
**Secretariat of the Commission for Environmental Cooperation
of North America**

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

Submitters: Myredd Alexandra Mariscal Villaseñor
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Silvestre García Alarcón
Roberto Abe Almada

Party: United Mexican States

Date of Receipt: 17 July 2006

Date of this Notification: 12 May 2008

Submission I.D.: **SEM-06-003** (*Ex Hacienda El Hospital II*)
SEM-06-004 (*Ex Hacienda El Hospital III*)

I. EXECUTIVE SUMMARY

Articles 14 and 15 of the North American Agreement on Environmental Cooperation (the “NAAEC” or the “Agreement”) create a mechanism whereby any person or nongovernmental organization can file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) initially considers these submissions based on criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission meets these requirements, it then determines, pursuant to the provisions of Article 14(2), whether the submission merits a response from the concerned Party. In light of the response of the Party, the Secretariat may notify the Council that the matter warrants the development of a factual record and provides its reasons in accordance with Article 15(1). The Secretariat dismisses the submission if it finds that development of a factual record is not warranted.

On 17 July 2006, Myredd Alexandra Mariscal Villaseñor, on her own behalf and representing Justina Domínguez Palafox, Félix Segundo Nicolás, Karina Guadalupe Morgado Hernández, Santos Bonifacio Contreras Carrasco, Florentino Rodríguez Viaira, Valente Guzmán Acosta, María Guadalupe Cruz Ríos, Cruz Ríos Cortés, and Silvestre García Alarcón, filed submission

SEM-06-003 (*Ex Hacienda El Hospital II*). On 22 September 2006, Roberto Abe Almada filed submission SEM-06-004 (*Ex Hacienda El Hospital III*) and endorsed the assertions of submission SEM-06-003. Both submissions were filed with the Secretariat in accordance with NAAEC Article 14.

The persons who filed submissions SEM-06-003 and SEM-06-004 with the Secretariat (the “Submitters”) assert that Mexico is failing to effectively enforce its environmental law with respect to the operation, decommissioning, and dismantlement of a pigment production plant (the “Facility”) operated by BASF Mexicana, S.A. de C.V. (BASF), located in Ex Hacienda de Nuestra Señora de la Concepción El Hospital (“Ex Hacienda El Hospital”) in the municipality of Cuautla, state of Morelos.

On 30 August and 28 September 2006, the Secretariat determined that submissions SEM-06-003 and SEM-06-004, respectively, met the requirements of Article 14(1) and found that, in light of the Article 14(2) criteria, they warranted a response from Mexico.¹ In accordance with paragraph 10.3 of the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”), the Secretariat consolidated the two submission files SEM-06-004 (*Ex Hacienda El Hospital III*) and SEM-06-003 (*Ex Hacienda El Hospital II*), since both relate to the same facts and the same asserted failures to effectively enforce environmental laws.²

On 10 January 2007, Mexico filed its response with the Secretariat in accordance with NAAEC Article 14(3), with 59 documentary exhibits, as well as the file of the administrative proceeding opened by the Office of the Federal Attorney for Environmental Protection (*Procuraduría Federal de Protección al Ambiente—Profepa*) against BASF which comprised a total of 58 volumes divided into 13 binders. In its response, Mexico notes the existence of a pending administrative proceeding and presents information on inspection and enforcement actions, fines, and safety measures that were under the responsibility of Profepa. Mexico states that Profepa followed up on the recommendations deriving from an environmental audit of the facilities operated by BASF and that it processed citizen complaints filed in relation to the matter raised by the Submitters in a timely manner. Mexico’s response alleges that restoration actions for the site were blocked by one of the Submitters. Finally, Mexico indicates that, “as manifested by Profepa,” it cannot provide information concerning the ongoing criminal investigation of BASF.

After considering the submission in light of Mexico’s response, the Secretariat concludes that the response leaves open central questions as to the effective enforcement of environmental law in relation to several of the Submitters’ assertions. The Secretariat finds that the environmental authorities ordered plans and studies for environmental restoration within the Facility, which

¹ SEM-06-003 (*Ex Hacienda El Hospital II*), Determination pursuant to Article 14(1) and (2) (30 August 2006), and SEM-06-004 (*Ex Hacienda El Hospital III*), Determination pursuant to Article 14(1) and (2) (28 September 2006).

