

**Secretariat of the Commission for Environmental Cooperation**

**Article 15(1) Notification to Council that Development  
of a Factual Record is Warranted**

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<b>Party:</b>	United Mexican States
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<b>Submission no.:</b>	<b>SEM-13-001</b> ( <i>Tourism Development in the Gulf of California</i> )

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**Table of Contents**

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>3</b>
<b>II.</b>	<b>EXECUTIVE SUMMARY .....</b>	<b>5</b>
<b>III.</b>	<b>ANALYSIS .....</b>	<b>7</b>
<b>A.</b>	<b>Preliminary considerations raised by Mexico regarding the determination based on Articles 14(1) and (2).....</b>	<b>7</b>
<b>1.</b>	<b>Page limit requirement under paragraph 3.3 of the Guidelines.....</b>	<b>8</b>
<b>2.</b>	<b>On the consistent application of NAAEC provisions.....</b>	<b>9</b>
<b>3.</b>	<b>On consideration of the Ramsar Convention .....</b>	<b>10</b>
<b>B.</b>	<b>Submission SEM-13-001 - Consideration pursuant to NAAEC Article 15(1) of the Submitters' assertions in light of Mexico's Response .....</b>	<b>11</b>
<b>1.</b>	<b>The Cabo Cortés project.....</b>	<b>12</b>
<b>2.</b>	<b>The CIP Playa Espíritu project.....</b>	<b>14</b>
	<b>i) Enforcement of REIA Article 36.....</b>	<b>14</b>
	<b>ii) Enforcement of LGEEPA Article 35, REIA Articles 13 and 44 and LGVS Article 5, section II ....</b>	<b>16</b>
	<b>iii) Enforcement of REIA Article 24.....</b>	<b>21</b>
	<b>iv) Enforcement of the Ramsar Convention.....</b>	<b>22</b>
<b>3.</b>	<b>Entremares project.....</b>	<b>25</b>
	<b>i) Enforcement of LGEEPA Article 35 and REIA Articles 13 and 44.....</b>	<b>25</b>
	<b>ii) Enforcement of LGVS Article 60 <i>ter</i> .....</b>	<b>26</b>

iii) Enforcement of NOM-059.....27

iv) Enforcement of the Ramsar Convention.....29

**4. The Paraíso del Mar project.....31**

i) Enforcement of Articles 35 of LGEEPA and REIA articles 13 and 44 of REIA .....31

ii) Enforcement of LGVS Article 5, section II.....32

iii) Enforcement of NOM-022.....33

iv) Enforcement of a Protected Forest Zone executive order.....34

v) Enforcement of LGVS Article 1 in lieu of the LGDFS .....35

vi) Enforcement of the Ramsar Convention.....36

**IV. NOTIFICATION.....37**

## I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC or the “Agreement”) provide for a process allowing any person or nongovernmental organization to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the CEC (“the Secretariat”) initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat determines that a submission meets the criteria set out in Article 14(1), it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the NAAEC Party named in the submission. In light of any response from the concerned Party, and in accordance with the NAAEC, the Secretariat may notify the Council that the matter warrants the development of a factual record, providing its reasons for such recommendation in accordance with Article 15(1). Where the Secretariat decides to the contrary, or where certain circumstances prevail, it proceeds no further with its consideration of the submission.<sup>1</sup>
2. On 11 April 2013, the Interamerican Association for Environmental Defense (*Asociación Interamericana para la Defensa del Ambiente*—AIDA) and Earthjustice, representing the nongovernmental organizations listed on the first page of this Notification (the “Submitters”), filed a submission with the Secretariat of the CEC under NAAEC Article 14. The Submitters assert that Mexico is failing to effectively enforce its environmental law “by authorizing various construction projects and tourism real estate operations in ecologically sensitive areas” of the Gulf of California.<sup>2</sup>
3. According to the Submitters, Mexico is failing to effectively enforce provisions of the Convention on Wetlands of International Importance especially as Waterfowl Habitat (the “Ramsar Convention”);<sup>3</sup> the Convention concerning the Protection of the World Cultural and Natural Heritage (the “World Heritage Convention”);<sup>4</sup> the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico y la Protección al Ambiente*—LGEEPA);<sup>5</sup> Regulation to the LGEEPA respecting Environmental Impact Assessment (*Reglamento de la LGEEPA en materia de Evaluación del Impacto Ambiental*—REIA);<sup>6</sup> the General Wildlife Act (*Ley General de Vida Silvestre*—LGVS);<sup>7</sup> Official Mexican Standard NOM-022-SEMARNAT-2003 - *Specifications for the preservation, sustainable use and restoration of coastal wetlands*

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<sup>1</sup> For detailed information on the various stages of the submission process, as well as on the Secretariat’s determinations and factual records, please consult the CEC website: <[www.cec.org/submissions](http://www.cec.org/submissions)>.

<sup>2</sup> SEM-13-001 (*Tourism Development in the Gulf of California*), Submission pursuant to Article 14(1) (11 April 2013) at 1, <<http://goo.gl/uQP54K>> [the “original submission”].

<sup>3</sup> Convention on Wetlands of International Importance especially as Waterfowl Habitat, enabling decree published in *Diario Oficial de la Federación (DOF)* on 29 August 1986 and modified by the Protocol to Amend the Convention on Wetlands of International Importance especially as Waterfowl Habitat, adopted in Paris, France, on 3 December 1982, and by the Amendments to Articles 6 and 7 of the Convention, adopted in Regina, Canada, on 28 May 1987 [“Ramsar Convention”].

<sup>4</sup> Convention concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 November 1972, enabling decree published in *DOF* on 2 May 1984 [“World Heritage Convention”].

<sup>5</sup> *Ley General del Equilibrio Ecológico y la Protección al Ambiente (LGEEPA)*, published in *DOF* on 28 January 1988.

<sup>6</sup> *Reglamento de la LGEEPA en materia de Evaluación del Impacto Ambiental (REIA)*, published in *DOF* on 30 May 2000.

<sup>7</sup> *Ley General de Vida Silvestre (LGVS)*, published in *DOF* on 3 July 2000.

in mangrove zones (“NOM-022”);<sup>8</sup> and, Official Mexican Standard NOM-059-SEMARNAT-2010 - *Environmental protection - Native species of wildlife in Mexico - Risk categories and specifications for inclusions, exclusions or modifications - List of species at risk* (“NOM-059”).<sup>9</sup>

4. The Submitters assert that the development of the Cabo Cortés, CIP Playa Espíritu, Entremares and Paraíso del Mar projects has significant impact on the Cabo Pulmo coral reef, the Marismas Nacionales wetland, the El Mogote nesting area and the Bay of La Paz in Mexico.<sup>10</sup> They also assert that the proper environmental impact assessment and permitting procedures were not followed, among other alleged environmental law enforcement failures.<sup>11</sup>
5. On 24 May 2013, the Secretariat determined that submission SEM-13-001 did not meet the admissibility requirements in Article 14(1) of the Agreement and, pursuant to paragraph 6.1 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”),<sup>12</sup> it notified the Submitters that they had sixty working days, i.e., until 16 August 2013, to file a submission meeting all NAAEC Article 14(1) requirements.<sup>13</sup>
6. On 16 August 2013, the Submitters filed a revised submission with the Secretariat in accordance with NAAEC Article 14(1) and paragraph 6.1 of the Guidelines, in which they clarified assertions and addressed the issues brought to their attention by the Secretariat.<sup>14</sup>
7. On 12 November 2013, the Secretariat determined that the revised submission met the requirements established under NAAEC Article 14(1), and requested a response from the Party pursuant to NAAEC Article 14(2).<sup>15</sup> On 24 February 2014, the Secretariat acknowledged receipt of the Party’s response (“Response”).<sup>16</sup>

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<sup>8</sup> Official Mexican Standard NOM-022-SEMARNAT-2003, *Specifications for the preservation, sustainable use and restoration of coastal wetlands in mangrove zones*, published in *DOF* on 10 April 2003 and amended by the *Agreement which adds specification 4.43 to Official Mexican Standard NOM-022-SEMARNAT-2003* published in *DOF* on 7 May 2004 [“NOM-022”].

<sup>9</sup> Official Mexican Standard NOM-059-SEMARNAT-2010, *Environmental protection - Native species of wildlife in Mexico - Risk categories and specifications for the inclusions, exclusions or modifications - List of species at risk*, published in *DOF* on 30 December 2010 [“NOM-059”].

<sup>10</sup> Original submission, *supra* note 2 at 1.

<sup>11</sup> *Idem*.

<sup>12</sup> *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, <<http://www.cec.org/guidelines>> [“Guidelines”]. Paragraph 6.1 of the Guidelines stipulates that:

Where the Secretariat determines that a submission does not meet the criteria set out in Article 14(1) of the Agreement or any other requirement set out in these guidelines, with the exception of minor errors of form contemplated in section 3.10 of these guidelines, the Secretariat will promptly notify the Submitter of the reason(s) why it has determined not to consider the submission.

<sup>13</sup> SEM-13-001 (*Tourism Development in the Gulf of California*), Determination pursuant to Article 14(1) (24 May 2013), <<http://goo.gl/TQhCvj>> (viewed 6 January 2012) [“Article 14(1) Determination”].

<sup>14</sup> SEM-13-001 (*Tourism Development in the Gulf of California*), Revised submission pursuant to Article 14(1) (16 August 2013), <<http://goo.gl/pev8oW>> [“revised submission”]. The reader should note that references below are to the original Spanish version of the revised submission.

<sup>15</sup> SEM-13-001 (*Tourism Development in the Gulf of California*), Determination pursuant to Articles 14(1) and (2) (12 November 2013), <<http://goo.gl/TQhCvj>> [“Article 14(1) and (2) Determination”].

<sup>16</sup> SEM-13-001 (*Tourism Development in the Gulf of California*), Response pursuant to Article 14(3) (24 February 2014), <<http://goo.gl/Y8UsWs>> [“Response”].

8. In addition to providing information regarding the effective enforcement of the environmental law in question, Mexico's Response notified the Secretariat of an administrative proceeding pending resolution. On 16 May 2014, due to the existence of a pending administrative proceeding the Secretariat notified the Submitters and Council that it was terminating the submission process in relation to the effective enforcement of REIA Articles 57 and 58 with respect to the Paraíso del Mar project, and that it was proceeding with the rest of the assertions in the revised submission.<sup>17</sup>

## II. EXECUTIVE SUMMARY

9. After analyzing the revised submission in light of Mexico's Response, the Secretariat hereby determines, pursuant to NAAEC Article 15(1), that submission SEM-13-001 (*Tourism Development in the Gulf of California*) warrants the preparation of a factual record with respect to the effective enforcement of provisions applicable to best available information in the preparation of an environmental impact statement (*manifestación de impacto ambiental*, EIS); and to due consideration of cumulative and residual effects, alleged fragmentation of the projects, protection of species listed under any category of protection, and enforcement of the Ramsar Convention in the issuance of environmental impact authorizations (*autorizaciones de impacto ambiental*). With this notification, and in accordance with NAAEC Article 15(1), the Secretariat explains the reasons for its recommendation below.<sup>18</sup>
10. Figure 1 shows the location of the projects in question. Table 1 schematically indicates the assertions and environmental law in question for each project. The following points summarize the Secretariat's analysis:
- The Cabo Cortés project.** Mexico notified the Secretariat that the project in question "does not exist either materially or legally"<sup>19</sup> due to the annulment of its environmental impact authorization. The Secretariat considers that since the environmental impact authorization has been annulled, the preparation of a factual record is not warranted, and the assertions with regard to this project are moot. Consequently, the Secretariat has terminated its analysis of the assertions in relation to the Cabo Cortés project (§§25-32 *infra*).
  - The CIP Playa Espíritu project.** The Secretariat finds that a factual record would present more detailed information on the following matters: Mexico's procedures when it requires consideration of the best available information in an EIS; the assessment of cumulative and residual effects; the alleged fragmentation of the project; and enforcement of the Ramsar Convention in issuing an environmental impact authorization. However, the Secretariat considers that the assertions concerning the consideration of technical opinions from different agencies do not warrant the preparation of a factual record (§§33-65 *infra*).

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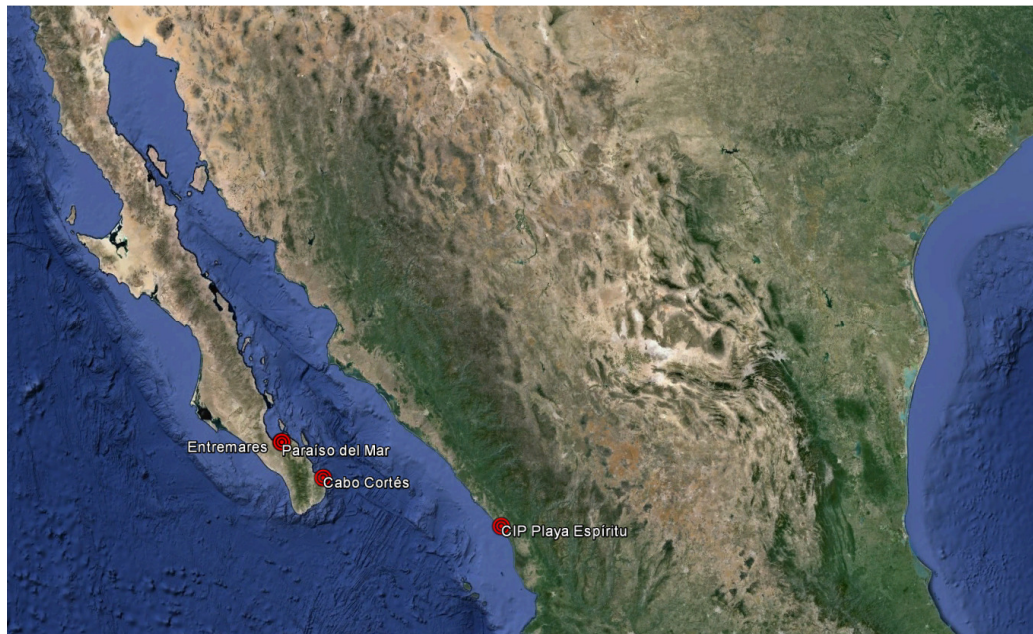
<sup>17</sup> SEM-13-001 *Tourism Development in the Gulf of California*, Notification to Submitters and the Council regarding a proceeding notified by Mexico (16 May 2014), <<http://goo.gl/VHbEou><http://goo.gl/lI9MVg>> ["Secretariat Notification re pending proceeding"].

<sup>18</sup> Information on the original submission, the revised submission and Mexico's response may be consulted in the CEC's registry of submissions. Please see the webpage for submission SEM-13-001: <<http://goo.gl/KX5rgv>>.

