waters.¹⁵ Moreover, the Party argues that under Article 27 “groundwater may be freely used, that is to say, any interested party may construct a water catchment structure and extract from it whatever volume of water it may require, without any need for a permit or concession [...]”.¹⁶
15. Clearly, the Party affirms “the waters used to irrigate avocado production [in Michoacán] are not national waters” since the waters in question come from rainwater capture by means of the abovementioned “water storage ponds.”¹⁷ If all of Michoacán’s avocado orchards were effectively equipped with “water storage ponds” and avocado production was irrigated only and exclusively with captured rainwater, in the manner of seasonal crops, Mexico's argument regarding the inappropriateness of the application of legal provisions related to national waters would be valid. However, the Party provides no data, surveys, registers, inventories, lists or any information in its response which would serve to support the argument it advances.
16. Although Article 27 of the Constitution specifies that no concession is required to freely use groundwater, it also stipulates that “[...] when the public interest so requires or other uses are affected, the Federal Government may regulate its extraction and utilization, and even establish closed areas, just as it does for other national waters.” In effect, it is by virtue of this constitutional provision, that there are provisions, under the National Waters Act, which establish the conditions and requirements governing the use, enjoyment and extraction of national waters. Said provisions were cited in the submission.
17. The Party response alludes to an inventory of irrigation units¹⁸ that are supplied either by surface water or groundwater (wells), which corroborates the existence of a mechanism for granting concessions for the use of national waters for irrigation units. Some of these concessions are allocated to avocado production.¹⁹ In principle, this confirms that groundwater is, in fact, extracted for use in avocado irrigation processes in Michoacán.
18. In this regard, the Secretariat determines that it will pursue its analysis of enforcement of the provisions pertaining to national waters cited in the submission and its analysis of the different means of irrigation used in avocado orchards.
19. Furthermore, the Party alludes to the additional information filed by the Submitter on 25 April 2023, in the form of a revised submission with annexes, including, notably, an email dated 15 March 2023 which the coordinator of a civil society group addressed to the Minister of the Environment and Natural Resources and to Semarnat’s Citizen Affairs Unit, and in which it requested their intervention to address the issues raised in the submission. The Party observes that this request was made after the original submission was filed, without the appropriate authority having had the opportunity to address and respond to the request, and yet the Secretariat found that the requirements and conditions for continuing with its review of the submission were

¹⁵ Id. at §§ 7.

¹⁶ Id. at §§ 8.

¹⁷ Id. at §§ 7.

¹⁸ Irrigation unit are systems which provide small scale agricultural irrigation works and infrastructure to various users, such as associated rural producers who form a legal entity for the purposes of receiving a national waters use concession. See in this regard: LAN Article 58.

¹⁹ Response, §§ 34-35.

met.²⁰ The Party further adds that in the event of a negative response to the request, one should first exhaust the available means of national judicial redress. In the Party's opinion, one may conclude "that the admission of the submission in question is a flawed action, at Mexico's expense."²¹

20. For these reasons, the Party asks the CEC Secretariat, in accordance with the provisions of USMCA Article 24.27(3)(a), to proceed no further with the submission, as it fails to satisfy the admissibility criterion established in subparagraph 24.27(2)(e).²²
21. In relation to the requirement to indicate "whether the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any," it is important to clarify that the objective here is to give the governmental authority in question the opportunity to become aware of the matter prior to a submission being filed. Moreover, as the requirement is written in an impersonal manner, it is not necessary for the authors of the submissions themselves to be the ones who communicated the matter to the authorities.²³
22. The referenced email is *one* of the communications that the Submitter annexed as part of the additional information provided to demonstrate the matter was communicated to the relevant authorities of the Party. The Submitter provided other information, which was the focus of the Secretariat's analysis, that is pre-dated well before the filing of the original submission. Specifically, the Submitter presented a variety of evidence which demonstrates that the environmental authorities in Mexico —Semarnat, the Federal Attorney for Environmental Protection (Profepa), the National Forestry Commission (Conafor), the National Water Commission (Conagua) and the Ministry of Agriculture, Livestock Farming, Rural Development, Fisheries and Food (Sagarpa [now the Ministry of Agriculture and Rural Development—Sader])— have been aware, for a number of years, of the matter raised in the submission.²⁴ In considering the revised submission, the Secretariat analyzed Order 390, adopted on 24 May 2017 by the Congress of the state of Michoacán;²⁵ Recommendation R-103: *Regulation of land use changes in light of the expansion in land allocated to avocado production*, released in June 2016 by the State Ecology Council of Michoacán (Coecoco),²⁶ and Export Report 1, issued on 4 July 2017 by the Third Commission of the Federal Senate: *Finance and Public Credit, Agriculture and Development, Communications and Public Works*.²⁷ Likewise, the Secretariat took into consideration the register of 35 citizen complaints.²⁸

²⁰ Id. at § 12.

²¹ Id.

²² Id.

²³ See SEM-21-001 (*Terminal Fairview*), Article 24.27(2)(3) Determination (27 April 2021), §29, <<https://bit.ly/3Z9VJxf>>, and SEM-23-005 (*Valle de Bravo-Amanalco Sub-Basin*), Article 24.27(2)(3) Determination (14 June 2023), §86, <http://www.cec.org/wp-content/uploads/wpallimport/files/23-5-det09_en_redacted.pdf>:

The Secretariat believes that seeking (or having recourse to) remedies available to individuals can be interpreted broadly, so that it is possible to meet this criterion by filing a citizen complaint, but also by referring to a remedy initiated by a third party, be it an individual person or an organization or legal entity.

²⁴ Revised Submission, §§ 7, 9, 11.

²⁵ Second Determination, §§12-15.

²⁶ Id. at §§ 16-19.

²⁷ Id. at § 21.

²⁸ Id. at § 23.

23. In the foregoing paragraphs, the Secretariat has considered the facts and arguments presented in Mexico's response. Nevertheless, it stands by its conclusions set forth in its determination of 24 May 2023.

b. Notification of currently pending legal proceedings

24. The transparency and credibility of the SEM process require close scrutiny of Mexico's notification regarding the existence of pending proceedings in the terms of USMCA Article 24.27(4). In effect, the USMCA does not authorize the termination of a submission solely on the basis of a notification from a Party.²⁹ This is corroborated by the CEC's practice throughout the implementation of the SEM process, since 1994, in relation to submissions which, in most cases, have resulted in a Council vote in favor of the preparation of a factual record.³⁰
25. The Secretariat has already clarified on previous occasions that it is *not* a court and that its determinations "are not binding on the Parties or submitters, and Factual Records are not rulings or judicial opinions on an asserted failure of effective enforcement of environmental law." Consequently, it is not evident how a factual record could in any manner interfere with ongoing domestic proceedings, in the same way that a court decision could.³¹
26. The threshold for considering whether there are pending judicial or administrative proceedings must be construed narrowly in order to give full effect to the object and purposes of the SEM process;³² in effect, "the Secretariat must attempt to ensure a modicum of predictability and thus fairness [in implementing the SEM process]".³³ The fact that the Secretariat can determine whether the pending proceedings notified by a Party require termination of a submission, rests on the principle that a treaty cannot contribute to the realization of its express object and purpose if it is not effective.³⁴ Accordingly, it is necessary to implement the SEM process under the

²⁹ *Cfr.* SEM-01-001 (*Cytrar II*), Article 14(3) Determination (13 June 2001) at 5 <<https://bit.ly/3nNzzSR>>: "Only in the specific case where the matter that is the subject to a submission is the subject of a pending proceeding is the Secretariat authorized to proceed no further with its consideration of a submission [...]"