² Paragraph 10.3 of the Guidelines: “The Secretariat may consolidate two or more submissions *that relate to the same facts and the same asserted failure to effectively enforce an environmental law*. In other situations where two or more submissions relate essentially to the same facts and enforcement matter and the Secretariat considers that it would be more efficient or cost-effective to consolidate them, it may so propose to the Council.” (Emphasis added.)

appears to respond to several of the Submitters' assertions. However, the information appended to the response leaves open various issues relating to the assertions of failure to effectively enforce LGEEPA Articles 134, 135 paragraph III, 136, 139, 150, 151, 152 bis, 169, and 170; LGPGIR Articles 68, 69, 75, and 78; CPF Article 421, as well as CPF Articles 415 paragraph I and 416 in force prior to 6 February 2002; RRP Articles 8 paragraph X, 10, and 12, and Mexican Official Standards NOM-052-SEMARNAT-1993 and NOM-053-SEMARNAT-1993. These open issues relate to the investigation and prosecution of environmental offenses, the alleged illegal disposal of waste during the operation of the Facility, as well as the control of contamination on other lots in the community where waste and materials resulting from the dismantlement were disposed. For these reasons, the Secretariat recommends to Council the preparation of a factual record.

II. SUMMARY OF THE SUBMISSION

The Secretariat hereby summarizes submissions SEM-06-003 and SEM-06-004, taking into account that Roberto Abe Almada endorsed the assertions in SEM-06-003.

A. Submission SEM-06-003 (*Ex Hacienda El Hospital II*)

The Submitters assert that Mexico is failing to effectively enforce various provisions of the General Ecological Balance and Environmental Protection Act (*Ley General del Equilibrio Ecológico la Protección al Ambiente—LGEEPA*);³ the General Waste Prevention and Integrated Management Act (*Ley General para la Prevención y Gestión Integral de Residuos—LGPGIR*);⁴ the National Waters Act (*Ley de Aguas Nacionales—LAN*);⁵ the Federal Criminal Code (*Código Penal Federal—CPF*);⁶ the Regulation to the LGEEPA respecting Hazardous Waste (*Reglamento de la LGEEPA en materia de Residuos Peligrosos—RRP*);⁷ the Regulation to the National Waters Act (*Reglamento de la Ley de Aguas Nacionales—RLAN*);⁸ and two Mexican Official Standards.⁹ They further assert that Mexico is failing to impose sanctions for violations documented by an environmental audit of the Facility (the “Environmental Audit”) of which Mexico has allegedly been aware since 1997.

The Submitters assert that BASF illegally disposed of hazardous waste at the Facility¹⁰ and indicate that during dismantlement, the company allowed the collection and deposit of waste on

³ LGEEPA Articles 4, 5, 6, 134-6, 139-40, 150-2, 152 bis, 160-2, 167, 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4, 170-4, 191-3. The Secretariat is mindful that several of these articles were repealed with the entry into force of the LGPGIR on 6 January 2004.

⁴ LGPGIR Articles 68-9, 75, 78, 101, 103, 106.

⁵ LAN Articles 29 paragraphs VI-VII, 119 paragraphs VI-VII, XI, XIV-XV.

⁶ CPF Article 415 paragraphs I and II and Article 416 paragraph I (versions in force in 1997); CPF Articles 420 Quater and 421 (versions in force as of reform of 6 February 2002).

⁷ RRP Articles 6, 8, 10, 12, 14, 15 paragraphs II and VII, 16, and 17 paragraph II.

⁸ RLAN Articles 135 paragraphs IV-VII, 136 paragraph II.

⁹ Mexican Official Standard NOM-052-ECOL-1993, Establishing the characteristics of hazardous wastes and the list thereof as well as the threshold above which a waste is considered hazardous due to its toxicity in the environment; Mexican Official Standard NOM-053-SEMARNAT-1993, Establishing the extractive testing procedure for determining the constituents making a waste hazardous due to its toxicity in the environment.