<sup>19</sup> Response, *supra* note 16 at 7.

- c. **The Entremares project.** The Secretariat determines that a factual record would present more detailed information on the following matters: consideration of cumulative and residual effects and the alleged fragmentation of the project; protection of species listed under any category of protection; and enforcement of the Ramsar Convention. However, the Secretariat determines that the assertions concerning the protection of mangrove species do not warrant the preparation of a factual record (§§66-86 *infra*).
- d. **The Paraíso del Mar project.** The Secretariat recommends the preparation of a factual record in relation to the following matters: consideration of cumulative and residual effects and the alleged fragmentation of the project, and enforcement of the Ramsar Convention. The preparation of a factual record is not recommended concerning the following matters raised in the assertions: assessment of the project's environmental impact pursuant to the Protected Forest Zone Executive Order (*Decreto de Protectora Forestal Zona Vedada*), the protection of mangrove species, including consideration of the distance of project activities from mangrove areas and aquifer replenishment in said ecosystems, and the non-applicability of the General Law of Sustainable Forestry Development (*Ley General de Desarrollo Forestal Sustentable*, LGDFS) (§§87-113 *infra*). Pursuant to the Secretariat's notification of 16 May 2014 (§8 *supra*) with respect to a pending administrative proceeding, the assertion on the environmental impact of construction and non-authorized activities concerning the Paraíso del Mar project site is not examined herein.<sup>20</sup>

Figure 1. Project locations<sup>21</sup>



Note: The project locations shown above are approximate.

<sup>20</sup> Notification of a pending proceeding, note 17 *supra*.

<sup>21</sup> Map produced using Google Earth.



**Table 1. Environmental law in question and assertions by project**

	Cabo Cortés	CIP Playa Espíritu	Entremares	Paraíso del Mar
REIA Art. 57 & 58 (activities without environmental impact authorization; corrective measures)				Pending proceeding
REIA Art. 59 (non-compliance with conditions)				
REIA Art. 57, 58 & 59 (unauthorized access road to project)				
REIA Art. 57, 58 & 59 (non-shutdown of worksite after 2 1/2 years of construction)				
REIA Art. 36 (best available information)	X	X		
LGEEPA Art. 35 and REIA Art. 44 (cumulative and residual effects, project fragmentation)	X	X	X	X
LGVS Art. 5, section II (possible environmental impacts)	X	X		X
REIA Art. 24 (technical opinions from other agencies)		X		
LGVS Art. 60 ter (mangrove clearing)			X	
NOM-022 (distance from mangrove)				X
NOM-022 (aquifer recharging)				X
NOM-059 (species under any category of protection)	X		X	X
Protected Forest Zone				X
LGDFS (non-applicability)				X
Ramsar Convention Art. 3.1 (authorizing of projects without implementing measures)	X	X	X	X
Ramsar Convention Art. 3.2 (monitoring measures; review of Ramsar site conditions)	X	X	X	X
UNESCO Convention Art. 4	X			

*N.B.* This notification restricts its effective enforcement analysis to the instances where projects and provisions coincide in the shaded quadrants above. The Secretariat's analysis of the Cabo Cortés project does not address issues of effective enforcement (see paragraphs 25-32 *infra*).

### III. ANALYSIS

11. In accordance with NAAEC Article 15(1), the Secretariat here explains the reasons for its recommendation to Council that development of a factual record is warranted. In addition, the Secretariat addresses the issues raised in Mexico's Response regarding the number of pages in the submission and the consistent application of the NAAEC's provisions.

#### A. Preliminary considerations raised by Mexico regarding the determination based on Articles 14(1) and (2)

12. In its Response, Mexico notes its "deep disappointment" that the Secretariat considered the submission admissible in accordance with Article 14(1), despite the fact that the submission exceeds the limit (provided in the Guidelines) of fifteen typed pages. Mexico also objects to the Secretariat's reference to past determinations in relation to other Article 14 submissions. In addition, Mexico disputes the application of the SEM process to a multinational treaty such as the Ramsar Convention. The Secretariat therefore addresses these issues in the paragraphs that follow.

### 1. Page limit requirement under paragraph 3.3 of the Guidelines

13. Mexico considers that the Secretariat should not have admitted a submission that exceeded the limit of fifteen typed pages on letter-sized paper, as specified in paragraph 3.3 of the Guidelines. The Party considers that Guideline 3.3 “is not a mere recommendation,”<sup>22</sup> and that the fifteen-page limit applies to both original and revised submissions,<sup>23</sup> that supporting information must not contain assertions on the effective enforcement of environmental law<sup>24</sup>, and that by accepting such submissions the Secretariat “encourages evasion of the Guidelines’ provisions [...] which is detrimental to transparency and comprehension of the matters raised in the Submission.”<sup>25</sup>
14. In its determination dated 12 November 2013, the Secretariat considered whether, in effect, it was dealing with an error of form and whether, in any case, this prevented further processing of the submission.<sup>26</sup> The Secretariat determined that, taken as a whole, the revised submission and the clarifications contained in Appendix A did in effect exceed the number of pages recommended in paragraph 3.3 of the Guidelines. However, it noted that the Guidelines do not specify the manner in which a Submitter may present clarifications to a submission and that, in any case, the existence of “minor errors of form” does not authorize the Secretariat to terminate a submission or prevent the timely processing and subsequent consideration thereof.<sup>27</sup>
15. The Secretariat may not terminate the processing of a submission solely because of a minor error of form, and the Guidelines do not authorize any such practice;<sup>28</sup> the Guidelines do, however, provide for rectification of such errors in Guideline 3.10. Termination on such grounds would compromise the Agreement’s express objectives of transparency and cooperation, in favour of a mere formality.<sup>29</sup> It should also be noted that revised submissions have been filed in the form of an appendix or supplementary information, without objections being raised by a Party.<sup>30</sup> Timeliness, quality and efficiency in the processing of submissions —priorities underlined by the Council and the Joint Public Advisory Committee—<sup>31</sup> must, in any case, be ensured “in the interests of transparency and cooperation, and to the benefit of the North American public,” as Mexico points out in its Response.<sup>32</sup>

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<sup>22</sup> Response, *supra* note 16 at 2.

<sup>23</sup> *Idem*.

<sup>24</sup> *Ibid.*, at 3.

<sup>25</sup> *Idem*.

<sup>26</sup> Article 14(1) Determination, *supra* note 13, §11.

<sup>27</sup> *Idem*.

<sup>28</sup> *Cfr.* Paragraph 6.1 of the Guidelines, *supra* note 12.

<sup>29</sup> *Cfr.* North American Agreement on Environmental Cooperation (NAAEC), *DOF* on 21 December 1993, Article 1, paragraphs (c) and (h).

<sup>30</sup> See for example SEM-04-005 (*Coal-fired Power Plants*), Submission pursuant to Article 14(1), Appendix 12 (18 January 2005).

<sup>31</sup> Submissions “under Articles 14 and 15 should be processed in a timely and efficient manner in order to meet the public’s expectations regarding the process,” Council Resolution 01-06 (29 June 2001), Response to the report from the Joint Public Advisory Committee (JPAC) on lessons learned regarding the Articles 14 and 15 process.

<sup>32</sup> Response, *supra* note 16 at 3. It’s worth pointing out that the length of submissions (see Guidelines, paragraph 3.3) and the limited number of pages in the Secretariat’s determinations (see Guidelines, paragraph 16.2) contrast with the length of the responses of the Party in question, as may be seen in the



## 2. On the consistent application of NAAEC provisions

16. Mexico states that the Secretariat's practice of citing its past determinations is inappropriate, as it is tantamount to following the doctrine of *stare decisis*: it amounts to "considering [the Secretariat's determinations and Party responses] as binding precedents".<sup>33</sup> Mexico maintains that its responses do not embrace "past opinions or responses."<sup>34</sup> Mexico thus considers the Agreement's provisions and the Guidelines to be the sole parameters applicable in the SEM process.<sup>35</sup> According to the Party, it is inappropriate to construct a doctrine of precedents in the context of the SEM process.<sup>36</sup>
17. The Secretariat has made it clear that the doctrine of *stare decisis* does not govern its determinations in the submissions process.<sup>37</sup> In any case, the Secretariat undertakes a consistent interpretation of Articles 14 and 15 in light of NAAEC's object and purpose.<sup>38</sup> NAAEC is to be applied in a consistent and, therefore, predictable manner.<sup>39</sup> Mexico has itself referred to SEM practice when similar situations arise.<sup>40</sup> Indeed, to that end the Party has quoted Secretariat determinations<sup>41</sup> to support its Responses, and, in a few cases, has highlighted the importance of applying the Agreement in a consistent and predictable manner.<sup>42</sup>

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following examples: SEM-13-001 (109 pp.), SEM-11-002 (56 pp.), SEM-09-001 (84 pp.), SEM-09-002 (84 pp.) and SEM-08-001 (73 pp.).

<sup>33</sup> *Ibid.*, at 3-4.

<sup>34</sup> *Ibid.*, at 4.

<sup>35</sup> *Idem.*

<sup>36</sup> *Idem.*

<sup>37</sup> SEM-97-001 (*BC Hydro*), Notification pursuant to Article 15(1) (27 April 1998) at 7, <<http://goo.gl/qE1KdY>>.

<sup>38</sup> SEM-07-005 (*Drilling Waste in Cunduacán*), Determination pursuant to Article 14(3) (8 April 2009) §24.

<sup>39</sup> "At a minimum, references to previous determinations will assist in ensuring that the Secretariat consistently applies the provisions of the NAAEC. Such a contextual approach to a treaty is suggested by general canons of statutory interpretation as well as Articles 31 and 32 of the Vienna Convention on the Law of Treaties," SEM-97-001 (*BC Hydro*), Notification pursuant to Article 15(1) (27 April 1998) at 7, note 9, <<http://goo.gl/qE1KdY>>. See also: SEM-98-001 (*Guadalajara*), Determination pursuant to Article 14(1) (13 September 1999) at 5-6.

<sup>40</sup> SEM-09-003 (*Los Remedios National Park II*), Response pursuant to Article 14(3) (20 December 2010) at 3 (considering "environmental law" pursuant to strict criteria).

<sup>41</sup> SEM-11-002 (*Sumidero Canyon II*), Response pursuant to Article 14(3) (23 November 2012) at 4, note 1; SEM-09-001 (*Transgenic maize in Chihuahua*), Response pursuant to Article 14(3) (3 May 2010) at 4, note 1 (both responses refer to a determination made during the processing of *BC Hydro* in relation to consideration of pending proceedings); SEM-05-003 (*Environmental Pollution in Hermosillo II*), Response pursuant to Article 14(3) (16 February 2006) at 8 (in reference to the inclusion of a succinct account of the facts in a submission); SEM-09-003 (*Los Remedios National Park II*), Response pursuant to Article 14(3) (20 December 2010) at 3 ("the Secretariat is not a court charged with administering justice").

<sup>42</sup> "Article 4 of the Constitution of the United Mexican States must be excluded from the Secretariat's analysis in this and any other citizen submission." SEM-06-006 (*Los Remedios National Park*), Response pursuant to Article 14(3) (15 July 2007) at 49.

18. In short, the Secretariat seeks to create “a modicum of predictability and thus fairness in its practice with regard to Articles 14 and 15, for example, by taking into account lessons learned from previous Determinations.”<sup>43</sup>

### 3. On consideration of the Ramsar Convention

19. Mexico indicates that it would be “inappropriate” to address allegations of effective enforcement of the Ramsar Convention through the NAAEC’s submissions mechanism, arguing that the NAAEC does not provide for the possibility of reviewing other instruments of public international law, and that to do so would constitute an “unacceptable international practice.”
20. The Secretariat has consistently found that obligations in international instruments may be subject to consideration under Articles 14 and 15, provided that such obligations have been incorporated into the domestic legal system of the Party in question.<sup>44</sup> Furthermore, the Secretariat observes that the Party has reaffirmed in the past that certain provisions of the Ramsar Convention are “environmental law,” and can thus be considered under the NAAEC:

The Government of Mexico acknowledges that the Ramsar Convention has been incorporated into the national legal system, as it has been signed, approved, and ratified in accordance with the provisions of the Constitution of the United Mexican States.<sup>45</sup>

21. Moreover, the Council has issued instructions regarding the preparation of factual records in relation to international instruments adopted by Parties as domestic law, such as the US Migratory Birds Treaty Act<sup>46</sup> and Canada’s Migratory Bird Convention Act (MBCA),<sup>47</sup> both adopted in accordance with the Migratory Birds Convention. The Secretariat, in considering the assertions made by the submitters about international law, is fulfilling its obligation under Article 14(1) by determining whether such instruments are subject to further review.<sup>48</sup> The Secretariat is guided by the Council’s observation that the submissions process “is designed to promote information sharing in order to allow members of the public to draw their own conclusions.”<sup>49</sup> The Secretariat confirms

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<sup>43</sup> SEM-07-001 (*Minera San Xavier*), Determination pursuant to Article 15(1) (15 July 2009), §33.

<sup>44</sup> SEM-01-002 (*AAA Packaging*), Determination pursuant to Article 14(1) (24 April 2001) at 3.

<sup>45</sup> SEM-09-002 (*Wetlands in Manzanillo*), Response pursuant to Article 14(3) (12 October 2010) at 30. Similarly for another international instrument, “[...]the Government of Mexico acknowledges that the Cartagena Protocol, as an international instrument arising under the Convention on Biological Diversity, has been incorporated into the existing national law, as it has been signed, approved, and ratified in accordance with the provisions of the Constitution of the United Mexican States,” SEM-09-001 (*Transgenic maize in Chihuahua*), Response pursuant to Article 14(3) (3 May 2010) at 14-15.

<sup>46</sup> SEM-99-002 (*Migratory Birds*) Council Resolution 01-10 (16 November 2001).

<sup>47</sup> SEM-04-006 (*Ontario Logging II*), Council Resolution 04-03 (12 March 2004).

<sup>48</sup> “[T]he Secretariat does not wish to exclude the possibility that future submissions may raise issues in respect of a Party’s international obligations [...]”, SEM-97-005 (*Biodiversity*), Determination pursuant to Article 14(1) (26 May 1998) at 5. Moreover, “[i]t is clear that ILO Convention no. 169 is existing domestic law under Article 133 of the Constitution of the United Mexican States [...]”, SEM-06-009 (*Tarahumara*), Determination pursuant to Articles 14(1) and (2) (6 November 2001) at 10. See also: SEM-09-001 (*Transgenic maize in Chihuahua*), Determination pursuant to Articles 14(1) and (2), §22 (in relation to the Cartagena Protocol); SEM-09-002 (*Wetlands in Manzanillo*), Determination pursuant to Article 14(1) (9 October 2009), §16 (in relation to the Ramsar Convention).