³⁰ SEM-96-003 (*Oldman River I*); SEM-97-001 (*BC Hydro*); SEM-98-004 (*BC Mining*); SEM-00-004 (*BC Logging*); SEM-00-006 (*Tarahumara*); SEM-01-001 (*Cytrar II*); SEM-02-003 (*Pulp and Paper*); SEM-03-003 (*Lake Chapala II*); SEM-04-002 (*Environmental Pollution in Hermosillo*); SEM-04-005 (*Coal-fired Power Plants*); SEM-05-003 (*Environmental Pollution in Hermosillo II*); SEM-06-003 (*Ex Hacienda El Hospital II*) in combination with SEM-06-004 (*Ex Hacienda El Hospital III*); SEM-06-005 (*Species at Risk*); SEM-06-006 (*Los Remedios National Park*); SEM-07-005 (*Drilling Waste in Cunduacán*); SEM-07-001 (*Minera San Xavier*); SEM-09-003 (*Los Remedios National Park II*); SEM-09-002 (*Manzanillo Wetlands*); SEM-11-002 (*Sumidero Canyon II*), SEM-10-002 (*Alberta Tailing Ponds*); SEM-12-001 (*BC Salmon Farms*); SEM-13-001 (*Tourism Development in the Gulf of California*); SEM-19-002 (*City Park Project*); SEM-22-001 (*Pollution in Playa Hermosa*) and SEM-21-003 (*North Atlantic right whale*).

³¹ SEM-07-001 (*Minera San Xavier*), Article 15(1) Notification (15 July 2009), § 44 <<https://bit.ly/3ZF4rCg>> [Determination 15(1) *Minera San Xavier*]. In addition, see the analysis on *lis pendens* in §§ 40-43.

³² *Id.* at § 35.

³³ *Id.* at § 33.

³⁴ *See*, for example: A. M. Slaughter and A. Wiersema, "The Scope of the Secretariat's Powers Regarding the Submissions Procedure of the North American Agreement on Environmental Cooperation under General Principles of International Law," § 6, in: CEC, *North American Environmental Law and Policy: Citizen Submissions on Enforcement Matters*, DPAAN series, vol. 27, Commission for Environmental Cooperation, Montreal, 2010 at 1-33, <<https://bit.ly/3PLrwBr>>.

umbrella of institutional effectiveness, interpreting the provisions of the USMCA in a constructive manner.³⁵

27. Therefore, the Secretariat is only authorized to apply this exceptional form of terminating a submission after examining whether the preparation of a factual record could *duplicate efforts or cause interference* in a judicial or administrative proceeding, by considering: i) whether the proceeding in question was initiated by and is being pursued by the Party; ii) whether the proceeding is timely and in accordance with the Party's law; iii) whether it deals with the same subject matter, including the same environmental law cited by the submitters; and iv) whether there is "a reasonable expectation that the 'pending judicial or administrative proceeding' invoked by the Party will address and potentially resolve the matters raised in the submission."³⁶
28. That said, before proceeding with an analysis of the existence of ongoing proceedings related to the matter raised in submission SEM-23-002 (*Avocado Production in Michoacán*), it is worth pointing out that, in its response, in addressing *whether the matter at issue is the subject of a pending judicial or administrative proceeding*, the Party cites various coordination actions which do not, per se, qualify as judicial or administrative proceedings, as they instead constitute environmental regulatory actions³⁷ and concern adjustments in the legal framework regulating avocado production.³⁸ The Secretariat will consider these actions cited by Mexico in the context of the measures adopted to enforce the environmental law in question with respect to avocado production in Michoacán.
29. As for the pending proceedings reported by Mexico in its response, the Secretariat observes that these were detailed in the subsection entitled "iii) Whether the matter has *previously* [emphasis added] been the subject of a judicial or administrative proceeding,"³⁹ wording which—at least in principle—suggests that the proceedings cited therein are *not* currently pending. Be that as it may, to ensure maximum transparency in its analysis, the Secretariat considers below the existence of the current proceedings reported by Mexico, which, in effect, could terminate further processing of submission SEM-23-002 (*Avocado Production in Michoacán*), in accordance with the USMCA. To that end, the Secretariat considers the four factors that are necessary to take into account to determine whether the preparation of a factual record might duplicate efforts or cause interfere with a judicial or administrative proceeding in relation to any of the proceedings cited by the Party. The CEC's analysis is presented below.

³⁵ "[I]nternational law authorises, indeed requires, the organisation, should it find it necessary, if it is to discharge all its functions effectively, to interpret its procedures in a constructive manner directed towards achieving the objective the Parties are deemed to have had in mind." See: United Nations Security Council, *Special Report of the Secretary-General on Ethiopia and Eritrea*, doc. no. S/2006/992, 15 December 2006, § 17; <<https://bit.ly/486xLXJ>>.

³⁶ SEM-01-001 (*Cytrar II*), Article 15(1) Notification (29 July 2002), p. 5-6 <https://bit.ly/01-001_NOTen> [Article 15(1) Notification *Cytrar II*].

³⁷ Response, §§19-23, 26-31 and 37-43.

³⁸ Id. at §§45-58.

³⁹ Id. at 13-24. It should be remembered that USMCA Article 24.27 [Submissions on Enforcement Matters] indicates in subparagraph 4(b)(ii)(b) that: "The Party shall inform the CEC Secretariat within 60 days of delivery of the request: [...] b) of any other information the Party wishes to provide, such as: [...] ii) whether the matter was previously the subject of a judicial or administrative proceeding [...]."

i) Whether the proceeding in question is being pursued by the Party

30. In the following paragraphs, the Secretariat first analyzes whether any of the pending administrative proceedings reported by the Party were initiated by it,⁴⁰ after which it considers the three other factors necessary for determining the existence of pending proceedings.⁴¹
31. None of the 14 ongoing administrative proceedings reported by Mexico are actions being pursued on the initiative of environmental authorities. On the contrary, every proceeding concerns citizen complaints filed by individuals in accordance with LGEEPA.
32. The citizen complaints in question do not, in themselves, constitute acts by the Party aimed at the implementation of enforcement measures related to land use changes on forest lands and sustainable water use. In the ongoing proceedings, reported by Mexico in its response, the complainants seek to spur the authorities to address the impacts caused by the clearing of wooded areas, the burning of trees or forested sites and land use changes on forest land to authorize avocado cultivation in Michoacán.
33. That said, in addressing the citizen complaints cited in the revised submission,⁴² the Party observes that “it is only by citing CPEUM Article 4 paragraph five and LGVS Articles 1, 9 sections IV and XXI and 19, that attention is drawn to the jurisdiction of this Federal Attorney [Profepa].” However, “the Submitter does not invoke any legal provision” whereby said agency is assigned the authority to exercise its powers “to address citizen complaints and carry out monitoring and inspection actions on compliance with the LGDFS and LGEEPA” in relation to “the increase in avocado production on forest lands in the state of Michoacán,” in order to guarantee effective enforcement.⁴³
34. In this regard, without elaborating on the adequacy of the legal provisions cited by the Submitter, the Secretariat observes that the Party details in its response a history of the administrative actions, including some criminal proceedings, carried out between 2012 and 2021 “with the goal of deterring clandestine logging on forest lands [to enable] the planting of avocado trees”⁴⁴, in response to the citizen complaints filed in the same period.⁴⁵ In every one of these cases, the file has been closed and there are no pending proceedings. Consequently, they do not justify terminating the submission process.
35. With regard to the citizen complaints that are still pending and that could justify terminating the submission, the Secretariat notes that Mexico does not provide information that shows what actions were taken in the administrative proceedings initiated in response to the citizen