¹⁰ Submission SEM-06-003, p. 6; Appendix 11: Certification of facts drawn up 14 May 2005, by Lic. Neftalí Tajonar Salazar, Notary Public no. 4, VI district, State of Morelos.

the property of residents of Ex Hacienda El Hospital.¹¹ They state that BASF “donated or sold at low prices to former workers and neighbors of the site...containers, boards, drying trays, and other materials that had been in contact with or contained hazardous waste”¹² and assert that the company allowed the use of hazardous waste-contaminated debris for filling and grading on property of residents of the community of Ex Hacienda El Hospital.¹³

According to the Submitters, from August 1996 to March 1997, BASF participated in the Profepa environmental auditing program. The Submitters raise questions about how the company was potentially permitted to use the environmental auditing program improperly, since by voluntarily registering for the program, it avoided being inspected, thus postponing law enforcement measures until the deficiencies were identified.¹⁴ The Submitters assert that by allowing BASF to participate in the auditing program, Profepa made it possible for the company to circumvent law enforcement during that period, since BASF allegedly did not sign a compliance agreement, as provided by the self-regulation mechanism, at the conclusion of the audit but rather subsequent to the audit, and then merely gave notice of the decommissioning of the Facility.¹⁵

The Submitters state that Profepa did not take preventive and corrective measures despite what they view as the obvious soil contamination at the Facility and on other sites in the community.¹⁶ The submission indicates that Profepa issued an administrative order for BASF to inventory materials and wastes at the Facility and to implement programs for safe dismantlement of the Facility,¹⁷ but did not include urgent measures nor ultimately require effective compliance.¹⁸ The Submitters also assert that some of the alleged contamination caused by illegal hazardous waste disposal on the property of Ex Hacienda El Hospital residents is still present and that Profepa has not ordered measures sufficient to prevent environmental harm.¹⁹

According to the Submitters, the authorities do not have their own environmental analysis²⁰ and should not have accepted or required the remediation plan proposed by BASF, which led the

¹¹ Submission SEM-06-003, p. 5 and Appendix 8, Study by Roberto Flores Ortega. The study mentions the property of Jacobo Rodríguez Mares, Próculo García Alarcón, Reyna Puentes Ramírez, Cruz Ríos Cortés, and Aurora García Gutiérrez.

¹² Submission SEM-06-003, p. 6.

¹³ “...the property of Jacobo Rodríguez Mares, Próculo García Alarcón, Reyna Puentes Ramírez, Cruz Ríos Cortés, and Aurora García Gutiérrez who, deceived by BASF, allowed their property to be filled with hazardous waste...” Submission SEM-06-003, Appendix 8: Study by Roberto Flores Ortega, p. 1.

¹⁴ Submission SEM-06-003, p. 3, and Appendix 24, Resolution moved by the parliamentary group of the *Partido Verde Ecologista de México* (Green Party of Mexico), p. 2.

¹⁵ Submission SEM-06-003, p. 3. Note: The environmental auditing program allows a company to document its noncompliance with its environmental obligations and/or good industry practices, and to obtain a time period in which to comply by means of an agreement between the company and the authorities.

¹⁶ Submission SEM-06-003, p. 4.

¹⁷ *Ibid.*, Appendix 4, Administrative decision in file B-002/0750 of 1 July 1998, issued by the Director General, Industrial Inspection, Profepa, pp. 10-11.

¹⁸ Submission SEM-06-003, pp. 5, 9.

¹⁹ *Ibid.*, p. 9, and Appendix 6, Administrative decision in file B-002/0775 of 20 July 2000, issued by the Director General, Industrial Inspection, Profepa.

