

ANNEX A

This Annex provides additional information in support of Petition SEM-13-001 (Tourist Developing in the Gulf of California), as requested by the Secretariat in paragraph 125 of the Secretariat's May 24, 2013 Determination under Article 14 (1) of the North American Agreement on Environmental Cooperation (NAAEC). The Petition, along with this Annex and the supporting documents provided electronically, satisfies the admissibility requirements of Article 14(1) of the NAAEC.

i) The current state of the Los Pericúes Project:

Hansa Baja Investments has discontinued the Los Pericúes project. Because the project is not subject to an environmental impact assessment or any other administrative proceeding it is not a subject of this Petition.

However, Hansa Baja Investments has filed an action for invalidation with the Court of Fiscal and Administrative Justice, arguing that the members of the Cabo Pulmo community did not have legal standing to file an appeal for review of the Environmental Impact Authorization (EIA) of the Cabo Cortés project and that, therefore, the EIA for Cabo Cortés should still be valid.

ii) The nature of Mexico's failure to effectively enforce Article 34 of the LGEEPA:

Article 34 of the LGEEPA indicates that SEMARNAT may invite public comment after publication of the EIA in its Environmental Gazette. However, SEMARNAT's publication of the EIA is incomplete because it does not contain the appendices. Therefore, although some information is available regarding the nature of the project, it is not possible to submit comments or study the proposal, because SEMARNAT has not published the complete EIA.

iii) Specific provisions of the Ramsar Convention that are not being applied and further information supporting consideration of the "Management Recommendations" as environmental legislation under the terms of the NAAEC:

The Ramsar Convention constitutes environmental legislation of a Contracting Party in accordance with Article 45(2) of the NAAEC. The goal of the Convention is to protect the environment through the protection of flora and wildlife, including species in danger of extinction, and their habitats. The principal purpose of the Convention is the conservation and wise use of wetlands, as well as the protection of waterfowl that depend on these ecosystems.

Mexico ratified the Ramsar Convention in 1986.ⁱ Article 133 of the Constitution of the United Mexican States provides that the Constitution, the laws of the Congress of the Union, and all treaties in accordance with that Constitution signed by the President of

the Republic and approved by the Senate, are the supreme law of the Union. Thus, as a treaty duly signed by the President and approved by the Senate, the Ramsar Convention is the law within Mexico.

Furthermore, Paragraph Two, Article 1 of the Constitution states that “the laws regarding human rights shall be interpreted in accordance with the Constitution and international treaties on this subject which at all times favor persons with the broadest possible protection.” Because of the close relationship between environmental protection and human rights, Article 1 incorporates the provisions of the Ramsar Convention into Mexican law as a human rights treaty. The protection of wetlands is also necessary for safeguarding the human right to a healthful environment, as contained in Article 4 of the Constitution. Thus, the Ramsar Convention is environmental legislation in Mexico in accordance with Article 45(2) of the NAAEC.

Mexico has failed to fulfill its obligations under the Ramsar Convention. For example, Article 3.1 of the Ramsar Convention requires that “Contracting Parties shall formulate and implement their planning so as to promote the conservation of wetlands included in the List, and as far as possible, the wise use of wetlands in their territory.” The Ramsar Convention defines “wise use of wetlands” as “the maintenance of their ecological character, achieved through the implementation of ecosystem approaches,ⁱⁱ within the context of sustainable development.”ⁱⁱⁱ The Convention also develops the concept of “ecological character” as that “combination of ecosystem components, processes and benefits/services that characterize the wetland at a given time.”^{iv}

With the designation of Bahía de la Paz, Cabo Pulmo and Marismas Nacionales as Ramsar sites, Mexico is obligated to administer those sites in such a manner as to maintain the ecological characteristics of each one and thus maintain the essential ecological and hydrological functions for the benefit of their “products, functions and attributes.” Nevertheless, SEMARNAT authorized the Paraíso del Mar and the CIP Playa Espíritu projects, adjacent to the Ramsar sites, without adequate measures to ensure the ecological and hydrological functions of the wetlands, as is shown on pages 10 and 11 of the Petition. This violates Article 3.1 of the Ramsar Convention.