⁴⁰ Determination 15(1) *Minera San Xavier*, § 36: “The proceedings notified by Mexico in this matter were initiated by the Submitter and not Mexico. They therefore, in part, fall outside of the definition of pending proceedings in Article 45(3)(a)” emphasis in the original].

⁴¹ *Cfr.* SEM-96-003 (*Oldman River I*), Article 15(1) Notification (2 April 1997) <<https://bit.ly/3ZG7sTu>>. In particular at 3-4:

The pending Federal Court case called to the attention of the Secretariat by Canada is not an action pursued by the Party within the meaning of Article 45(3)(a) [emphasis in the original].[...] Since the current matter before the Canadian court was initiated and is being pursued by a private entity, and not a “Party” as that term appears to be employed in Article 45(3)(a), the Secretariat may consider other factors in its review of the Submission at this stage.

⁴² Revised Submission, §§25-26.

⁴³ Response, §59.

⁴⁴ *Id.* at §60.

⁴⁵ *Id.* at §61 (table).

complaints filed between in 2022 and 2023 (plus one in 2021⁴⁶). In its response, the Party simply cited “14 administrative proceedings [which] are undergoing technical and judicial analysis so to take such measures as justice may require.”⁴⁷

36. The Secretariat has already determined that the threshold for determining the existence of a pending administrative proceeding is reached when a government *actively* focuses on enforcement of the measures provided for in its law in relation to the very matter raised by the submitters. In such cases, the Secretariat is, in effect, obliged to terminate its consideration of the submission and pursue it no further.⁴⁸
37. The identification data for the fourteen citizen complaints cited in Mexico’s response indicate that these complaints were filed and gave rise to ongoing administrative proceedings (each with its own specific file); however, the Party provides no information on the implementation of enforcement measures. Therefore, it cannot be determined whether there are indeed material acts undertaken by the Party to enforce the environmental law question.
38. In view of all of the foregoing, the Secretariat finds that Mexico’s response does not confirm that the reported proceedings are being pursued by the Party and, consequently, said proceedings do not justify proceeding no further with submission SEM-23-002 (*Avocado Production in Michoacán*).

ii) Whether the administration of said proceeding is timely and in accordance with the Party’s law

39. Regarding the citizen complaints cited in its response, Mexico indicates that 43 inspection operations were carried out in the 2018-2023 period (an average of eight per year). These in turn gave rise to 43 administrative proceedings, 29 of which concluded with rulings that imposed penalties and ordered corrective measures, while 14 others remain active (“in process”).⁴⁹ “Likewise, during the same period 65 monitoring patrols were carried out in areas considered highly prone to logging for the purpose of land use change in the state of Michoacán.”⁵⁰ In addition, the Party notifies that it brought 23 criminal complaints to the Attorney General’s Office, without providing any additional information on the status of these complaints.⁵¹
40. The response mentions in total 34 municipalities where the 43 inspection operations⁵² and 65 monitoring patrols were carried out.⁵³ In this regard, the Secretariat notes that, according to the information provided by the Party, avocado production in Michoacán is distributed among 112 municipalities;⁵⁴ however, the Party’s response provides no information whatsoever on any monitoring and inspection actions carried out in the other 78 municipalities where avocados are cultivated.

⁴⁶ Id. The last item of the table in question (with the 35 citizen complaint files corresponding to the 2012-2021 period, which have all been adjudicated), concerns, in reality a citizen complaint initiated in 2021, which “remains in the determination of criminal charges phase” (see p. 22 in the response).

⁴⁷ Id. at § 62.

⁴⁸ *Cfr.* Article 15(1) Notification *Oldman River I* at 3-4.

⁴⁹ Response, § 62.

⁵⁰ Id. at §64.

⁵¹ Id.

⁵² Id. at § 62.

⁵³ Id. at §64.

⁵⁴ Id. at § 17.

41. The Party declines to comment on the current status of the 23 criminal complaints filed with the Federal Attorney General (Mexico does not provide information on related investigative actions and, if applicable, the implementation of criminal penalties and the Secretariat does not know whether said complaints are still active). That said, the fact that 29 of the 43 inspection operations carried out from 2018 to 2023 (and mentioned in the response) concluded with the imposition of penalties and corrective measures signifies that such measures were imposed in 67% of all administrative proceedings undertaken. While this shows that enforcement actions are in fact being carried out, it is also indicative of the high incidence of logging infractions related to avocado production.
42. Regarding the citizen complaints, Mexico shares general information in a table with a list of thirteen active files.⁵⁵ However, the Secretariat does not know—due to a lack of more detailed information in the response—whether the filing and administration of said complaints has resulted in the implementation of ongoing administrative proceedings and, if so, whether they are being conducted in accordance with the law. Consequently, it is not possible to determine whether the administration of these complaints is timely and in accordance with the Party’s law.

iii) whether the same matter and environmental law(s) are the subject of pending proceedings

43. The Secretariat has determined on previous occasions that, in analyzing possible duplication of efforts or possible interference with pending litigation, it is necessary to consider whether the proceedings involve the same matter as the allegations raised in the submission.⁵⁶ The Secretariat should examine whether the matter in the proceedings is the same matter raised by the

⁵⁵ Id. at § 62, table pp. 22-23. It’s worth noting that this table includes thirteen active files corresponding to administrative proceedings which “are undergoing legal and technical analysis” and, consequently, “remain in the determination of criminal charges phase.” The other active proceeding (the Party reported a total of fourteen ongoing proceedings) is included in the table as part of § 61 of the response (pp. 14-22), which lists the citizen complaints filed and processed between 2012 and 2021. The files are complete for every complaint except one. In the latter case, the administrative proceeding “remains in the determination of criminal charges phase.”