²⁰ Submission SEM-06-003, pp. 1, 5.

authorities to order insufficient cleanup actions.²¹ The Submitters state that Profepa improperly issued certification of the conclusion of the environmental restoration activities carried out at the Facility from May to July 2000, and assert that the Director of Pollution Source Inspection of Profepa (*Director General de Inspección de Fuentes de Contaminación*) lacked the authority to issue that document.²² They further assert that the sanctions applied to BASF are insufficient, because they only relate to instances of non-compliance occurring in connection with the implementation of the environmental restoration program, and not to other alleged violations included in the submissions.²³

The Submitters maintain that BASF omitted part of the process wastewater discharge system from the plans that it filed with the authorities,²⁴ and that Profepa included those plans in an administrative order for implementation of the dismantlement plan for the Facility,²⁵ and that this sequence of events constitutes one or more environmental offenses. The Submitters add that the drainage dismantlement program was suspended on 31 May 2005 by the municipal authorities because they found inconsistencies in the system plans.²⁶

B. Submission SEM-06-004 (*Ex Hacienda El Hospital III*)

In submission SEM-06-004, Roberto Abe Almada endorses submission SEM-06-003 and expands on several assertions concerning contamination at the Facility and on the property of third parties. Mr. Abe Almada states that he is the executor of the testamentary succession of Roberto Abe Domínguez, who owned the lot on which the Facility was located. Roberto Abe Almada asserts that he agreed with BASF on environmental restoration actions at the Facility in a judicial settlement, but that the company prevented him from verifying compliance. In addition, he asserts that he obtained information confirming the alleged contamination of areas not covered by the contract, and therefore decided to notify the authorities and to pursue judicial and administrative remedies.²⁷

²¹ Ibid., pp. 6-9. In brief, the Submitters state that the site assessment and the cleanup plan for the Facility were developed by BASF's advisers, and that these studies served as the basis for the authorities' actions. The Submitters allege that in the absence of independent studies, Profepa was working with biased information on site restoration activities.

²² Submission SEM-06-003, p. 9; Appendix 13, Administrative decision in file B-002/0775 of 26 July 2002, issued by the Director General, Pollution Source Inspection, Profepa.

²³ Submission SEM-06-003, p. 11.

²⁴ Ibid., pp. 7, 10; Appendix 14, Doc. PFPA/SJ/067/06 of 27 February 2006, issued by the Assistant Attorney General for Judicial Affairs (*Suprocurador Jurídico*), Profepa.

²⁵ Submission SEM-06-003, p. 10; Appendix 17, Administrative decision in file SII-DGIFC-023/2004 of 5 August 2004, issued by the Director General, Pollution Source Inspection, Profepa.

²⁶ Submission SEM-06-003, p. 10; Appendix 16, Certification of facts issued 11 May 2005, by Lic. Neftalí Tajonar Salazar, Notary Public no. 4, VI district of state of Morelos; Appendix 20, unnumbered doc. of 3 June 2005, issued by the Director, Urban Development, Municipal Public Works and Services, Cuautla.

²⁷ Submission SEM-06-004, p. 5.

Mr. Abe Almada asserts that the studies and documents appended to his submission²⁸ indicate that there is still contamination at the Facility despite site restoration activities. He further asserts that property owned by community residents is contaminated with heavy metals ensuing from the operation and dismantlement of the Facility.²⁹ He also asserts that Profepa “has not ordered remediation measures or any measures to prevent the spread of contaminants through the subsoil” onto third-party property, despite its awareness of technical information demonstrating their contamination.³⁰ Finally, Mr. Abe Almada provides information additional to that included in submission SEM-06-003 concerning Mexico’s alleged failure to prosecute environmental offenses.³¹

III. SUMMARY OF THE RESPONSE

In accordance with NAAEC Article 14(3), on 10 January 2007 Mexico filed its response to submission SEM-06-003 (*Ex Hacienda El Hospital II*) and consolidated submission SEM-06-004 (*Ex Hacienda El Hospital III*) with the Secretariat.

A. Existence of Pending Proceedings

In its response, Mexico notifies the Secretariat of the existence of a pending proceeding before the Federal Tax and Administrative Court (*Tribunal Federal de Justicia Fiscal y Administrativa*), and therefore requests that the Secretariat, in accordance with NAAEC Article 14(3)(a), proceed no further in reviewing the submission.³²

B. Invalidity of the Submission

Mexico argues that submissions SEM-06-003 and SEM-06-004 meet neither the requirements of NAAEC Article 14(1) nor the criteria for requesting a response from the Party under Article 14(2).

