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Pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (NAAEC or the "Agreement"), the Government of the United Mexican States, in its capacity as Party, hereby provides *ad cautelam* the Party Response to submission SEM-09-001 (Transgenic Maize in Chihuahua), filed by Frente Democrático Campesino, El Barzón, A.C., Centro de Derechos Humanos de las Mujeres, A.C., Greenpeace Mexico, A.C., et al.

I. INTRODUCTION

On 28 January 2009, Frente Democrático Campesino, El Barzón, A.C., Centro de Derechos Humanos de las Mujeres, A.C., Greenpeace Mexico, A.C., et al. (the "Submitters") filed an NAAEC Article 14 submission with the Secretariat of the Commission for Environmental Cooperation (CEC) asserting that Mexico is failing to effectively enforce its environmental law in relation to the control, inspection, investigation, and assessment of the risks associated with transgenic maize in Chihuahua, Mexico.

On 6 January 2009, the Secretariat issued a determination (the "First Determination") in which it found that submission SEM-09-001 did not meet the requirements and criteria of NAAEC Articles 14(1) and (2) and notified the Submitters of the period in which to file a revised submission, which took place on 5 February 2009.

On 3 March 2010, the Secretariat issued a determination (the "Second Determination") in which it decided to request a response from the Government of Mexico in regard to alleged failures to effectively enforce Article 4 of the Political Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*; the "Constitution"), the Cartagena Protocol on Biosafety of the Convention on Biological Diversity (the "Cartagena Protocol"), the Genetically Modified Organisms Biosafety Act (*Ley de Bioseguridad de los Organismos Genéticamente*

Modificados—LBOGM), the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA) and the Federal Criminal Code (*Código Penal Federal*—CPF) in respect of the assertions contained in the aforementioned submissions concerning the acts of various federal authorities.

It also requested a response from the Party in respect of the Submitters' assertions concerning denial of access to justice and lack of technical law enforcement capacity on the part of the Mexican federal authorities, matters which are considered outside the bounds of an NAAEC review of the Parties' effective enforcement of environmental law.

In response to the foregoing, the Government of Mexico has produced this Party Response pursuant to NAAEC Article 14(2) and (3).

First, the Secretariat is notified of the existence of various pending quasi-judicial administrative proceedings and judicial proceedings in Mexico, thus fulfilling the requirement of NAAEC Article 14(3)(a) for automatic termination of submission SEM-09-001, since these proceedings were initiated before a Party in a timely manner and in accordance with its law, and their subjects coincide with the matters raised in the submission.

Following this, several considerations are set out concerning the Party's view that in this case, the requirements and criteria of NAAEC Article 14(1) and (2) were not fully met, and therefore submission SEM-09-001 should have been dismissed.

Irrespective of the foregoing and as explained in detail in the body of this document, the Government of Mexico holds the view that an analysis of submission SEM-09-001 and the applicable legal provisions yields no evidence of any failure to effectively enforce the environmental law.

On the contrary, the information contained in the Response indicates that a legal framework for the comprehensive regulation of activities relating to the use of genetically modified organisms (GMO) is steadily being put in place in Mexico, including prevention of the risks that such activities may pose to human health or the environment and biodiversity, as required by Article 2 of the Cartagena Protocol, which provides that the signatories must take necessary and appropriate legal, administrative and other measures to ensure an adequate level of protection.

This Response presents a detailed analysis of the legal provisions included in the Secretariat's determinations and their relationship to the assertions contained in the submission, including the Party's interpretation of which of these provisions may be considered environmental law in the sense of NAAEC Article 45(2).

From the perspective of the Government of Mexico, the determination of which provisions constitute environmental law pursuant to the Agreement must be done with special care and with adherence to strict criteria

consistent with the purposes of that international instrument and with respect for the scope of cooperation intended by the Parties therein.

Finally, the Party reports a number of activities that have been carried out on an ongoing basis, both in relation to the matters raised in submission SEM-09-001 and additional thereto, with a view to furthering the refinement of the legal and institutional framework for biosafety as well as strengthening the capacity to effectively enforce it in Mexico.

II. NOTIFICATION OF PENDING PROCEEDINGS AS GROUNDS FOR AUTOMATIC TERMINATION OF THE SUBMISSION

[…]

Finally, given that pursuant to Articles 13 paragraph V, 14 paragraphs III and IV, and 15 of the Federal Transparency and Access to Governmental Public Information Act (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*—LFTAIPG), information relating to procedural strategies in judicial or administrative proceedings pending final judgment, criminal investigations, judicial files, and quasi-judicial administrative proceedings pending final judgment is considered classified, the information contained in this section of the Party Response must be treated as such in the present case.

III. CONSIDERATIONS RELATING TO THE DECISION TO ALLOW THE SUBMISSION PURSUANT TO NAAEC ARTICLES 14(1) AND 14(2)

III.1. Non-fulfillment of the NAAEC Article 14(1) requirements

In its First Determination the Secretariat found that the original submission did not meet some of the NAAEC Article 14(1) requirements, since:

- it did not cite the provisions compelling the PGR to inform a complainant of the status of an investigation;
- it did not provide sufficient information to allow for its review, and
- it did not contain information on remedies pursued in relation to the assertions made, and appeared to be based exclusively on mass media reports.

In its Second Determination, having received the revised submission and the complementary information filed by the Submitters, the Secretariat found that the requirements listed in NAAEC Article 14(1) were met.

The Party's view is that the matters raised in the First Determination were not addressed in the revised submission, and hence it should not have been allowed on the basis of the Secretariat's original reasoning, for the reasons set out below:

- **The Submitters do not cite any provision compelling the PGR to**

inform a complainant of the status of an investigation.

The revised submission includes information on the legal provisions governing the powers of the Office of the Public Prosecutor of the Federation contained in Articles 21 and 102 of the Constitution, having regard to the investigation of federal offenses, as well as a transcription of several paragraphs from National Human Rights Commission (*Comisión Nacional de los Derechos Humanos*) General Recommendation 16 in respect of the timetable for finalization of a criminal investigation,[1] *yet nothing in these legal instruments compels the PGR to keep complainants informed of the results of ongoing investigations.*

On the contrary, in the relevant section, the Submitters transcribe Article 5 paragraph IX of the Office of the Attorney General of the Republic Act, which establishes the power of the PGR to:

> IX. Establish systematic and direct channels of communication with society in order to report on its activities. In all cases, information whose disclosure could jeopardize investigations by the Office of the Public Prosecutor of the Federation shall be considered classified, and [the PGR] shall preserve the confidentiality of personal data, pursuant to the provisions of the Federal Code of Criminal Procedure and any other applicable provisions….

The provision cited by the Submitters establishes the PGR's *power,* not its *obligation,* to inform not specifically the Submitters but all of society about its activities, and for greater clarity, it underscores the duty not to disclose information whose disclosure could jeopardize investigations by the Office of the Public Prosecutor of the Federation, pursuant to the applicable procedural law.

In direct agreement with the foregoing, on 23 January 2009 an amendment to the CFPP was published in the DOF to the effect that the information contained in criminal investigations is *classified* (*estrictamente reservada*)*:*

> Article 16. …
>
> Only the defendant, his council, and the victim or aggrieved party or his legal representative shall have access to the criminal investigation file. The criminal investigation as well as all documents, regardless of their content or nature, and the objects, voice recordings, and images or things related to it are classified.
>
> For the purposes of access to governmental public information, only where there is a decision of *nolle prosequi* is a public version of that decision required, provided that a period equal to the statute of limitations for the offenses in question has run, in accordance with the provisions of the Federal Criminal Code, which period may not be less than three nor greater than twelve years following the date when such decision is made final.
>
> Where a decision of *nolle prosequi* results from a lack of information establishing that the offense was committed, the Office of the Public

[1] Published in the DOF on 4 June 2009.

> Prosecutor may provide information in accordance with the applicable provisions, provided that no investigation is thereby put in jeopardy.
>
> In no instance may there be any reference to confidential information relating to the personal data of the defendant, the victim, or the aggrieved party, as well as witnesses, public servants, or any person related to or mentioned in the investigation.
>
> The Office of the Public Prosecutor may not provide information to anyone without a legitimate right to it once the prosecution is in progress.
>
> Any public servant who violates the duty not to disclose information relating to the criminal investigation or provides copies of any documents it contains is liable to the applicable administrative or criminal liability proceeding….

Thus, the legislation governing the operations of the Office of the Federal Public Prosecutor does not compel the PGR to inform the Submitters, in the manner they think is appropriate, about the progress of ongoing criminal investigations. In fact, the aforecited legislation requires the Office of the Public Prosecutor *not to provide information to the Submitters unless they are also defendants, their representatives, or victims,* which is not the case in any of the ongoing proceedings. The Government of Mexico holds the view that the Secretariat's request for the Submitters to state precisely *which provisions compel the PGR to inform the Submitters of progress on the Party's ongoing investigations* was not addressed, since on the contrary, the explanations given in the revised submission, as well as the aforementioned provisions, clearly illustrate the classified nature of the information in pending proceedings before the Party.

It should also be noted that neither the original nor the revised submission presents any documentary evidence to support the Submitters' assertions concerning denial of information; thus, the decision to allow the submission and the request for a Party Response including information on the alleged lack of transparency and timeliness of the Party's domestic proceedings violates Article 14(1)(c) of the Agreement.

The provisions cited by the Submitters and, in general, the assertions concerning the alleged lack of transparency and timeliness in the pursuit of the Party's domestic administrative and judicial proceedings in no way constitute environmental law in the sense of NAAEC Article 45(3), since in any case they would refer to evaluation of the effective administration and delivery of justice under domestic policies and institutions. For this reason, their inclusion in the Secretariat's Determination with a view to their possible consideration in a factual record exceeds the scope of the citizen submission procedure and, indeed, of the NAAEC itself.

In addition to the foregoing, the Government of Mexico is of the view that, even if the existence of an obligation on the part of the PGR to provide information on ongoing criminal investigations were substantiated, as submission SEM-09-001 maintains, the CEC citizen submission procedure does not constitute the appropriate forum in which to pursue this access to

information request; for this purpose, the Submitters have various channels through which they can apply to the competent national bodies.

- **The submission does not provide sufficient information for the Secretariat to review it.**

In its First Determination, the Secretariat found that in order to meet the NAAEC Article 14(1) requirements, the Submitters had to add documentary information other than that appearing in mass media reports in order to support their assertions, "such as the Senasica report, information about the maize landraces and species of teocintle found in Chihuahua, or information about the alleged consequences of the release of genetically modified organisms for human health and biodiversity," and that "[s]uch information was not included with the Submission."

In response to the Secretariat's request, the revised submission contains as appendices various scientific and academic publications containing general information on the characteristics of GM maize that is not directly related to any of the assertions of alleged acts indicating a failure to effectively enforce the environmental law, nor does it support the Submitter's assertions.

The Secretariat itself confirms the foregoing in its Second Determination when it states that:

> While some of the documents *have no direct bearing on the assertions in the submission*, since they refer to the biological effects of consuming transgenic maize, and to biodiversity and traditional knowledge of maize, *the revised submission also includes documents serving as background information to its assertions*, including the proceedings of a workshop on identification and production of maize centers of origin; a consensus document issued by the Organization for Economic Cooperation and Development (OECD); a compilation on the origin and diversification of maize in Mexico; a study on the context of wild and cultivated maize in Mexico produced as part of a report published by the Secretariat under NAAEC Article 13; a copy of an issue of *Ciencias,* a publication of the Faculty of Science of the Universidad Nacional Autónoma de Mexico, on the topic of transgenic maize in Mexico; and a copy of a paper on the origin and diversity of maize in the Americas published by one of the Submitters.[2] (Emphasis added.)

As may be observed, the information presented by the Submitters merely illustrates the generic context for scientific and academic debate around the issues implicit in the matters relating to the use of GMOs. The Secretariat's acknowledgment of this fact did not prevent it from concluding that the revised submission contains sufficient information to support the assertions made.

Along these same lines, the Secretariat proceeds to list the information presented by the Submitters, which does not refer directly to any of the assertions contained in submission SEM-09-001, nor to specific issues

[2] Second Determination, p. 10.

connected with failures to effectively enforce the environmental law; on the contrary, this information emphasizes the technical difficulties inherent in the handling of GM maize. For example, the Conabio document[3] states that while "no solid scientific evidence of harm to biodiversity, the environment, or human health from the environmental release [of living modified organisms in agriculture] has been found", it is acknowledged that the case of transgenic maize has certain particularities, since "it is open-pollinated and is also the agricultural species with the widest known genetic diversity, allowing it to be grown in a broad range of environments."

The Secretariat finds, for example, that the presentation of a Conabio report recommending that a safety protocol for the release of GM maize be put in place and that the competent institutions be allowed to participate in this regard constitutes sufficient information to review the submission's assertions of failure to effectively enforce the environmental law in connection with safety measures for the safe release of transgenics, even though that information is not supported by any documentary evidence in the revised submission indicating that the Government of Mexico does not possess adequate safety protocols or that the applicable safety measures are not being implemented.

Similarly, the Secretariat affirms that the revised submission includes sufficient documentation to support the assertions on the alleged failure to address complaints and the alleged lack of capacity to investigate and prosecute violations relating to the illegal presence of GM seeds in maize crops, including complaints filed with the PGR and appearances of the complainant before the investigating body, which is inaccurate, since the information presented does not possess the scope that the Secretariat claims.

Ad cautelam, it is felt necessary to emphasize that the Government of Mexico holds the view that matters potentially related to access to justice and assessment of the Party's institutional capacities do not constitute matters within the scope of the NAAEC since: i) they do not refer to the effective enforcement of environmental law in the sense of Article 45(2) of the Agreement, and ii) they relate to assessment of the effectiveness of the Parties' policies, laws, and institutions.

This Party's view is that the information provided by the Submitters in response to the Secretariat's request does not evidence that the requirement of NAAEC Article 14(1) has been met.

While the Submitters attach to the revised submission copies of the complaints they filed with the PGR headquarters and Chihuahua office, their testimony before the PGR, a clarifying document, a document providing evidence, and an addendum to a complaint, these documents only demonstrate the access that the Submitters have to legal channels through which they can challenge conduct, in the case of unidentified individuals

[3] The Secretariat makes reference to the Conabio document titled *Documento base sobre centros de origen y diversidad en el caso de maíz en Mexico.*

whom they may believe to have committed an offense, but these documents in no way substantiate any obligation on the part of the authority responsible for criminal investigations nor any failure to effectively enforce the environmental law by this Party.

Irrespective of the foregoing, it should be noted that in these documents, the complainants, now the Submitters, based their complaint on facts reported in the mass media, since the complaints were filed following the appearance of various articles in national and local newspapers and not, as the Secretariat affirms, based on "the Submitters' direct knowledge of the facts."[4]

In addition to the foregoing, in its First Determination, in relation to the alleged citizen complaint filed by the Submitters with the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente*—Profepa),[1] the Secretariat concluded that "*when the Submitters cite provisions applicable to the citizen complaint process* and to administrative proceedings, *they state that they pursued remedies before Profepa* and that Mexico has allegedly not properly processed 'administrative proceedings and remedies filed by the Submitters,' *yet they do not include the corresponding documentary evidence*".[2] (Emphasis added.)

If it is considered that the revised submission does not make any specific reference to the alleged citizen complaint filed with Profepa that can serve to identify the administrative unit it was filed with, the date, or the specific procedure, nor does it present any relevant documentary evidence, such as copies of the complaint itself showing evidence that it was indeed received by Profepa, it is evident that the Submitters did not address the Secretariat's request, and therefore there is no justification for allowing the submission in question.