⁵⁶ SEM-00-004 (*BC Logging*) Article 15(1) Notification, p. 17, available at: <<https://bit.ly/00-004NOTen>> [BC Logging Notification]:

In previous determinations, the Secretariat considered the rationale underlying Article 14(3) and identified two reasons for excluding matters that fall within Article 45(3)(a) – a need to avoid duplication of effort and a need to refrain from interfering with pending litigation. The Secretariat has noted in the past that these considerations can also be relevant for a Party’s proceedings that fall outside Article 45(3)(a) but nonetheless relate to the same subject matter as is raised in a submission.

submitter(s)⁵⁷ and narrowly construe the “matter” pending resolution⁵⁸ Moreover, the Secretariat has determined that citizen complaints only constitute pending proceedings for the purposes of the SEM process when they lead to the implementation of administrative proceedings.⁵⁹

44. As already mentioned, Mexico indicated in its response the existence of 14 pending administrative proceedings related to the effective enforcement of Article 4 paragraph five of the Constitution; LGEEPA Articles 5 sections II and IX, 15 sections III, IV, IX and XII, 19 sections I, II, III, V and VII, 21, 78 and 79 sections I, II, VI and IX; and LGVS Articles 1, 9 sections IV and XXI, and 19. In light of said pending proceedings, the Party argued, in accordance with USMCA Article 24.27(4)(a), that the Secretariat should proceed no further with the submission.⁶⁰
45. The 14 citizen complaints which gave rise to ongoing proceedings concern land use changes on forest lands to plant avocado trees, the destruction and clearing of wooded areas and hills, intentional forest fires, deforestation and well drilling, among other issues, on sites located in the state of Michoacán.⁶¹ And it could be inferred that similar questions are at issue in the 23 criminal complaints (once again, the Secretariat does not know if any of these complaints are still active). Accordingly, the ongoing proceedings involve the same matter, including some of the same environmental laws raised in the submission, but the matters in the proceedings notified by the Party are on a smaller scale, focusing on specific properties in a few municipalities in Michoacán, and do not involve all of the environmental laws cited in the submission.

⁵⁷ BC Hydro Notification, p. 2 (“the ‘judicial or administrative proceeding’ must address the same ‘matter’ as the Submission.”); SEM-98-004 (*BC Mining*), Notification pursuant to Article 15(1), p. 15, available at: <<https://bit.ly/3ZGm3gZ>> (“Further, such a proceeding must concern the same subject matter as the allegations raised in the submission.”); BC Logging Notification, p.16 (“Only those proceedings ... concerning the same subject matter as the allegations raised in the submission should preclude the Secretariat from proceeding further...”). See also: SEM-12-001 (*BC Salmon Farms*), Notice to Submitters and Council on Court Proceedings Served by Canada (7 May 2014), available at: <https://bit.ly/12-001_14-3DETen> §18 regarding the location of salmon farms cited in the submission and in a court appeal; and §4 regarding that the court proceedings concern aquaculture licenses and not regulations on the deposition of substances in water.

⁵⁸ Cfr. SEM-01-001 (*Cytrar II*), Article 15(1) Notification at 7:

The Secretariat has previously construed provisions of the Agreement narrowly when a broader reading could defeat the objectives of the Agreement by too liberally allowing Article 14(3)(a) to cut off further review.

⁵⁹ Cfr. SEM-15-001 (*La Primavera Forest*), Article 15(1) Notification (4 November 2016), § 25 <<https://bit.ly/3nR3ZDv>>:

The Secretariat considers that in any event, Mexico has conducted implementation of the citizen’s complaint mechanism provided in Articles 189 of LGEEPA and 107 of LGVS and has made this process available to individuals.

See also: SEM-00-004 (*BC Logging*), Article 15(1) Notification (27 July 2001) at 20-21 <<https://bit.ly/00-004NOTen>>.

The concerns that weigh against development of a factual record when pending litigation is addressing the same subject matter as is raised in a submission are similar to the concerns relevant to whether a factual record is warranted with regard to a matter that is also subject to a timely, active, pending criminal investigation.

⁶⁰ Response, §§78 and 81.

⁶¹ Cfr. Response, § 62, table at 22-23.

iv) Whether the proceeding can potentially resolve the matter raised in the submission

46. In examining the notification of ongoing judicial or administrative proceedings, the Secretariat takes into consideration whether, in fact, the processing and resolution of the proceedings will address and potentially resolve the matter raised in the submission.⁶² Recently, the Secretariat considered whether the resolution of ongoing judicial proceedings and, in particular, the implementation of alternative dispute settlement mechanisms might address the issue raised in a submission and potentially resolve it.⁶³ It also considered, in the same case, whether conducting environmental damage studies to assess the impact of the activities at issue in the submission, as part of the corrective measures adopted in the context of administrative proceedings instituted by Profepa, and then subsequently implementing the recommendations of said studies could contribute to resolving the issue raised in the submission.⁶⁴ That said, from the Secretariat's perspective, the mere existence of a complaint directed towards the competent authority does not necessarily lead to an administrative proceeding oriented toward imposing penalties or corrective measures and, thus, does not qualify per se as a pending proceeding.⁶⁵
47. Regarding submission SEM-23-002 (*Avocado Production in Michoacán*), the citizen complaints cited by the Party center on specific properties in a few municipalities in Michoacán (21 according to the response) affected by changes in land use, the planting of avocado trees, the destruction and clearing of wooded areas or hills, forest fires, deforestation and well drilling, among other factors.⁶⁶
48. However, the central issues in the submission are the change in land use on forest lands to plant avocado trees and the impacts on sustainable water use due to irrigation of avocado cultivation. Both phenomena are present throughout the entire state of Michoacán. There is little likelihood that addressing the citizen complaints reported by Mexico in its response will resolve the matter raised by the Submitter, which concerns general tendencies in Michoacán and the environmental effects arising from monoculture, including land use changes and deforestation.
49. Moreover, the Secretariat considers that there is minimal risk of duplication of efforts or interference with the ongoing administrative proceedings (based on citizen complaints) reported by Mexico should the submission review process continue, because the submission raises general effects caused by avocado farming in Michoacán and does not refer to the environmental damages affecting specific properties, orchards, or crops. The preparation of a factual record—in the event one is authorized by the Council—would entail presenting aggregate data; i.e., it

⁶² Cfr. Article 15(1) Notification *Cytrar II* at 6:

To apply this exceptional condition for terminating a submission [i.e., apply 14(3)(a) to that end], [...] there must be a reasonable expectation that the “pending judicial or administrative proceeding” invoked by the Party will address and potentially resolve the matters raised in the submission.

See also: SEM-21-003 (*North Atlantic right whale*), USMCA Article 24.28(1) Notification (3 June 2022), § 27 and SEM-13-001 (*Tourism Development in the Gulf of California*), Notification to the Submitters and to Council regarding a proceeding notified by Mexico (16 May 2014), § 22.

⁶³ Cfr. SEM-22-001 (*Pollution in Playa Hermosa*), Article 24.28(1) Determination (4 November 2022), §§41-43 <<https://bit.ly/3Rw2zeu>>.

⁶⁴ Id. at § 32, in which the implementation of an environmental damage study by Profepa was considered as a measure that could contribute to resolving the Submitters' assertion.

⁶⁵ Id. at §45.

⁶⁶ Response, § 62 and table at 22-23.

would involve compiling and analyzing aggregate information, without specifying certain properties, and would present an overview of the issues raised by the Submitter.