In relation to submission SEM-06-003, Mexico states that neither Myredd Alexandra Mariscal Villaseñor nor the persons she represents have notified Mexico’s competent authorities of the matter in writing, nor have they pursued the remedies provided by Mexican law. According to Mexico, the citation of complaints filed by third persons does not meet the requirements of the Agreement and the Guidelines.³³

Mexico argues that submission SEM-06-004 is not aimed at promoting the enforcement of environmental law because, allegedly, Roberto Abe Almada, did not allow access to the

²⁸ *Ibid.*, p. 2; Appendix 9, Study by Manuel Murad Robles; Appendix 16, Certification of facts issued 11 May 2005, by Lic. Neftalí Tajonar Salazar, Notary Public no. 4, VI district of state of Morelos; Appendix 18, Certification of facts issued 9 May 2005, by Lic. Neftalí Tajonar Salazar, Notary Public no. 4, VI district of state of Morelos.

²⁹ Submission SEM-06-004, p. 2; Appendix 8, Certification of facts issued 9 May 2005 by Lic. Neftalí Tajonar Salazar, Notary Public no. 4, VI district of state of Morelos.

³⁰ Submission SEM-06-004, pp. 2-3.

³¹ *Ibid.*, p. 7.

³² Response, p. 6; Appendix 1, Administrative proceeding no. B-002/775 opened by Profepa against BASF.

³³ Response, pp. 16-17.

Facility in order for the measures ordered by Profepa to be carried out;³⁴ Mexico contends that he is merely seeking compensation and that his submission focuses on fulfillment of commitments between private parties.³⁵ Mexico affirms that Mr. Abe Almada did not pursue the remedies provided by law and that those pursued by Mr. Abe Domínguez are invalid since he withdrew them. Mexico asserts that the judicial settlement agreement cited by Mr. Abe Almada is a civil contract that has no bearing on the effective enforcement of environmental law.³⁶ Mexico further asserts that the writ of *amparo* (constitutional remedy providing individual relief) filed by Mr. Abe Domínguez was filed in opposition to Profepa's request to obtain access to the Facility for the purpose of implementing the environmental restoration plan, and therefore should not be considered by the Secretariat.³⁷

C. Alleged Failures to Effectively Enforce the Environmental Law

Mexico asserts that it properly exercised its powers relating to soil and water contamination, hazardous waste management and disposal, environmental auditing, conduct of administrative proceedings, and processing of citizen complaints.

Mexico asserts that it did not fail to enforce the provisions cited by the Submitters and that these do not contemplate obligations of the Party that may be considered in the Secretariat's analysis.³⁸ Mexico contends that other provisions should not be analyzed by the Secretariat because they are not applicable to the matter raised in the submissions,³⁹ they have no bearing on any documented assertion,⁴⁰ they were not in force when Profepa's acts of inspection and monitoring took place,⁴¹ or they are not environmental laws as defined in NAAEC.⁴²

Mexico maintains that by means of the plans and studies that Profepa ordered BASF to carry out,⁴³ the provisions relevant to site characterization and control of discharges, deposits, or infiltrations of polluting materials or substances into the Facility's soil were applied.⁴⁴ As to hazardous waste treatment activities,⁴⁵ Mexico argues that Profepa conducted an inspection visit to verify sound management during dismantlement of the Facility.⁴⁶ The response asserts

³⁴ Ibid., pp. 9-10.

³⁵ Ibid., pp. 7-13.

³⁶ Ibid., p. 18.

³⁷ Ibid.

³⁸ LGEEPA Articles 4-6; LGPGIR Article 78; Response, pp. 21, 29.

³⁹ LGEEPA Articles 134-5 paragraphs I, II, IV; Response, p. 23.

⁴⁰ LGEEPA Articles 135 paragraph III, 160-2, 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4, 170-4; LAN Articles 29 paragraphs VI-VII, 119 paragraphs VI, VII, IX, XIV, XV; RLAN Articles 135 paragraphs IV-VI and 136 paragraph II; Response, pp. 24, 46-9.

⁴¹ LGPGIR Articles 68-9, 75, 78, 101, 103, 106; LGEEPA Articles 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4; Response, pp. 28-32, 53.