Additionally, Article 3.2 of the Ramsar Convention stipulates that “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 as the result of technological developments, pollution, or other human interference.” Nonetheless, SEMARNAT authorized the construction and operation of the Paraíso del Mar, Entre Mares, Cabo Cortés and CIP Playa Espíritu projects without putting into place measures for monitoring and review of the ecological conditions of the Bahía de la Paz, Cabo Pulmo and Marismas Nacionales wetlands.

The Ramsar Convention establishes obligations of the Contracting Parties which are elucidated by Resolutions and Recommendations adopted by the Conference of the Parties. Article 6, paragraphs 1 and 2, sections d) and f) of the Convention grant the

Conference of the Contracting Parties the power to make decisions regarding the implementation and interpretation of the Convention. In keeping with this, the Resolutions and Recommendations constitute environmental law, since they are adopted by the Conference of the Contracting Parties, with the participation and approval of Mexico as a Party to the treaty.

The Conference of Parties issued Resolutions establishing standards for environmental impact assessments and the protection of wetlands in the face of climate change. None of the projects—Paraíso del Mar, Entre Mares, Cabo Cortés or CIP Playa Espíritu—complies with these resolutions. For example, Resolution VII.16 “calls upon Contracting Parties to reinforce and strengthen their efforts to ensure that any projects, plans, programs and policies with the potential to alter the ecological character of wetlands in the Ramsar List, or impact negatively on other wetlands within their territories, are subjected to rigorous impact assessment procedures and to formalize such procedures under policy, legal, institutional and organizational arrangements.”^v Despite the fact that environmental impact studies of Cabo Cortés show that the project may damage the Cabo Pulmo reef, SEMARNAT approved the project without taking into account the cumulative impacts on the environment, whether direct or indirect. This is confirmed in Conclusion 3 of the 2013 Joint Mission Report, which concludes that the EIA for Cabo Cortés does not take into account the assessment of the combined direct and cumulative impacts related to the project itself, which focuses on waste management.^{vi} Thus Mexico did not subject the project to a rigorous impact assessment.

In addition, Resolution X.24 “urges Contracting Parties to manage wetlands wisely in order to reduce the multiple pressures they face and thereby increase their resilience to climate change, and to take advantage of the significant opportunities to use wetlands wisely as a response option to reduce the impacts of climate change.”^{vii} None of the environmental impact studies of Paraíso del Mar, Entre Mares, Cabo Cortés or CIP Playa Espíritu mentions the possibility of sea-level rise in the context of changes to the coastline resulting from the construction and operation of the projects in those sites. Furthermore, other aspects of climate change and related harmful effects of these projects are not considered.

Resolution VIII.3 requires Mexico to examine, modify and adopt measures with respect to those policies and practices in force that could adversely affect coastal wetlands; and to acknowledge in its policies the vital function fulfilled by the coastal wetlands as sources of subsistence for the population, and their role in mitigating the impacts of climate change and sea-level rise and conserving biological diversity.^{viii} Mexico applied neither the precautionary principle nor the National Policy of Attention to Mangroves, despite mandates and guidelines issued by the Ramsar Convention which, as best practices, must be followed, particularly by government projects such as the CIP Playa Espíritu, which is promoted and financed by FONATUR.^{ix}

The Ramsar Advisory Missions are a technical assistance mechanism which aims to provide expert assistance or advice for the resolution of problems that threaten Ramsar sites.^x In contrast to Resolutions and Recommendations, the reports issued by the Advisory Missions are specific to a particular site. In Mexico, these Mission reports constitute

environmental law for the following reasons: (1) The Recommendations made by the Mission specify how obligations under the Ramsar Convention apply to a particular site. By ratifying the Ramsar Convention, Mexico agreed to adhere to the provisions of the Convention; (2) The text of the Recommendations, Resolutions and Advisory Missions are part of the Ramsar Convention system, given that the Missions specifically were created pursuant to Resolution IV.7 of 1990 and were voted unanimously by the Conference of Parties (including Mexico); (3) The Mexican government reviews the Mission reports containing the site recommendations, and once they are accepted the government publicizes them on the Ramsar Convention website.