<sup>49</sup> Guidelines, *supra* note 12, Introduction.

its earlier determination that certain of the Ramsar Convention provisions have been integrated into the Mexican domestic legal system, and may thus be considered further in a factual record.

22. According to Mexico, the resolutions of the Conference of Contracting Parties of the Ramsar Convention (COP) have not been incorporated into the country's legal system through the necessary constitutional processes, in order to be considered statutory instruments.<sup>50</sup> The Secretariat clarifies that it is not analyzing whether the COP resolutions are part of the Mexican legal system, but rather, whether said resolutions might serve as a guide to understanding the operation of the provisions of Ramsar that can be considered part of Mexican law. In this connection, an eminent legal scholar has observed, "[I]nstead of asking whether COP activity is really law, we should be asking what the relationship is between COP activity and the original international legal obligations of the parties to the underlying treaty".<sup>51</sup> In the spirit of promoting transparency about the submitters' assertions concerning the Ramsar Convention,<sup>52</sup> a factual record would shed light on enforcement of Articles 3.1 and 3.2 of the Ramsar Convention.<sup>53</sup>

**B. Submission SEM-13-001 - Consideration pursuant to NAAEC Article 15(1) of the Submitters' assertions in light of Mexico's Response**

23. In accordance with the Secretariat's determinations of 24 May 2013 (on the admissibility of the original submission) and 12 November 2013 (on the admissibility of the revised submission), and its 16 May 2014 notification (on the existence of a pending administrative proceeding),<sup>54</sup> and furthermore considering that the Secretariat is not proceeding with its analysis of the assertions related to the Cabo Cortés project (see 1. The Cabo Cortés Project, below), the Secretariat's Article 15(1) analysis focuses herein on the provisions cited by the Submitters that meet NAAEC's definition of "environmental law," namely:
- a. Articles 3.1 and 3.2 of the Ramsar Convention.<sup>55</sup>
  - b. LGEEPA Article 35;<sup>56</sup>
  - c. REIA Articles 13, 24, 36 and 44;<sup>57</sup>
  - d. LGVS Articles 5, section II, and 60 *ter*;<sup>58</sup>

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<sup>50</sup> Response, *supra* note 16 at 104.

<sup>51</sup> Annecoos Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 MICH. J. INT'L L. 231 (2009) at 2, <<http://goo.gl/nFT9Ny>> (viewed 8 November 2013).

<sup>52</sup> "The objectives of this Agreement are to [...] h) promote transparency [...] in the development of environmental [...] policies," NAAEC, Article 1(h).

<sup>53</sup> *Cfr.* Article 14(1) and (2) Determination, *supra* note 15, §§20- 22 and 78.

<sup>54</sup> Article 14(1) Determination, *supra* note 13; Article 14(1) and (2) Determination, *supra* note 15, and Notification of a pending proceeding, *supra* note 17.

<sup>55</sup> Article 14(1) and (2) Determination, *supra* note 15, §§15-16.

<sup>56</sup> *Cfr.* Article 14(1) Determination, *supra* note 13, §§37-38, and Article 14(1) and (2) Determination, *supra* note 15, §13.

<sup>57</sup> *Cfr.* Article 14(1) Determination, *supra* note 13, §§44-48, and Article 14(1) and (2) Determination, *supra* note 15, §13.

- e. Subparagraphs 4.0, 4.15 and 4.42 of NOM-022;<sup>59</sup> and
- f. The species listed in NOM-059.<sup>60</sup>

24. Appendix I of this notification includes the texts of the environmental laws in question.

### 1. The Cabo Cortés project

25. The Submitters state that the Cabo Cortés project consists of the construction of a tourism complex bordering on the Cabo Pulmo National Park, a Protected Natural Area,<sup>61</sup> and that the project's developer is Hansa Baja Investments.<sup>62</sup> The Submitters indicate that it is a five-stage project, consisting of the construction of 30,692 hotel rooms, two 27 hole golf courses, a marina, a system of canals and artificial lakes, a desalination plant and other amenities.<sup>63</sup>
26. As noted previously, the Submitters assert that Mexico is failing to effectively enforce the Ramsar Convention, the World Heritage Convention, LGEEPA Article 35, LGVS Article 5, section II, REIA Article 36 and NOM-059.
27. In its Response, Mexico informed the Secretariat that "[...] the Submitters' assertions [...] in relation to the authorization of the Cabo Cortés project are without foundation given that said project has no material or legal existence, as the authorization to construct, develop and operate it was denied [...]."<sup>64</sup> Mexico emphasizes that one of the motives for refusing said authorization "[...] was the absence of the comprehensive technical and scientific environmental information required to demonstrate the Cabo Cortés project's environmental viability [...]."<sup>65</sup> In particular, it argues that the project lacked sufficient studies on:
- [...] the potential implications for the carrying capacity of ecosystems given the environmental impacts the project would have generated, such as compromising the habitat and survival of different species, including those listed in NOM-059-SEMARNAT-2010, i.e. species that are protected, threatened or in danger of extinction.<sup>66</sup>
28. The Secretariat consulted the appendices of Mexico's Response and found that on 22 September 2008, Semarnat's Environmental Impact and Risk Branch (*Dirección General de Impacto y Riesgo Ambiental*—DGIRA) issued the Cabo Cortés project's environmental impact authorization;<sup>67</sup> subsequently, following the filing of a judicial

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<sup>58</sup> Cfr. Article 14(1) Determination, *supra* note 13, §§52-53, and Article 14(1) and (2) Determination, *supra* note 15, §13.

<sup>59</sup> Cfr. Article 14(1) Determination, *supra* note 13, §§54-55, and Article 14(1) and (2) Determination, *supra* note 15, §13.

<sup>60</sup> Cfr. Article 14(1) Determination, *supra* note 13, §§56-57, and Article 14(1) and (2) Determination, *supra* note 15, §13.

<sup>61</sup> Revised submission, *supra* note 14 at 6.

<sup>62</sup> *Ibid.*, at 6.

<sup>63</sup> *Idem.*

<sup>64</sup> Response, *supra* note 16 at 7.

<sup>65</sup> *Idem.*

<sup>66</sup> *Idem.*

<sup>67</sup> DGIRA (Semarnat), file no. S.G.P.A./DGIRA/DG/2998/08 (22 September 2008), which includes the environmental impact approval for the Cabo Cortés project.

review application by a citizen,<sup>68</sup> Semarnat's Environmental Protection Branch (*Subsecretaría de Gestión para la Protección Ambiental*—SGPA) declared the administrative ruling null and required the issuance of a second environmental impact authorization, in view of the project's proximity to Cabo Pulmo National Marine Park (Cabo Pulmo).<sup>69</sup> On 24 January 2011, DGIRA granted, on this second occasion, a partial environmental impact authorization to the Cabo Cortés project.<sup>70</sup> Following this authorization, on 1 July 2011, a group of citizens filed a second judicial review application.<sup>71</sup> On 14 June 2012, the SGPA ruled on this appeal, declaring the second environmental impact authorization null and void and ordering the issuance of a new administrative ruling denying authorization of the Cabo Cortés project.<sup>72</sup>

29. On 25 June 2012, DGIRA issued the official document in which it denied environmental impact authorization of the Cabo Cortés project. In its administrative ruling, DGIRA found: "the company did not provide the necessary scientific or technical information in compliance with its statutory requirements"; that the project developer had an obligation "to demonstrate to the authority that the studies included in the environmental impact statement took into account traditional biological, scientific and economic knowledge"; and that, although NOM-059 does not establish parameters for assessing the effects of infrastructure projects on species, the environmental impact statement (EIS) did not conduct "a comprehensive analysis of the project's implications" on species habitat or regarding "whether the carrying capacity of the ecosystems could support the environmental impacts that would be generated."<sup>73</sup> DGIRA enumerated instances of the "developer's repeated noncompliance with the environmental impact authorization conditions"; failure to justify the creation of artificial wetlands;<sup>74</sup> "failure to present a conclusive and objective analysis" to justify the location of the hazardous wastes storage facility;<sup>75</sup> failure to present a hazardous waste management plan with clear objectives, scope and procedures;<sup>76</sup> "negligence in presenting environmental indicators to enable identification of the impacts of different levels of boating activity,"<sup>77</sup> failure to conduct oceanographic monitoring in compliance with the terms ordered by DGIRA;<sup>78</sup> failure to comply with the environmental impact authorization conditions related to the planning of a turtle protection camp and actions for future turtle protection and conservation;<sup>79</sup> failure to pay reforestation offset fees to

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<sup>68</sup> Judicial review application filed by a citizen on 13 October 2009 against file no. S.G.P.A./DGIRA/DG/2998/08 (22 September 2008), which includes the environmental impact approval for the Cabo Cortés project.

<sup>69</sup> SGPA, ruling on judicial review application no. 529/2009 in file XV/2009/529 (30 August 2010).

<sup>70</sup> DGIRA, file no. S.G.P.A./DGIRA/DG/0606/11 (24 January 2011), which includes the environmental impact approval for the Cabo Cortés project.

<sup>71</sup> Judicial review application filed by a group of citizens on 1 July 2011 against file no. S.G.P.A./DGIRA/DG/0606/11 (24 January 2011), which includes the environmental impact approval for the Cabo Cortés project.

<sup>72</sup> SGPA, ruling on judicial review application no. 403/2011 in file XV/2011/403 (14 July 2012).

<sup>73</sup> DGIRA, file no. S.G.P.A./DGIRA/DG/4832 (25 June 2012) at 7.

<sup>74</sup> *Ibid.*, at 8.

<sup>75</sup> *Idem.*

<sup>76</sup> *Ibid.*, at 8-9.

<sup>77</sup> *Ibid.*, at 10.

<sup>78</sup> *Ibid.*, at 11.

<sup>79</sup> *Ibid.*, at 11-12.

the Mexican Forestry Fund (*Fondo Forestal Mexicano*);<sup>80</sup> failure to define the basic scope of its environmental monitoring program<sup>81</sup>; and failure to consider the required technical aspects in defining a salt wedge behavior monitoring program.<sup>82</sup>

30. The authority concluded that “manifestly, the project developer failed to comply, on repeated occasions, with the [environmental impact authorization] conditions”.<sup>83</sup>
31. Although the Submitters argue that the project “remains a latent danger,”<sup>84</sup> the Secretariat deems that it would serve no purpose to prepare a factual record concerning the enforcement of environmental law in relation to the Cabo Cortés project. The Secretariat has indicated in similar instances that once an environmental impact authorization has been annulled the preparation of a factual record is not warranted.<sup>85</sup>
32. In light of the foregoing, the Secretariat has determined that it will proceed no further with its analysis of the assertions concerning the Cabo Cortés project.

## 2. The CIP Playa Espíritu project

33. CIP Playa Espíritu consists of a project to develop a tourism complex in the municipality of Escuinapa, Sinaloa, covering an area of 2,381.24 ha and 12 km of beachfront on the Sea of Cortés in the Gulf of California. The project’s developer is the National Tourism Fund (*Fondo Nacional de Turismo*—Fonatur). The project includes: the urban development of the project site over a ten stage process; the construction and operation of 43,981 hotel rooms (all inclusive resort-type hotels, *hacienda*-type hotels and condominiums); three golf courses, and two marinas.<sup>86</sup> CIP Playa Espíritu’s amenities include buildings associated with the golf courses, business premises, a yacht club, a beach club, a cruise ship pier, a community center, habitat interpretation centers, a sports area, health clinics, spas, a shopping district, a water skiing area, an equestrian center, a treatment plant and a transformer substation.<sup>87</sup> The environmental impact statement of the CIP Playa Espíritu project was authorized on 9 February 2011 in doc. No. S.G.P.A./DGIRA/DG/1167/11 (the “CIP Playa Espíritu Authorization”).

### i) Enforcement of REIA Article 36

34. The Submitters assert that the Playa Espíritu project’s EIS did not incorporate the best available technical information<sup>88</sup> and that the EIS is deficient in its consideration of soil hypersalinity.<sup>89</sup> Furthermore, they argue that the consultants charged with undertaking the study did not consider publicly available studies that address the technical feasibility

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<sup>80</sup> *Ibid.*, at 12.

<sup>81</sup> *Ibid.*, at 13.

<sup>82</sup> *Ibid.*, at 14.

<sup>83</sup> *Ibid.*, at 15.

<sup>84</sup> Revised submission, *supra* note 14 at 7.

<sup>85</sup> SEM-05-002 (*Coronado Islands*), Notice of Withdrawal of Article 15(1) Notification and Termination of Submission (26 March 2007), <<http://goo.gl/Qa2nUV>>.

<sup>86</sup> Original submission, *supra* note 2, citing: Consultores en Gestión, Política y Planificación Ambiental, S.C., *Manifestación del impacto ambiental del proyecto Centro Integralmente Planeado Costa del Pacífico*, Mexico, 2010, ch. 1, p. 2, <<http://goo.gl/Sz4iT>> (viewed 29 April 2014) [“EIS-CIP Playa Espíritu”].

<sup>87</sup> *Ibid.*, ch. 2 at 7-82.

<sup>88</sup> Revised submission, *supra* note 14 at 8-9.

<sup>89</sup> *Ibid.*, at 5.



of constructing a marina on the project site. The available information indicates that a marina facing the open sea would be more exposed “to tropical storms and hurricanes.”<sup>90</sup> In addition, the study conducted by the UNAM Geography Institute (*Instituto de Geografía* at UNAM) —which the Submitters cite—identifies the risk of a saline intrusion in the aquifer should a marina be built and the sand bar aquifer affected.<sup>91</sup>

35. The Submitters assert that Mexico is failing to enforce REIA Article 36 because it did not require the incorporation of the best available information in the project’s EIS.
36. Mexico states that the obligations imposed by REIA Article 36 “do not fall to the Government of Mexico in its environmental impact assessment process.” Rather, in every case, they are “the responsibility of the parties who conduct the studies.”<sup>92</sup> Consequently, Mexico states that rather than binding the Party, the provision is to be implemented based “on the principle of good faith,” as “it leaves it in the hands of individual parties” to incorporate the best techniques and methodologies utilized by the scientific community.<sup>93</sup> The Party states that one may only allege a lack of effective enforcement when false information is presented in connection with an EIS no such assertion is made in the submission.<sup>94</sup>
37. The Secretariat determined that REIA Article 36 does indeed constitute “environmental law” under the Agreement in that it is part of the environmental impact assessment process and the main purpose of this provision is consistent with NAAEC Article 45(2), as it supports the inclusion of the best and most detailed technical and scientific information available.<sup>95</sup> Moreover, it should be noted that REIA Article 36 is sufficiently specific to take concrete form through actions to be implemented by the environmental authority, and is thus enforceable through one of the government enforcement actions listed in NAAEC Article 5(1).<sup>96</sup> It also unequivocally identifies the relevant parties as: “those who elaborate [environmental impact] studies.”<sup>97</sup>
38. Mexico does not provide additional information in response to the assertion of the alleged failure to include the best and most detailed technical information available in the EIS. Nor does it address alleged EIS deficiencies in light of the analysis prepared by the UNAM Institute of Geography. In the UNAM analysis, filed with the EIS as one of the studies supposedly demonstrating the project’s viability, a number of issues are raised: the risk of saline intrusion arising from the construction of a marina in the coastal barrier; the breaks in the continuity of beaches due to the existence of jetties and breakwaters; and the fact that “an open sea marina [...] would face the risk of greater exposure to tropical storms and hurricanes.”<sup>98</sup> The UNAM analysis recommends the

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<sup>90</sup> *Ibid.*, at 9.