⁴² CPF Articles 415 paragraphs I and II and 416 paragraph I, text in force in 1997; CPF Articles 420 Quater and 421, text in force as of the revision of 6 February 2002; Response, pp. 57-58.

⁴³ Response, pp. 24, 28-9, and Exhibit 13, Administrative decisions in file B-00026/775 of 19 September and 20 July 2000, issued by the Director General, Pollution Source Inspection, Profepa.

⁴⁴ LGEEPA Articles 136, 139; LGPGIR Article 75.

⁴⁵ LGEEPA Article 152.

⁴⁶ Response, pp. 26-7, and Exhibit 15, Inspection record no. 17-006-0001/98 of 23 June 1998, issued by the Industrial Inspection Branch (*Dirección General de Inspección Industrial*), Profepa.

that Mr. Abe Almada was present during that visit and was therefore aware of Mexico's actions.⁴⁷

Concerning the general rules for performance of acts of inspection and monitoring prescribed by the LGPGIR and the LGEEPA,⁴⁸ Mexico indicates that the authority adhered to the procedures in effect when the inspection visits were carried out.⁴⁹ Concerning the implementation of safety measures as provided by LGEEPA Article 170, Mexico asserts that Profepa issued administrative orders including temporary total closing of the Facility.⁵⁰ In relation to the application of sanctions prescribed by the LGEEPA,⁵¹ Mexico notes that it enforced the environmental law by fining BASF a total amount of 1,872,000 pesos.⁵²

Mexico asserts that it effectively enforced the hazardous waste management provisions⁵³ by means of administrative orders governing BASF's waste management and final disposal during dismantlement of the Facility. It further notes that it ordered the implementation of restoration programs, the dismantlement of the industrial drainage system, and a characterization study of the Facility.⁵⁴ Mexico asserts that the provisions applicable to the operation of the Facility's wastewater discharge system are not related to any assertion documented in the submissions and affirms that BASF's industrial activities "did not alter the quality of the groundwater or the sediments in Espiritu Santo creek."⁵⁵

Concerning the application of criminal sanctions,⁵⁶ Mexico responds that it is unable to provide the Secretariat with a copy of the proceedings because the preliminary investigations "were carried out by the Office of the Attorney General of the Republic [*Procuraduría General de la República—PGR*]"⁵⁷ and adds that the information relating to a preliminary investigation is not public and must be kept confidential under the Federal Transparency and Access to Public Governmental Information Act (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental—LFTAIPG*) and the Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales—CFPP*).⁵⁸

⁴⁷ Ibid.

⁴⁸ LGPGIR Article 101; LGEEPA Articles 160-2, 167, 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4, 170-4.

⁴⁹ Response, pp. 30-31, 46-49, 54.

⁵⁰ Ibid., p. 55, and Exhibit 29, Administrative decision in file B-0002/0750 of 1 July 1998, issued by the Director General, Pollution Source Inspection, Profepa.

⁵¹ LGEEPA Articles 171-4.

⁵² Response, pp. 37-38, 56, and Exhibit 30, Administrative decision in file B-002/0775 of 20 December 2005, issued by the Director General, Pollution Source Inspection, Profepa. Note: The fines in question were imposed in the legal currency of the United Mexican States.

⁵³ LGEEPA Articles 140, 150-2; RRP Articles 6, 8, 10, 12, 14, 15 paragraphs II and VII, 16, 17 paragraph II, 23; NOM-052-SEMARNAT-1993; NOM-53-SEMARNAT-1993.

⁵⁴ Response, pp. 32-36, and Exhibit 16, Administrative decisions in file B-0002/0775 of 3 and 29 September 1998, 20 July 2000, 31 August 2004, and 25 February 2005, issued by the Director General, Pollution Source Inspection, Profepa.

⁵⁵ Response, p. 43.

⁵⁶ CPF Articles 415 paragraphs I and II, 416 paragraph I (in force in 1997), and 420 Quater (in force as of 6 February 2002).

⁵⁷ Response, p. 57.