The National Commission for Protected Natural Areas (CONANP) is the entity charged with overseeing Mexico's compliance with the Ramsar Convention. During the environmental impact assessment process SEMARNAT must take into consideration the advisory opinion of CONANP, as well as its experience with the implementation of the Advisory Mission's resolutions and recommendations, since Bahía de la Paz, Cabo Pulmo and Marismas Nacionales are Ramsar sites.

The diplomats who take part in the Advisory Missions write a report, which later becomes a public document that can serve as the basis for the adoption of conservation measures at the site. The report contains important conclusions and recommendations relevant to governmental decisions. For example, Conclusion 4 of the Joint Mission report for Cabo Pulmo states that: "Given the extent of the Cabo Cortés project in terms of the construction that has already been approved, and the possible impacts, whether direct, indirect or cumulative, that would be generated by that construction adjacent to the Cabo Pulmo National Reserve (PNCP), it is determined that the PCNP is an endangered site according to the guidelines of the Ramsar Convention."^{xi} The Joint Mission recommended the "future restriction of large-scale tourist development in the areas surrounding the Cabo Pulmo National Reserve (and in the other sectors of the site known as 'World Heritage Islands and Protected Areas of the Gulf of California'), in order to avoid the risk of cumulative impacts."

Conclusion 10 of the Ramsar Mission report for Marismas Nacionales indicates that: "With respect to the FONATUR project, the Mission considers that given the environmental importance, for Mexico and for the international community, of this area as a Ramsar Wetland, and taking into account the coastal regulations, the pressures and vulnerability of the Marismas Nacionales system, it is not viable to have tourist development of the magnitude, density of use and design proposed by FONATUR."^{xii}

iv) *Statements related to the application of Article 35 bis of the LGEEPA:*

The Petition does not assert a failure to comply with Article 35 bis of the LGEEPA.

v) *Whether there is a failure to apply Article 28 of the LGEEPA:*

The Petition does not assert a violation of Article 28 of the LGEEPA.

vi) *Statements related to the application of Articles 24 and 58 of the Regulations for Environmental Impact Assessment (REIA):*

Under Article 24 of the REIA, SEMARNAT has the authority to seek the technical opinion of a Federal Public Administration agency or entity whenever the nature of the operation or activity warrants it. For the EIA of the CIP Playa Espiritu project, SEMARNAT sought the input and opinion of the following agencies: the General Administration of Forest and Land Management, the General Administration of the National Commission on Water, the General Administration of the Mexican Institute of Water Technology, the General Administration of the Federal Maritime Zone and Coastal Areas, the National Commission for the Awareness and Use of Biodiversity, the National Commission on Protected Natural Areas, the General Administration for Environmental Policy and Regional and Sectoral Integration, and the General Administration of Wildlife. All these agencies and authorities expressed their concern and negative opinion regarding the CIP Playa Espiritu project.

In seeking but disregarding the opinions of expert agencies, SEMARNAT abused the discretion the law has granted it to seek such opinions. Despite the warnings of the different entities, Mexico did not apply preventive or precautionary measures to avoid negative impacts to Marismas Nacionales stemming from the CIP Playa Espiritu project.

For purposes of clarification, Article 57 of the REIA provides that in those cases where construction or activities are carried out without an EIA, SEMARNAT shall order, through PROFEPA, corrective or urgent measures. This is without prejudice to administrative sanctions or the exercise of civil or criminal actions that may be applicable, as well as any security measures that may be imposed.