In view of the foregoing, there is also no basis for the Secretariat to request, as it did in its Second Determination, information on the alleged failure to enforce LGEEPA Articles 189, 190, 191, 192, 193, 201, and 202 concerning the citizen complaint procedure, since this request was made in the First Determination, where it was indicated that this information was necessary in order to decide on whether the submission was eligible for review. Thus, as discussed in greater detail in the following sections of this document, if an eligibility requirement was not met, there is no validity or legal basis for requesting that information again.

III.2. Failure to fulfill the NAAEC Article 14(2) criteria

In its First Determination, the Secretariat referred to its duty to ascertain, during the initial review of a submission, whether the submission meets the criteria of NAAEC Article 14(2), pursuant to section 5.6 of the Guidelines.

[4] Second Determination, p. 14.
[1] Original submission, pp. 2, 6.
[2] First Determination, p. 11.

For the specific case of this review, the Secretariat concluded that "the Submitters do not attach other documentary information not drawn from mass media reports to support their assertions," and requested that information meeting this requirement, such as "the Senasica report, information about the maize landraces and species of teocintle found in Chihuahua, or information about the alleged consequences of the release of genetically modified organisms for human health and biodiversity," be included in a revised submission. The Secretariat notes, "Such information was not included with the Submission."

Despite this determination, the Submitters do not present additional information in the revised submission from which it may be inferred that they had direct knowledge of the facts they assert, since the documentation and information they attach refers exclusively to: i) complaints and other documents filed with federal and local authorities in order to bring to their knowledge information contained in media reports; ii) a transcription of various legal provisions; iii) several jurisprudential judgments (*tesis jurisprudenciales*); iv) other media reports; v) scientific articles concerning the characteristics of GM maize, and vi) Sagarpa Memo CSCH 30 09 08 and Bulletin 183/08.

These documents do not constitute documentary evidence supporting the assertions in submission SEM-09-001, nor are they derived from sources of knowledge different from media reports. Consequently, the Submitters did not address what the First Determination required, and the result should therefore have been a finding that the revised submission, too, failed to meet the NAAEC Article 14(2) criteria.

An example of the foregoing is obtained by analyzing the following aspects of the information presented by the Submitters:

- In a complaint filed with the Sagarpa office in Chihuahua, the complainants state that […]

- The complaint filed with the PGR on 3 October 2007 by the legal representative of Greenpeace Mexico A.C. refers to facts derived from an article published in the newspaper *Reforma* on 25 September 2007.

- The addendum to the criminal complaint filed by the legal representative of Greenpeace Mexico A. C. on 30 September 2008 states as follows in support of its assertions: "as appears from the article by Edna Martínez […]

  […]

Concerning Sagarpa Memo CSCH 30 09 08 and Bulletin 183/08, the Party maintains that they do not prove the Submitters' direct knowledge of the facts complained of, but in fact constitute a method of information in which the competent authority itself, to promote the principle of transparency in

respect of the information in its possession, informs the public of precautionary measures it has taken to verify compliance with the provisions applicable to biosafety in Mexico.

As to the letters sent to José Reyes Baeza, governor of the state of Chihuahua, the letter of 28 October 2008 addressed to the governor, a copy of which was attached to the revised submission and relayed to this Party along with the request for this Response, does not bear the signature of any representative of the communities mentioned therein, nor does it bear any proof that it was indeed delivered to the governor of the state of Chihuahua.

Finally, concerning the letter from Greenpeace of 16 October 2008 proposing biosafety measures for adoption in the state of Chihuahua, it is not substantiated that this document was addressed to the state governor nor is there evidence, among the documentation sent to this Party as appendices to the revised submission, of his acknowledgment of receipt.

The foregoing exposition leads this Party to the position that the assertions made by the Submitters and the remedies pursued with the Sagarpa office in Chihuahua, the PGR, and the PGR office in Chihuahua, are based exclusively on information provided in the media, and so, pursuant to Article 14(2) of the Agreement, the submission does not meet the requirements for review.

In view of the foregoing, the Government of Mexico holds the view that submission SEM-09-001 does not meet the requirements for review by the Secretariat and that, in any case, it should be terminated due to the notification of pending proceedings before the Party. Notwithstanding the foregoing, the Party does not acknowledge as true any of the Submitters' assertions concerning any of the municipalities mentioned in the submission, nor in respect of the effective enforcement of the legal provisions cited. The CEC Secretariat is hereby requested to consider each and every one of these assertions to be responded to with the information provided in the following sections.

IV. CONSIDERATIONS RELATING TO DOMESTIC PROVISIONS CONSIDERED ENVIRONMENTAL LAW UNDER NAAEC ARTICLE 45(2) AND THEIR SCOPE WITH RESPECT TO SUBMISSION SEM-09-001

IV.1. Article 4 of the Constitution

The fourth paragraph of Article 4 of the Constitution establishes the right of everyone to live in an environment that is adequate for their development and well-being.

Concerning its inclusion in submission SEM-09-001, the Secretariat noted the following in its First Determination:

> Regarding Article 4 of the Political Constitution of the United Mexican States, the Secretariat has determined that it can analyze portions of this provision where the analysis is conducted in relationship with the environmental law in question. However, such an analysis would be limited to the fourth paragraph of Article 4 of the Mexican Federal Constitution.[5]

This Party concurs with the Secretariat's interpretation in the sense that the guarantee contained in Article 4 cannot be made effective in isolation, but rather through secondary legislation enacted by the Congress of the Union by virtue of its powers under paragraph XXIX-G of the Constitution to enact laws establishing the contributions of the authorities of the three orders of government, within their respective jurisdictions, to environmental protection and to preservation and restoration of ecological stability.

This interpretation also finds its basis in the preliminary recitals of the constitutional reform bill inserting the fourth paragraph of Article 4, where it is explained that:

> the entrenchment of this right in the body of the Constitution will provide a clear and unequivocal basis for its regulation, *through secondary legislation* as well as the exercise of the powers of the Federation, the federated entities, and the municipalities in the area of environmental protection and preservation of ecological stability, which shall be exercised by the administrative authorities for the benefit of the holders of the subjective public right granted.[6] (Emphasis added.)

Thus, it is the secondary legislation that must establish the mechanisms to make this constitutional right effective, by means of regulation of the principles, policy instruments, criteria, remedies, and other legal instruments necessary to realize this right, as the Federal Judicial Branch (*Poder Judicial de la Federación*) has clearly determined as follows:

> **ADEQUATE ENVIRONMENT FOR DEVELOPMENT AND WELL-BEING. CONCEPT, REGULATION, AND REALIZATION OF THIS GUARANTEE.[7]**
>
> Article 4, fifth paragraph, of the Political Constitution of the United Mexican States, added 28 June 1999, enshrines the subjective right of every individual to an *adequate environment* for their development and well-being. Thus the preservation and restoration of ecological stability and the protection of the *environment* in Mexico are directly governed by the Constitution, in view of the great relevance of this matter. Indeed, protection of the environment and natural resources is of such great importance that it is integral to the "social interest" of Mexican society and entails and justifies, to the extent that they should

[5] First Determination, p. 5.
[6] http://www2.scjn.gob.mx/leyes/Default.htm
[7] Novena Época, Body: Tribunales Colegiados de Circuito, Source: Semanario Judicial de la Federación y su Gaceta, XXI, January 2005, p. 1799, Tesis: I.4o.A.447 A, Tesis Aislada, Area: Administrativa.

> prove unavailable, all those strictly necessary restrictions conducive to preserving and upholding this interest, specifically *in the laws establishing public order.* Thus, for example, sections 5.8.7 and 5.8.7.1 of Emergency Mexican Official Standard NOM-EM-136-ECOL-2002, "Environmental protection – specifications for conservation of marine mammals in captivity," prohibit the temporary or traveling exhibition of cetaceans. *Now, a systematic, causal, purposive, and principled interpretation of Articles 4 fourth paragraph, 25 sixth paragraph, and 73 paragraph XXIX-G of the Federal Constitution indicates that they protect the right of persons to an adequate environment for their development and well-being, to the adequate use and enjoyment of natural resources, to the preservation and restoration of ecological stability, and to sustainable development. The protection of an adequate environment for development and well-being, as well as the need to protect natural resources and to preserve and restore ecological stability, are fundamental principles that the Constitutional Convention sought to protect, and while it does not concretely and specifically delineate how this protection is to be effected, its content must indeed be defined based on a systematic, coordinated, and complementary interpretation of those legal provisions intended to identify, clarify, and promote the fundamental principles and values that inspired the Constitutional Convention.* FOURTH COLLEGIAL ADMINISTRATIVE TRIBUNAL OF THE FIRST CIRCUIT. (Emphasis added.)

Thus, it must be concluded that in Mexico, the right enshrined in the fourth paragraph of the Constitution is made effective through laws enacted by the Congress of the Union on the basis of Article 73 paragraph XXIX-G of the Constitution, to the end of *protecting the right of persons to an adequate environment for their development and well-being, and these laws include the LGEEPA, the Wildlife Act (Ley General de Vida Silvestre), the Sustainable Forestry Development Act (Ley General de Desarrollo Forestal Sustentable) and the Comprehensive Waste Prevention and Management Act (Ley General para la Prevención y Gestión Integral de los Residuos)*. Thus, an assessment of its effective enforcement can only be obtained from a systematic, comprehensive, and complementary interpretation of the provisions of any secondary legislation that may be applicable to the assertions contained in submission SEM-09-001, which is analyzed in the following sections of this Party Response.

IV.2. Cartagena Protocol

In its First Determination, the Secretariat required additional information from the Submitters in order to determine the extent to which the Cartagena Protocol is linked to assertions concerning the effective enforcement of environmental law by the Government of Mexico, so as then to determine whether this instrument meets the NAAEC Article 45(2) definition. The Secretariat wrote:

> The Secretariat notes that while the Submission describes alleged failures in effective enforcement of some parts of the Mexican Federal Laws quoted in

> the Submission, it fails to fully do so with regard to the Cartagena Protocol. The Submitters may further elaborate on their assertions concerning the Cartagena Protocol, *having due regard to Guideline 5.1 by focusing on "any acts or omissions of the Party asserted to demonstrate such failure", in a revised submission*.[8] (Emphasis added.)

In the revised submission, the Submitters maintain that with the entry into force of the Cartagena Protocol, the Mexican authorities became obligated to enforce the provisions of that international treaty, expressly acknowledging that the LBOGM *"represents the instrument whereby the Biosafety Protocol is incorporated into domestic law."*[9]

Thus, without providing the further information required by the Secretariat, the Submitters make a general assertion that the Government of Mexico has not fulfilled its obligations under the Cartagena Protocol in connection with alleged occurrences in the municipalities of Cuauhtémoc, Namiquipa, Buenaventura and Ascensión of the state of Chihuahua, since:

- No legislative, administrative, or other measures have been taken to ensure an adequate level of protection.

- Despite the alleged entry and planting of GM maize in the Chihuahua region, no risk assessment has been performed, nor has the principle of prior informed consent been applied.

- There are no adequate measures to control and supervise storage, distribution, and marketing centers, nor do the customs authorities have inspection, monitoring, and surveillance processes.

In its Second Determination, the Secretariat concluded that the Cartagena Protocol "appears to constitute domestic law in Mexico," and requested a Party Response in respect of the effective enforcement of the provisions contained in Articles 2 (paragraphs 1 and 2), 8 and 9 (with the exception of paragraph 3), 10 (with the exception of paragraph 7), and 15 and 16 (with the exception of anything that may include the taking of legislative measures), having regard to "the provisions relating to measures that Mexico must take to implement its obligations; the rules applicable to notification in connection with living modified organisms; the decision procedure in connection with transboundary movement of living modified organisms, and risk assessment and risk management."

In this regard, the Government of Mexico acknowledges that the Cartagena Protocol, as an international instrument arising under the Convention on Biological Diversity, was incorporated into the domestic legal framework by being signed and ratified in accordance with the Constitution.

However, as the Submitters themselves acknowledge, the Cartagena Protocol is not enforced directly in the domestic sphere but by means of the

[8] First Determination, p. 6.
[9] Revised submission, p. 7.

formal requirements for the incorporation of international law into our country's substantive law, as is the ordinary procedure, in which, according to the importance of the matter governed by the treaty in question, the adaptation takes place by means of domestic provisions (constitutional, legislative, administrative, etc.), with amendment or, as necessary, enactment of those domestic laws necessary to guarantee that the standards and procedures in question can be enforced in the domestic sphere.

The following jurisprudential criterion serves as a basis for the foregoing:[10]

> INTERNATIONAL TREATIES. INCORPORATED INTO DOMESTIC LAW. THE ANALYSIS OF THEIR UNCONSTITUTIONALITY INCLUDES THAT OF THE DOMESTIC PROVISION.
>
> The Mexican government has its own legal system, and likewise forms a part of the international community. Given this duality, ensuing from the coexistence of local legal systems with international provisions, *a distinction arises between domestic or internal law and international or supranational law, according to the source from which they arise and their spatial domain of applicability.* This being the case, the jurisdictional body must give substantive consideration to the existence of international provisions that have been incorporated, through the use of the constitutional mechanism, into the domestic legal order, *as well as to those local provisions whose purpose is to establish, in a given case, which is the applicable provision governing the juridical act in issue.* Therefore, it cannot be decided in a general and absolute manner that foreign substantive law cannot be applied by the domestic jurisdictional body, since in Mexico there exist federal provisions, such as Articles 14 and 133 of the Constitution and Article 12 of the Federal Civil Code, setting out specific criteria that must be considered in order to arrive at a resolution, based in law and in fact, of an issue of this nature and, ultimately, to determine whether or not the application of foreign substantive law is appropriate in any given case. Thus, for example, it is evident from Article 133 of the Constitution that international sources of law include treaties or conventions constituting agreements between subjects of the international legal order (states and international organizations) that are entered into and take into account matters of international law. Hence with the grammatical interpretation of the first part of Article 133, in order to hold that a treaty is "the Supreme Law of the Whole Union" alongside the laws ensuing from the Constitution and enacted by the Congress of the Union, it must satisfy two formal requirements and one substantive requirement. The former consist in the treaty's being signed by the President of the Republic and ratified by the Senate, while the substantive requirement consists in the constitutionality of the international convention itself. *In respect of the formal requirements having regard to the incorporation of international law into the substantive law of our country, two procedures are described: 1) the ordinary procedure, in which the instrument is adapted in the form of domestic provisions (constitutional, legislative, administrative, etc.), and 2) the special procedure, also known as referral (remisión), in which the international rule is not reformulated, but rather the organs of the State*

[10] Novena Época, Body: Tribunales Colegiados de Circuito, Source: Semanario Judicial de la Federación y su Gaceta, XXVI, July 2007, p. 2725, Tesis: I.3o.C.79 K, Tesis Aislada, Areas: Civil, Común.

> *simply order compliance with it. This second procedure has two variants: a) a requirement for the existence of an implementing order, in the case of treaties, and b) the automatic procedure, in the case of international custom.* In addition, in the case of international treaty law, one must consider what the treaty itself provides on the matter. Thus, where adaptation of international to domestic law is concerned, the special procedure predominates. However, where the ordinary procedure applies, in situations in which our country not only notes the necessity of observing the content of the international treaty but also deems it appropriate, given the importance of the matter governed by the treaty in question, *to incorporate the international instrument into domestic law by means of the ordinary incorporation procedure, this is done by revising domestic statutes or, where applicable, by enacting new laws pursuant to the provisions of the treaty.* Therefore, where the act of authority challenged by amparo is founded on the international treaty as well as on the provision of domestic law, and this latter has already been found to be constitutional by our Supreme Court, any arguments seeking to demonstrate the unconstitutionality of the international treaty that gave rise to the enactment of the domestic provision must be dismissed pursuant to the grounds of invalidity contemplated in Article 73 paragraph XVIII, in relationship to Article 80, of the Amparo Act, since an analysis of the reasoning behind the act of enforcement of the international treaty would not produce anything useful. This is because the criteria set out in Article 80 of the Amparo Act could not be met, for if the challenged act is not founded solely on the international treaty but also on a legal provision whose existence derives from the international treaty and whose constitutionality has been declared by the Supreme Court, the complainant's enjoyment of the individual guarantees asserted to be violated could not be restored, since the constitutionality of the act of enforcement would be supported by the remaining precepts already held to be constitutional. THIRD COLLEGIAL CIVIL COURT OF THE FIRST CIRCUIT.
>
> Amparo review 398/2006. José Martín Roiz Rodríguez. 24 May 2007. Unanimous. Presiding: Justice Víctor Francisco Mota Cienfuegos. Secretary: María Estela España García.