<sup>91</sup> UNAM, Diagnóstico del sistema de marismas asociado al Sistema Ambiental Regional Terrestre del proyecto CIP Costa Pacífico, Instituto de Geografía, UNAM, COPEIA-Fonatur (2009) [“UNAM Analysis”], at 51.

<sup>92</sup> Response, *supra* note 16 at 5 (emphasis in the original).

<sup>93</sup> *Ibid.*, at 6.

<sup>94</sup> *Idem.*

<sup>95</sup> Article 14(1) Determination, *supra* note 13, §§35, 44 and 47.

<sup>96</sup> For example, NAAEC Article 5(1)(b) (“monitoring compliance and investigating suspected violations [...]”); (d) (“publicly releasing non-compliance information”), and (j) (“initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings [...]”).

<sup>97</sup> REIA, Article 36.

<sup>98</sup> UNAM Analysis, *supra* note 91 at 50-51.

construction of the marina 15 km from the CIP Playa Espíritu project.<sup>99</sup> It emphasizes the impact of climate change on the project's environmental viability. It also recommends avoiding the construction of breakwaters, as they encourage beach erosion, underlining the effectiveness of conserving beaches in preventing erosion.<sup>100</sup> Although it was available to the consultant charged with preparing the environmental impact studies, it appears that the UNAM study was not utilized, which in principle, supports the assertion that—in preparing the EIS—the consultant failed in his obligation to utilize the best available information and “to suggest the most effective prevention and mitigation measures to attenuate the environmental impacts.”<sup>101</sup>

39. The Secretariat determines that a factual record would provide more information on the effective enforcement of REIA Article 36 in relation to the preparation of environmental impact studies for the CIP Playa Espíritu project.

**ii) Enforcement of LGEEPA Article 35, REIA Articles 13 and 44 and LGVS Article 5, section II**

40. The Submitters assert that Mexico is failing to effectively enforce LGEEPA Article 35 and REIA Articles 13 and 44 with respect to the assessment of cumulative effects and alleged fragmentation of the CIP Playa Espíritu project.<sup>102</sup> The Submitters argue that when the EIS was filed with the environmental authority for its analysis, the project was divided into several components in order to facilitate the project's authorization and consequently the impacts presented in the EIS do not represent an integral appraisal of all the elements of the project in their entirety. In support of their assertion, the Submitters note that Semarnat authorized the first of the project's ten phases without considering the tourist development proposal as a whole.<sup>103</sup> The Submitters assert that due to this fragmentation in the assessment of the project's elements—and, thereby, of their impacts—the environmental authority failed to observe LGEEPA Article 35 and REIA Article 44.<sup>104</sup>
41. Furthermore, the Submitters assert that Mexico is failing to effectively enforce LGVS Article 5, section II, due to lack of implementation of precautionary measures and mitigation and preventive measures.<sup>105</sup> They maintain that Fonatur did not conduct the necessary studies to show that water quality would not be affected in the aquifer where the project is to be located. The Submitters also argue that Fonatur did not present sufficient information to demonstrate that coastline impacts would not occur as a result of maritime infrastructure construction.<sup>106</sup> The Submitters assert that the project's execution was conditional on the future elaboration of environmental impact studies.<sup>107</sup> They argue that the project's authorization risks salinizing wetlands and modifying the

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<sup>99</sup> *Ibid.*, at 51.

<sup>100</sup> *Ibid.*, at 90-91.

<sup>101</sup> Revised submission, *supra* note 14 at 9.

<sup>102</sup> *Ibid.*, at 10-11.

<sup>103</sup> *Ibid.*, at 12.

<sup>104</sup> The text of the provisions in question may be consulted in the appendix to this notification.

<sup>105</sup> Revised submission, *supra* note 14 at 9-10.

<sup>106</sup> *Ibid.*, at 10.

<sup>107</sup> *Ibid.*, at 10 (“approved the construction of a marina on the condition that the developer submit studies showing that the aquifer would not be adversely affected or the coastline eroded, even in the event of hurricanes”), and at 11 (“separating project work and the resulting environmental impacts into discrete segments [...] violates Articles 28 and 35 of the LGEEPA”).

hydrological flow, which would cause irreversible damage to the fish larvae that depend on the Marismas Nacionales wetland ecosystem.<sup>108</sup>

42. Mexico responds that, contrary to the Submitters' assertion, "it did indeed assess the cumulative and residual environmental impacts in the regional environmental system"<sup>109</sup> and that it proposed strategies for prevention and mitigation, thus complying with the provisions of LGEEPA Article 35 and REIA Articles 13 and 44.<sup>110</sup> Concerning the enforcement of LGVS Article 5, section II, Mexico argues that by imposing conditions on project authorization it addressed the Submitters' concerns in relation to the effects on the aquifer arising from the construction of the marina.<sup>111</sup> Mexico refers to the CIP Playa Espíritu Authorization, in which —Mexico maintains—the project's cumulative impacts are identified and precautionary, mitigation and preventive measures are stipulated.<sup>112</sup>
43. LGEEPA Article 35 establishes that in order to issue an environmental impact authorization, Semarnat "shall consider [...] the potential effects of the works or activities to be developed in the relevant ecosystem(s), taking into account the constituent elements of the latter in their entirety, rather than focusing solely on the resources that may be exploited or used."<sup>113</sup> Moreover, REIA Article 44 adds that, "[w]hen evaluating environmental impact statements the Ministry shall consider [...] The use of natural resources in a manner that respects the functional integrity and carrying capacities of the ecosystems [...] over time"<sup>114</sup> while Article 13 requires an EIS to identify, describe and evaluate "cumulative and residual" effects and strategies for their mitigation.<sup>115</sup>
44. Based on analysis of the environmental impacts and the mitigation measures proposed by Fonatur, the CIP Playa Espíritu Authorization noted that the main environmental impacts concern aquifer water salinity, an increase in drinking water consumption, coastline modification and effects on sea turtle nesting areas.<sup>116</sup> Fonatur's environmental impacts mitigation proposal was analyzed by DGIRA, which included the following requirements in its CIP Playa Espíritu Authorization:
- a. Regarding the increase in aquifer water salinity as a consequence of the decrease in water infiltration caused by marine works and hydraulics infrastructure, Fonatur shall conduct periodic monitoring of the behavior of the aquifer's sand wedge through the installation and operation of 24 observation wells during a five-year period following the initiation of the works in question;<sup>117</sup>
  - b. With respect to the increase in drinking water consumption due to the area's development, Fonatur did not provide the information it was required to

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<sup>108</sup> *Ibid.*, at 10.

<sup>109</sup> Response, *supra* note 16 at 13.

<sup>110</sup> *Ibid.*, at 13-16.

<sup>111</sup> *Ibid.*, at 27.

<sup>112</sup> DGIRA, file no. SGPA/DGIRA/DG/1167/11 (9 February 2011), in Appendix C of the Response [CIP Playa Espíritu Authorization] at 13 and 27.

<sup>113</sup> LGEEPA, Article 35.

<sup>114</sup> REIA, Article 44, Section II.

<sup>115</sup> REIA, Articles 13, Sections V and VI.

<sup>116</sup> CIP Playa Espíritu Authorization, *supra* note 112 at 36.

<sup>117</sup> *Ibid.*, at 37 and 64-65.

provide. As a result, DGIRA made its authorization conditional on the proponent obtaining approvals by the National Water Commission (*Comisión Nacional del Agua*—Conagua) prior to the initiation of the project's first phase;<sup>118</sup>

- c. Regarding coast line modification as a consequence of the project's marine works and the opening of a port on the coast, DGIRA requires the development of a new simulation of the behavior of these components that would take into consideration extraordinary events and factors that could influence sediment transport;<sup>119</sup>
- d. On the effects on sea turtle nesting areas, DGIRA imposes on Fonatur the requirement that it conduct actions to conserve the environmental conditions enabling such species to nest and spawn.<sup>120</sup>

45. Despite the CIP Playa Espíritu Authorization including conditions addressing environmental impacts, the Submitters' central assertion remains open concerning the alleged separate assessment of each of the project's phases. These consist of successive additions to the CIP Playa Espíritu project's proposed tourism infrastructure which, allegedly, runs contrary to a legal requirement to conduct an EIS assessing cumulative and residual impacts of the regional environmental system<sup>121</sup> and, for the authority to consider "the potential effects of the works or activities to be developed" taking into account the elements of an ecosystem "rather than focusing solely on the resources that may be exploited or used"<sup>122</sup>. The Submitters point out that this stepwise assessment approach provides no estimations of the cumulative impacts of these stages taken as a whole. Although Phase I of the project was approved, questions remain concerning the interaction of impacts and its cumulative effects arising from subsequent stages of the project's development.<sup>123</sup>
46. The CIP Playa Espíritu Authorization acknowledges that during the project's public consultation process various observations were made<sup>124</sup> about the project's cumulative impacts, in particular the demographic growth that economic activities would bring and the increase in demand for water that would be unleashed in the region as a result of the project<sup>125</sup> supports the assertion that "the potential effects of the works or activities to be developed" were not fully considered, contrary to LGEEPA Article 35 and REIA Articles 13 and 44.
47. Regarding the effective enforcement of LGVS Article 5, section II, one of the agencies consulted during the CIP Playa Espíritu assessment process pointed out that "under the

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<sup>118</sup> *Ibid.*, at 37 and 64.

<sup>119</sup> *Ibid.*, at 37-38 and 66.

<sup>120</sup> *Ibid.*, at 38 and 69.

<sup>121</sup> Cfr., REIA, Article 13, Section V.

<sup>122</sup> Cfr. REIA, Article 44, Section I.

<sup>123</sup> REIA Article 3, section VII defines cumulative environmental impact as "[t]he effect on the environment that results from the increase in the impacts of particular actions occasioned by the interaction with other impacts that occurred in the past or are occurring in the present." Under REIA Article 3, section VIII, a synergistic environmental impact is defined as "[T]hat which is produced when the combined effect of the simultaneous presence of various actions supposes a greater environmental impact than the sum of the individual effects contemplated separately."

<sup>124</sup> CIP Playa Espíritu Authorization, *supra* note 112 at 15-16.

<sup>125</sup> *Ibid.*, at 15.

precautionary principle, one should recommend against this project's execution"<sup>126</sup> in light of the number of species that could be affected by the proposed works and the need to conserve the coastal area, which constitutes "a protective barrier against natural phenomena and coastal erosion processes."<sup>127</sup> Although said opinion is not binding, it supports the Submitter's assertion of a failure to effectively enforce LGVS Article 5, section II which gives effect to the precautionary principle.

48. It should also be noted that the authorization conditions for drinking water and coast line modification—both deemed "significant impacts" by the DGIRA in its administrative ruling<sup>128</sup> are subject to *a posteriori* project assessment. In effect, Fonatur did not provide the required information on drinking water supply.<sup>129</sup> As for coastline modification, DGIRA requested "that a new simulation be done."<sup>130</sup> The Secretariat notes that in neither case was said information presented for environmental impact assessment to the competent authority—DGIRA—and that, nevertheless, provision of said information is a condition of the authorization. The Secretariat has in the past recommended the development of a factual record where *ex post facto* studies were required as a condition of an environmental impact authorization<sup>131</sup> and the Council authorized a factual record in relation to the same submission.<sup>132</sup>
49. In this regard, the assertion on the alleged fragmentation of environmental impact assessment of the CIP Playa Espíritu project remains an open question. As the Submitters assert, not all possible coastline impacts were assessed in relation to the execution of the project's maritime works.<sup>133</sup> The same is true for the impacts on drinking water from population growth and the construction of waterworks infrastructure and marine works.<sup>134</sup> The revised submission supplementary information supports this assertion by pointing out that "an isolated review" of the project prevents an assessment of the full magnitude of its impacts, thereby allegedly increasing the likelihood of the project's authorization. By contrast, seen in a fragmented fashion, the project does not appear to affect the resiliency of the Marismas Nacionales system.<sup>135</sup> The same study also notes the delimiting of the regional environmental system as a micro basin, based only on administrative criteria, means that the interconnection between the Nayarit and Sinaloa Marismas Nacionales systems is not taken into account.<sup>136</sup> Allegedly, one result of the preceding is that the effects of the existing

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<sup>126</sup> *Ibid.*, at at 41.

<sup>127</sup> *Ibid.*, at 41.

<sup>128</sup> "From the foregoing it emerges that the most relevant impacts are the ones generated by components pertaining to hydrology, coastal hydrodynamics, flora and fauna," CIP Playa Espíritu Authorization, *supra* note 112 at 37.

<sup>129</sup> CIP Playa Espíritu Authorization, *supra* note 112 at 37 ("[...] taking into account that in relation to the additional information [...] Fonatur was requested to present an analysis on water availability [...], which Fonatur did not provide,").

<sup>130</sup> *Ibid.*, at 38.

<sup>131</sup> SEM-09-002 (*Wetlands in Manzanillo*), Notification pursuant to Article 15(1) (19 August 2013), §§ 236-250.

<sup>132</sup> SEM-09-002 (*Wetlands in Manzanillo*), Council Resolution 14-06 (8 July 2014).

<sup>133</sup> Revised submission, *supra* note 14 at 10.

<sup>134</sup> *Ibid.*, at 5, 11-12.

<sup>135</sup> Ramsar Advisory Mission no. 67, Laguna Huizache-Caimanero (Ramsar site no. 1689) and Ramsar site Marismas Nacionales (Ramsar site no. 732), report of 9 August 2010, subparagraph 5.2.2, <<http://goo.gl/nlIGXx>> (viewed 12 September 2013), ["Ramsar Advisory Mission-Marismas Nacionales"].