Article 58 of the REIA states that the purpose of corrective or urgently measures is the avoidance of further harm to the environment, ecosystems, and their elements. Although Paraíso del Mar no longer has an EIA, PROFEPA has not shut down the construction or operation of the project. This matter is discussed on pages 4, 5, 6 and 7 of the Petition. By avoiding the application of corrective or urgent measures for the protection of the natural resources in the project area, PROFEPA is violating the provisions of Article 58 of the Regulations.

vii) *Relationship between the CIP Playa Espiritu project and the CIP Costa Pacífico project:*

The CIP Costa del Pacífico project changed its name to Playa Espiritu; for purposes of this Petition, the Submitters have decided to refer to it as CIP Playa Espiritu.

viii) *Information on measures for the protection of sea turtles that were not considered in the Cabo Cortés EIS:*

SEMARNAT acknowledged that five species of turtles were found in the Cabo Cortés tract of land. However, because the area of the site had already been altered

and/or cleared of vegetation, the agency determined that the project would not generate environmental impacts affecting the biotic composition of the vegetation.^{xiii}

Neither the EIS nor the EIA for the Cabo Cortés project contemplated protective measures for sea turtles^{xiv} even though CONANP indicated that to preserve the sea turtle area, mitigation and compensation measures should be adopted, such as, for example, the installation of low-intensity amber lighting and services to provide visitors with information about the beaches as sea turtle nesting areas.^{xv}

ix) Information on the non-applicability of the LGDFS:

The purpose of the General Law for Sustainable Forest Development (LGDFS) is to regulate and foster conservation, protection, restoration, production, regulation, cultivation, management, and utilization of the forest ecosystems of Mexico and their resources. In accordance with Article 58 of the LGDFS, SEMARNAT may authorize changes of forest land use or the utilization of timber resources in forested areas.

The purpose of the General Wildlife Law (LGVS) is the conservation and sustainable utilization of wildlife and its habitats in Mexico. Article 1, Paragraph 2 of the Law states that: “[t]he sustainable utilization of forest resources for timber and non-timber purposes, as well as those species whose entire means of livelihood is water, shall be regulated by laws governing forests and fisheries, respectively, unless those species or populations are at risk.”^{xvi}

Through its General Administration of Risk and Environmental Impact (DGIRA), SEMARNAT applied the LGDFS, basing the authorization of the Paraíso del Mar project on Conclusion 1 of the EIA.^{xvii} Despite the fact that the EIA recognized that the site contains protected species of mangroves, the DGIRA did not go through the necessary procedure with the Wildlife Administration. Although the LGDFS regulates the utilization of forest lands it is not applicable to species that are protected—as is the case with the mangroves—under any regulation. Because mangroves are protected it was necessary to request a permit for the utilization and felling of mangroves in accordance with the LGVS rather than the LGDFS. The EIA does not address this.

The protected mangrove species adversely affected by the Paraíso del Mar project are the black mangrove (*laguncularia racemosa*), red mangrove (*rhizophora mangle*) and white mangrove (*ariceni germinar*), all of them listed on the NOM-059 under the category of at-risk species. For this reason, SEMARNAT was obliged to rely on the LGVS instead of the LGDFS when it authorized the change in land use and the removal of the mangrove cover on the Paraíso del Mar tract.

x) Information satisfying Section 14(1)(c) of the NAAEC:

The information below can be accessed using the following link:

<https://drive.google.com/#folders/0B1212Sdr-aEDWHh3WTB0d25YYnc>.