Thus, the LBOGM was enacted on 18 March 2005, becoming the instrument whereby Mexico incorporated the provisions of the Cartagena Protocol into its domestic legal framework so that it can be enforced in Mexico.

As reaffirmation of the foregoing, the preliminary recitals of the act in question expressly state as follows:[11]

> … the object of this bill, in accordance with the Protocol, is to regulate the contained use, experimental release, pilot program release, commercial release, marketing, and import of GMOs with a view to preventing, averting, or reducing the risks that such activities may pose to the environment and biological diversity, comprising both transboundary movement (import) and activities carried out in the nation's territory.
>
> This bill contemplates a broader scope of protection than that established in

[11] The documents relating to the LBOGM legislative process are available at http://www2.scjn.gob.mx/leyes/Default.htm

> the international treaty, since in addition to human health, the environment, and biological diversity, protection against the possible adverse risks of GMOs extends to animal, plant, and aquaculture health, due to their importance in biodiversity as well as to their use or to their direct or indirect consumption by human beings.[12]

In regard to the enforcement of the Cartagena Protocol in the domestic sphere, the preliminary recitals of the bill further states as follows:

> … comprises the scope necessary for the application in Mexico of domestic instruments, procedures, and institutions consistent with the national legal system, such that the provisions of this Act and not those of the Cartagena Protocol would be directly applicable to transboundary movements of genetically modified organisms. Therefore, special care has been taken with this bill to ensure its compatibility with the object and purpose of the Protocol.
>
> With domestic legislation on biosafety in place, the provisions of the Protocol would be enforced with the enactment of the law itself and through its enforcement by the competent bodies. In addition, its structure and integrity would be such that no other legislative provisions would be required in order to regulate the biosafety of activities with GMOs, since all aspects thereof would be contemplated in the Act hereby proposed and in the regulatory provisions ensuing from it. No other legal provisions would be necessary, not even those currently in force, in order to guarantee the protection of human health, the environment, and biological diversity.

Similarly, in the report produced by the Originating Chamber during the legislative process leading to the promulgation of the LBOGM, the federal legislators stated that:[13]

> … Further to the input provided by the participants in the consultation process, a systematic review of the bill was conducted, for the fundamental purpose of ensuring compatibility and full compliance with the content of the Cartagena Protocol on Biosafety of the Convention on Biological Diversity, so as to provide certainty that with the enactment of the LBOGM, the administrative authorities competent to enforce it, as well as the persons obligated to comply with it, have the assurance that by complying with the provisions of this Act, they will be adhering to the requirements of that international instrument. With the promulgation of this Act, the Government of Mexico would be fulfilling the commitment set out in the Protocol in terms of the enactment of the relevant domestic provisions with content adhering to the guidelines, instruments, and mechanisms set out in the Protocol, such that the enforcement of the prior informed consent procedure set out in the international treaty would be unnecessary, since this bill would fully govern that matter. The need to ensure that the LBOGM bill has such scope has given rise to various amendments and additions to the bill, consistent with the specific points of view expressed during the consultation process, which are discussed below.

Now, concerning enforcement of the Cartagena Protocol in Mexico, the

[12] http://www2.scjn.gob.mx/leyes/Default.htm
[13] Ibid.

Submitters do not provide information sufficient to analyze *in what measure the Cartagena Protocol is linked to assertions concerning the effective enforcement of environmental law*, even though this was requested by the Secretariat in its First Determination. The Submitters limit themselves to making statements about events that may possibly be occurring in Mexico, without providing any documentary evidence that this is so. Thus, in response to the matters for which the Secretariat has requested a response from the Party, we proceed to explain how said international instrument is enforced in Mexico by means of its incorporation into domestic legislation.

i) Article 2(1) and (2) of the Cartagena Protocol in relation to "the provisions concerning the adoption of measures to fulfill its obligations"

Article 2(1) and (2) of the Cartagena Protocol establishes the following general provisions:

1. Each Party shall take necessary and appropriate legal, administrative and other measures to implement its obligations under this Protocol.

2. The Parties shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health.

As discussed above, the Government of Mexico enacted the LBOGM (legislative measures), comprising the entirety of the aspects covered by the Cartagena Protocol, and took various measures to permanently strengthen the domestic legal framework for biosafety through the enactment of various regulatory provisions discussed at greater length in section V of this Party Response, including the LBOGM Regulation and its amendments establishing the Special Protection Regime for Maize (administrative measures).

Additionally, for the effective enforcement of the legal framework in question, the Party has implemented various measures of other kinds, including the creation of the Interministerial Commission on Genetically Modified Organisms (*Comisión Intersecretarial de los Organismos Genéticamente Modificados*—Cibiogem), the Mexican Genetically Modified Organisms Monitoring Network (*Red Mexicana de Monitoreo de Organismos Genéticamente Modificados*), and the Living Modified Organisms Information System (*Sistema de Información de Organismos Vivos Modificados*—SIOVM).

In regard to the enforcement of Article 2(2) of the Protocol, the object of the LBOGM is to regulate the contained use, experimental release, pilot program release, commercial release, marketing, import, and export of GMOs, with a view to preventing, averting, or reducing the risks that these activities may pose to human health or the environment, and to biodiversity or animal, plant, and aquaculture health (Article 1).

ii) Articles 8, 9 (with the exception of paragraph 3) and 10 (with the exception of paragraph 7) of the Cartagena Protocol, in relation to the rules applicable to notification of living modified organisms (LMO) and the decision-making procedure for transboundary movement of a LMO

The cited articles establish the exporter's obligation to give prior written notification to the competent domestic authority of the Party of import prior to the transboundary movement of a LMO, and the acknowledgment of receipt of such notification by the Party of import.

Since Article 8 of the Cartagena Protocol refers to the *export*-related requirements to which the Party must adhere, while the Submitters' assertions refer to alleged failures of domestic enforcement in connection with the *import* of GMOs, it is not evident in principle how this provision is applicable to the case at hand.

Article 9 of the Protocol, for its part, establishes the obligation of the country of import, *in the event of receiving the relevant notification,* which did not occur in this case, to acknowledge receipt thereof.

As may be ascertained from a reading of submission SEM-09-001, the assertions made in respect of these provisions refer to alleged illegal acts of import or possible "contraband" in GMOs. Therefore, it is evident that the submission refers to alleged acts carried out in violation of the putative exporters' obligation to make the relevant notifications to the Government of Mexico.

In this context, it is likewise not evident how Article 9 of the Cartagena Protocol is applicable, since the only possible analysis of an alleged failure to effectively enforce the environmental law that could be eligible for the NAAEC procedure has to do with whether, *having received notification from an exporter,* the Government of Mexico acknowledged receipt thereof.

The foregoing considerations also apply to Article 10, concerning the decision-making procedure of the Party of import, having regard to the risk assessment contemplated in Article 15 of the Protocol. The procedure includes communication, by the Party of import to the notifier, of unconditional authorization, conditional authorization, or prohibition of the transboundary movement in question.

For greater clarity, the Submitters refer in their assertions to the possible illegal import of GM maize as follows:

> The Government of Mexico has failed to enforce the provisions of Articles 4, 6, 7 first paragraph, 8, 9, and 10 of the Cartagena Protocol, in connection with risk assessment of GMOs for their deliberate introduction into the environment prior to their first intentional transboundary movement (Article 15 of the Cartagena Protocol), prior to the taking of national decisions regarding their importation.

> In addition, the *illegal presence* of GMOs in the state of Chihuahua is due to the absence of adequate monitoring and surveillance mechanisms on the Mexican border, *since there is a high probability that contraband GM seeds are coming into Mexico* without prior risk analysis or application for authorization.
>
> These cases of lack of inspection and monitoring of the entry of grains and seeds at Mexican customs facilities illustrates the lack of capacity to perform inspection and surveillance at border crossings. A serious problem affecting the health of Mexican citizens is *the probability that non-food-grade GMOs are illegally entering the country*.…[14] (Emphasis added.)

Thus, it is evident that the Submitters did not provide information to support their assertions on the failure to effectively enforce the environmental law by the Government of Mexico in respect of Articles 8, 9, and 10 of the Cartagena Protocol. The assertions in question refer to allegations of "the strong probability that acts of contraband*"* in non-food-grade GM maize are taking place in Mexico, but never refer to matters that are in fact taking place, as required by Article 14(1) of the Agreement, and thus they should not be included in this citizen submission proceeding.

Notwithstanding the foregoing, another object of the LBOGM is to establish the legal framework for the import of GMOs, including matters relating to compliance with Articles 8, 9, and 10 of the Cartagena Protocol, *inter alia,* by means of the import permitting system for GMOs, including those intended for human use or consumption or for processing of food for human consumption, for the purpose of marketing them and importing them for market (Articles 1, 2 paragraph VII, 5).

Article 18 of the same Act establishes the powers of the Ministry of the Treasury and Public Credit (*Secretaría de Hacienda y Crédito Público*—SHCP) in respect of the import of GMOs and products containing them, including:

> I. Verifying at points of entry into the nation's territory that GMOs imported and intended for environmental release or for the purposes set out in Article 91 of this Act are covered by the relevant permit and/or authorization, as applicable pursuant to this Act;
>
> …
>
> IV. Immediately notifying Semarnat, Sagarpa, and/or the Ministry of Health of probable violations under this Act in connection with the import of GMOs, and
>
> V. Preventing the entry into the nation's territory of GMOs and products containing them, in cases where such organisms and products are not covered by import permit and/or authorization, whichever applies, pursuant to this Act.

[14] Original submission, pp. 8-9.

Article 32 of the Act provides, as a mechanism for giving the notification contemplated in Articles 8 and 9 of the Cartagena Protocol, the requirement to obtain a permit for experimental, pilot program, and commercial environmental release, including import for such activities.

Under article 36, permits for experimental, pilot program, or commercial release of GMOs into the environment have the effects of permits to import such organisms under the terms and conditions set out in the permits themselves. No import permit shall be granted for GMOs or products containing them in cases where such organisms are prohibited in the country of origin or are classified as not permitted for commercial release or for import for that purpose (Article 40).

LBOGM Articles 42, 43, 50, 51, 55, and 56 set out the criteria that must be met by applications for permits for experimental, pilot program, and commercial environmental release of GMOs, including their import for such purposes, as well as the studies of risk to the environment and biological diversity, the monitoring measures and procedures for the activity and for biosafety, and the information and documentation substantiating that release of the GMO is permitted under the laws of the country of origin, at least at the experimental stage, attaching for such purposes the official authorization or documentation covering this situation.

Article 119 paragraph XV sets out, as a criterion defining administrative violations, the situation in which anyone, with full knowledge that GMOs are at issue:

> XV. Imports GMOs that are prohibited in the country of origin or classified as not permitted for commercial release or for import for such purpose on the lists to which this Act refers, where the competent Ministries have not positively determined that said prohibitions are not applicable in the nation's territory;

iii) Articles 15 and 16 of the Cartagena Protocol (with the exception of anything that may include the taking of legislative measures), in relation to risk assessment and management

Article 15 refers to the Party of import's obligation to ensure that risk assessments are performed prior to transboundary movement, with adherence to sound scientific procedures and taking account of recognized risk assessment techniques for determining and assessing the possible adverse impacts of LMOs on the conservation and sustainable use of biological diversity and the risks to human health.

Article 16 governs risk management, taking into account Article 8(g) of the Convention on Biological Diversity, having regard to *in situ* biodiversity conservation measures, including the obligation of the parties, to the extent possible and as applicable, to "establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and

sustainable use of biological diversity, taking also into account the risks to human health."

Under Article 16 of the Cartagena Protocol, the Parties have the obligation to establish and maintain appropriate mechanisms, measures and strategies to regulate, manage and control risks associated with the use, handling and transboundary movement of LMOs, including: i) measures based on risk assessment within the territory of the Party of import; ii) appropriate measures to prevent unintentional transboundary movements of LMOs, including risk assessment to be carried out prior to first release; iii) verification that any LMO, whether imported or locally developed, has undergone an appropriate period of observation that is commensurate with its life-cycle or generation time before it is put to its intended use; iv) cooperation to identify LMOs or specific traits of LMOs that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and the taking of appropriate measures regarding the treatment of such LMOs or specific traits.

Mexico has incorporated the aforementioned provisions into its domestic legal system, principally in the form of the LBOGM, which expressly includes among its objects the establishment of administrative procedures and criteria for assessing and monitoring the risks that activities with GMOs may pose to human health or the environment and biological diversity or to animal, plant, or aquaculture health (Article 2).

Risk assessment and management are contemplated in the Act as guiding principles of national biosafety policy, as requirements in the context of authorizations for the release of GMOs and, in particular, within Chapter III of Title Two, "Risk Study and Assessment."

For reference, LBOGM Article 9 includes the following among the principles that shall govern the formulation and conduct of biosafety policy and the promulgation of the corresponding regulations and Mexican Official Standards:

> V. The protection of human health, the environment, and biological diversity demands that due attention be paid to the control and management of the risks that may ensue from activities with GMOs, by means of prior assessment of such risks and monitoring subsequent to their release;
>
> VIII. The risks to human health and biodiversity that may be posed by activities with GMOs shall be assessed case by case. Such assessment shall be based on the best available scientific and technical evidence;
>
> IX. The environmental release of GMOs shall take place "step by step," whereby any GMO intended for commercial release shall be subjected to prior satisfactory testing in accordance with the risk studies, the risk assessment, and the result reports applicable to the activities of experimental release and pilot program release of such organisms, as prescribed by this Act;

X. Any adverse effects on biodiversity that may be posed by the release of GMOs shall be monitored, also taking into account any risks to human health;

Article 37 of the Act includes, among monitoring, prevention, control, and safety measures for any risks of the use of the GMO that the competent Ministry may establish in the permits, safety measures to ensure that the possible risk is kept within the tolerance limits allowed in the assessment, as well as monitoring of the activity in question, in relation to the risks that such activity may pose (paragraphs II and III).

In addition, as regards risk management, the Act contains various provisions intended to ensure that the competent authorities, when ruling on permit applications for the release of GMOs, possess the information necessary to analyze and assess any risks to the environment and biological diversity. In particular:

- Permit applications for the experimental environmental release of GMOs, including import thereof, shall include a study of any risks that the release of GMOs may pose to the environment and biodiversity (Article 42 paragraph III). The experimental environmental release permit holder shall report to the competent authority the results of releases carried out, having regard to the possible risks to the environment and biological diversity, and shall report any situation occurred in connection with the permitted release that could increase or decrease the risks to the environment, biological diversity, and/or human health (Articles 46 and 47).

- Permit applications for pilot program environmental release of GMOs, including import thereof, shall include references and considerations relating to reporting of the results of experimental releases, having regard to risks to the environment and biological diversity. Furthermore, permit holders must report the results of releases carried out in relation to risks to the environment and biological diversity and must inform the competent authority of any situation that could increase or decrease the risks to the environment, biological diversity, and/or human health (Articles 50, 53, and 54).

- Permit applications for commercial environmental release of GMOs, including import thereof, shall include, as applicable, considerations relating to the risks of technological alternatives available to contend with the problem for which the GMO to be released was designed (Article 55).