<sup>136</sup> *Idem*.

activities on the Baluarte River are unknown and underestimated, as are the effects of the construction of breakwaters associated with the CIP Playa Espíritu project, which will affect hydrodynamics and environmental quality in the area.<sup>137</sup> According to the latter, the project represents “a minimal affected area,” as its 220,000 ha is the equivalent of just 1.08% of the total area of Marismas Nacionales.<sup>138</sup> The environmental law in question requires the project proponent to assess impacts “affecting the regional environmental system”<sup>139</sup> and the authority to consider “the constituent elements of the latter in their entirety, rather than focusing solely on the resources that may be exploited or used.”<sup>140</sup>

50. Another aspect of the alleged fragmentation of the environmental impact assessment of the CIP Playa Espíritu project emerges from a passage of the environmental impact authorization:

Regarding the execution of individual works and activities in each of the lots that are part of the authorized Phase of the **project** (and, indeed, of the project’s subsequent development phases), and which will not be executed by **Fonatur**, each is subject, prior to its execution, to the filing of an environmental impact statement, in accordance with the particular relevant procedures. Said environmental impact statements shall conform to the planning parameters for land use established by **Fonatur** for each of the **project’s** lots [...] so that each such environmental impact statement, duly filed for assessment, may be assessed and approved.<sup>141</sup>

51. The above passage supports the assertion that the CIP Playa Espíritu project was fragmented to facilitate its assessment and authorization. The Submitters maintain that when these activities are considered in an isolated fashion, no significant impacts on the ecological processes of Marismas Nacionales arise from the projects: such impacts may arise from processes associated with tourist flows, and activities in the individual lots on the project site.<sup>142</sup> Although Fonatur is not responsible for the specific activities in each of the lots on the project site, failure to assess all works and activities related to the project allegedly runs contrary to LGEEPA Article 35 and REIA Article 44.<sup>143</sup> The Secretariat addressed a similar question in relation to an earlier submission:

the issue of whether the Mexican environmental authorities’ conduct in not requiring the submission of an EIA on the totality of works contemplated in the Cozumel Port Terminal project may constitute a failure to enforce existing law. For the most part, these considerations turn on facts relating to ... [inter alia,] the extent to which the project or projects have been ‘authorized.’<sup>144</sup>

52. Another similar issue raised by the Submitters in connection with enforcement of the environmental law in question is the total volume of projected construction quantities in

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<sup>137</sup> *Idem*.

<sup>138</sup> CIP Playa Espíritu Authorization, *supra* note 112 at 48.

<sup>139</sup> REIA, Article 13, Section V.

<sup>140</sup> LGEEPA, Article 35.

<sup>141</sup> *Ibid.*, at 59 [emphasis in the original].

<sup>142</sup> Ramsar Advisory Mission-Marismas Nacionales, *supra* note 135.

<sup>143</sup> According to the available sources on the size of the floating population, the estimated number of tourists per year is about three million. Ministry of Economic Development of Sinaloa, *Good Tourism Good Business*, [www.citsinaloa.gob.mx/goodtourist.pdf](http://www.citsinaloa.gob.mx/goodtourist.pdf) (viewed 17 July 2014).

<sup>144</sup> SEM-96-001 (Cozumel) Notification pursuant to Article 15(1) (7 June 1996), at 4.



the CIP Playa Espíritu project's EIS, which is in the order of 7.9 million cubic meters.<sup>145</sup> The information consulted has little to say about the impacts of said materials; nor does it specify their intended use.<sup>146</sup> Although the volume of materials is presented, there is no information on the impacts arising from excavation work, dredging or navigation channel maintenance in accordance with LGEEPA Article 35 and REIA Article 44 requirements to consider "the potential effects" of said works or activities in "the relevant ecosystem(s)" as well as the their carrying capacity. REIA Article 13 requires the EIS, *inter alia*, to describe works,<sup>147</sup> establish a compliance with the applicable legal statutes,<sup>148</sup> describe the regional environmental system,<sup>149</sup> and identify the cumulative and residual impacts.<sup>150</sup>

53. In summary, the Secretariat considers that the Response does not address a central assertion in the Submission, namely that Mexico "has avoided performing a comprehensive study of the environmental impacts of the Playa Espíritu project, instead fragmenting the project for analysis"<sup>151</sup>—the components of which are assessed separately or postponed—and the alleged disregard of the magnitude of the impacts taken as a whole, which were not addressed in the authorization.<sup>152</sup> The assertion that the effects are not restricted to the project's "property land" but rather are connected with processes of a greater magnitude and complexity that exist beyond the proposed project execution site, is a matter that could be addressed in a factual record.<sup>153</sup> A factual record would help the public to understand Mexico's enforcement of the environmental impact assessment process when a project is divided up and executed over different phases and whether, in this particular case, the Project has been fragmented.<sup>154</sup>

### iii) Enforcement of REIA Article 24

54. The Submitters assert that Mexico is failing to enforce REIA Article 24, which allows Semarnat to request, at its discretion, technical opinions from other governmental agencies or entities, which may then be incorporated into an environmental impact assessment process; and that Semarnat "abused the discretion granted it under the law," when it approved the CIP Playa Espíritu project, thereby ignoring the institutional opinions that questioned the company's environmental viability.<sup>155</sup>
55. Mexico asserts that the law does not confer any binding character on such technical opinions, nor does it stipulate how they shall be considered during an environmental impact assessment procedure.<sup>156</sup> This option, authorized under REIA Article 24,

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<sup>145</sup> EIS-CIP Playa Espíritu, *supra* note 86, ch. 2, at 34, table II.10 Summary of the Project's Work Quantities.

<sup>146</sup> The 7,993,691 m<sup>3</sup> of construction quantities is the equivalent of 3,197 Olympic swimming pools if one divides this figure by 2,500 (the volume of an Olympic size swimming pool). The only reference to the intended use of these materials indicates that "[t]he materials produced from dredging will be used in the in the construction of the development [...]", EIS-CIP Playa Espíritu, ch. 2, at 34.

<sup>147</sup> REIA, Article 13, Section II.

<sup>148</sup> REIA, Article 13, Section III.

<sup>149</sup> REIA, Article 13, Section IV.

<sup>150</sup> REIA, Article 13, Section V.

<sup>151</sup> Revised submission, *supra* note 14 at 11.

<sup>152</sup> *Ibid.*, at 11-12.

<sup>153</sup> Ramsar Advisory Mission-Marismas Nacionales, *supra* note 135.

<sup>154</sup> *Cfr.* LGEEPA, Article 35; REIA, Article 44.

<sup>155</sup> Revised submission, *supra* note 14 at A-4.

<sup>156</sup> Response, *supra* note 16 at 28.

allowed Semarnat to request opinions that—the Party argues—were incorporated into the CIP Playa Espíritu Authorization.<sup>157</sup> The authorization cites the opinions of the Commission for the Knowledge and Use of Biodiversity (*Comisión Nacional para el Conocimiento y Uso de la Biodiversidad*—Conabio), Conagua, the Mexican Institute for Water Technologies (*Instituto Mexicano de Tecnología del Agua*—IMTA), the Commission for Protected Natural Areas (*Comisión de Áreas Naturales Protegidas*—Conanp) and Semarnat’s Federal Coastal Zone and Coastal Environments Branch (*Dirección General de Zona Federal Marítimo Terrestre y Ambientes Costeros*).

56. While REIA Article 24 does not confer a binding character on the technical opinions of other agencies, nor does it define how such opinions shall be evaluated; such opinions are nevertheless part of the project assessment file and there is a reasonable expectation that at a minimum, technical opinions by other agencies be taken into account by the authority that requested them. In light of the Response, the Secretariat determines that Mexico has addressed the Submitters’ assertion on the consideration of technical opinions from other agencies during an environmental impact assessment procedure. On examination of the CIP Playa Espíritu Authorization, it is clear that such opinions were incorporated and analyzed during the project assessment process.<sup>158</sup> The Secretariat therefore does not recommend the preparation of a factual record on this assertion.

**iv) Enforcement of the Ramsar Convention**

57. The Submitters assert that Mexico is not effectively enforcing Articles 3.1 and 3.2 of the Ramsar Convention in relation to the monitoring, conservation and wise use of Marismas Nacionales; they maintain, moreover, that contrary to Mexico’s obligation under the Ramsar Convention to “formulate and implement their planning so as to promote the conservation of wetlands”,<sup>159</sup> the CIP Playa Espíritu project was approved without adequate measures to ensure ecological functions of the wetland.<sup>160</sup> They also maintain that Semarnat has not taken the necessary measures to monitor changes to the ecological conditions of the Marismas Nacionales wetland, following authorization of the project in question.<sup>161</sup>
58. By means of a 2005 resolution, the Conference of the Parties (“COP”) to the Ramsar Convention adopted the following definition of the concept of “wise use”, a phrase that is used in Article 3.1 of the Convention:

Wise use of wetlands is the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development.<sup>162</sup>

59. The Parties to the Ramsar Convention have also resolved that:

The phrase “in the context of sustainable development” is intended to recognize that whilst some wetland development is inevitable and that many developments have important benefits to society, developments can be

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<sup>157</sup> *Idem*.

<sup>158</sup> This was the case for the technical opinions from Conabio, Conagua, IMTA, Conanp and the Federal Coastal Zone and Coastal Environments Branch (a Semarnat agency). These opinions may be consulted in pp. 41-52 of the CIP Playa Espíritu Authorization.

<sup>159</sup> Ramsar Convention, Article 3.1.

<sup>160</sup> Revised submission, *supra* note 14 at A-2.

<sup>161</sup> *Idem*.

<sup>162</sup> Ramsar Convention, Resolución IX.1, Anexo A (2005).

facilitated in sustainable ways by approaches elaborated under the Convention, and it is *not appropriate to imply that “development” is an objective for every wetland.*<sup>163</sup>

60. The Secretariat has determined that COP criteria and resolutions may serve as a guide to understanding the assertions related to the effective enforcement of the Ramsar Convention provisions in question (see §§19-22 above).
61. Mexico maintains that, in keeping with its Ramsar Convention obligations, the CIP Playa Espíritu Authorization noted that the Convention “does not prohibit the development of projects within Ramsar sites” and that, in any case, DGIRA assessed the wise use of said area and proposed the conservation and rehabilitation thereof.<sup>164</sup> Following its assessment, DGIRA determined that “[no] ecological processes originating on the [project] site have been identified that affect [Marismas Nacionales] in a significant manner.” Consequently, DGIRA concluded that the project “does not constitute a source of risk or significant disruption at the regional level for the hydrodynamics of the Marismas Nacionales System.”<sup>165</sup>
62. According to the information consulted by the Secretariat, the Marismas Nacionales Ramsar site is located between the states of Sinaloa and Nayarit and was included on the List of Wetlands of International Importance on 22 June 1995.<sup>166</sup> Marismas Nacionales covers an area of 200,000 ha and its designation as a Ramsar site was due to criteria such as its representative character, the sheltering of species listed under any category of protection, the presence of ecologically threatened communities and the provision of sustenance for species during a critical stage of their biological cycle.<sup>167</sup> Marismas Nacionales is considered “of special value in maintaining the region’s genetic and ecological diversity”<sup>168</sup>; its ecosystem shelters 36 endemic species of waterfowl, and it regularly supports a population of 20 thousand waterfowl, in particular because it serves as a winter refuge for over 100 thousand migratory waterfowl.<sup>169</sup>
63. On 12 May 2010, a portion of the Marismas Nacionales Ramsar site was declared the Marismas Nacionales Nayarit Biosphere Reserve, a protected natural area.<sup>170</sup> Another protected natural area in the Sinaloa portion, to be known as the Marismas Nacionales Sinaloa Biosphere Reserve, has also been proposed.<sup>171</sup>

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<sup>163</sup> *Idem.*

<sup>164</sup> Response, *supra* note 16 at 93.

<sup>165</sup> *Idem.*

<sup>166</sup> The Ramsar Convention on Wetlands, *The List of Wetlands of International Importance* (23 July 2014) at 27, <<http://goo.gl/pcvqS9>> (viewed 6 August 2014).

<sup>167</sup> Ramsar Advisory Mission-Marismas Nacionales, *supra* note 135.

<sup>168</sup> *Idem.*

<sup>169</sup> *Idem.*

<sup>170</sup> Decree declaring as a protected natural area, with the status of a biosphere reserve, the region known as Marismas Nacionales Nayarit, located in the municipalities of Acaponeta, Rosamorada, Santiago Ixcuintla, Tecuala and Tuxpan in the state of Nayarit, *DOF*, 12 May 2010.

<sup>171</sup> Notice informing the general public of the availability of the studies conducted to support the issuance of a decree intended to declare as a protected natural area, with the status of a biosphere reserve, the region known as Marismas Nacionales Sinaloa, having an area of 47,556-25-00 hectares and located in the municipalities of El Rosario and Escuinapa, in the state of Sinaloa, *DOF*, 5 June 2008.

64. The Ramsar Mission report concluded that “a tourism development of the magnitude, density of occupation and design proposed by [Fonatur] is not viable.”<sup>172</sup>
65. Although the phase I of the CIP Playa Espíritu project,<sup>173</sup> may not represent significant additional impact on the already deteriorated Marismas Nacionales,<sup>174</sup> the EIS,<sup>175</sup> the technical opinions<sup>176</sup> and the environmental impact authorization<sup>177</sup> do not make wetland recovery the overall strategy in the planning, authorization and development of the project. Despite Mexico’s contention that the Ramsar Convention may not be subject to review under Articles 14 and 15,<sup>178</sup> the Council, the Secretariat and the Parties have confirmed, through practice, that factual records indeed may address international obligations incorporated into national law (see §20 *supra*). The alleged failure to consider the environmental impact of the CIP Playa Espíritu tourism development in its entirety and to adequately estimate the project’s inevitable effects beyond its own site,<sup>179</sup> as well as exclusion of the effects of the components associated with the project, such as drinking water supply,<sup>180</sup> raise central questions that the Response does not clarify in relation to the enforcement of the Ramsar Convention.<sup>181</sup> A factual record would help the public understand the Mexico’s enforcement of the environmental impact assessment process in cases where a project is located within a Ramsar site.

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<sup>172</sup> Ramsar Advisory Mission-Marismas Nacionales, *supra* note 135.

<sup>173</sup> CIP Playa Espíritu Authorization, *supra* note 112 at 57 (“Phase I or ‘priority’ is authorized”).

<sup>174</sup> *Ibid.*, at 35 (“the economic activities that have developed [...] led to land use changes and loss of plant cover”); MIA-CIP Playa Espíritu, *supra* note 89, ch. 4, at 19 (“the absence of flooding causes the loss of structure in mangrove systems or mangrove mortality”); ch. IV, at 26 (“the conservation status of the Sinaloa portion of Marismas Nacionales [...] is severely affected by various human activities”), ch. VIII, at 17 (“the intended site of the project’s implementation is already disrupted”), ch. VII, at 19 (“the implementation of the project will contribute to the economic development of the area and of the inhabitants in general, without causing greater damage to the environment than the damage caused in the past 40 years”).