- a) Court of Tax and Administrative Justice, Eleventh Metropolitan Regional Chamber, Judgment of August 3, 2010, record 32183/06-17-11-3, referenced in Endnote 18 of the Petition;
- b) Diagnostic of wetlands associated with the Regional Environmental System of the CIP Playa Espíritu Project (2009), referenced in Endnote 29 of the Petition;
- c) Appeal Review 11/2012, Carlos Simentel, File XV/2012/11, referenced in Endnote 32 of the Petition;
- d) SEMARNAT, Environmental Impact Authorization for Paraíso del Mar;
- e) SEMARNAT, Authorization of Land Use Change, Cabo Cortés Project, August 4, 2009, contained in Writ SEMARNAT-BCS.02.02.0905/09, referenced in Endnote 35 of the Petition;
- f) Appeal Review 403/2011, File XV/2011/403, referenced in Endnote 40 of the Petition;
- g) Electronic communication of community spokespeople of Cabo Pulmo, to the Cabo Pulmo Vivo Coalition, 9 July 2012, referenced in Endnote 41 of the Petition;
- h) SEMARNAT, Authorization of Forest Land Use Change, Cabo Cortés;
- i) Ramsar Advisory Mission report on Marismas Nacionales, August 9, 2011;
- j) District Court, Final Judgment of Nullification of the EIA for Paraíso del Mar;
- k) Action for nullification brought by Hansa for the Cabo Cortés project;
- l) The document entitled “Diagnostic of wetlands associated with the Regional Environmental System of the CIP Costa Pacífico,” referenced in Endnote 53 of the Petition, is the same as that described in (b) above;
- m) We are not submitting the PROFEPA resolutions of Files PFPA/BCS/DQ/79/0018-05 and PFPA/BCS/DQ/79/0127 of August 13, 2011, referenced in Endnote 16 of the Petition, because none of the Submitters or Partners is able to obtain this information.

xi) *Whether the Petition asserts a failure to effectively apply the Convention Concerning the Protection of World Cultural and Natural Heritage:*

The Petition asserts that Mexico is in violation of several provisions of the Convention Concerning the Protection of World Cultural and Natural Heritage by failing to take into consideration its duty to protect the natural heritage sites in Mexico. The UNESCO Convention constitutes “environmental legislation” in accordance with Article 45(2) of the NAAEC, for the reasons discussed in section (iii) above regarding the Ramsar Convention.

Article 2 of the Convention defines natural heritage as “those sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.” In accordance with Article 4 of the Convention, Mexico has an obligation to utilize its resources to ensure the protection, conservation, and transmission to future generations of the cultural and natural heritage situated in its territory.

Cabo Pulmo, along with the islands of the Gulf of California, was declared a Natural Heritage site under the UNESCO Convention. Mexico is in violation of the provisions of Article 4 because it has not taken into consideration the carrying capacity of the coral reef ecosystems, but only that of land-based fauna. With the increased population of visitors to Cabo Cortés requiring services, SEMARNAT has not taken into account the parallel increase in maritime traffic, waste production, and water demand, which are among the factors that could harm the health of the reef. This runs counter to Mexico’s duty to protect its natural and cultural heritage as under the UNESCO Convention.

xii) Information satisfying the Section 14(1)(e):

Copies of the communications sent to various authorities and the responses received can be viewed at the following link:

<https://drive.google.com/#folders/0B1212Sdr-aEDWHh3WTB0d25YYnc>.

- a) Meeting with SEMARNAT and CONANP officials, as well as Ramsar, IUCN and UNESCO diplomats, November 15, 2011, as appears in the Appendix to the Joint Mission Report for Cabo Pulmo, August 6, 2012;
- b) Request for termination of the Cabo Cortés EIA of December 5, 2011, for breach of terms;
- c) Stenographic copy of the appearance before the Senate of former Secretary of the Environment, Juan Elvira, during which concerns contained in the Petition regarding Cabo Cortés were brought to his attention, March 28, 2012;
- d) Letter from Friends for the Conservation of Cabo Pulmo, October 18, 2012, to the Commissioner for Protected Natural Areas, expressing concern about the Cabo Cortés project;

- e) Electronic communications with federal authorities, July 12, 2013;
- f) Letter to the Commissioner for Protected Natural Areas requesting the implementation of the Recommendations of the Ramsar Joint Mission and Heritage of Humanity for CaboPulmo, June 28, 2013.

Finally, we make mention of the meeting that was held between federal authorities from the environmental sector and civil society on June 11, 2013 at the Hotel Westin, Los Cabos, Baja California. Commissioner Luis Fueyo McDonald, Alfonso Flores of the General Administration of Environmental Impact and Risk, as well as representatives of the Legal Unit and of community groups were present at the meeting.

ⁱMinistry of the Interior, Official Journal of the Federation, August 29, 1986.