50. In short: the citizen complaints listed in Mexico's response gave rise to the pending administrative proceedings reported by the Party; it is not known which citizen complaints led to enforcement measures on the part of the authority; the complaints only partially coincide with the provisions cited in the submission, and, regarding the criminal charges brought, it is unknown whether they resulted in a penalties or corrective measures or what their present status is; finally, in addition, the conclusion of the proceedings in question would not have the potential to resolve the matter raised in the submission.
51. It is important to underline that a factual record would present aggregate data. For this reason, a factual record could not interfere with the pending proceedings reported by Mexico.
52. In light of the foregoing, the Secretariat is continuing with its analysis to determine whether the preparation of a factual record is warranted.

c. Regarding the assertions in submission SEM-23-002

53. The Secretariat now considers whether, in light of Mexico's response, the preparation of a factual record is warranted regarding alleged failures to effectively enforce the law in matters related to:
i) land use changes on forest lands; and ii) sustainable water use.

i) Regarding the alleged deforestation of forests in Michoacán caused by improper land use changes on forest lands

54. The Submitter asserts that "avocado production in Michoacán has shown notable growth in recent decades," a trend which has positioned the state as the principal avocado producer and exporter in the world.⁶⁷ As a consequence, there has been an accelerating increase in land dedicated to the avocado cultivation, "basically at the expense of forest lands,"⁶⁸ a situation which has resulted in Michoacán having one of the highest deforestation rates in Mexico and Latin America.⁶⁹
55. The submission presents information obtained from the Association of Avocado Producers and Packers of Mexico (APEAM) regarding incorporation in the avocado sector, which, in December 2022, included the participation—according to the APEAM—of 32,315 producers and 81 packers on 150,000 registered hectares, in 43 municipalities located in the so-called "avocado strip" of Michoacán.⁷⁰ The Submitter states that there are avocado producers who are not members of the APEAM who could be cultivating the same acreage if not more. The Submitter explains that, if, based on the official total production of Michoacan avocado, one also takes into consideration non-APEAM registered production, a possible estimate of the total acreage dedicated to avocado production in the state, in 2022, could be as high as around 300,000 hectares.⁷¹

⁶⁷ Submission, § 1.

⁶⁸ Id. at § 5.

⁶⁹ Id. at § 15.

⁷⁰ Id. at § 7.

⁷¹ Id.

56. The Submitter points out the relationship between the increase in the acreage where avocado trees are planted and the registered rise in deforestation and observes that some estimates indicate that up to 60,000 hectares are deforested per year.⁷²
57. In its response, the Party corroborates that Michoacán is the country's principal avocado producing state with over 34,800 producers, most of whom have plots of five hectares or less, distributed in 112 municipalities, and an official total acreage devoted to avocado production of 176,179 hectares.⁷³
58. According to the Party, between 2000 and 2010, the average annual growth rate of land planted with avocado trees was 3.6%, a rate which rose to 6.4% per year between 2010 and 2016. However, beginning in 2016 this growth rate has been falling, such that in 2022 a growth rate of 1% was recorded. Mexico underlines the fact that from 2018 to 2022 the average annual growth rate went from 4.9% to 1%, which indicates that the growth in acreage devoted to avocado production in Michoacán has stabilized.⁷⁴
59. Regarding the **accelerated growth in acreage dedicated to avocado cultivation at the expense of forest lands in Michoacán**,⁷⁵ the Party asserts that “the current administration has not incentivized the establishment of new avocado plantations,” as programs—such as Production for Wellbeing, Fertilizers for Wellbeing and Guaranteed Prices—are focused on achieving food self-sufficiency in maize, beans, wheat and rice.⁷⁶ Likewise, Mexico informs the CEC of the existence of economic instruments such as the *Order disclosing the Operational Rules of the Agriculture, Livestock Farming, Fisheries and Aquaculture Development Program* for fiscal year 2023, an instrument which confirms that no support was granted for the development of projects in deforested areas beyond the agricultural frontier.⁷⁷ Furthermore, Mexico states that action lines have been established with the intention of reforming a few provisions of the LGDFS to ensure that “support or incentives are not granted for carrying out activities which extend the agricultural frontier at the expense of the country's forested areas.”⁷⁸
60. The Secretariat notes, however, that the Submitter's assertions do not focus on any alleged incentives for avocado cultivation in Michoacán as a principal element of the issues raised (although said incentive is indeed mentioned in paragraphs 44-46 of the submission), instead the main issue is the uncontrolled and illegal growth of avocado production⁷⁹ and a permissive policy on forest land use changes in favor of avocado cultivation.⁸⁰
61. The Party indicates that not a single **land use change** authorization for forest lands, which, in any event, would be issued by the General Directorate for Forestry, Soils and Environmental Zoning Management, a Semarnat agency, has been located that is related to avocado production in Michoacán.⁸¹ The Secretariat observes that, on the one hand, Mexico refers to the growth in acreage for avocado cultivation and, on the other, it refers to the non-existence of permits having

⁷² Id. at §§16-17.

⁷³ Response, § 17.

⁷⁴ Id. at § 25.

⁷⁵ Submission, § 5 and table 1.

⁷⁶ Response, § 22.

⁷⁷ Id. at § 21.

⁷⁸ Id. at § 19.

⁷⁹ Submission, § 38.

⁸⁰ Id. at §§ 34, 37 and 43.

⁸¹ Response, § 37.

been granted (in accordance with the applicable legal provisions) for land use change in forested lands, which allows one to presume the possible existence of illegal avocado cultivation in Michoacán. The response does not show evidence of regulation of avocado production during the 2013-2023 period; it only indicates that the growth rate of acreage planted with avocado trees went from 4.9% to 1%.⁸² That, however, contradicts the annual trends observed with respect to avocado cultivation; in effect, every year production and exports reach a new record, a phenomenon supported by the APEAM's own data and by the Agrifood and Fisheries Information System (SIAP), which is administered by Sader.⁸³ In fact, the information presented in the submission notes that avocado exports tripled during the 2010-2020 period.⁸⁴ The response provide information on how such avocado production capacity was achieved with such a slight increase in the acreage planted for avocado cultivation. It simply indicates that "progress has been made in the elaboration of an Avocado Producer Register,"⁸⁵ without, however, providing information on the conditions, goals, and forecasts of said register.

62. Having considered the information in the submission in light of Mexico's response, the Secretariat observes that there is significant growth in avocado production in the state of Michoacán, despite the absence of official records of an equivalent growth in the planted area or of land use change authorizations for forested areas. A factual record could yield factual information on this phenomenon and assemble public information on the alleged existence of sites where forest land uses were changed in favor of avocado cultivation without proper authorization.
63. Moreover, regarding **land use change in forest-fire affected areas**, the Submitter argues that, according to official information, Conafor admits that it does not deploy mechanisms to prevent areas affected by forest fires from being repurposed for agricultural activities; it has forwarded no communications whatsoever to Sader to inform it of the areas affected by forest fires in Michoacán during the 2010-2022 period; and it has no information available to determine the present state of the areas affected by forest fires in Michoacán during the 2002-2022 period.⁸⁶ The submission also observes that Conafor does not have the National Forest Registry's records of sites affected by forest fires in Michoacán for the 2002-2022 period, as this Registry is under Semarnat's jurisdiction⁸⁷
64. The Submitter asserts that, in addition to not complying with LGDFS Article 97 by failing to have mechanisms in place for avoiding land use changes in areas affected by forest fires in Michoacán and for preventing them from being repurposed for agricultural activities, Mexico is failing to effectively enforce LGDFS Article 99, as the competent authority—Conafor—lacks the means to coordinate with Sader and take the appropriate actions to prevent growth in

⁸² Id. at § 25.