Finally, the LBOGM, includes a specific chapter devoted to risk study and assessment, defined as “the process whereby the risks or impacts that the experimental environmental release of GMOs may pose to the environment and biodiversity, as well as to animal, plant, and aquaculture health, are analyzed case by case, based on sound scientific and technical studies that the interested parties shall produce” (Article 60).

The same chapter of the Act includes the applicable guidelines and the basic steps to be followed in producing the risk study and assessment (Articles 61 and 62), including considerations for decision making where there is uncertainty as to the level of possible risk that GMOs may pose to biodiversity. In particular, the second paragraph of LBOGM Article 63 provides that:

> Where there is a threat of grave or irreversible harm, uncertainty as to the level of the risks that GMOs may pose to biological diversity or to human health shall not be used as grounds for the competent Ministry to delay the adoption of effective measures for preventing the negative impact on biological diversity or human health. In taking such measures, the competent Ministry shall consider the existing scientific evidence serving as a basis or criterion for the taking of the measure or measures; the administrative procedures set out in this Act, and the trade provisions contained in international treaties and agreements to which the United Mexican States is a party.

In submission SEM-09-001, the Submitters assert that "[t]he Government of Mexico has violated Articles 15 and 16 of the Cartagena Protocol on risk assessment and management, since with respect to the facts described hereinabove it has failed to establish mechanisms, measures, and strategies to regulate, manage, and control risks arising from the illegal entry into Mexico and release into the environment of transgenic maize without authorization, prior assessment, or risk-management mechanisms."

However, contrary to what the Submitters assert, from the foregoing exposition it is evident that, in conformity to Articles 15 and 16 of the Cartagena Protocol and to provide for its domestic enforcement, the Government of Mexico has enacted the legal provisions necessary to implement risk assessment and management measures in accordance with international law, principally by means of procedures for evaluation of permit applications for the release of GMOs, and such activities may not be carried out outside of the relevant administrative procedures.

The foregoing is of special relevance in the case at hand, since as discussed above, the Submitters' assertions relating to the alleged failure to effectively enforce Articles 15 and 16 of the Cartagena Protocol and its equivalent provisions in domestic law *do not refer to matters that are actually taking place and in respect of which the Government of Mexico is failing to enforce criteria or measures for risk assessment within the application procedures governing permits for environmental release;* instead, the Submitters refer in the relevant section of their submission to the "high probability that contraband GM seeds are coming into Mexico without prior risk analysis or application."[15]

Thus, the Submitters confuse the domain in which the risk studies and assessment contemplated in Articles 15 and 16 of the Cartagena Protocol are applicable – *and that is only in respect of acts occurring prior to* the environmental release of GMOs, within the context of the administrative

[15] Original submission, p. 9.

procedures prescribed in domestic law – with the applicable measures that must be taken for the effective enforcement of environmental law where violations of environmental law are committed, as would be the case of the alleged illegal (i.e., unauthorized) acts mentioned in the submission, and these measures consist of inspection and surveillance measures as well as application of the safety measures and sanctions contemplated in the applicable Mexican law.

IV.3. LBOGM

In its First Determination, the Secretariat found "in accordance with Article 45(2) that [the LBOGM] contains provisions the primary purpose of which is to regulate activities concerning genetically modified organisms with a view to protecting the environment and preventing a danger to human health viz. LBOGM Articles 1 and 2."

Based on this premise, in the same determination the Secretariat finds that it can take into account, for further analysis, the LBOGM provisions relating to:

- the principles guiding biosafety policy, particularly for enforcing the LBOGM;
- the relevant powers of Sagarpa, except those with no connection to the matter raised in the submission;
- coordination among the authorities in the event of an accidental release of GMOs;
- exercise of the SHCP powers as regards inspection of GMOs entering Mexico;
- permit application for GMO release, the processing, issuance, validity, and effects of such permits, and the measures contained in such permits, as well as modifications to the conditions that originated a permit and concomitant permit holder obligations;
- restrictions on the importation of GMOs;
- requirements for risk assessment;
- rules applicable to centers of origin;
- labeling requirements for GMOs intended for planting in Mexico;
- enforcement of Mexican Official Standards;
- rules applicable to the conduct of inspection visits;
- establishment of safety measures or urgent measures, and infractions and fines for violations of the law.

The Government of Mexico does not share the Secretariat's interpretation of the LBOGM as environmental law in the sense of NAAEC Article 45(2). Likewise it is argued that the Secretariat, in its determination of matters meriting further study with respect to the effective enforcement of the LBOGM, exceeds the scope of application of the NAAEC, seeking to extend its scope to the review of acts of federal authorities which, within the Party's legal and institutional system, are not responsible for the effective enforcement of environmental law. This is the case, for example, of the SHCP, which is responsible for organizing and administering customs and inspection services in Mexico.

NAAEC Article 45(2) stipulates that "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:

> (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
>
> (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
>
> (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

In the Mexican legal system, the LBOGM, unlike the LGEEPA, the Wildlife Act, the Sustainable Forestry Act, or the Comprehensive Waste Prevention and Management Act, is not considered environmental law *sensu stricto.* In the case of these latter acts, it is the Mexican environmental authorities who are competent to enforce them, and their enactment finds its legal basis in the constitutional provisions governing environmental protection and the preservation and restoration of ecological stability, as provided by Article 27, third paragraph, of the Constitution and in accordance with the powers granted to the Congress of the Union by Article 73 XXIX-G of the Constitution.

Article 1 of the LBOGM provides that its object is *to govern the activities of contained use, experimental release, pilot program release, commercial release, marketing, import, and export of GMOs*, with a view to preventing, averting, or reducing the risks that such activities may pose to human health or the environment and biodiversity or to animal, plant, and aquaculture health.

While it is true that certain of the criteria of NAAEC Article 45(2) *are coincident with the purposes of the LBOGM*, one cannot reach the general conclusion, as the Secretariat does, that the primary purpose of the LBOGM is environmental protection or the prevention of a danger to human life or health; its purpose is rather the comprehensive regulation of the activities of

contained use, experimental release, pilot program release, commercial release, marketing, import, and export of GMOs.

The foregoing was expressed during the legislative process leading to the promulgation of the LBOGM in the report issued by the Originating Chamber on 23 April 2003, with the following reasoning:[16]

> The consultation process has confirmed that protection of the environment, including protection of biodiversity and human health, from any risks arising from the use, application, utilization, and consumption of products derived from techniques of modern biotechnology must be effected in a holistic, comprehensive manner. *This means that, pursuant to the recommendations of the World Health Organization, protection of the environment and human health must be addressed simultaneously in a single legal instrument and not sector by sector. It also means that protection from such risks cannot ignore economic activities and the public benefits that may result from applications of modern biotechnology.* It further signifies that in addition to setting a horizon for careful, responsible, prudent, and cautious action in relation to the management and use of GMOs, the country's experience and capacities in the scientific and technological realm as well as in control and management of risks are taken into account.
>
> It is important to note that various consultation participants concurred in recognizing modern biotechnology as a fulcrum for the country's development, which is why the bill puts no impediments or obstacles in the way of its development; on the contrary, it establishes the necessary elements and instruments so that, by means of its application, it will be possible to sustainably resolve and satisfy many of Mexico's current needs; among other applications, the development of a non-polluting industry. (Emphasis added.)

To these ends, the LBOGM establishes a comprehensive regulatory framework for GMO-related activities, including design of the institutional architecture necessary for its application to different matters, according to the jurisdictions of the various federal authorities responsible for its enforcement. The foregoing was in fact set out in the bill's preliminary recitals, which state as follows:

> it is established that only three bodies of the Federal Executive Branch shall have jurisdiction over biosafety:
>
> • The Ministry of the Environment and Natural Resources (Semarnat) in respect of all types of GMOs and the risks that they may pose to the environment and biodiversity.
>
> • The Ministry of Agriculture, Livestock, Rural Development, Fisheries, and Food (Sagarpa) in respect of GMOs that are plants, animals, plant or animal health products, or fish and aquaculture species.
>
> • The Ministry of Health in respect of GMOs for human use or consumption, for purposes of public health, or other organisms that may constitute a risk to public health.

[16] http://www2.scjn.gob.mx/leyes/Default.htm

> The jurisdiction of each of these Ministries is defined and delimited in such a manner as to provide legal certainty to anyone engaging in activities with GMOs, especially in respect of the processing of permits and authorizations as well as the monitoring, inspection, and surveillance carried out by said Ministries.

Of course, the Party understands that NAAEC Article 45(2)(c) stipulates that the primary purpose of a particular statutory or regulatory provision is determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

However, the Government of Mexico is of the view that the assessment of domestic provisions that may be considered environmental law in the sense of the NAAEC must conform to strict criteria involving a precise analysis of the primary purpose of each legislative or regulatory provision cited in a submission and not in a general manner, as the Secretariat has done in this case, with the inclusion of provisions whose purpose is not environmental protection and that do not fall within the jurisdiction of the authorities responsible for the enforcement of environmental law, the only matter subject to review under the NAAEC. The contrary, it is argued, would be tantamount to interpreting the Agreement as having a broader scope than its actual sphere of application.

Additionally, in its Second Determination, the Secretariat decided to request a Party Response from Mexico in relation to the effective enforcement of LBOGM Articles 9, 12 paragraph I, 13, 17, 18 paragraphs I, II, IV and V, 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, 49, 60, 61, 62, 63, 64, 65, 66, 86, 87, 88, 101, 112, 113, 114, 115, 117, 119, and 120. In this connection, the following considerations are set forth.[17]

Article 9. Biosafety Principles

In the first place it should be emphasized that LBOGM Article 9 is composed of 19 paragraphs, and thus in any case, in strict application of NAAEC Article 45(2)(c), the Secretariat should have specifically stated which of these principles are considered environmental law by virtue of their primary purpose, which is not clear, for example, with regard to paragraphs VI, VII, XI, XII, or XIX of this article.

In its Determination of 3 March 2010, the Secretariat even goes beyond what is asserted in submission SEM-09-001, including of its own accord *provisions that were not cited in the section in question,* in which the Submitters refer exclusively to paragraphs I, II, III, IV, V, VIII, IX, X, XI, XIV, XV, XVI, XVII, XVIII, and XIX of the article in question[18] and not to the 19 biosafety policy principles that make up LBOGM Article 9, as they appear in the request for a Party Response to the Government of Mexico.

Additionally, it should be specified that the biosafety principles contained in

[17] Second Determination, pp. 15-16.
[18] Revised submission, p. 10.

LBOGM Article 9 are to be applied, as the first paragraph of this provision establishes, *to the formulation and conduct of biosafety policy, as well as to the promulgation of the relevant regulations and Mexican Official Standards*, matters not addressed by the submission.

Articles 12 paragraph I and 13: Powers of Sagarpa

In its Determination of 3 March 2010, the Secretariat requests a Party Response in regard to the effective enforcement of LBOGM Articles 12 paragraph I and 13, considering, in respect of the first of the cited provisions, that it "gives Sagarpa the power to enforce the Act in connection with activities involving genetically modified plants, including seeds, considered agricultural species. It therefore qualifies for review, insofar as the exercise of such powers is geared toward the protection of the environment or human health."[19]

The aforementioned provisions read as follows:

> ARTICLE 12. Sagarpa is competent to exercise its powers under this Act, in matters concerning activities with GMOs, in the following cases:
>
> I. Plants considered agricultural species, including seeds, and any other organism or product considered within the scope of application of the Federal Plant Health Act, with the exception of those wild and forest species governed by the Wildlife Act and the Sustainable Forestry Development Act, respectively, and those governed by any special protection regime further to Mexican Official Standards ensuing from said acts;
>
> ARTICLE 13. In the cases contemplated in the preceding article, Sagarpa is competent to exercise the following powers:
>
> I. To participate in the formulation and application of general biosafety policy;
>
> II. To analyze and evaluate, case by case, the risks that activities with GMOs could pose to animal, plant, and aquaculture health, as well as to the environment and biological diversity, based on the risk studies and result reports produced and submitted by the interested parties pursuant to this Act;
>
> III. To rule upon and issue permits to engage in activities with GMOs, as well as to establish and monitor the conditions and measures to which such activities shall be subject, pursuant to the provisions of this Act;
>
> IV. To monitor any impacts on animal, plant, and aquaculture health or on biological diversity that may be caused by the release of GMOs, be it permitted or accidental, pursuant to the provisions of this Act and the Mexican Official Standards ensuing from it;
>
> V. To participate in the drafting and issuance of the lists contemplated in this Act;

[19] Determination of 3 March 2010, p. 9.

> VI. To suspend the effects of permits where it possesses supervening scientific and technical information from which it is deduced that the permitted activity poses risks greater than those foreseen, that may negatively affect animal, plant, or aquaculture health, biological diversity, or human health; these last two at the express request of Semarnat or the Ministry of Health, whichever has jurisdiction under this Act, based on scientific and technical considerations;
>
> VII. To order and apply the relevant safety or urgent measures, based on technical and scientific criteria and on the precautionary focus, as prescribed by this Act;
>
> VIII. To inspect and monitor compliance with this Act, its regulations, and the Mexican Official Standards ensuing from it;
>
> IX. To impose administrative sanctions on persons who contravene this Act, its regulations, and the Mexican Official Standards ensuing from it, without prejudice to the applicable penalties where the acts or omissions constituting violations of this Act also constitute offenses, and to any civil liability that may result, and
>
> X. Any other powers granted by this Act.

As stated above, the Party argues that there is no legal basis for including each and every paragraph of LBOGM Article 13 without assessing *its primary purpose in order to ascertain whether it should be considered environmental law* and hence covered by the NAAEC, or indeed assessing whether all the cited paragraphs bear any relationship to the assertions in the submission, which is not the case of paragraphs III, V, and VI, for example.

As observed earlier, the Party is of the view that the cited provisions do not constitute environmental law in the sense of NAAEC Article 45(2), since they refer to the regulation of plants considered agricultural species, including seeds, and any other organism or product considered within the scope of application of the Federal Plant Health Act (*Ley Federal de Sanidad Vegetal*), which are not under the jurisdiction of the environmental authority, precisely because they are not covered by the special legal regime for the preservation of the environment and ecological stability in Mexico.

It is true that LBOGM Article 13 paragraphs II, IV, and VI empower Sagarpa to assess the risks that activities with GMOs could pose to the environment and biodiversity, to monitor the potential impacts of their release on biodiversity, or to suspend the effects of permits, at the express request of Semarnat or the Ministry of Health, where it possesses supervening scientific and technical information from which it may be deduced that the permitted activity poses risks greater than those foreseen, that may negatively affect animal, plant, or aquaculture health, biodiversity, or human health.

However, the Submitters did not consider in their submission, nor did the Secretariat in its Second Determination, that LBOGM Articles 11 paragraphs II, IV, VII and VIII and 15 provide that in cases under the jurisdiction of Sagarpa, *it is the environmental authority (Semarnat) that is competent* to take measures relating to protection of the environment and biological diversity, including case-by-case assessment of the risks that activities with GMOs could pose to the environment and biodiversity, based on the risk studies and the result reports produced and submitted by the interested parties; monitoring of the potential impacts of the release of GMOs on the environment and biodiversity; enforcement of the relevant safety or urgent measures, based on scientific and technical criteria and the precautionary focus, and the performance of acts of inspection and enforcement of the Act, within the scope of its jurisdiction.