ⁱⁱResolution IX.1 Annex A, Conceptual framework for the wise use of wetlands and the maintenance of their ecological characteristics, Uganda, 2005, para. 22, available at <http://www.ramsar.org/pdf/guide/guide-wise-use-2005-s.pdf>.

ⁱⁱⁱ*Id.* The phrase “within the context of sustainable development” is intended to recognize that while development activities in some wetlands are inevitable, and many of these activities generate significant benefits for society, these can be undertaken in a sustainable manner, through the implementation of the approaches developed by the Convention, and that it is not appropriate to assume that “development” is a goal for all wetlands.

^{iv}*Id.* at para. 15.

^vRamsar Convention, Resolution VII.16, available at http://www.ramsar.org/pdf/res/key_res_vii.16s.pdf.

^{vi}Joint Mission Report of the Ramsar and World Heritage Conventions and International Union for the Conservation of Nature, 6 August 2012, http://www.ramsar.org/pdf/ram/ram_rp_74-CaboPulmo_sp.pdf.

^{vii}Ramsar Convention, Resolution X.24 Climate Change and Wetlands, Korea, 2008, para. 28, available at http://www.ramsar.org/pdf/res/key_res_x_24_s.pdf.

^{viii}Ramsar Convention, Resolution VIII.3 Climate Change and Wetlands: Adaptation and Mitigation, Korea, 2008, para. 16, available at http://www.ramsar.org/pdf/res/key_res_viii_03_s.pdf.

^{ix}Courts in other countries have considered the obligations of Ramsar as part of domestic law. For example, the Dutch court ruled in favor of the Municipal Administration of Bonaire for denying authorization and construction of a mega resort at HetLac. The Court ruled in favor of the municipal authority on the basis of Ramsar, taking into account articles 3 and 6 of the Convention, as well as resolutions and recommendations. Jonathan M Verschuuren, *Ramsar Soft Law is Not Soft at All. Discussion of the 2007 Decision by the Netherlands Crown on the Lac Ramsar Site on the Island of Bonaire* (November 25, 2008), *Milieu en Recht*, Vol. 35, No. 1, pp. 28-34, 2008, available at <http://ssrn.com/abstract=1306982>.

^xRamsar Convention, Recommendation 4.7 Climate Change and Wetlands: Adaptation and Mitigation, Korea, 2008, para. 16, available at http://www.ramsar.org/cda/es/ramsar-documents-recom-recommendation-4-7/main/ramsar/1-31-110%5E23111_4000_2.

^{xi}Joint Mission Report of the Ramsar and World Heritage Conventions and International Union for the Conservation of Nature, 6 August 2012, Conclusion 4, http://www.ramsar.org/pdf/ram/ram_rp_74-CaboPulmo_sp.pdf.

^{xii}Ramsar Advisory Mission on Marismas Nacionales, August 9, 2010, available at http://www.ramsar.org/pdf/ram/ram_rp_67-Mexico_sp.pdf.

^{xiii}Cabo Cortés Environmental Impact Authorization, 2008, p. 112 -113, available at <http://app1.semarnat.gob.mx/dgiraDocs/documentos/bcs/resolutivos/2008/03BS2008T0004.pdf>.

^{xiv}Cabo Cortés Environmental Impact Statement, 2008, p. 142-144/177 of Chapter IV: Marine Flora and Fauna, available at <http://app1.semarnat.gob.mx/dgiraDocs/documentos/bcs/estudios/2008/03BS2008T0004.pdf>.

^{xv}Cabo Cortés Environmental Impact Authorization, 2008, p. 103, available at <http://app1.semarnat.gob.mx/dgiraDocs/documentos/bcs/resolutivos/2008/03BS2008T0004.pdf>.

^{xvi}Congress of the Union, Official Journal of the Federation, July 7, 2013, available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/146.pdf>.

^{xvii}Paraíso del Mar Environmental Impact Authorization, 2004, p. 6, para. 1, available at <https://docs.google.com/file/d/0B1212Sdr-aEDM0x3am5HLUZleEU/edit?usp=sharing>.