⁸³ The Submitter presents data from SIAP, which are the basis for estimates that avocado production in Michoacán reached 1,831,622 tons in 2021 (Submission, footnote 7 at 6). APEAM's information illustrates the growth generated by "green gold fever": in September 2021, the Association registered 29,000 affiliated producers and 65 packers who reported exports of 962,000 tons during the 2019-2020 agricultural season. By December 2022, the number of affiliated producers had risen to 32,315 and the number of packers to 81. Likewise, the number of municipalities included in the avocado strip had increased to 43 compared to 22 in 2017 (Submission, §7).

⁸⁴ Submission, footnote 5 at 6.

⁸⁵ Response, §20.

⁸⁶ Submission, §§ 40-41.

⁸⁷ Id. at § 42.

agricultural production at the expense of forest lands in Michoacán. Moreover, Conafor recognizes that it took no action whatsoever in this regard throughout the 2000-2020 period.⁸⁸

65. Although the response addresses the initiatives of the Government of Michoacán to develop and institute a forest fire inventory,⁸⁹ as well as the joint actions by the state and federal governments to fight forest fires, “specifically in areas where land use changes may be sought to establish avocado orchards,”⁹⁰ it provides no information on the federal government’s measures to have a reliable registry of forest fires as part of the national registries of environmental information, nor does it present information on the effectiveness of its actions in this regard.
66. The Party indicates, however, that in light of the importance of fire-affected sites and as a measure to preserve and restore ecological balance, environmental restoration zones were decreed in 2022 on the following four sites of past forest fires: the Tacátzcuaro Hill, in the municipalities of Tocumbo and Tingüindin; the Tariakeri site, which belongs to the municipality Tzintzuntzan; La Estacada Hill, in the municipality of Tancítaro; and the Atapán site, in the municipalities of Tocumbo and Los Reyes.⁹¹
67. A factual record would make it possible to clarify whether forest regeneration occurred in any of the areas affected by forest fires in recent years or whether these areas are now avocado orchards. Likewise, a factual record would shed light on the information available for the enforcement of LGDFS Article 97 in cases where properties were affected by forest fires.
68. Regarding the alleged lack of **coordination between governmental authorities**, the Submitter emphasizes that enforcement of the laws and standards that regulate land use changes is hampered by the poor to non-existent coordination between the different responsible government agencies, an issue that has been recognized for years, including in an official study.⁹² In addition to showing that, as indicated above, Conafor lacks coordination mechanisms with Sader to promote sustainable practices and prevent growth in agricultural production at the expense of forest lands.⁹³ In fact, the Submitter adds that Conafor acknowledges not having conducted any actions in this regard from 2000-2020.⁹⁴
69. The Submitter argues that, according to information at its disposal, Sader is infringing on LGDFS Article 99 by granting support— albeit not of an economic or direct funding nature —to avocado producers, by means of the international phytosanitary certificates for export products issued by the National Health, Food Safety and Food Quality Service (Senasica), which is a Sader agency.⁹⁵ It is worth noting that the Secretariat does not consider the issuance of international phytosanitary certificates, in itself, to be an incentive—not even an indirect one—for avocado production in Michoacán. Such certificates are simply an instrument to guarantee that a product of plant origin complies with the required phytosanitary conditions for export.

⁸⁸ Id. at §§ 39-40. See also paragraph 43, which in a certain fashion summarizes the issue of post-forest fire land use changes in favor of avocado production in Michoacán, which has been a recurrent problem for years.

⁸⁹ Response, § 74.

⁹⁰ Id. at § 41.

⁹¹ Id. at § 42.

⁹² Submission, §§33-34.

⁹³ Id. at § 40.

⁹⁴ Id.

⁹⁵ Submission, §§ 44-45.

70. To confirm the existence of coordination between the responsible government authorities, the Party asserts that actions have been taken in this regard, especially since October 2021, when the current administration took office in the state of Michoacán.⁹⁶ The Party indicates that various coordination agreements have been signed, including notably: a collaboration and coordination agreement between Semarnat and Sagarpa (now known as Sader), which proposes to preserve forests and jungles and strengthen food sustainability;⁹⁷ a framework agreement on coordinating forestry issues, which aims to establish coordination between Conafor and the Government of Michoacán in order to promote sustainable forest development in the state;⁹⁸ and the *Coordination Agreement which establishes the Bases of the Process for the Elaboration and Execution of the Environmental Land-Use Management Program for the area known as the “Duero River Basin,”* signed by the federal government, the Government of Michoacán (acting through its Ministry of the Environment) and various municipal governments with the goal of strengthening regional environmental land-use management in northeastern Michoacán.⁹⁹
71. According to Mexico, coordination activities between the state and federal governments have resulted in the mobilization of material, human and economic resources, and the implementation of various joint actions to fight forest fires, specifically in areas where land use changes may be sought to establish avocado orchards.¹⁰⁰
72. The Secretariat notes that the response reveals the existence of various initiatives for coordination between the federal authorities and the state of Michoacán and that, although no information is presented on the results of such efforts, at least it may be seen that the authorities are endeavoring to bring them to fruition.¹⁰¹ Be that as it may, the preparation of a factual record would contribute to clarifying questions regarding the effective enforcement of LGDFS Article 99 in relation to the coordination between Conafor and Sader in the formulation and implementation of land use policies and sustainable practices for avocado production in Michoacán, which include forest cover protection criteria.
73. In relation to the extremely high deforestation rates recorded in Michoacán due to the planting of avocado trees, the Submitter highlights the fact that one of the direct effects of deforestation and monocultures—including avocado production—is **the loss of biodiversity**. One study reveals that 66% of avocado producers in Michoacán do not conserve native forest species. Moreover, according to researchers from the National Autonomous University of Mexico (UNAM), there are seven native species of pine “at imminent risk of disappearing from the ecosystems surrounding avocado growing areas,” due to the effects of avocado production in Michoacán.¹⁰²
74. The submission asserts that Mexico is failing to enforce various provisions in terms of the preservation and sustainable use of flora, fauna and wildlife habitat, including, *inter alia*, LGEEPA Article 79 sections I and VI; LGVS Articles 9 sections I, II, IV, XVIII and XXI, 18, 20, 70 and 106; and LGCC Article 26 sections I, III, IV and XI. In relation to this alleged failure—apart from the loss of biodiversity—one of the effects of deforestation caused by land use changes on forest lands is the **loss of environmental services** that forest ecosystems

⁹⁶ Response, § 39.

⁹⁷ Id. at § 19.

⁹⁸ Id. at § 40.

⁹⁹ Id. at § 43.

¹⁰⁰ Id. at § 41.

¹⁰¹ Id. at § 43.