<sup>175</sup> AIA-CIP Playa Espíritu, *supra* note 114 at 41 (on Conabio’s opinion that “one should recommend against this project’s execution”); at. 42 (“the construction of the marina [...] will modify the underground flow and there exists the possibility that [...] changes in water quality will result”).

<sup>176</sup> UNAM Analysis, *supra* note 94 at 89 (“high intensity recreational activities [...] should be avoided”), at 91 (“avoid the la construction of breakwaters [...]” and opt for “beaches and dunes with little or no infrastructure”).

<sup>177</sup> AIA-CIP Playa Espíritu, *supra* note 114 at 35 (“the information presented [...] describes the environmental components that are liable to be affected”), at 54 (“the present (altered) scenario of the [Regional Environmental System], has been affected by economic activities”).

<sup>178</sup> Response *supra* note 16 at 104.

<sup>179</sup> AIA-CIP Playa Espíritu, *supra* note 114 at 54 (“the surface area requested for the change in land use [...] is equivalent to 0.06% of the total area of the site”), at 55 (“its water supply is dependent on a future infrastructure project”).

<sup>180</sup> *Ibid.*, at 55 (“satisfaction of the demand for water required by the project has not been ensured”).

<sup>181</sup> Ramsar Convention, Articles 3.1 (“The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory”) and 3.2 (“Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change”).

### 3. Entremares project

66. The Entremares project consists of the development of 390.76 ha on the El Mogote peninsula, facing La Paz Bay (to the north) and Ensenada de La Paz (to the south).<sup>182</sup> The project is comprised of sub-divisions, hotels, condominiums and residences, beach clubs, restaurants, bars and shops, a golf course, a desalination plant and waste treatment plant, roadways, services, tourism infrastructure and various amenities.<sup>183</sup> The development includes residential, tourism and commercial uses, and includes the construction of 6,840 hotel rooms.<sup>184</sup> The environmental impact statement of the Entremares project was authorized on 25 November 2009 in doc. No. S.G.P.A./DGIRA/DG/6884/09 (the “Entremares Authorization”).

#### i) Enforcement of LGEEPA Article 35 and REIA Articles 13 and 44

67. The Submitters assert that Mexico is failing to effectively enforce LGEEPA Article 35 and REIA Articles 13 and 44 by permitting fragmentation in the assessment of the effects of the Entremares project.<sup>185</sup> The Submitters argue that the assessment of the Entremares project does not consider the impact that the creation of a new population center in El Mogote would have. The Submitters also assert that in its assessment, Semarnat did not take into account the effects the project would have on the local mangrove ecosystems, the volume of water available in the region and the species that inhabit El Mogote.<sup>186</sup> Mexico responds that DGIRA “assessed the environmental impacts, cumulative and residual, on the regional environmental system, as well as the strategies for the prevention and mitigation thereof” in accordance with the provisions of LGEEPA Article 35 of and REIA Articles 13 and 44.<sup>187</sup>

68. In analyzing the Response, it is clear that, although DGIRA did take into account the total planned area of the project’s infrastructure in relation to the plant cover of different types of vegetation,<sup>188</sup> the assessment does not consider the impact that a project of this magnitude, with its associated activities, would have on the regional environmental system. REIA Article 13 requires the EIS to include a comprehensive assessment of the environmental, cumulative and residual impacts affecting the regional environmental system. The Entremares Authorization also does not provide clear information on the cumulative impact of the creation of the population center in El Mogote.<sup>189</sup> LGEEPA Article 35 and REIA Article 44 requires Semarnat to “assess the potential effects of the works or activities” of a project. On this matter, for example, the Entremares Authorization does not include an analysis of a new population center and merely states that “the developer proposes a Management System and Specific Environmental

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<sup>182</sup> Consultores en Gestión, Política y Planeación Ambiental S.C., Manifestación de environmental impact, modalidad regional, of the project Entremares, ch. 1 at 1 [EIS-Entremares].

<sup>183</sup> *Idem.*

<sup>184</sup> *Idem.*

<sup>185</sup> Original submission, *supra* note 2 at 12.

<sup>186</sup> Original submission, *supra* note 2 at 12.

<sup>187</sup> Response, *supra* note 16 at 16.

<sup>188</sup> Response, *supra* note 16 at 18 (“[t]he developer affirms that the relevance of the impact on vegetation will be “Permanent, Non-relevant,” based on the reasoning that the types of vegetation present on the site are distributed throughout the regional environmental system [...] in terms of extension this impact is not relevant”).

<sup>189</sup> DGIRA, file no. SGPA/DGIRA/DG/6884/09, which includes the environmental impact approval for the Entremares project, at 54 [Entremares Authorization].

Management,”<sup>190</sup> without directly addressing the cumulative impact arising from other processes generated by the project due to the combination of potentially adverse environmental effects, which would be generated by a population center.

69. The Secretariat notes that the EIS Entremares does not consider the potential cumulative impacts of the project’s works and activities combined with other ongoing activities in El Mogote (i.e., the Paraíso del Mar project). The Entremares Authorization does refer to the environmental impact but only on the site of the project, without discussing the interaction between ecosystems and the potentially adverse elements and processes generated by the project as a whole.<sup>191</sup> REIA Article 13, Section V requires an EIS to include identification of cumulative effects on the regional environmental system.
70. LGEEPA Article 35 and REIA Article 44 are clear insofar as they require the environmental authority to consider the following for any project: i) the ecosystem(s) and not just the resources subject to impact (e.g., plant cover); ii) use of natural resources in a manner that respects the functional integrity and carrying capacities of the ecosystems; and iii) the implementation of preventative and mitigation measures to minimize the adverse effects occasioned by the project.<sup>192</sup> REIA defines “cumulative environmental impact” as “The effect in the environment resulting from the increase in the impacts of particular activities occasioned by the interaction with other impacts, whether caused in the past or occurring in the present.”<sup>193</sup>
71. The Secretariat determines that the foregoing matters in this section could be addressed in a factual record, so that the North American public may draw their own conclusions regarding whether the Entremares project’s potential cumulative impacts have or have not been taken into account, as required by the environmental law in question.

## **ii) Enforcement of LGVS Article 60 *ter***

72. The Submitters assert that Mexico is failing to enforce LGVS Article 60 *ter*, arguing that the EIS did not demonstrate that the construction of the Entremares project would have no affect on the mangrove ecosystem.<sup>194</sup> The Submitters affirm that the Entremares project is located in an important mangrove area and that its authorization—in Conabio’s opinion—may result in a temporary disruption of the ecosystem, due to the creation of a system of tidal channels, influxes of organic matter and, potentially, the modification of natural hydrological flows. These impacts would affect wildlife, reproduction sites and nesting areas.<sup>195</sup>
73. On this matter, in DGIRA’s view: the project “respects the prohibition against the removing, filling in, transplanting or pruning” of mangrove species and undertakes to leave intact the entire present surface area of the three mangrove stands adjacent to the project site; the project respects the ecosystem’s carrying capacity for tourism projects—as “it does not touch or affect the mangrove stands”—; and the project respects the integrity of nesting areas—since it does not propose the modification of the existing mangrove stands — nor does it imply changes in ecological characteristics and

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<sup>190</sup> *Ibid.*, at 54

<sup>191</sup> Response, *supra* note 16 at 17-18.

<sup>192</sup> *Cfr.* LGEEPA Article 35 and REIA Article 44.

<sup>193</sup> REIA, Article 3, section VII.

<sup>194</sup> Original submission, *supra* note 2 at 12.

<sup>195</sup> *Idem.*



services.<sup>196</sup> Furthermore, DGIRA found that the project developer proposed the construction of channels as a compensatory measure based on the premise that the mangrove systems are “isolated, separated from each other and fragmented by salinated clayey soils.” In DGIRA’s view, the project “represents a proposal that both develops environmental services and contains a compensatory aspect.”<sup>197</sup>

74. The Submitters state that, based on a technical opinion from Conabio, “a temporary disruption of the ecosystem may occur, due to the creation of a system of tidal channels, influxes of organic matter and the potential modification of natural hydrological flows.”<sup>198</sup> The Secretariat considers that Mexico’s Response addresses the issue of mangrove removal, filling-in, transplanting and pruning provided for under Article 60 *ter* of the LGVS, since—according to the available information—the project does not affect the three mangrove stands<sup>199</sup> which, moreover, show signs of fragmentation due to salinated clayey soils resulting from a process of deterioration—“from mangrove to salinated clayey soils, from salinated clayey soils to dunes.”<sup>200</sup> The project proposes environmental compensatory actions “consistent with the object of the Article in question” and includes a mangrove coastal environment monitoring program.<sup>201</sup> Upon consideration of the following factors, among others, DGIRA found that the completeness of the hydrological flow, ecosystem and catchment area would not be affected, that the advancing dunes are negatively affecting mangroves, that the system of channels does not modify the adjacent marina-lagoon area, and that the proposed system of channels would enable the restoration—albeit modestly—of the salt marshes.<sup>202</sup>
75. In virtue of the above, the Secretariat does not recommend the preparation of a factual record concerning the alleged failure to enforce LGVS Article 60 *ter* in relation to the Entremares project.

**iii) Enforcement of NOM-059**

76. The Submitters assert that Mexico is failing to enforce NOM-059 in relation to the protection of species, listed under one of the categories of protection, that have been identified on the site of the Entremares project. According to the Submitters, the execution of the project could affect the whale shark and the species of dolphins protected by NOM-059, and the EIS does not justify how fauna will pass through the area of influence of the project without being affected.<sup>203</sup> They maintain that Semarnat’s Environmental Policy Branch expressed the opinion that the Entremares EIS does not indicate the impacts that boats could have on the dolphin populations identified in the project area.<sup>204</sup>
77. Mexico maintains that the applicable sub-paragraph of NOM-059 has not been identified.<sup>205</sup> In its Response, the Party cites the opinion of one of its administrative

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<sup>196</sup> Entremares Authorization, *supra* note 189 at 33.

<sup>197</sup> *Ibid.*, at 34.

<sup>198</sup> Original submission, *supra* note 2 at 12.

<sup>199</sup> Entremares Authorization, *supra* note 189 at 33.

<sup>200</sup> *Ibid.*, at 34.

<sup>201</sup> *Idem.*

<sup>202</sup> *Idem.*

<sup>203</sup> Revised submission, *supra* note 14 at 14.

<sup>204</sup> *Idem.*

<sup>205</sup> Response, *supra* note 16 at 77.

units,<sup>206</sup> according to which the area in question “is highly fragile”<sup>207</sup> and contains “distribution areas of species and populations at risk”<sup>208</sup> including species such as “the sea cucumber, the leatherback turtle, the ridley turtle, the pilgrim shark, the white shark, the humpback and the blue whale.”<sup>209</sup> The same government branch states that the project should only be approved if its environmental impacts do not affect—among others— “species and populations that are at risk and that represent conservation priorities” and “coastal wetlands (mainly mangroves).”<sup>210</sup> DGIRA nevertheless determined that “the project developer provided information demonstrating that the project will not affect species and populations at risk, and representing conservation priorities; and nor will it affect coastal wetlands (mainly mangroves),” among other elements.<sup>211</sup> Mexico points out that DGIRA incorporated land and marine environment monitoring programs as conditions of the authorization.<sup>212</sup>

78. NOM-059 is a legal-administrative instrument that identifies wildlife species at risk of extinction at the national level and specifies the criteria for inclusion, exclusion or change of risk classification by means of a risk of extinction assessment methodology.<sup>213</sup> The Secretariat considers that the citing of species listed in the standard within the environmental impact assessment process, is sufficient to conduct an analysis on the enforcement of these provisions. In Mexico, the law requires the authority to deny an environmental impact authorization when a project “could lead to one or more species being declared threatened or endangered or where there is any impact on any such species”.<sup>214</sup>
79. Mexico’s Response does not present new information on a central concern of the Submitters, namely the effective protection of species at risk located in the project area.<sup>215</sup> The Response does not clarify the procedure used by the EIS to assess impacts on species listed in any protection category. Nor does it clarify to what extent DGIRA considered such impacts when it issued its authorization.<sup>216</sup> For example, in the context of NOM-059, a question not addressed in the EIS is whether species at risk would be

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<sup>206</sup> The unit in question is the Environmental Policy and Regional and Sector Integration Branch (*Dirección General de Política Ambiental e Integración Regional y Sectorial*), a Semarnat department.

<sup>207</sup> Response, *supra* note 16 at 78.

<sup>208</sup> *Idem.*

<sup>209</sup> *Ibid.*, at 79.

<sup>210</sup> *Idem.*

<sup>211</sup> *Idem.*

<sup>212</sup> *Idem.*

<sup>213</sup> NOM-059, paragraph 1. Objective and jurisdiction.

<sup>214</sup> For example, in light of LGEEPA Article 35, cited in the submission, which establishes:

Having assessed the environmental impact statement, the Ministry shall with a basis in the law and fact, [...] the corresponding decision in which it may: [...] III. Deny the requested authorization, where: [...] b) The work or activity in question could lead to one or more species being declared threatened or endangered or where there is any impact on such species [...]

<sup>215</sup> Response, *supra* note 16 at 19 (in relation to NOM-059 “on the project site, the presence of 6 species of reptiles, 2 of land birds, 4 of waterfowl and 1 mammal species has been reported [...] the developer concludes [...] that the project site is not a relevant wildlife area in terms of Bahía de la Paz”); see also, pp. 78 (on the project site there are “distribution areas of species and populations at risk” and the environmental unit “presents a very high level of fragility”).

<sup>216</sup> *Cfr.* Response, *supra* note 16 at 79 (it is concluded that “the project will not affect the species and populations at risk”)

affected by the transporting of residents and visitors from the city of La Paz;<sup>217</sup> nor is it clear whether Semarnat favored a precautionary approach in the enforcement of NOM-059, in light of the information presented in the EIS.<sup>218</sup> Moreover, the Response does not present information on the preventive measures —either proposed in the EIS or included as conditions in the environmental impact authorization—for ensuring that water extraction and brine disposal methods guarantee “the protection of priority species at risk.”<sup>219</sup> In the Article 14(1) determination, the Secretariat underlined<sup>220</sup> that a federal administrative court remarked that DGIRA “was negligent in failing to issue any consideration” on the project’s activities in relation to NOM-059.<sup>221</sup>

80. The Secretariat considers that a factual record would present relevant factual information on the assessment of the Entremares project in light of the presence of NOM-059 listed species.