For greater clarity, Article 15, *not included in submission SEM-09-001*, provides as follows:

> ARTICLE 15. In cases under the jurisdiction of Sagarpa, Semarnat is competent to:
>
> I. Issue the applicable biosafety report, prior to the Sagarpa decision, further to the risk analysis and assessment that Semarnat performs, based on the study produced and submitted by the interested parties of the risks that the GMO-related activity in question may pose to the environment and biological diversity, in the case of permit applications for experimental release of such organisms, or based on the result reports and the information attached by the interested parties to their permit applications for pilot program release and commercial release;
>
> II. Require Sagarpa to suspend the effects of permits issued by said Ministry where it possesses scientific and technical information from which it may be deduced that the permitted release poses risks greater than those foreseen that may negatively affect the environment and biological diversity, and
>
> III. Exercise the powers contemplated in Article 11 paragraphs I, II, IV, V, VII, and VIII of this Act.
>
> The biosafety report contemplated in paragraph I of this article shall be binding, prior to the issuance of the permits that Sagarpa is competent to issue, and shall be issued pursuant to Article 66 of this Act.

Thus, LBOGM Articles 12 and 13 do not have environmental protection or the prevention of a danger to human life or health as their primary purpose, nor may they be considered in a review of the effective enforcement of environmental law, since the powers of Sagarpa regulated therein do not include the taking of measures to verify that, in activities relating to the use of GMOs that are agricultural plant varieties, the criteria for protection of the environment and biological diversity are adhered to, for these are enforced, where applicable, by the environmental authority.

Article 17. Accidental release of GMOs

LBOGM Article 17, included in the Second Determination, provides as follows:

> ARTICLE 17. In the event of accidental release of GMOs, the Ministries shall coordinate their efforts in order that, each within the scope of its jurisdiction under this Act, they impose the measures necessary to prevent negative impacts on biological diversity, human health, or animal, plant, and aquaculture health, as the case may be.

In order to accurately discern the scope of this provision, one must take into consideration LBOGM Article 3 paragraph I, which defines an accident as:

> I. Accident: The *unintentional* release of genetically modified organisms during their use that may, based on technical criteria, pose risks to human health or the environment and to biological diversity. (Emphasis added.)

None of the assertions in submission SEM-09-001 refers to the unintentional release of GMOs; on the contrary, they refer to the alleged deliberate and illegal introduction (without import or release authorization) of GM maize in various municipalities of the state of Chihuahua. Thus, it is argued that the provision in question is not applicable to the case at hand.

Article 18 paragraphs I, II, IV and V: Powers of the SHCP

Likewise, LBOGM Article 18 is not considered environmental law in the sense of NAAEC Article 45(2) since its primary purpose is not environmental protection or prevention of a danger to human health or life, but rather regulation of the jurisdictional framework within which the SHCP participates, in its capacity as the federal authority responsible for organizing and administering customs and inspection services in Mexico,[20] and, within the scope of its jurisdiction, enforcing the provisions relating to the import of GMOs into the nation's territory.

Thus, within the Mexican legal system, the SHCP is not competent to enforce the environmental law, nor do the provisions establishing its powers have environmental protection as their primary purpose, since, as provided by LBOGM Article 18 paragraph IV, the SHCP must where applicable notify the environmental authority of probable violations under this Act so that enforcement of the environmental law in question can take place.

In view of the foregoing, the Party maintains that the inclusion of the provisions governing the powers of the federal customs authority in this citizen submission proceeding exceeds the scope of the NAAEC.

Articles 32, 33, 34, 36, 37, 38, 39, 40, 42, 43, 45, 46, 47, 48, and 49: Permits

The aforementioned provisions have as their primary purpose the establishment of the legal framework for processing and ruling upon permits

[20] Article 31 paragraph XII of the Federal Public Administration Act (*Ley Orgánica de la Administración Pública Federal*).

for experimental environmental release of GMOs, including adherence to monitoring measures established therein.

As indicated in the section concerning the incorporation of the Cartagena Protocol into the Party's domestic law, although the permitting system for the release of GMOs in Mexico specifically includes the presentation of information to assess and prevent risks to the environment, biological diversity, and human health, *its primary purpose is not the protection thereof*, but rather the creation of a comprehensive administrative framework in this area.

Furthermore, the assertions contained in submission SEM-09-001 do not provide evidence with which to review any failure to effectively enforce the Party's obligations under the provisions for the prevention or avoidance of risks to the environment or biological diversity in the course of ruling upon permits for experimental environmental release or import of GM maize, *since these assertions refer exclusively to alleged illegal import and release events in the state of Chihuahua, allegedly without application for the applicable permits; therefore, the legal provisions governing assessment and prevention of environmental risks could not have been enforced by the Party* within the administrative proceedings governed by the LBOGM articles included in the Second Determination.

Articles 60-66: Risk study and assessment

Similarly, LBOGM Articles 60 to 66 establish the criteria and mechanisms necessary to conduct assessments of risk to the environment, biological diversity, and human health *within procedures for ruling upon applications for environmental release of GMOs,* and it is impossible to assess their effective enforcement when no corresponding application for authorization has been submitted, as occurs, according to the Submitters, in the alleged cases of release of GM maize mentioned in their assertions.

Article 101: Labeling and identification of GMOs

LBOGM Article 101 governs GMOs or products containing GMOs that are *authorized as safe by the Ministry of Health pursuant to this Act and are for direct human consumption,* in order to ensure that the presence of GMOs in the product is explicitly mentioned and that the additional general labeling requirements under the Mexican Official Standards enacted by the Ministry are met, pursuant to the provisions of the General Health Act (*Ley General de Salud*) and its regulatory provisions, with the participation of the Ministry of the Economy.

Thus, the primary purpose of this provision is not environmental protection or prevention of a danger to human life or health, within the framework of the NAAEC, but rather to specify administrative requirements for the sound management of GMOs authorized as safe for human consumption, including matters relating to assessment of compliance with

Mexican Official Standards as provided by the Federal Measurement and Standards Act (*Ley Federal sobre Metrología y Normalización*).

Articles 112-115: Law enforcement, inspection and surveillance, and safety or urgent measures

LBOGM Article 112 provides that enforcement of the Mexican Official Standards relating to biosafety, as well as acts of inspection and surveillance, are under the exclusive jurisdiction of the competent Ministries as provided by this Act. In addition, this article provides that compliance therewith may be assessed by certification bodies, inspection units, and approved testing laboratories.[21]

LBOGM Articles 113 and 114 establish that the competent Ministries may, acting by duly authorized personnel, carry out any acts of inspection and surveillance they consider necessary, with adherence to the requirements and legal formalities set out in the Act and any relevant suppletive provisions. In regard to restoration or compensation for harm to the environment or biodiversity, the provisions of the second paragraph of LGEEPA Article 168 may be applicable.

Article 115, for its part, enumerates the safety measures that may be ordered by the authorities responsible for the enforcement of the LBOGM, each within the scope of its jurisdiction, where the criteria of paragraphs I, II, and III of this article are met.

In the case at hand, the Government of Mexico is of the view that these provisions do not constitute environmental law in the sense of NAAEC Article 45(2), since their purpose is to establish the administrative framework for enforcement of the LBOGM, based on the principles of legality and legal certainty that govern the domestic legal system and not, as required within the framework of the NAAEC, the protection of the environment or of human health or life.

Irrespective of the foregoing, the Party maintains that pursuant to NAAEC Article 45(1)(a), the provisions analyzed cannot be addressed by the citizen submission process, since they refer to the reasonable exercise of the Party's discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters.

For greater clarity, the aforementioned provisions are to be enforced by the competent authorities with due attention to various matters that must be

[21] It should be recalled, as explained in the section on pending judicial proceedings, that the Submitters' assertions to the effect that the Mexican Official Standards constitute one of the ways "for the Government of Mexico to act with precaution, prudently, and on a scientific and technical basis to prevent, reduce, or avoid the risks that activities with GMOs could pose to human health, the environment, and biodiversity" and that "there is no current technical standard governing biosafety in Mexico" directly coincide with the acts challenged in writ of amparo 548/2009, and therefore if there is no recommendation to automatically terminate the submission, there is a risk of interfering with the Party's judicial proceedings and duplicating their review.

assessed depending on timeliness, necessity, technical aspects, or other factors, which may be considered depending on the circumstances of each case, in order to ascertain when it is necessary to apply any or all of the relevant safety measures.[22]

For the foregoing reasons, notwithstanding the application of any safety measures or sanctions by Mexico in response to any matter related in the submissions in question that may be substantiated by the documentary evidence attached to the Party Response, the Party maintains that analysis of the effective enforcement of the legal provisions governing acts of inspection and surveillance and the ordering of safety measures should not be addressed in this citizen submission proceeding.

Article 117: International notification of accidental release of GMOs

In the case at hand, the Submitters' assertions do not refer to the accidental release of GMOs but to alleged acts of deliberate introduction of transgenic maize to various regions of the state of Chihuahua.

Even assuming that any accidental release of GM maize occurred, there is nothing in the submission's assertions to suggest that such release could have significant adverse impacts on biodiversity or human health in another country. Therefore, it is not clear what, if anything, could constitute a failure to effectively enforce this provision by the Government of Mexico in the present case.

Articles 119 and 120: Violations and sanctions

LBOGM Article 119 establishes the list of violations committed by anyone who, having full knowledge that GMOs are at issue, commits any of the acts listed.

Article 120 prescribes the various sanctions that may be imposed where, in the judgment of the competent authorities and according to the information contained in the files of any applicable administrative proceedings, any of the violations set out in Article 119 is substantiated.

The Party holds the view that the inclusion of LBOGM Articles 119 and 120 in this citizen submission proceeding has no legal basis, since the primary purpose of said provisions is neither environmental protection nor prevention of a danger to life or health.

[22] In this regard, the Supreme Court has held that "the cornerstone of discretionary powers is the freedom of appraisal which the law grants to the authorities in order for them to act or refrain from acting, for the purpose of achieving the ends set out in the law itself, and hence the exercise of such powers necessarily entails the possibility of opting or choosing from two or more decisions. However, this does not signify or allow for arbitrariness, since such action is subject to the requirements of Article 16 of the Political Constitution of the United Mexican States, i.e., that it be based in law and fact…." *Semanario Judicial de la Federación y su Gaceta. Vol. VIII, September 1998. Record no.: 195,530. Tesis: P. LXII/98, p. 56.*

In addition, the arguments raised in the considerations relating to the lack of basis for the inclusion of LBOGM Article 115 are reiterated here, since the determination of possible violations of the LBOGM pursuant to Article 119 thereof, and the choice of sanctions contained in Article 120, also refer to the reasonable exercise of the Party's discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters, pursuant to NAAEC Article 45(1)(a).

The foregoing, notwithstanding the fact that the documentary evidence attached to the Party Response may substantiate the imposition of sanctions in response to one or more matters raised in the submissions in question, for these documents are included in order to illustrate the biosafety measures taken on an ongoing basis by the Party.

IV.4. LGEEPA

Article 15: Principles of environmental policy

Submission SEM-09-001 asserts that "C.III). Concerning LGEEPA Article 15, the Government of Mexico is failing to adopt general principles of environmental law such as the following: ecosystems are a common heritage of society; responsibility to protect and preserve ecological stability, both in the present and in terms of the conditions that will determine the quality of life of future generations; prevention, minimization, or repair of harm; responsibility; coordination among entities of the public administration, between different levels of government, and with society at large; the right of communities, including indigenous peoples, to the protection, preservation, sustainable use and enjoyment of natural resources and the safeguarding and use of biodiversity."

The Submitters do not link the alleged failure by the federal government with concrete facts indicating, in their judgment, that the entirety of the principles of environmental policy that make up LGEEPA Article 15 are not being observed.

Moreover, as indicated in regard to the principles of biosafety, the first paragraph of LGEEPA Article 15 provides that these principles must be adhered to not in the abstract but rather for: i) the formulation and conduct of environmental policy and ii) the promulgation of Mexican Official Standards and other instruments prescribed by the LGEEPA and having regard to the preservation and restoration of ecological stability and environmental protection.

It is not evident in this case how the cited provisions are applicable, since the submission includes no assertions of alleged failures by Semarnat in respect of the formulation and conduct of environmental policy, the drafting of Mexican Official Standards prescribed by the LGEEPA, or the application of its instruments; i.e., environmental planning, land use planning, environmental regulation of human settlements, environmental impact assessment of works and activities under federal jurisdiction, economic

instruments, Mexican Official Standards, environmental auditing, and self-regulation; the foregoing as prescribed by LGEEPA Title I Chapters II and IV, which set out the principles and instruments of environmental policy.

Articles 160, 161, 164, 165, 166, 170 and 170 Bis: Control and safety measures and sanctions

Article 160 specifies that the provisions of Title Six shall apply to acts of inspection and surveillance; the implementation of safety measures; the determination of administrative violations; the commission of offenses and the corresponding sanctions, and administrative procedures and remedies, *in the case of matters under federal jurisdiction governed by the LGEEPA*, except where other laws specifically govern such matters, with respect to the matters governed by this Act. Concerning matters contemplated in this Act that are governed by special laws, this Act applies as suppletive law where inspection and surveillance proceedings are concerned.

Article 161 provides that Semarnat shall carry out acts of inspection and surveillance in regard to the provisions of the LGEEPA in accordance with Title Six thereof. Articles 164, 165, and 166, for their part, establish the formal requirements that must be observed in connection with inspection visits.

Under LGEEPA Article 170, where there is an imminent risk of ecological instability or of serious harm to or degradation of natural resources, or cases of contamination with dangerous consequences for ecosystems, their components, or public health, Semarnat *may* order any of the safety measures prescribed by this article. Likewise, Semarnat may seek the implementation by the competent authority of any safety measure contemplated in other provisions.

Along the same lines, Article 170 Bis provides, for those cases in which Semarnat decides to order any safety measure, that the interested party may be notified of measures that must be taken to cure the irregularities detected and the timetable in which they must be taken.

As stated concerning the equivalent LBOGM provisions, the Government of Mexico's view is that provisions governing the formal requirements that acts of inspection and surveillance must meet in order to preserve the constitutional guarantees related to due process, giving legal certainty to any administrative proceedings the federal authority may institute, do not constitute environmental law in the sense of NAAEC Article 45(2).

Irrespective of the foregoing, the Party maintains that pursuant to NAAEC Article 45(1)(a), the provisions analyzed cannot be addressed by the citizen submission process since they refer to the reasonable exercise of the Party's discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters.

For the foregoing reasons, notwithstanding the application of any safety measures or sanctions by Mexico in response to any matters discussed in these submissions that may be substantiated by the documentary evidence attached to the Party Response, it is argued that analysis of the effective enforcement of the legal provisions governing acts of inspection and surveillance and the application of safety measures should not be addressed in this citizen submission proceeding.

Article 182: Federal offenses

LGEEPA Article 182 provides as follows:

> ARTICLE 182. Where, as a result of the exercise of its powers, the Ministry takes cognizance of acts or omissions that may constitute offenses under the applicable law, it shall file the relevant information with the Office of the Federal Public Prosecutor.
>
> Any person may directly file criminal complaints corresponding to the environmental offenses defined in the applicable law.
>
> The Ministry shall, in the matters under its jurisdiction, furnish any technical or expert reports requested by the Office of the Public Prosecutor or the judicial authorities further to any complaints filed in connection with the commission of environmental offenses.
>
> The Ministry shall assist the Office of the Federal Public Prosecutor as prescribed by the Federal Code of Criminal Procedure; the foregoing, without prejudice to any assistance that may be provided by the victim or the directly aggrieved party on his own behalf or acting by his legal representative.

In this regard, the following remarks must be made in relation to the case at hand:

The criterion triggering the operation of the first, third, and fourth paragraphs of LGEEPA Article 182 is that, as a result of the exercise of its powers, in this case ensuing from matters governed by the LGEEPA, Semarnat takes cognizance of acts or omissions that may constitute federal offenses. The foregoing also involves a discretionary power on the part of the environmental authority where it identifies, in respect of any facts appearing in the administrative files in its possession, the existence of facts that may constitute federal offenses, and it may then file a criminal complaint with the competent authorities and act as assistant therewith, which has not occurred in the case at hand. The Party's view is that these provisions: i) do not have environmental protection as their primary purpose pursuant to the NAAEC, and ii) refer to the reasonable exercise of its discretion in respect of investigatory, prosecutorial, regulatory, or compliance matters.