¹⁰² Submission, §§ 26-27.

provide, such as refuge for wildlife, habitat for the development of organisms, regulation of the hydrological cycle and carbon capture.¹⁰³ In particular, the Submitter cites the close link between water and forests. In effect, as deforestation increases, water availability is affected because as forests capture water they also regulate and maintain water flow and quality. In addition to regulating eco-hydrological cycles, forest cover plays an essential role in relation to other water-related processes, such as biodiversity, erosion, flooding, regional precipitation and climate change.¹⁰⁴ Some studies find that the growth in avocado cultivation has already had a significant impact on the ecosystem services that the forests of Michoacán provide in relation to the production and protection of water.¹⁰⁵

75. Although the Submitter recognizes the avocado industry's socioeconomic importance in Michoacán, they emphasize the urgent necessity of adequate environmental regulation of avocado production, along with solutions to enhance its sustainability.¹⁰⁶ Thus, the Submitter argues that, in addition to reforming the applicable legal framework with respect to the industry, *environmental certification* is required to establish parameters for avocado farming regarding aspects such as: the background history of sites (deforestation, fires), water supply, agrochemicals and wastewater management, the creation of buffer zones, the conservation of percentages of original forests, establishment of environmental offset mechanisms and demarcation of the agricultural frontier, among others.¹⁰⁷
76. Mexico recognizes that land use change in forested areas in favor of avocado cultivation in Michoacán has provoked diverse environmental impacts—including, *inter alia*, loss of biodiversity, the depletion and pollution of aquifers and water bodies, soil erosion and pollution—and that, due to the loss of native forest cover, there is a deterioration in forest ecosystem benefits. Consequently, it is “of vital importance to create instruments which ensure that growth in avocado cultivation [takes place] in suitable areas, without generating more land use change from forest uses to agriculture.”¹⁰⁸ The Party alludes to the importance of promoting good environmental practices in the avocado sector and notes that to that end the state government of Michoacán is endeavoring to create an environmental certification for avocado orchards, which comply with the applicable regulations and with certain sustainable management guidelines, as well as an appropriate environmental offset mechanism.¹⁰⁹ That said, the response does not provide detailed information on the creation and implementation of instruments to make avocado cultivation sustainable, nor on the loss of environmental services due to deforestation and its effects on climate change; in effect, it did not go beyond stating the importance of ensuring sustainable avocado production.¹¹⁰
77. The Secretariat finds that a factual record could present information on the loss of environmental services, as well as the effects on climate change arising from the high deforestation rates and land use changes in forest areas in favor of avocado production in the state of Michoacán. A factual record could shed light on the loss of environmental services regarding regulation of natural processes, habitat and loss of carbon sinks. Moreover, it would contribute to clarifying

¹⁰³ Submission, §§ 11-13, 18, 26, 27 and 60.

¹⁰⁴ Id. at §23.

¹⁰⁵ Id. at § 24.

¹⁰⁶ Id. at § 62.

¹⁰⁷ Id. at § 63.

¹⁰⁸ Response, § 54.

¹⁰⁹ Id. at §§ 55-57.

¹¹⁰ Id. at §§ 23 and 28.

questions related to the effective enforcement of LGEEPA Article 79 sections I and VI; LGVS Articles 9 sections I, II, IV, XVIII and XXI, 18, 20, 70 and 106; LGCC Article 26 sections I, III, IV and XI; and the provisions thereof regarding the preservation and sustainable use of flora, fauna and wildlife habitat, as they pertain to avocado production in Michoacán.

ii) Land use change management tools

78. The Party indicates that it has promoted the identification of potential areas for land conservation and that under the present state government 200,000 hectares in Michoacán have been decreed as protected natural areas (*áreas naturales protegidas*—ANP) to protect them against land use change.¹¹¹ The response also mentions various land use management information tools, including: the Land Cover Map of the Mexican Republic, the Protected Agriculture Consultation System and the National Forestry Management System.¹¹²
79. The Secretariat notes that although the Government of Mexico’s efforts to decree areas with some form of conservation status are evident, in the response there is no mention of concrete instruments, such as management programs for proper protection of the ANPs that are being decreed.
80. Furthermore, in general terms, the response does not provide an overview regarding: the annual growth in the planted area of avocado cultivation in Michoacán; the number of avocado producers, both APEAM affiliated and non-affiliated; and the available technological instruments for timely detection of changes in forest cover in Michoacán. In this regard, a factual record could help bring together the efforts of various institutions to have high quality cartographic information systems on land use change to guide enforcement actions.
81. In addition, a factual record could bring to light Mexico’s efforts to analyze, dissect, and project the phenomenon of land use change in forested areas, by means of the tools at the disposal of the environmental authorities and the public, with a view to ensuring the effectiveness of the provisions of LGDFS Articles 93 to 99 in relation to avocado cultivation in Michoacán.

iii) regarding the alleged lack of actions to guarantee the sustainable use of water employed in the irrigation of avocado orchards

82. Regarding groundwater use for irrigation of avocado orchards, the Submitter maintains that, according to a measurement of the potential water consumption index, an excess consumption of 20 to 140% has been detected in the avocado strip of Michoacán compared to the water required by the avocado orchards.¹¹³
83. Furthermore, the submission reports that the need to sustain avocado production has led to widespread construction of water storage ponds, which are totally out of control and unregulated by the authorities. Likewise, according to some sources, over half of the water wells found in avocado orchards are illegal. Consequently, “every day, social conflicts over water are increasingly evident as avocado producers take away water supplies to the detriment of the basic necessities of communities.”¹¹⁴

¹¹¹ Id. at § 42.

¹¹² Id. at §§ 20 and 71.

¹¹³ Submission, § 22.

¹¹⁴ Id. at § 25.

84. Mexico, for its part, argues—as indicated at the outset of this notification (subsection a. “preliminary questions”)—that LAN Articles 7 *bis* section XI, 9 section XXXVI, 14 *bis* 5 sections IX, X, XI and XII, and 119 sections III, VIII, XVII and XVIII; and LGEEPA Article 89 sections II, III, V and XI are not applicable in relation to submission SEM-23-002. In effect, the purpose of these provisions is to regulate “national waters,” which the Party asserts are not used to irrigate avocado cultivation in Michoacán, as it depends instead on rainwater captured in “water storage ponds,” which do not constitute national waters in the terms of the provisions of Article 27 of the Constitution.¹¹⁵
85. The Party reports that the state of Michoacán does not have specialized rainfed districts and in terms of irrigation districts, the corresponding agricultural statistics indicate that in Michoacán, “the registered avocado [production] area is extremely small”.¹¹⁶ The Party further indicates that “256 irrigation units with some avocado cultivation, 178 of which depend on surface water sources and 78 on groundwater sources,”¹¹⁷ have been identified in the state.
86. Mexico adds that, regarding the 22 principal avocado-producing municipalities in Michoacán, one observes an evolution which correlates with the recorded increase in irrigation units.¹¹⁸ Nonetheless, in terms of the growth in avocado acreage planted and the type of irrigation used, the Party notes that it is the area planted for seasonal avocado production that has recorded the largest increase, i.e., it is 4.4 times greater than 30 years ago, having increased from 34,830 hectares (out of a total of 70,756 ha) in 1991 to 103,821 hectares (out of a total of 174,442 ha) in 2021, according to official data.¹¹⁹ According to the response, in the principal avocado producing municipalities—Tancítaro, Uruapan, Tacámbaro, Salvador Escalante, Ario, Peribán, Nuevo Parangaricutiro and Los Reyes—which account for 69% of the planted area (120,799 ha), 63% of the avocado crop there is seasonal (110, 213 ha) and, consequently, does not depend on irrigation water.¹²⁰
87. In addition, Mexico reports that since 2010 Conagua has conducted 71 inspection visits to sites occupied by avocado plantations. In 41 of these plantations, violations to the LAN were detected, which resulted in the implementation of administrative proceedings to impose the appropriate fines or penalties.¹²¹
88. Having analyzed Mexico’s response, the Secretariat finds that the information provided indicates that the issue of water consumption for avocado production is not at all well documented and that a factual record would help to shed light on this issue.
89. On the one hand, the Party asserts that the issue at hand does not concern national waters as farmlands specializing in avocado production essentially sustain their crops using “seasonal” water sources and “water storage ponds” constructed to capture rainwater and, as a consequence, the environmental law cited in the submission in relation to national waters is not applicable. This reasoning allows one to infer that, in some form, Mexico is indicating that every site dedicated to avocado production has water storage ponds or seasonal water sources; however—