**iv) Enforcement of the Ramsar Convention**

81. The Submitters assert that the environmental impact authorization of the Entremares project violates Articles 3.1 and 3.2 of the Ramsar Convention. The Submitters also argue that the Bay of La Paz, the project’s planned location, has been recognized as a wetland of international importance since 2007.<sup>222</sup> The Submitters assert that, from the moment the Mogote-Ensenada de La Paz Wetland was designated a Ramsar site, the Party “committed to administer said sites such that the ecological characteristics of each would be maintained, thus preserving the essential ecological and hydrological functions.”<sup>223</sup> They argue, furthermore, that the Contracting Parties’ obligations are detailed in the Convention’s resolutions and recommendations, which establish “environmental impact standards and wetlands protection in the face of climate change.”<sup>224</sup> These obligations include, for example, taking into consideration the ecological and hydrological functions of the Ramsar site. Article 3.1 of the Ramsar Convention establishes Mexico’s obligation “to formulate and implement [its] planning so as to promote the conservation of the wetlands included in the List and, as far as possible, the wise use of wetlands in [its] territory.”<sup>225</sup> Article 3.2 states that each Contracting Party “shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory [...] has changed.” The Secretariat has referred to the concepts of “wise use” and “sustainable development” enshrined in said Convention (§§58-59 *supra*) and observed that the resolutions of the COPs may serve as guidelines in reading the provisions in question (§§19-22 *supra*).
82. The Entremares Authorization observes that, on 2 February 2008, the Mogote-Ensenada de La Paz Wetlands site was included in the List of Wetlands of International

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<sup>217</sup> EIS-Entremares, *supra* note 182, ch. 6 at 118.

<sup>218</sup> Response, *supra* note 16 at 78.

<sup>219</sup> *Ibid.*, at 79.

<sup>220</sup> Determination, Article 14(1), §89.

<sup>221</sup> Federal Tax and Administrative Court, Fifth Metropolitan Regional Chamber, sentence in file no. 4083/11-17-05-7 (2 August 2012) at 45.

<sup>222</sup> Revised submission, *supra* note 14 at 14, and Conanp, Ficha Informativa de los Humedales Ensenada La Paz (27 October 2007).

<sup>223</sup> Revised submission, *supra* note 14 at A2.

<sup>224</sup> *Idem.*

<sup>225</sup> Ramsar Convention, Article 3.1.

Importance, thus making the Ramsar Convention applicable in this case.<sup>226</sup> According to estimates, 86.8 ha of the Entremares project are located within a Ramsar site. The developer has affirmed that, although the project is located within said Ramsar site, “the present surface area of the three mangroves will be preserved 100% and left untouched,” [...] “there will be no changes to the present ecological characteristics and services,” and “no modifications to said mangroves are envisaged.”<sup>227</sup> The developer argues that he has proposed “concrete actions to increase mangrove goods and services”<sup>228</sup> and asserts that the project does not affect the migration of some twenty thousand migratory birds, as the latter cross the Chametla-Centenario corridor and the Zacatecas estuary, which are not located on the project site.

83. On the other hand, the Entremares Authorization does recognize that there are sites adjacent to the project where “migratory birds do transit and stay for temporary periods” and that, undoubtedly, the sites occupy part of the Mogote-Ensenada de La Paz Wetlands Ramsar site.<sup>229</sup> Furthermore, it is clear that within the Ramsar site in question important species exist, such as the least tern (*Sterna antillarum*), which is subject to special protection, and one of its subspecies (*S.a browni*), which is in danger of extinction.<sup>230</sup> Although it is not immediately adjacent to the project site, there is no information indicating that the project will not, due to its activities, affect the nesting area in question.
84. Although the project’s presence on the Mogote-Ensenada de La Paz Wetlands Ramsar site does not, in principle, affect the area of the three existing mangroves, the Entremares Authorization presents no information on the potential interaction of project related activities with the Ramsar site and the El Mogote mangrove. Mexico’s Response does not address the interaction of the project’s different components. Such interactions include the potential impact of water consumption, wastewater discharges, and waste disposal, on a site that receives twenty thousand birds, which stay for several days or weeks on the banks of this inlet, during their migration.<sup>231</sup>
85. Nor does the Response clarify whether, in the case of this Ramsar site, COP resolutions inform in any manner the environmental impact assessment process. Beyond determining whether or not COP resolutions are integrated into Mexico’s legal system, and without addressing the legal basis of said resolutions, a factual record could shed light on the extent to which such instruments serve to guide the enforcement of Ramsar Convention Articles 3.1 and 3.2 within the environmental impact assessment process, in relation to the Entremares project.
86. The Secretariat deems that a factual record could offer more detailed information on the conservation of the wetland and on the measures taken due to the development of the Entremares project. In addition, it could clarify the extent to which the immediate proximity of said project influences the ecological processes in El Mogote, in light of the requirements established in Articles 3.1 and 3.2 of the Ramsar Convention.

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<sup>226</sup> Entremares Authorization, *supra* note 189 at 37.

<sup>227</sup> *Ibid.*, at 38.

<sup>228</sup> *Idem.*

<sup>229</sup> *Ibid.*, at 39.

<sup>230</sup> *Idem.*

<sup>231</sup> Ramsar Secretariat, Ficha Informativa de los Humedales de Ramsar, Humedales Mogote-Ensenada La Paz (23 October 2007).

#### 4. The Paraíso del Mar project

87. The Paraíso del Mar project is located on the El Mogote peninsula and faces the Bay of La Paz, in the municipality of La Paz, Baja California Sur. According to the project's EIS, it is "a multiple use megaproject" which envisages developing 508.34 ha on land and 39 ha on the sea, as well as the construction of 2,120 hotel rooms, 2,286 condominium units, two golf courses, a shopping district, a convention center, a marina beach club, a marina with 500 spaces, a dry dock, a pier with a terminal building and various services associated with the project.<sup>232</sup>
88. On 9 March 2004, DGIRA issued an environmental impact approval for the Paraíso del Mar project ("Paraíso del Mar 2004 Authorization"). According to the Party's information: the Paraíso del Mar 2004 Authorization was the object of a nullity action; on 14 January 2013, the Eleventh Metropolitan Regional Chamber declared the authorization null and void; and the issuing of any future approval must include consideration of NOM-022, among other issues.<sup>233</sup> On 13 May 2013, DGIRA issued file no. SGPA/DGIRA/DG/3118, in which it approved, subject to conditions, the Paraíso del Mar project ("Paraíso del Mar 2013 Authorization").<sup>234</sup>

##### i) Enforcement of Articles 35 of LGEEPA and REIA articles 13 and 44 of REIA

89. The Submitters assert that Semarnat did not assess the cumulative effects on the ecosystems surrounding the new population center in El Mogote, despite the foreseeable impacts on the mangrove ecosystems, the species inhabiting them and the volume of available water in the region.<sup>235</sup> Mexico responds that DGIRA "did indeed conduct an assessment of said [cumulative] impacts" in accordance with LGEEPA Article 35 and REIA Article 44.<sup>236</sup>
90. Mexico refers in its Response to the Paraíso del Mar 2013 Authorization, which describes the project's environmental impacts and the proposed preventive, mitigation and compensatory measures.<sup>237</sup> The Response includes a chart summarizing the information on the measures to be adopted re loss of mangrove plant cover, wildlife habitat disruption and effects on the marine environment.<sup>238</sup> However, the Secretariat notes that neither the Response nor the Paraíso del Mar 2013 Authorization present information on the project's cumulative impacts, since the interaction between the project's effects and foreseeable past and current activities is not mentioned.<sup>239</sup>
91. REIA Article 13, Section V requires the EIS to include a description of cumulative impacts —i.e. the Entremares project construction and operation— and the correlative expectation that the authority consider the project components and the ecosystem under

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<sup>232</sup> Centro de Investigaciones Biológicas del Noroeste, S.C., Manifestación de impacto ambiental, modalidad regional, del proyecto Paraíso del Mar, ch. 2 at 7-8 ["Paraíso del Mar EIS"].

<sup>233</sup> DGIRA, file no. SGPA/DGIRA/DG/03118 (13 May 2013), which includes the environmental impact approval for the Paraíso del Mar project ["Paraíso del Mar 2013 Authorization"] at 7-8.

<sup>234</sup> *Idem.*

<sup>235</sup> Revised submission, *supra* note 14 at 12.

<sup>236</sup> Response, *supra* note 16 at 21.

<sup>237</sup> *Idem.*

<sup>238</sup> *Ibid.*, at 21-22.

<sup>239</sup> Cumulative environmental impact "results from the increase in the impacts of particular actions occasioned by the interaction with other impacts which occurred in the past or are occurring in the present," REIA, Article 3, section VII.

LGEEPA Article 35 and REIA Article 44. The Response refers to impacts on the mangrove, wildlife and the marine environment, and presents a summary of the plans and programs to mitigate environmental impacts; however, neither the Response nor Paraíso del Mar 2013 Authorization offers information regarding the project's various elements as a whole, such as, for example, the tourist flows that the operation of the Paraíso del Mar project's 2,120 hotel rooms and 2,286 condominium units would bring. The Secretariat notes that the Paraíso del Mar 2013 Authorization approves the construction and operation of part of the project and also acknowledges the existence of associated projects subject to the authority's future assessment<sup>240</sup> without, however, offering an evaluation of the interaction between Paraíso del Mar's operations and its components.

92. A factual record would assist the North American public in understanding how an environmental impact assessment is conducted in cases of alleged project fragmentation and absence of cumulative effects assessment. The Secretariat determines that a Factual Record is warranted with respect to the effective enforcement of LGEEPA Article 35 and REIA Articles 13 and 44 to the Entremares project.

**ii) Enforcement of LGVS Article 5, section II**

93. The Submitters assert that Semarnat did not consider the environmental impacts of the marina in El Mogote before approving the Paraíso del Mar project as required by LGVS, Article 5, Section II.<sup>241</sup> According to the Submitters, the Paraíso del Mar 2013 Authorization merely stipulates that an environmental performance monitoring program shall "estimate the environmental impacts" in order to define the effects of different levels of boating activity on marine biota.<sup>242</sup>
94. Mexico states that DGIRA did in fact consider the potential environmental impacts of the marina construction project in El Mogote.<sup>243</sup> According to Mexico, DGIRA considered the following elements during the project approval process: the marina and the dry dock would be constructed in two stages;<sup>244</sup> the construction of access channels to the dry dock would bring ecological benefits to the mangrove system;<sup>245</sup> the project would not affect the integrity of the mangrove due to the design of the dry dock and pier;<sup>246</sup> and the construction of a perimeter channel in the project ecosystem would improve the structure and ecological functions of the mangrove, which would not affect the integrity of its hydrological flow.<sup>247</sup> DGIRA determined that the project was consistent with NOM-022 and that it had correctly assessed the alteration to wildlife habitat.
95. The submission does not elaborate further on a failure to consider the precautionary principle in issuing the environmental impact authorization.<sup>248</sup> In light of Mexico's response, the submission does not raise further concerns regarding the preventive

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<sup>240</sup> Paraíso del Mar 2013 Authorization, *supra* note 233 at 52.

<sup>241</sup> Revised submission, *supra* note 14 at 10.

<sup>242</sup> *Idem.*

<sup>243</sup> Response, *supra* note 16 at 25.

<sup>244</sup> Paraíso del Mar 2013 Authorization, *supra* note 233 at 12.

<sup>245</sup> Response, *supra* note 16 at 25.

<sup>246</sup> *Idem.*

<sup>247</sup> *Idem.*

<sup>248</sup> LGVS, Article 5, Section II.

measures implemented pursuant to LGVS Article 5, section II, nor does it specify the circumstances in which a lack of scientific certainty exists.

96. The Secretariat determines that preparation of a factual record is not warranted concerning the alleged failure to effectively enforce LGVS Article 5, section II.

**iii) Enforcement of NOM-022**

97. The Submitters assert that Mexico is failing to enforce subparagraphs 4.16 and 4.42 of NOM-022 in relation to the protection of mangrove species. The Submitters state that Semarnat “acknowledges in the environmental impact authorization that the project is not in compliance with the distances stipulated in subparagraph 4.16 [of NOM-022]” since the construction of a dry dock within the mangrove ecosystem was allegedly approved, based on the fact that “the proposed activity is not adjacent to, nor adjoining, but within the ecosystem itself [...]”<sup>249</sup> The Submitters indicate, moreover, that the Paraíso del Mar project allegedly affects the groundwater recharge process in the natural wells of El Mogote.<sup>250</sup> The Submitters allege that the Paraíso del Mar EIS recognizes that the Paraíso del Mar project “will have severe environmental impacts given that with the building of 2,050 hotels rooms, a shopping area, a single family and multi-family residential area, and two golf courses on the El Mogote dune it is obvious that said constructions will block the rainwater recharging of the aquifer.”<sup>251</sup> The Secretariat notes that the Paraíso del Mar EIS indicated that Conabio reported that the aquifer “is drying up, becoming salinated and polluted by solid wastes and wastewaters” and that the following measures were advisable: “recharging of aquifers, urban growth planning and clean-up of urban wastes.”<sup>252</sup>
98. Mexico argues that the Paraíso del Mar 2013 Authorization contains a systematic analysis of the enforcement of the provisions of NOM-022 and that it transcribes the specifications thereof, along with DGIRA’s analysis.<sup>253</sup>
99. In the Paraíso del Mar 2013 Authorization, DGIRA observes that the El Mogote hydrological system “is totally lacking in permanent or temporary inputs of fresh groundwater,”<sup>254</sup> that in this desert area “it only rains a few days a year,”<sup>255</sup> and that the construction of the system of channels proposed by the developer “would significantly improve interstitial salinity conditions.”<sup>256</sup> The environmental impact authorization also included the following observations: there is an intention to restore the hydrodynamic interactions of the salt marshes with the marine area, which would guarantee the completeness of the mangrove hydrological system;<sup>257</sup> the proposed channels would enable reduction of salinity in deteriorating areas;<sup>258</sup> the developer “presented a modification to the project” with which it proposed the rehabilitation of mangroves;<sup>259</sup> the proposed system of channels is based on scientific studies which defined the

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<sup>249</sup> Revised submission, *supra* note 14 at 13.

<sup>250</sup> *Idem.*

<sup>251</sup> *Idem.*

<sup>252</sup> Article 14(1) Determination, §82.

<sup>253</sup> Response, *supra* note 16 at 41-50.

<sup>254</sup> *Ibid.*, at 41.

<sup>255</sup> *Idem.*

<sup>256</sup> *Ibid.*, at 42.

<sup>257</sup> *Ibid.*, at 42-43.