In regard to the second paragraph of LGEEPA Article 182, it merely establishes a private right of action that the Submitters themselves have exercised, as appears from the complaints they filed and mentioned in the

submission. Thus, it is not evident what failure of effective enforcement on the part of the Government of Mexico is being alleged.

Articles 189, 190, 191, 192, 193, 198, 201 and 202: Citizen complaints

In contrast to what is asserted in submission SEM-09-001, it is not evident from any document in the file that the Submitters have filed any citizen complaint with Profepa. As discussed previously, the Secretariat requested in its First Determination that the relevant documentation be attached, but the Submitters did not do so.

Given this, the Party is of the view that the provisions mentioned in this section have no place at all in submission SEM-09-001, since they refer to the establishment of a citizen complaint procedure and to the corresponding rules of procedure. This clearly has no bearing whatsoever on the case at hand, since the Submitters did not file the legal remedy contemplated in LGEEPA Article 189 et seq.

Articles 201 and 202, for their part, provide as follows:

> ARTICLE 201. Authorities and public servants who are involved in matters under the jurisdiction of the Office of the Federal Attorney for Environmental Protection or who can, by reason of their duties or activities, provide relevant information, shall comply with any such request made by that body.
>
> Authorities and public servants who are requested to provide information or documentation that is classified under the applicable law shall communicate this status to the Office of the Federal Attorney for Environmental Protection. In such case, the Office shall handle the information provided *with the strictest confidentiality*.
>
> ARTICLE 202. The Office of the Federal Attorney for Environmental Protection, within the scope of its jurisdiction, *may take* any applicable action before the competent authorities where it takes cognizance of acts, occurrences, or omissions constituting violations of administrative or criminal law.

Again, the Party does not see how the aforementioned provisions are applicable in the case at hand, and furthermore holds the view that they do not constitute environmental law in the sense of the NAAEC. Article 201 establishes the obligation of public servants to respond to requests made by Profepa, as well as the duty of Profepa to protect classified information. Submission SEM-09-001 contains no assertion in respect of Profepa having requested any information from any authority, nor is it evident how this issue could relate to any alleged failures by the Party to enforce the environmental law.

Article 202, in addition to not constituting environmental law, refers to a discretionary power on the part of the environmental authority.

Articles 203 and 204: Civil liability for environmental harm

Articles 203 and 204, included in the request for a Party Response to the Government of Mexico, provide as follows:

> ARTICLE 203. Without prejudice to any applicable criminal or administrative sanctions, anyone who contaminates or deteriorates the environment or affects natural resources or biodiversity shall be liable and obligated to repair the harm caused, in accordance with the applicable civil legislation.
>
> The period in which *to sue for environmental liability* shall be five years as from the occurrence of the act or omission in question.
>
> ARTICLE 204. Where harm or injury has been caused by a violation of the provisions of this Act, *the interested parties may apply to the Ministry for preparation of a technical report in that regard,* which shall have evidentiary value in the event of being presented at trial.

As with the preceding paragraphs, the Party is of the view that these provisions are not applicable in the case at hand, since it is not evident from the assertions in submission SEM-09-001 or from the documents in the corresponding file that the Submitters make reference to having filed civil liability actions in respect of environmental harm, which constitutes the subject matter of the articles in question.

V. INFORMATION ON MEASURES TAKEN BY THE GOVERNMENT OF MEXICO

V.1. Alleged lack of measures for the operation of biosafety mechanisms; establishment of a special protection regime for maize, with determination of centers of origin and genetic diversity; implementation of a permitting system for experimental plantings, and corresponding risk analysis and assessment[23]

The Submitters include in their assertions, as facts allegedly evidencing the failure to effectively enforce the environmental law, the "failure by the Government of Mexico to effectively enforce LBOGM Articles 86, 87, and 88 in relation to determination of the special protection regime for maize, centers of origin and genetic diversity, and geographical areas in which the species and protection measures are located."

On this point, without offering documentation or specific assertions of facts supporting their claim, as required by NAAEC Article 14(1)(c), the Submitters assert that "still lacking in Mexican law are the special protection regime for maize, the determination of centers of origin and genetic diversity, and the geographical areas in which the species and protection measures for them are located, pursuant to LBOGM Articles 2 paragraph XI, 86, 87, and 88. This situation stands in the way of experimental releases of GM maize in Mexico, since the safeguard mechanisms for biosafety are not yet fully in place in Mexico."

[23] Determination of 3 March 2010, p. 16.

In its corresponding determination, the Secretariat requested a Party Response from the Government of Mexico, including information in respect of "the operation of biosafety mechanisms; the establishment of a special protection regime for maize, with determination of centers of origin and genetic diversity; the implementation of a permitting system for experimental plantings, and the corresponding risk analysis and assessment."

As stated in the previous section, and contrary to what is asserted in submission SEM-09-001, the Government of Mexico has enacted the provisions making up the Special Protection Regime for Maize by means of an executive order revising, adding, and repealing various provisions of the LBOGM Regulation, published in the DOF on 6 March 2009, issued in accordance with the procedures prescribed by domestic law, including a transparent public consultation process in which the Submitters themselves participated.

For greater clarity, on 4 April 2008, as provided by Article 69H and other relevant provisions of the Federal Administrative Procedure Act (*Ley Federal de Procedimiento Administrativo*), Sagarpa submitted to the Federal Regulatory Improvement Commission (*Comisión Federal de Mejora Regulatoria*–Cofemer) the regulatory impact statement (*manifestación de impacto regulatorio*) for the "Order establishing those legal provisions in respect of biosafety, forming a part of the Special Protection Regime for Maize, that are necessary in order to rule upon permit applications for environmental release of genetically modified maize."[24]

As established in the regulatory impact statement, the Order, which would be issued by the ministers of agriculture and environment on the basis of LBOGM Articles 2 paragraph XI, 9 paragraphs I, IV, V, VIII, IX, X, XII and XIII, 10 paragraphs I and II, 11 paragraph IV, 13 paragraph IV, 34, 37, 63, 113, 114, and 115, as well as Article 65 and the Eighth Transitory Article of the LBOGM Regulation, included those biosafety-related provisions of the Special Protection Regime for Maize that are necessary in order to rule upon permit applications for environmental release of GM maize, and also established provisions and procedures in respect of monitoring, inspection, and surveillance, as well as the relevant safety or urgent measures.

During the public consultation process for the Draft Order, Cofemer received 7043 opinions from academic institutions, farmers, civic organizations, and other interested parties. The civic organizations included several of the Submitters, such as Greenpeace Mexico A.C.

In the opinions received, *including those expressed by the Submitters*, it was stated that the appropriate legal instrument for regulation of the Special Protection Regime for Maize was the LBOGM Regulation and not the Order proposed by Sagarpa.

[24] Document available at Cofemer website, http://www.cofemermir.gob.mx/inc_lectura_regioncontentall_text.asp?submitid=15250.

As an example of the foregoing, on 8 June 2006 the representative of Greenpeace Mexico A.C. e-mailed comments to Cofemer on Draft Order 04/444/290506, including the following, *inter alia* (Appendix 6):[25]

> … my client states that the Order, chosen arbitrarily and unilaterally by the environmental authority, is not the correct or appropriate legal instrument.
>
> As prescribed by Article 2 paragraph XI of the Genetically Modified Organisms Biosafety Act, the legal instrument with which to incorporate the Special Protection Regime for Maize should be the Regulation to the Act itself, which is currently being debated before the Federal Regulatory Improvement Commission. With that regulatory framework in place, the Special Protection Regime for Maize would be governed by the principles, purposes, and other instruments contemplated within the biosafety framework in force in Mexico: the precautionary principle, case-by-case studies, access to public information, consultation and public participation, liability schemes, etc.
>
> … FURTHER TO THE MEASURES SET OUT ABOVE BY MY CLIENT, I HEREBY REQUEST THAT THE REQUEST BY THE AUTHORITY RESPONSIBLE FOR ENVIRONMENTAL POLICY IN MEXICO BE DISMISSED, IN THE SENSE OF EXCLUDING FROM THE REGULATORY IMPACT STATEMENT THE DRAFT "ORDER ESTABLISHING THE BIOSAFETY POLICIES AND GUIDELINES TO WHICH THE MINISTRY OF AGRICULTURE, LIVESTOCK, RURAL DEVELOPMENT, FISHERIES AND FOOD AND THE MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES SHALL ADHERE IN ESTABLISHING A SPECIAL PROTECTION REGIME FOR MAIZE," SINCE IT ENTAILS COMPLIANCE COSTS FOR PRIVATE CITIZENS AND, FURTHERMORE, THE "ORDER" IS NOT THE APPROPRIATE TYPE OF LEGAL INSTRUMENT WITH WHICH TO ENACT THE REGIME; ON THE CONTRARY, IT IS MORE APPROPRIATE TO INCLUDE IT IN THE DRAFT REGULATION TO THE GENETICALLY MODIFIED ORGANISMS BIOSAFETY ACT, WHICH IS CURRENTLY UNDER REVIEW BY THE COMMISSION.[26]

On 21 May 2008, in the context of this regulatory improvement procedure, Cofemer issued a Non-Final Rule (*Dictamen Total*)[27] containing various observations on the Draft Order referred to Sagarpa, including the recommendation to make a detailed and specific analysis of the arguments received during the public consultation process for consideration during the revision of the Draft Order (Appendix 7).

On 10 December 2008, Sagarpa submitted its response to the Non-Final Rule issued by Cofemer, stating the following *inter alia* (Appendix 8):

> … in regard to the due consideration recommended by Cofemer, concerning the 7043 comments made by interested parties participating in the sector during the

[25] This regulatory impact assessment process may be viewed at http://www.apps.cofemer.gob.mx/cofemerapps/scd_expediente_3.asp?ID=12/0846/040408.
[26] Comments by Greenpeace Mexico A.C. of 8 June 2006 on Draft Order 04/444/290506.
[27] Doc. no. COFEME/08/1307 of 21 May 2008, available at Cofemer website, http://www.apps.cofemer.gob.mx/cofemerapps/scd_expediente_3.asp?ID=12/0846/040408.

public consultation process, approximately 94% of which specifically address the following considerations:

- That the Order is inconsistent with the provisions of the Biosafety Act;

- That the Order does not implement safety measures adequate to the experimental release of transgenic maize;

- That no protection measure is established for maize, i.e., it is not consistent with the spirit of the Act whereby it was incorporated therein; and

- That it does not provide for broad and exhaustive monitoring of the current extent of transgenic contamination. (See document in Appendix II.)

A concern was expressed in some of the comments made within the consultation process conducted by the Commission under the Federal Administrative Procedure Act in regard to the legal status of the Draft Order, in view of the need to give greater certainty to the public.

Further to these comments, the following considerations were set forth:

1. The Special Protection Regime for Maize contemplated in the Genetically Modified Organisms Biosafety Act must give the citizen the certainty of containing a set of general provisions allowing for full enforcement of the Act, and not merely a body of standards governing technical and operational aspects whose existence is subordinate to constant technological progress.

2. For this reason, it is argued that the Special Protection Regime for Maize should be contained within the Regulation to the Genetically Modified Organisms Biosafety Act, since the regulation is by its nature a set of standing, systematically organized, mandatory administrative provisions and rules; otherwise, the observance thereof could be interpreted as optional, and the Act it is intended to make enforceable would not be, thus rendering the will of the legislators inoperative.

3. For this reason, the original idea of a transitional order leading to a rulemaking process was reconsidered due to the need to enact those generally applicable, impersonal, objective, mandatory principles that are necessary in order to provide for the implementation and enforcement of the Genetically Modified Organisms Biosafety Act.

Along with the response transcribed above, Sagarpa submitted to Cofemer a Draft Order revising, adding, and repealing various provisions of the LBOGM Regulation that provides as follows, *inter alia*:

- The Special Protection Regime for Maize is made up of the provisions contained in Title Twelve of the Regulation to the Act, as well as any other regulations applicable to GMOs and any other instruments promulgated by the authority (Article 65).

- Permit applications for experimental release of GM maize must meet requirements additional to those set out in Article 16 (Article 66).

- Experimentation with, or environmental release of, GM maize containing characteristics that prevent or limit its human or animal use or consumption, or its use in processing of food for human consumption, is not permitted (Article 67).

- Sagarpa, prior to issuing permits for experimental release, must ascertain whether there is an alternative conventional variety for the organism to be released. If so, a comparative analysis of different technological options shall be performed, the result of which shall be considered an additional element in the risk assessment study performed as part of the permit application requirements (Article 68).

- The *in situ* conservation of native maize landraces and varieties and their wild relatives shall be promoted through subsidy programs or other mechanisms for the promotion of biodiversity conservation; however, this does not imply any authorization for a land use change from forestry to agricultural (Article 70).

- Specific monitoring measures are provided through the creation of laboratories for the detection, identification, and quantification of GM maize (Article 71).

- In cases where the authorities confirm the prohibited presence of GM material in landraces, varieties, and wild relatives of maize, they shall take measures to eliminate, control, or mitigate such presence, with Sagarpa being competent in respect of races and varieties and Semarnat in respect of wild relatives (Article 72).

It must be emphasized that during the regulatory improvement process for the Draft Order in question, at the request of Cofemer and also considering the various opinions received during the public consultation for the Draft Order, Sagarpa analyzed and gave a specific response to various matters relating to the Submitters' assertions, in respect of the operation of biosafety mechanisms; the establishment of a special protection regime for maize, with determination of centers of origin and genetic diversity; the implementation of a permitting system for experimental plantings, and the corresponding risk analysis and assessment, from which the following may be concluded:

- With the incorporation of the Special Protection Regime for Maize into the LBOGM Regulation, the legislative, administrative, and other measures that the Government of Mexico has been systematically implementing in fulfillment of its commitments under Article 2(1) of the Cartagena Protocol are incorporated into the catalog of measures, as stated by Sagarpa in the following remarks submitted to Cofemer:

Article 2 paragraph XI of the Genetically Modified Organisms Biosafety Act provides that a special protection regime shall be maintained for maize (not biotechnology as applied to its cultivation).

Now, the object of the Draft Order is not to implement a right already established within the legal framework, since such implementation is accomplished by the provisions of the Regulation, the Mexican Official Standards, or other legal provisions ensuing from the Act that govern genetically modified organisms (tariffs, customs, transportation, labeling, etc.).

However, it is evident from the analysis of the comments received by the Commission during the public consultation period for the Order that, generally speaking, the private participants interpreted the provisions of the Draft Order as identical to the Special Protection Regime for Maize and considered the document whose regulatory impact is under assessment to be discretionary.

Therefore, it was considered necessary to revise the content and scope of the provisions making up the Draft Order and it was found that if the right established by the legal framework is implemented through the Regulation, then it is the Regulation that should contain those provisions, additional to those applicable to all types of genetically modified organisms, that are specific to maize and whose object is to protect native maize varieties in all their aspects, such as human health, the environment, biodiversity, plant and animal health, and economic and agricultural aspects, and specifically food quality, since in this way, strict adherence to the Act that established a special protection regime for this crop is achieved.

It must be emphasized that Mexico is a party to the Cartagena Protocol on Biosafety, which arises under the Convention on Biological Diversity. This instrument provides that "[e]ach Party shall take necessary and appropriate legal, administrative and other measures to implement its obligations under this Protocol." It further stipulates that "[n]othing in this Protocol shall be interpreted as restricting the right of a Party to take action that is more protective of the conservation and sustainable use of biological diversity than that called for in this Protocol, provided that such action is consistent with the objective and the provisions of this Protocol and is in accordance with that Party's other obligations under international law." Thus, as noted, the Draft Order forms a part of a set of legislative and administrative measures that Mexico, as party to the Protocol, may implement, and these may even be stricter than those contained in that international instrument.