¹¹⁵ Response, §§ 6-7.

¹¹⁶ *Id.* at § 8.

¹¹⁷ Response, § 35.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at § 36.

¹²⁰ *Id.* at § 24.

¹²¹ *Id.* at § 30.

as noted above—the response does not provide any survey data or cite any other registry of water use by avocado producers in Michoacán which indicates that this is the case.

90. On the other hand, and contrary to the foregoing, the Party refers to the inspection visits that Conagua has carried out in avocado orchards, in the last thirteen years, pursuant to the LAN, actions which are, in effect, indicative that national waters are used in avocado cultivation in Michoacán. In this regard, the Secretariat notes that, during the 2010-2023 period, Conagua carried out 71 inspection visits—an average of five per year—and that in over half of these cases (57%) irregularities were detected which, in turn, resulted in the imposition of fines or penalties. However, the response provides no detailed information on said violations of the LAN and the its regulations. Nor does it report the fines or penalties imposed.
91. A factual record would contribute valuable information on the construction of “water storage ponds” to sustain avocado orchards, as well as on the use of seasonal precipitation for avocado cultivation, with said data to be obtained from surveys, registries or inventories of water storage ponds and other rainwater collection systems. Furthermore, a factual record would shed light on the number of wells in avocado producing areas, document the enforcement actions pursued by Conagua and shed light on the enforcement of the criteria established in the LAN (Articles 7 *bis* section XI, 9 section XXXVI, 14 *bis* 5 sections IX, X, XI and XII, and 119 sections III, VIII, XVII and XVIII) and LGEEPA (Articles 88 sections I, III and IV, 89 sections II, III, V and XI) in relation to sustainable use of national waters in avocado production in Michoacán.
92. Furthermore, in relation to another aspect of sustainable water use, the Submitter raises a grave environmental problem associated with avocado production in Michoacán: the **pollution of aquifers, rivers and streams** due to the indiscriminate use of agrochemicals (insecticides, fungicides and fertilizers).¹²² According to the results of a broad study of rural Michoacán carried out in 2011, 93% of avocado producers used synthetic pesticides.¹²³ Mexico argues that this no longer reflects the current situation, as today 14% of the agricultural area with avocado orchards in Michoacán produces organic avocados, “which thereby contributes to reducing the excessive use of synthetic chemical products.”¹²⁴
93. Even with organic production on 14% of the cultivated area, this means that approximately 86% of the cultivated area has conventional production presumably using agrochemicals. Given that this is a significant majority of the agricultural area, there are possible impacts worth considering and a factual record could present a fuller perspective on water issues related to avocado cultivation in the state of Michoacán. This would follow the practice of previous factual records that addressed various matters related to water issues across North America.¹²⁵

III. NOTIFICATION

94. Having considered submission SEM-23-002 (*Avocado Production in Michoacán*) in light of the response of the United Mexican States, the Secretariat finds that there are important open

¹²² Submission, §§ 19-21.

¹²³ Id. at §26.

¹²⁴ Response, § 24.

¹²⁵ See, for example, the following factual records made available to the public in accordance with NAAEC Article 15(7): SEM-97-002 (*Rio Magdalena*), SEM-97-001 (*BC Hydro*), SEM-97-006 (*Oldman River II*), SEM-02-003 (*Pulp and Paper*), SEM-03-003 (*Lake Chapala II*), SEM-03-005 (*Montreal Technoparc*); SEM-04-005 (*Coal-fired Power Plants*) and SEM-17-001 (*Alberta Tailings Ponds II*).

questions in relation to avocado production in Michoacán and land use changes on forest lands for such purposes. Consequently, it recommends the preparation of a factual record in relation to the effective enforcement of the following provisions:

- i) Article 4 paragraphs five and six of the Constitution;
- ii) LGEEPA Articles 5 sections II and IX, 15 sections III, IV, IX and XII, 19 sections I, II, III, V and VII, 20 *bis* 1, 21, 78, 79 sections I, II, VI and IX, 88 sections I, III and IV, 89 sections II, III, V and XI, 98 and 99 sections IV, V, VII, IX and XII;
- iii) LGVS Articles 1, 4, 5 sections II and V, 6, 9 sections I, II, IV, XVIII and XXI, 18, 19, 20, 70 and 106;
- iv) LGDFS Articles 93, 94, 96, 97, 98 and 99;
- v) LAN Articles 7 *bis* section XI, 9 section XXXVI, 14 *bis* 5 sections IX, X, XI and XII, and 119 sections III, VIII, XVII and XVIII;
- vi) LDRS Articles 165, 170 and 172; and
- vii) LGCC Article 26 sections I, III, IV and XI.

95. In accordance with USMCA Article 24.28(1), the Secretariat hereby notifies the CEC Council and the Chapter 24 Environment Committee of its determination that, in furtherance of the objectives of Chapter 24 of the Agreement,¹²⁶ the preparation of a factual record is warranted in relation to submission SEM-23-002 (*Avocado Production in Michoacán*).

96. Pursuant to the provisions of USMCA Article 24.28(2), the Secretariat “shall prepare a factual record if at least two members of the Council instruct it to do so.”

Respectfully submitted for your consideration,

Secretariat of the Commission for Environmental Cooperation

(original signed)

By: Jorge Daniel Taillant
Executive Director

cc: Miguel Ángel Zerón, Alternate Representative, Mexico
Sandra McCardell, Alternate Representative, Canada
Jane Nishida, Alternate Representative, United States
Environment Committee Contact Points
Paolo Solano, Director of Legal Affairs and Submissions on Enforcement Matters
Submitter

Annex: Environmental laws in question

¹²⁶ USMCA, Article 24.2(2): “The objectives of this Chapter are to [...] promote high levels of environmental protection and effective enforcement of environmental laws [...]”