<sup>258</sup> *Ibid.*, at 43.

<sup>259</sup> *Ibid.*, at 45.

baseline of the regional environmental system;<sup>260</sup> and, in summary, the information contained in the project dossier analyzed the hydrological system of the wetlands in the El Mogote peninsula.<sup>261</sup>

100. Regarding the minimum distance of 100 m, DGIRA observes that:

Most of the works forming part of the project under assessment are adjacent to mangrove ecosystems and comply with the 100 meter minimum distance established under point 4.16 of the NOM-022-SEMARNAT-2003 standard [...] However, regarding the construction of the dry dock, which is located within the mangrove ecosystem, the developer holds a change of forest land use approval [...] therefore, the provisions of point 4.16 are not applicable in this case [...]<sup>262</sup>

101. In view of the foregoing, the Secretariat deems that the preparation of a factual record on the effective enforcement of NOM-022 is not warranted.

**iv) Enforcement of a Protected Forest Zone executive order**

102. The Submitters assert that the executive order (“Decree ZPFV”),<sup>263</sup> which decrees that the land surrounding the city of La Paz is a closed protected forest zone, constitutes a planning instrument that is in force and applicable to the project. The Submitters maintain that Decree ZPFV was not taken into consideration in the Paraíso del Mar 2013 Authorization, in contravention of LGEEPA Article 35.<sup>264</sup> Decree ZPFV establishes that:

The use of forest resources within the zone identified by Article 1 of the present Executive Order, shall consist exclusively of harvesting deadwood.<sup>265</sup>

103. Mexico argues that the Paraíso del Mar 2013 Authorization did in effect consider Decree ZPFV when the project approval was issued.<sup>266</sup> On this matter, the Authorization cites the sentence of 14 January 2013 rendered by the courts which ruled that the project “is located within the zone established by [Decree ZPFV], with the legal consequences that may pertain thereto.”<sup>267</sup> In compliance with this ruling, Paraíso del Mar 2013 Authorization includes reasoning that analyzes the project’s works and activities as consistent with Decree ZPFV.<sup>268</sup>

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<sup>260</sup> *Ibid.*, at 47.

<sup>261</sup> *Ibid.*, at 48.

<sup>262</sup> Paraíso del Mar 2013 Authorization, *supra* note 233 at 19.

<sup>263</sup> Forestry Department of Hunting and Fishing (*Departamento Forestal de Caza y Pesca*), Order declaring the lands surrounding the city and port of La Paz, B.C., a Closed Forest Protection Zone, *DOF*, 24 August 1938, <<http://goo.gl/MTThU>> (viewed 22 July 2014).

<sup>264</sup> Revised submission, *supra* note 14 at 11.

<sup>265</sup> Forestry Department of Hunting and Fishing (*Departamento Forestal de Caza y Pesca*), Order declaring the lands surrounding the city and port of La Paz, B.C., a Closed Forest Protection Zone, *DOF*, 24 August 1938, <<http://goo.gl/MTThU>> (viewed 30 April 2013).

<sup>266</sup> Response, *supra* note 16 at 9, which refers to a sentence issued on 14 January 2013 by the 11th Regional Metropolitan Court of the Federal Tribunal of Tax and Administrative Justice, in the nullity trial No. 32183/06-17-11-3.

<sup>267</sup> Paraíso del Mar 2013 Authorization, *supra* note 233 at 9.

<sup>268</sup> *Ibid.*, at 24-28.



104. DGIRA recognized that the Paraíso del Mar project is located within the area covered by Decree ZPFV, an instrument in effect since 1938,<sup>269</sup> and considered that in 1996 LGEEPA specified the different categories of protected natural areas,<sup>270</sup> including forest reserves and zones.<sup>271</sup> The Paraíso del Mar 2013 Authorization also pointed out that the 1996 reform of LGEEPA included a provisional article that provided for the re-categorization of a protected natural area to determine whether the original conditions leading to its establishment had changed, which, according to DGIRA, has not occurred.<sup>272</sup> DGIRA deems that, although Decree ZPFV does restrict resource exploitation and use in the zone, the law that created it does permit the possibility of authorizing activities provided that they are justified by technical studies.<sup>273</sup> According to DGIRA, Article 117 of the LGDFS provides for a mechanism to effect such analysis and that, according to results of a technical analysis for the Playa Espíritu 2013 Authorization, “the legal consequences pertaining to said location do not prevent its execution as the works and activities [...] do not cause in any manner the effects that said legal instrument sought to avoid.”<sup>274</sup>
105. In light of Mexico’s Response, the Secretariat determines that the assertion concerning the alleged failure to consider Decree ZPFV in the Playa Espíritu environmental impact assessment process is not a matter that warrants the preparation of a factual record.

**v) Enforcement of LGVS Article 1 in lieu of the LGDFS**

106. The Submitters assert that the LGDFS is not the applicable legislation in relation to the change of land use on the site of the Paraíso del Mar project and that, in any event, the land use change caused by the project should have been assessed and determined under the LGVS.<sup>275</sup> In support of this assertion, they cite LGVS Article 1, paragraph 2, which stipulates that “[t]he sustainable use of forest resources, timber and non-timber, and of aquatic species, shall be regulated by the forestry and fisheries laws, respectively, *except in the case of species or populations at risk.*”<sup>276</sup> The Submitters argue that the environmental impact authorization of Paraíso del Mar identifies the presence of protected mangrove species in the project area, namely: white mangrove (*Laguncularia racemosa*), red mangrove (*Rhizophora mangle*) and black mangrove (*Avicennia germinans*), i.e., species listed in NOM-059 as species at risk.<sup>277</sup> According to the Submitters, given the presence of species at risk in the project area, the applicable legislation should be the LGVS and not the LGDFS.<sup>278</sup> The Submitters affirm that the environmental impact authorization does not address the question of the LGVS’s applicability

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<sup>269</sup> *Ibid.*, at 24.

<sup>270</sup> “Decreto que reforma, adiciona y deroga diversas disposiciones de la LGEEPA”, *DOF*, 13 December 1996.

<sup>271</sup> LGEEPA, Article 53.

<sup>272</sup> Paraíso del Mar 2013 Authorization, *supra* note 233 at 25.

<sup>273</sup> *Ibid.*, at 26.

<sup>274</sup> *Ibid.*, at 27.

<sup>275</sup> Revised submission, *supra* note 14 at A-6.

<sup>276</sup> LGVS, Article 1, paragraph 2 [emphasis added].

<sup>277</sup> Revised submission, *supra* note 14 at A-6.

<sup>278</sup> Revised submission, *supra* note 14 at A-5 and A-6.

107. Mexico responds that the change of land use in forested areas is—in all instances—an activity regulated by the LGDFS and not the LGVS.<sup>279</sup> Thus, any total or partial removal of mangrove vegetation from a forested area intended for non-forestry activity “constitutes a change of land use of a forested area,” which requires prior authorization from Semarnat through the Forest and Soil Management Branch (*Dirección General de Gestión Forestal y de Suelos—DGGFS*).<sup>280</sup> Regarding the sustainable use of species listed in any category of risk under NOM-059, the LGVS does, in effect, stipulate that such uses are subject to the provisions of NOM-059.<sup>281</sup> However, —Mexico notes— when an activity does not constitute the sustainable use of forest resources, as is the case with the Paraíso del Mar project, the applicable legislation is the LGDFS and not the LGVS.<sup>282</sup> Mexico clarifies that whereas the purpose of sustainable use of forest resources (both timber and non-timber) is the rational and sustainable extraction of said resources,<sup>283</sup> a different goal is pursued with changes of land use in forested areas: “vegetation vital to the forested area is removed in order to introduce a different (non forestry) use to said area.” This is the case with the Paraíso del Mar project.<sup>284</sup>

108. In view of the foregoing, the Secretariat concludes that preparation of a factual record is not warranted with respect to enforcement of the LGVS in relation to the sustainable use of timber and non-timber forest resources.

#### vi) Enforcement of the Ramsar Convention

109. The Submitters assert that Mexico is failing to enforce Articles 3.1 and 3.2 of the Ramsar Convention in relation to the approval of the Paraíso del Mar project. The Submitters maintain that the project was authorized without the preparation of relevant actions to ensure compliance with the required environmental and hydrological measures.<sup>285</sup> The Submitters point out that following the project’s approval, the authorities did not take actions to monitor or review the ecological conditions of the Mogote-Ensenada de La Paz Wetlands Ramsar site.<sup>286</sup> They allege that Mexico’s obligations in respect of the site in question are detailed in COP resolutions and recommendations.<sup>287</sup>

110. Mexico maintains that it took into consideration the ecological and hydrological functions of the Mogote-Ensenada de La Paz Wetlands Ramsar site<sup>288</sup> “in order to maintain the mangrove ecosystem’s functional completeness to ensure the continuity of the environmental services it provides.”<sup>289</sup> Furthermore, Mexico indicates that

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<sup>279</sup> Response, *supra* note 16 at 81.

<sup>280</sup> *Idem.* The Party is referring to, among other provisions, LGDFS Articles 16, section XX, 58, section I, 117 and 118 (which authorize Semarnat to issue—on an exceptional basis—land use change approvals on forested lands based on a technical study supporting such a change and forestry offsets), as well as to Articles 120-127 of the Regulation to the LGDFS (which regulates land use change procedures on forested lands).

<sup>281</sup> Response, *supra* note 16 at 81.

<sup>282</sup> *Ibid.*, at 82.

<sup>283</sup> *Idem.*

<sup>284</sup> *Idem.*

<sup>285</sup> Revised submission, *supra* note 14 at A-2.

<sup>286</sup> *Idem.*

<sup>287</sup> *Ibid.*, at A-3.

<sup>288</sup> Response, *supra* note 16 at 97.

<sup>289</sup> *Idem.*

according to the studies presented as appendices to the EIS the works and activities of the Paraíso del Mar project “will not alter the hydrological system of the mangrove ecosystem,” thanks to the implementation of measures to induce a laminar flow into it.<sup>290</sup> The studies indicate that the proposed project will not affect the integrity of the hydrological flow because the area where mangrove will be removed “has [already] been disturbed”; because a management program is in place that will enable follow up on possible changes to the regional environmental system; and because the interactions among the mangrove, dune and adjacent marine areas will not be affected as “the direction of the tidal ebb and flow will not be altered at the regional and local system levels.”<sup>291</sup>

111. Under the Ramsar Convention, the contracting parties undertake to foster the conservation of wetlands (Article 3.1) and, if possible, obtain information on wetland modification as a result of project development (Article 3.2). In this regard, the premise for assessing and authorization of the project in question assumes a pre-existing disruption as a baseline for authorizing Paraíso del Mar, without including any guidance to restore the wetland in question. As a consequence, the approval justifies deforestation without addressing rehabilitation criteria contained in the Ramsar Convention. The Secretariat also notes that the Paraíso del Mar 2013 Authorization does not mention the Ramsar Convention, nor does it associate project compliance with the obligations arising from the Convention—which is also a requirement for the EIS preparation under REIA Article 13, section III cited in the revised submission. The Secretariat referred earlier in this Notification to the concepts of “wise use” and “sustainable development” adopted by the COP (§§58-59 *supra*) and observed that COP resolutions are necessary interpretive guides to the reading of Articles 3.1 and 3.2 (§§19-22 *supra*).
112. The Response does not clarify whether the COP resolutions inform in any manner the environmental impact assessment process of the Paraíso del Mar project in relation to the Mogote-Ensenada de La Paz Wetlands Ramsar site. Beyond determining whether or not COP resolutions are integrated into Mexico’s legal system, and without considering the legal foundation of said resolutions, a factual record would shed light on the extent to which such instruments serve to guide the enforcement of the Ramsar Convention within the environmental impact assessment process, as it pertains to the Paraíso del Mar project.
113. The Secretariat therefore recommends the preparation of a factual record that addresses the effective enforcement of Ramsar Convention Articles 3.1 and 3.2 in relation to the Paraíso del Mar project.

#### IV. NOTIFICATION

114. Having analyzed submission SEM-13-001 (*Tourism Development in the Gulf of California*) in light of the Response of the Government of the United Mexican States, the Secretariat hereby notifies the CEC Council that the preparation of a factual record is warranted in respect of the alleged failures to effectively enforce the following provisions:

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<sup>290</sup> *Ibid.*, at 98.

<sup>291</sup> *Idem*.

CIP Playa Espíritu Project

- i. REIA Article 36 in relation to the incorporation of better and more detailed technical information in the CIP Playa Espíritu EIS (§§34-39 *supra*);
- ii. LGEEPA Article 35, REIA Articles 13 and 44 and LGVS Article 5: section II, in relation to the assessment of the project's cumulative effects and its alleged fragmentation (§§40-53 *supra*);
- iii. Ramsar Convention Articles 3.1 and 3.2 in relation to the conservation, wise use and exploitation of the Marismas Nacionales Ramsar site (§§ 57-65 *supra*);

Entremares Project

- iv. LGEEPA Article 35 and REIA Articles 13 and 44 in relation to the assessment of the project's cumulative effects and its alleged fragmentation (§§67-71 *supra*);
- v. NOM-059 in relation to the species listed therein and identified on the project site (§§76-80 *supra*);
- vi. Ramsar Convention Articles 3.1 and 3.2 in relation to the conservation, wise use and exploitation of the Mogote-Ensenada de La Paz Wetlands Ramsar site (§§81-86 *supra*);

Paraíso del Mar Project

- vii. LGEEPA Article 35 and REIA Articles 13 and 44 in relation to the assessment of the project's cumulative effects and its alleged fragmentation (§§89-92); and
- viii. Ramsar Convention Articles 3.1 and 3.2 in relation to the conservation, wise use and exploitation of the Mogote-Ensenada de La Paz Wetlands Ramsar site (§§109-113 *supra*).

115. Recalling Council Resolution 01-06<sup>292</sup> and 12-06<sup>293</sup> regarding the timely preparation of factual records, and in observance of the NAAEC's objectives concerning transparency, public participation and effective enforcement of environmental law,<sup>294</sup> the Secretariat considers that the objectives of the NAAEC would be best served if any Council Resolution authorizing the development of a factual record pursuant to Article 15(2) is consistent with what is recommended herein.

Respectfully submitted for your consideration on 5 September 2014.

**Secretariat of the Commission for Environmental Cooperation**



Per: Irasema Coronado, Ph.D.  
Executive Director

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<sup>292</sup> Council Resolution 01-06, Response to the Joint Public Advisory Committee (JPAC) Report on Lessons Learned regarding the Articles 14 and 15 Process (29 June 2001).

<sup>293</sup> Adoption of the revised version of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (11 July 2012).

<sup>294</sup> NAAEC, Article 1, objectives g) and h).