- The promulgation of the Order revising the regulation in question establishes a sufficient legal basis for the immediate issuance of permits for the various phases of release of GM maize.

In this regard, the competent federal authority stated to Cofemer that with the promulgation of the Draft Order, there is now a sufficient legal framework within which to rule upon permit applications for environmental release of GM maize, since there would now be "a set of standing, systematically organized, mandatory administrative provisions and rules…"

The regulatory reform in question also established the temporary rules governing rulings on permits for experimental release of GM maize, in anticipation of the promulgation of orders determining the species for which the United Mexican States are the center of origin and genetic diversity, as well as the geographic areas in which they are located. For this purpose, Transitory Article Five of the Regulation provides as follows:

> FIVE. Permit applications filed prior to the entry into force of this Regulation, and those filed prior to the promulgation of the orders contemplated in Article 86 of the Act, shall be decided by the competent Ministry further to consultation with the institutions contemplated in said article.

- In addition to resolving matters concerning the issuance of the applicable permits, Transitory Article Five of the Regulation ensures the preservation of species for which Mexico is the center of origin and genetic diversity, since the environmental release of GM maize may only be permitted if the site where the release is to be carried out has been previously confirmed and verified and it has been demonstrated that the criteria of LBOGM Article 87 are met.

- Additionally, in relation to the measures termed *mecanismos de salvaguarda* (biosafety mechanisms) by the Submitters and the Secretariat as well as the corresponding risk assessments, during the aforementioned regulatory improvement process, the competent federal authorities assessed the benefits and risks of the use of GM maize, specifically considering that Mexico is the center of origin and genetic diversity for this crop.

In particular, Sagarpa emphasized, as a central concern in the development of the Draft Order, that GMOs could be introduced into ecosystems where related species occur, compromising the gene pools necessary for selective breeding. One element to consider is that it has been demonstrated that traditional agricultural practices applied to maize in Mexico include experimentation among small farmers and widespread exchange of seeds. Therefore, special attention must be paid to the risk of accidental introduction of GMOs.

On this point, Cofemer found that the Draft Order under evaluation is adequate from the regulatory improvement standpoint in that it establishes control, safety, inspection, surveillance, and monitoring measures. Cofemer concluded that (Appendix 9):[28]

> In this way it is intended to address a possible problem of negative externalities that could arise from the accidental introduction of genetically modified maize materials into other ecosystems of related species. In addition, Cofemer noted that the establishment of systems for monitoring the efficacy of measures contained in the permits will address a problem of information that will allow for the determination of new measures in subsequent permits.

[28] Final Rule (*Dictamen Total Final*) issued by Cofemer in Doc. COFEME/08/3768, of 11 December 2008, available at http://www.apps.cofemer.gob.mx/expediente/v99/_COFEME.08.3768.pdf.

In addition, it was found that the promulgation of the Draft Order provides what is needed in order to diminish the risk of loss of diversity among traditionally improved varieties, since:

> There are other causes of loss of maize varietal diversity that are not necessarily associated with the use of any technology, including biotechnology, but rather with economic, environmental, social, or cultural conditions.
>
> Recognizing this fact, the Act establishes principles governing the formulation and conduct of biosafety policy, as well as the enactment of the regulations and Mexican Official Standards ensuing from it, which give recognition to our country's biodiversity and the need to protect the valuable store of genetic diversity it possesses (Article 9 paragraphs I, IV, V, VIII, X, XI, XIII, XIV, and XV). Meanwhile, Transitory Article Nine of the Regulation prescribes the establishment of the relevant public protection policies.
>
> Consequently, the amendments to the Draft Order complement the legal provisions already existing in the Act and the Regulation, and moreover contain aspects that will assist in ensuring the safety of native maize varieties (Articles 68 and 70).
>
> In light of the foregoing and in view of the information currently available, it is held that the aforementioned set of provisions, including the amendments to the Draft Order, will provide what is necessary to reduce the risks that the release of genetically modified maize may pose to the environment, biological diversity, and human, animal, or plant health.

Independently of the foregoing, as discussed previously, the Draft Order included an express prohibition on experimentation with or release of GM maize containing characteristics that prevent or limit its human or animal use or consumption. This is consistent with the international position adopted by Mexico in the declaration drafted during the First Conference of the Parties-Meeting of the Parties (COP-MOP1) to the Cartagena Protocol, in respect of the use of GM maize with various properties that limit its consumption as a food, particularly considering the importance of the conservation and sustainable use of maize, since Mexico is the center of origin and genetic diversity thereof. For greater clarity, Article 67 of the Regulation provides as follows:

> Article 67. Experimentation with, or environmental release of, genetically modified maize containing characteristics that prevent or limit its human or animal use or consumption, or its use in processing of food for human consumption, shall not be permitted.

Concerning the determination of centers of origin and genetic diversity contemplated in LBOGM Article 86, and considering the language describing the need to identify regions "currently harboring populations of wild relatives of the GMO in question, also including landraces and varieties thereof that constitute a gene pool of the material" (LBOGM Article 87 paragraph II), the federal government identified the need to update the information on the distribution of wild relatives as well as the landraces and varieties of maize in Mexico.

In this regard, in 2006 the National Biodiversity Commission (*Comisión Nacional para el Conocimiento y Uso de la Biodiversidad*–Conabio) produced a *Documento base sobre centros de origen y diversidad en el caso de maíz en Mexico* (Reference document on centers of origin and diversity in the case of maize in Mexico) that provided technical and scientific information for the determination of centers of origin and biological diversity in Mexico. The document recommended the compilation of up-to-date information available in the country in order to reduce the uncertainty involved in delimiting the areas in question (Appendix 10).

Further to the recommendations transcribed, the Second Extraordinary Session of Cibiogem, held on 31 August 2006, approved decision no. […] allocating financial resources to the maize project coordinated by Conabio with a view to generating the information necessary to determine the centers of origin and genetic diversity contemplated in the Biosafety Act:

> […]

The funds received by Conabio were used to implement the Conabio project titled "Compilation, generation, updating, and analysis of information on the genetic diversity of maize and its wild relatives in Mexico," with the participation of various research institutions. This made it possible to generate new information on the distribution of various landraces and varieties of maize as well as its wild relatives in Mexico, with over 15,300 new records. […]

V.2. Alleged lack of "measures to control and supervise seed storage, distribution, and marketing centers supplying the region's growers"

The Secretariat, in its Second Determination, requests a Party Response in respect of the alleged lack of "measures to control and supervise seed storage, distribution, and marketing centers supplying the region's growers;…"

It should be specified that the LBOGM contains no legal provisions for the control and supervision of seed storage, distribution, and marketing centers. In this regard, the Submitters claim that the Government of Mexico should take measures that it is not required to take under domestic law. However, LBOGM Article 75 does provide for the regulation, by means of Mexican Official Standards, of the storage or deposit of GMOs and products containing them in Mexican customs facilities.

Title III of the LBOGM governs the contained use of GMOs for purposes of teaching and scientific and technological research, or for industrial or commercial purposes (LBOGM Articles 73 to 85). However, these provisions *were not included in the submission*, and furthermore they cannot be interpreted as regulations governing seed storage, distribution, and marketing centers, as is evident from the definition of contained use contemplated in Article 3 paragraph XXXIV:

> ARTICLE 3. For the purposes of this Act, the terms below shall have the following meanings:
> …
> XXXIV. Contained use: Any activity whereby the genetic material of an organism is modified or whereby the organism, thus modified, is grown, stored, employed, processed, transported, marketed, destroyed, or disposed of, provided that physical barriers or a combination of these with chemical or biological barriers are used in order to effectively limit its contact with people and the environment. For the purposes of this Act, *the area of the facilities or the ambit of contained use does not form a part of the environment.* (Emphasis added.)

For greater clarity, the production, quality testing, marketing, and circulation of seeds is regulated by the Federal Seed Production, Certification, and Trade Act (*Ley Federal de Producción, Certificación y Comercio de Semillas*─LFPCCS), enacted on the basis of Article 27 paragraph XX of the Constitution and the provisions of Title III, Chapter IX of the Sustainable Rural Development Act governing activities in respect of the planning and organization of agricultural production and its industrialization and marketing. For reference, LFPCCS Article 2 provides as follows:

> Article 2. The Federal Executive Branch, acting by the Ministry of Agriculture, Livestock, Rural Development, Fisheries, and Food, is competent to enforce this Act, whose object is to regulate:
>
> I. The production of certified seeds;
> II. The quality testing of seeds, and
> III. The marketing and circulation of seeds.
> …

The LFPCCS governs aspects relating to the genetic quality of seeds. LFPCCS Articles 6, 33, and 35 provide that persons engaging in activities with GMOs must also adhere to the LBOGM, principally as regards the marketing or circulation of seeds and their import for such purposes.

> From the foregoing it may be inferred that, contrary to what is asserted by the Submitters, the LBOGM does not cover "seed storage, distribution, and marketing centers supplying the region's growers," while the statute that does apply to this matter ─ the LFPCCS ─ does not meet the requirements of Article 45(2) of the Agreement, and thus is not eligible for inclusion in submission SEM-09-001.

V.3. Alleged lack of capacity to inspect and verify the presence of genetically modified seeds in maize crops; alleged "incapacity to perform adequate sampling and the absence of coordination among the authorities responsible for biosafety in Mexico"

In their original submission, the Submitters refer to the filing of a complaint with the Sagarpa office in Chihuahua as well as the filing of two criminal complaints with the PGR, and they infer the possible import, distribution, and release of varieties of GM maize for agricultural purposes and/or illegal planting in the

state of Chihuahua, specifically in the municipalities of Cuauhtémoc, Namiquipa, Buenaventura, and Ascensión, with the consent of the state authorities and with prejudice to local farmers.

V.3.1 Actions mentioned by the Submitters

- **Filing of a complaint with the Sagarpa officer in Chihuahua[29]**

On 26 September 2007, representatives of El Barzón Chihuahua, Frente Democrático Campesino, et al. informed the Sagarpa officer in Chihuahua in a written document that on 19 September 2007, an article was published in the *Diario de Chihuahua* allegedly containing an interview in which Armando Villareal Marta, director of Agrodinámica Nacional A.C., referred to the existence of a transgenic maize test plot in Ejido Benito Juárez, Municipality of Namiquipa, Chihuahua.

In the document, also directed at the mass media and public opinion, the organizations requested that Sagarpa "perform the tests necessary to determine what type of seeds were planted in Benito Juárez and make the corresponding report public. If these seeds are found to be transgenic, it will be necessary to determine the degree of pollen contamination on neighbouring lots, to destroy all the contaminated seed, and to bring those responsible to justice."

In response to the document, the Sagarpa office ordered a visit to Ejido Benito Juárez, Municipality of Namiquipa, Chihuahua to verify compliance with the Mexican Official Standards and the plant health-related legal provisions in facilities, offices, factories, warehouses, rooms, patios, storerooms, or depots, as well as the principal books, subsidiary records, records, documents, and all products and subproducts of the Ejido […].

[…]

[…] However, the work of Senasica in this case was impeded by the death of the alleged violator.

On 12 December 2007, the Sagarpa officer in Chihuahua reported to the Profepa office in the state of Chihuahua the possible release of GMOs that may cause harm to the environment in Ejido Benito Juárez, municipality of Namiquipa, Chihuahua, for the pertinent legal purposes (Appendix 12).

The Profepa office initiated the administrative proceeding under its jurisdiction, […]

- Filing of criminal complaints with the PGR

On 29 September 2008 representatives of the organizations Frente Democrático Campesino, Barzón Chihuahua, and Centro de Derechos

[29] Original submission, Appendix 5.

Humanos de las Mujeres A.C. filed a criminal complaint with the PGR office in Chihuahua requesting that the authority responsible for criminal prosecutions in Mexico take various measures, some of which exceed the scope of criminal investigations under the applicable domestic law.

[…]

Irrespective of the foregoing, and in regard to the complainants' request to "Investigate and pursue, as well as delineate possible liability" in respect of facts that may constitute the offenses defined in CPF Articles 420 Ter, 420 Quater paragraphs II and III, and 421 in the municipalities of Cuauhtémoc, Namiquipa, Buenaventura, and Ascensión of the state of Chihuahua, as indicated by the PGR in Chihuahua, it should be emphasized that the criminal investigation initiated by the Submitters' complaint is ongoing. Therefore, the information is classified under the applicable domestic law, and no additional information can be provided in this Party Response.

On 3 October 2007, Greenpeace Mexico A.C., for its part, filed a criminal complaint with UEIDAPLE against anyone found liable for the illegal cultivation and import of transgenic maize in Chihuahua in connection with facts constituting possible biosafety-related offenses under CPF Article 420 Ter.

On 21 November 2008, the representative of Greenpeace A.C. filed an addendum to the complaint […]

As indicated in document […] the criminal investigation initiated further to the criminal complaint, mentioned by the Submitters in points 9 and 14 of the original submission, in respect of facts that may constitute the offenses defined by CPF Articles 420 Ter, 420 Quater paragraphs II and III, and 421 in the municipalities of Cuauhtémoc, Namiquipa, Buenaventura, and Ascensión, state of Chihuahua, is also still in progress, and this information must therefore be considered classified, and no additional information in this connection can be provided in this Response.[30]

V.3.2. Measures taken by the Government of Mexico

Irrespective of the considerations put forward herein on the nature of the LBOGM and the powers of the entities responsible for its enforcement – to wit, that they are not eligible for consideration within the citizen submission procedure since they do not fall within the scope of application of the Agreement, the process under the NAAEC being limited to the study of matters related exclusively to the effective enforcement of environmental law ─ the Government of Mexico has taken various measures for timely and effective enforcement of domestic law: it has conducted inspection and verification for the presence of GM seeds in maize crops; it has applied sound scientific procedures for sampling, and it has seen to the timely coordination of the authorities responsible for biosafety in Mexico.

[30] The document in question is attached to the Response as Appendix 4.

In addition to the measures taken in response to the three actions filed by the Submitters, the Government of Mexico has taken and continues to take various measures for the effective enforcement of biosafety-related domestic law. Contrary to what the Submitters maintain, these include ongoing measures to detect the presence of GM seeds in maize crops in the country, including the state of Chihuahua, using scientifically sound techniques and methodologies and through implementation of coordination mechanisms among the competent authorities.

It should be emphasized that the measures in question do not ensue from any complaint, request, or information filed by the Submitters. Thus, the sole purpose of the information included in this Party Response with a view to addressing the assertions contained in the submission concerning the absence of measures to inspect for and verify the presence of GM seeds in maize crops and to conduct adequate sampling, and the lack of capacity and coordination among the competent authorities for the taking of such measures, is to demonstrate by example that the Government of Mexico is taking specific, ongoing, coordinated measures to verify compliance with the applicable biosafety-related provisions, for purposes of prevention.

In view of the foregoing, in conformity to the domestic legal provisions governing the protection of confidential information such as personal data pursuant to LFTAIPG Articles 18 paragraph II, 20 paragraph VI, and 21, the supporting information provided to the Secretariat is to be kept confidential.

- **Measures taken by Senasica**

[…]

Finally, as discussed in the "Administrative proceedings pursued by Sagarpa" section of this Response, the administrative proceedings in question are currently at different procedural stages before the jurisdictional and judicial bodies of Mexico ─ that is, they are pending ─ and therefore the information concerning them is considered confidential and classified.[31]

- **Measures taken by Profepa**

Profepa conducted two inspection operations within the scope of its jurisdiction to detect the presence of GM maize in the state of Chihuahua.

[…]

It must be underscored that in addition to the measures described, since 2009 Profepa and INE have been applying the "Genetically Modified Organisms Inspection and Surveillance Strategy" with the aim of establishing the administrative policy and guidelines on assessment and monitoring of compliance with the legal provisions applicable to the management of GMOs and their possible impacts on the environment.

[31] This information corresponds to Appendix 1 of this Response.

The strategy consists of goals specific to Semarnat-Profepa, such as having staff qualified to carry out acts of inspection in respect of GMOs at the national level; verifying GMO release permits; designing and implementing surveillance operations in natural areas, in coordination with INE and Conanp; responding to reported GMO-related contingencies, and addressing all GMO-related complaints, as shown following (Appendix 17):

- The planned training measures include classroom instruction for two persons from each Semarnat branch office, online instruction for the entire staff of the natural resources inspection and legal affairs areas, and national-level accreditation of technical capacity for GMO-related inspection and surveillance.

- In terms of permit verification, each Profepa branch office in the country must verify compliance with the terms and conditions of experimental release permits in accordance with its logistical capabilities and its powers under the applicable act.

- The strategy also includes a list of PNAs for which plans must be devised to carry out coordinated GMO-related inspection and surveillance operations with a view to detecting the accidental presence or unintentional planting of GM maize.

- In addition, the plan provides that GMO contingency response must take place with adherence to the following order of activities: i) compilation of information; ii) geographical location of the event and existing environmental conditions; iii) identification of human and material requirements; iv) coordination of operations between specialists and competent authorities; (v) implementation of a contingency plan, and (vi) agreement upon management of information within each working group.

- Concerning response to reports of deliberate illegal release of GMOs, the plan provides that Profepa must determine the possible impact on ecosystems, wildlife species, and species classified in "NOM-059-Semarnat-2001, Environmental protection. Mexican native species of wild flora and fauna. Risk categories and specifications for their inclusion, exclusion, or change. List of species at risk" arising from the GMO release giving rise to the complaint, for which purpose a diagram of measures to be taken shall be produced.

- Concerning monitoring and inspection of sites where the unintentional and/or illegal presence of GMOs has been reported, the strategy promotes institutional coordination within the environmental sector, according to the powers and responsibilities of each institution (INE, CONANP, Conabio, DGIRA, and Profepa), as well as horizontally with the federal agricultural authorities, specifically Senasica, and with the state and local governments.

    - **Measures taken by the Ministry of Health**

The Federal Commission for Protection against Sanitary Risks (*Comisionado Federal para la Protección Contra Riesgos Sanitarios*–Cofepris), a deconcentrated body of the Ministry of Health, is competent to authorize GMOs, including maize, for human or animal consumption and for processing.

[…]

- **Measures taken by the SHCP**

Concerning the alleged non-existence of "acts to prevent the entry into the nation's territory of genetically modified seeds, particularly those bound for the state of Chihuahua", noted in the Submitters' assertions, it should be noted that there is no provision in Mexican law prohibiting the entry of GM maize into the nation's territory. The law does, however, establish procedures to ensure that the import of GMOs takes place in accordance with the provisions of the Cartagena Protocol and the LBOGM.

For the sole purpose of illustrating the actions being taken on an ongoing and coordinated basis by the Government of Mexico for the effective enforcement of biosafety-related domestic law, […] the Central Accounting and Auditing Administration (*Administración Central de Contabilidad y Glosa*) of the SHCP instructed the country's customs administrators to enforce the Biosafety Act through the following measures (Appendix 19):

[…]

It must be emphasized that in the original and revised submissions, the Submitters do not provide any documentary basis for their assertions concerning the illegal entry of GM maize or the failure by the federal authorities to verify compliance with the applicable legal provisions.

- **Measures taken by Cibiogem**

In addition to the operations carried out and the measures taken on an ongoing and coordinated basis by the federal authorities to verify compliance with the applicable biosafety-related legal provisions, the Government of Mexico, acting by Cibiogem, has followed up on reports of unauthorized releases of transgenic maize in the state of Chihuahua (Appendix 20).

[…]

Additionally, Cibiogem has taken the following measures illustrative of the effective enforcement of biosafety-related domestic law, as well as the coordination existing between the authorities responsible for its enforcement and their capacity to enforce it.

  - **Formation of a high-level executive working group**

With a view to strengthening coordination among the competent authorities, a high-level executive working group was formed. It is coordinated by the Executive Secretariat of Cibiogem and composed of three executive-level officials from each of Sagarpa, Semarnat, and the Ministry of Health. It is designed to accelerate and expedite the coordinated response to cases of illegal release of GMOs in Mexico.

For reference, the high-level group was created by Decision […]

[…]

- **Development of a protocol for coordinated response to cases of illegal environmental release of GMOs**

During the Fourth Regular Session of Cibiogem held on 9 December 2008, and in fulfillment of Decision […],[32] the Executive Secretariat of Cibiogem coordinated the development of a coordinated response protocol (the "Protocol") between the Ministry of Health, Sagarpa, and Semarnat. […]

[…]

- **Other measures taken by the Party to strengthen the domestic legal-institutional framework and to build domestic capacity in the area of biosafety**

Capacity Building for Implementation of the Cartagena Protocol (MEX/01/G32 PIMS 2285 project)[33]

In 2001, steps were taken to give the government of Mexico access to international financing within the framework of the Global Environmental Facility (GEF) with the aim of developing pilot projects to build capacity for compliance with the Cartagena Protocol. Following a process in which various federal government bodies participated, Mexico submitted the project proposal "Capacity Building for Implementation of the Cartagena Protocol (MEX/01/G32 PIMS 2285)" (the "GEF-Cibiogem Project") and it was approved for an amount of US $1,466,330.00.

Implementation of the GEF-Cibiogem Project began in June 2002 and concluded in August 2005. Cibiogem was the executing agency and Sagarpa, Semarnat, and Conabio were the implementing agencies.

Among the notable results of the GEF-Cibiogem Project implementation are those relating to risk assessment, management, and monitoring. These were associated with goals, indicators of success, and verification measures within the project logical framework.

It is worth emphasizing that as a result of the capacity building in the area of risk management and monitoring, training was provided to 240

[32] [...]
[33] http://bch.cbd.int/database/record-v4.shtml?documentid=46851.

Sagarpa, Semarnat, and Profepa inspectors and field technicians from every region of the country (Appendix 22).

Living Modified Organisms Information System[34]

In addition to the above-described activities, it is worth noting that since 1999, with the support of the GEF-Cibiogem Biosafety Project (MEX/01/G32/A/1G/99), Conabio has developed the Living Modified Organisms Information System (*Sistema de Información de Organismos Vivos Modificados*–SIOVM*)*, which contains taxonomic, biological, genetic, and ecological data as well as geographical aspects of living modified organisms (LMO) and their non-modified counterparts. SIOVM contains information from public databases such as molecular characterization, processing methods, risk analyses from other countries, trade and legal information, food safety data, and data from environmental and agricultural impact reports from around the world.

SIOVM is employed as a methodology for analyzing and identifying the potential risks that each case of GMO release could pose to biodiversity, with the aim of analyzing the probability of gene flow between LMOs for which release approval is sought and existing wild populations in the country.

The methodology consists in: 1) identifying the wild relatives of LMOs for which release approval is sought; 2) determining, based on the published literature, the characteristics of the wild relatives and the LMO that are conducive to hybridization; 3) inferring, based on the published literature, whether the progeny are fit to survive and reproduce in the habitat in question; 4) ascertaining whether the release area overlaps the potential area of distribution of the wild relative.[35]

Cibiogem Regulation

On 28 November 2006, the Cibiogem Regulation was published in the DOF. It specifies the responsibilities of the institution, including formulation and coordination of domestic biosafety policies, which shall be incorporated into the sectoral programs of the other bodies of the Federal Executive Branch for horizontal application; promoting capacity building of the institutions competent for matters of biosafety; developing the National Biosafety Information System (*Sistema Nacional de Información sobre Bioseguridad*); and various measures to build domestic capacity in this area.

The Regulation establishes the structure of Cibiogem and of its advisory and technical bodies: the Scientific Advisory Council (Article 12) and the Joint Advisory Council (the auxiliary advisory and opinion body, pursuant to Article 13).

Rules of Operation of Cibiogem

[34] http://www.conabio.gob.mx/conocimiento/biosafety/doctos/consulta_SIOVM.html.
[35] Sistema de Información de Organismos Vivos Modificados (SIOVM), online. Mexico City: GEF-Cibiogem/Conabio Project. Updated 26/04/2010. Available at http://www.Conabio.gob.mx/conocimiento/biosafety/doctos/consulta_SIOVM.html.

On 5 December 2007, the Rules of Operation of Cibiogem were published in the DOF. The Rules of Operation cover the meeting procedure and rules of order, powers, organization, and operations of Cibiogem and of its technical and advisory bodies, such as the Technical Committee, the Scientific Advisory Council, and the Joint Advisory Council, as well as the mechanisms for public participation in matters of biosafety, including access to information.

LBOGM Regulation

On 19 March 2008 the LBOGM Regulation was published in the DOF. Its object is to promote and regulate strict adherence in the administrative sphere to the Biosafety Act in respect of permits for GMO-related activities, reconsideration of negative decisions and review of permits and authorizations, import and export of GMOs, restricted zones, inspection and surveillance, safety or urgent measures, violations, sanctions, and the Special Protection Regime for Maize.

Rules of Operation of the Cibiogem Fund

On 27 March 2009, the Rules of Operation of the Fund for Scientific and Technological Research on Biosafety and Biotechnology (the "Cibiogem Fund") were issued.[36]

The Cibiogem Fund makes grants and provides financing, *inter alia,* to promote the development of biosafety and technology projects that can yield knowledge to assess the risks that GMOs may pose to the environment, biological diversity, human health, and animal, plant, and aquaculture health. In addition, it promotes human, institutional, and infrastructure capacity building for assessment and monitoring of risks arising from GMOs.

The Rules of Operation lay the groundwork for grantmaking and financing as well as the structure of the Cibiogem Fund, which is made up of a Technical and Administrative Committee, a Technical Secretary, and various assessment bodies.

Mexican GMO Monitoring Network[37]

On 22 and 23 November 2007, INE, Senasica, and Cibiogem jointly held the "First Workshop on Monitoring of Genetically Modified Organisms" with the participation of various public and academic institutions, such as the Universidad Nacional Autónoma de México, the Universidad Autónoma Metropolitana, the Centro de Investigación y de Estudios Avanzados (CINVESTAV-Guanajuato), and the Colegio de Posgraduados.

On 29 and 30 May 2008, the "Second Workshop on Monitoring of Genetically Modified Organisms" was held with the goal of presenting the guidelines for the establishment of the Mexican Monitoring Network, identifying capacities in the

[36] http://www.cibiogem.gob.mx/Norm_leyes/Documents/Reglas_de_Operacion_FONDO-Cibiogem.pdf.

[37] *http://www2.ine.gob.mx/biosafety/red_monitoring.html*.

different geographical areas of the country, and defining the possible roles, responsibilities, and contributions of the participating institutions.

Subsequently, at the Second Regular Session of Cibiogem, held 2 May 2008, the members of the Commission, in Decision […], gave instructions for the establishment and maintenance of a GMO monitoring network:

[…]

Finally, in a document of 23 June 2009, the Cibiogem Plenary issued the Rules of Operation of the Mexican Monitoring Network. The Rules of Operation formally constitute the Monitoring Network and lay the foundations of its organization and operation.

In addition, the specific goals of the Mexican Monitoring Network were established, and they include the following: promoting coordination among the authorities competent for monitoring of GMOs; proposing, carrying out, and evaluating research to make possible the integration and comparability of results; strengthening ties between the authorities, academia, and other interested sectors, in order to facilitate and promote the dissemination of information for decision making and for the general public; producing any protocols, manuals, and guidelines that may be necessary in order to document and systematize monitoring activities, results, and analysis and to take joint monitoring measures.

In view of all the activities and measures discussed above, it is evident that the Submitters' assertions concerning the lack of capacity on the part of the domestic authorities as well as the lack of coordination mechanisms between them lack any basis whatsoever.

In this regard, it should further be emphasized that the Submitters did not indicate any general legal provision, nor any legal provision that may be considered environmental law under the NAAEC, that refers to a requirement for the competent federal authorities to have the technical capacities necessary to take measures to enforce the LBOGM. Thus, it is not evident what the legal basis may be for the Secretariat's determination to request a response from the Government of Mexico with respect to those assertions, since they refer to measures that the government of Mexico is not required to take under the Act.

VI. CONCLUSIONS

Based on the foregoing discussion, the Government of Mexico is of the view that this case does not warrant the preparation of a factual record.

First, Mexico has notified the Secretariat in this Response of the existence of various pending quasi-judicial administrative, jurisdictional, and judicial proceedings that: i) have been pursued in a timely manner by the Party; ii) meet the definition of NAAEC Article 45(3), and iii) are of the same subject matter as the assertions contained in submission SEM-09-001, and entail the review by domestic courts and tribunals of the enforcement of the same legal provisions

that the Submitters claim that Mexico is failing to effectively enforce. This in itself constitute sufficient grounds for termination of this process by the operation of Article 14(3)(a).

Additionally, the Submitters have various channels and actions that they can pursue in order to raise the matters giving rise to their assertions in submission SEM-09-001 before the competent domestic authorities. In fact, the Submitters have done precisely that in at least one action that they neglected to mention in submission SEM-09-001 and that is now sub judice before the competent authorities. Other actions and procedures in relation to various matters raised in the submission, as detailed in this Response, are also pending. The Government of Mexico holds the view that the automatic termination of the submission is necessary in order to allow for the facts asserted in respect of the failure to effectively enforce the applicable law to be reviewed by the competent bodies in Mexico.

Furthermore, Mexico has clearly shown in this Response that many of the Submitters' assertions refer to alleged acts by third parties ─ e.g., the assertions relating to contraband in transgenic maize ─ that are not eligible for consideration in a factual record since they are not failures to enforce on the part of the Government of Mexico. Concerning those assertions that could be related to possible failures to enforce by the Government of Mexico having regard to its response to the alleged illegal presence of transgenic maize, the Response has shown without a doubt that the measures taken have fully discharged, with the necessary technical capacity, the obligations of the Government of Mexico, indeed going beyond the geographical areas that were merely mentioned in a local newspaper article. Mexico cannot fail to mention that the Secretariat, contrary to Articles 14(1)(c) and 14(2)(d), decided to request a Party Response in respect of these assertions when they rely solely on a media report. A number of these assertions refer to matters that are not in fact taking place.

In addition, as shown in this Response, the analysis of the assertions contained in the submission from the standpoint of the proper interpretation of the various legal provisions cited in the Secretariat's Determination demonstrates that they cannot be considered environmental law in the sense of NAAEC Article 45(3). In other cases clearly identified in this response, the assertions concerning the failure to effectively enforce the environmental law refer to the reasonable exercise of the Party's discretionary powers.

The Government of Mexico has specifically responded to each of the issues raised in the Secretariat's determinations. The information provided clearly shows that not only did the Submitters not present any evidence of a failure by Mexico to effectively enforce its environmental law, but also that the Party has taken a series of ongoing measures to solidify the legal framework applicable to GMOs, with special emphasis on maize, as well as to continuously improve the technical and response capacities of the institutions responsible for biosafety policy, including various measures contemplated in NAAEC Article 5.

Based on the discussion in this Party Response, the United Mexican States contends that submission SEM-09-001 (Transgenic Maize in Chihuahua) should be terminated due to lack of legal basis and to the reasoning set out herein.

Should the Secretariat, despite the arguments for termination and the other considerations set out in this document, decide to proceed with the review of the submission in question, please consider this document as the *ad cautelam* Party Response, on the basis of which it must be concluded that the preparation of a factual record should not be recommended.

Sincerely,

WILEHALDO CRUZ BRESSANT
UNIT DIRECTOR

Cc: Juan Rafael Elvira Quesada, Minister of the Environment and Natural Resources

ARS/LBC