⁵⁸ LFTAIPG Articles 13-14; CFPP Article 16.

With reference to the instances of non-compliance that allegedly came to the knowledge of Profepa by means of the environmental audit,⁵⁹ Mexico indicates that environmental audits are voluntary environmental self-regulation processes that are governed by provisions not cited in the submission.⁶⁰ Mexico asserts that the information from the environmental audit served as the basis for devising acts of effective enforcement.⁶¹

Concerning the effective enforcement of provisions relating to the processing of citizen complaints,⁶² Mexico asserts that the Submitters of SEM-06-003 did not file a citizen complaint and therefore cannot allege a failure of effective enforcement in that connection. Mexico emphasizes that Carlos Álvarez Flores and Roberto Abe Domínguez withdrew their respective complaints, so their files were closed, and therefore the Submitters' assertions of failures of effective enforcement in this connection are invalid.⁶³

IV. ANALYSIS

The Secretariat finds that submission SEM-06-003 (*Ex Hacienda El Hospital II*) and consolidated submission SEM-06-004 (*Ex Hacienda El Hospital III*) warrant the preparation of a factual record, as recommended in this notification. After broadening its reasoning in regard to Mexico's procedural objections concerning the admissibility of the submission, the Secretariat does not find sufficient reasons to modify the determinations of 30 August and 28 September 2006, in which a response was requested from Mexico. Having analyzed the response, the Secretariat finds that central issues remain open concerning some of the Submitters' assertions. The Secretariat hereby presents the reasons for this recommendation.

A. Potential existence of pending proceedings that warrant termination of processing of the submissions

NAAEC Article 14(3)(a) provides that the Party, in responding to a submission, may state *whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further*. Mexico asserts that BASF filed an action against Profepa's and Semarnat's administrative decisions in Federal Tax and Administrative Court.⁶⁴ The action, called *juicio de nulidad* (nullity proceeding), relates to acts of inspection, monitoring, and enforcement related to the Facility restoration plan, the drainage

⁵⁹ LGEEPA Articles 134, 152; RRP Articles 8 paragraphs II-III, VI-VII, and IX, 14, 15 paragraphs II and VII, 17 paragraph II; LAN Articles 29 paragraph VII, 119 paragraphs VI-VII, XI, XIV-XV; RLAN Articles 135 paragraphs IV-VII, 136 paragraph II; NOM-052-ECOL-1993.

⁶⁰ Response, pp. 59-62.

⁶¹ *Ibid.*, p. 62, and Exhibit 34, Doc. no. B.O.O.A.A.-DGO 652/97 of 20 May 1997, issued by the Director General, Operations, Profepa.

⁶² LGEEPA Articles 191-3.

⁶³ Response, pp. 64-76.

⁶⁴ Response, p. 5.

dismantlement plan, and the sanctions ordered by Profepa by means of administrative decisions.⁶⁵ Mexico asserts that the motion for nullity filed by the company is pending.⁶⁶

Article 45(3) of the Agreement defines a judicial or administrative proceeding as:

- (a) a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order; and
- (b) an international dispute resolution proceeding to which the Party is party.

The Secretariat has noted in previous determinations⁶⁷ that in applying this exceptional grounds for termination of a submission, it must verify whether the proceeding in question is a judicial or administrative proceeding in the sense of Article 45(3) of the Agreement, whether the conduct of the proceeding by the Party is timely and in accordance with its law, whether the proceeding is related to the matter raised in the submission, and whether the proceeding invoked by the Party in its response could resolve the matter raised in the submission. The Secretariat has noted that by applying Article 14(3) in order to exclude matters falling within the purview of Article 45(3)(a), it avoids duplication of effort and potential interference with a pending dispute.

The Profepa office in Morelos initiated acts of environmental law enforcement against the Facility by means of an inspection order of 22 July 1997.⁶⁸ Further to the inspection, the Profepa office ordered urgent measures to be taken, and in August of that year, it opened administrative proceeding no. 17/VI/040/97 against BASF.⁶⁹ Further to the administrative

⁶⁵ Ibid., Exhibit 1, Motion for nullity 20683/06-17-05-5 in file XV/204/8878; Exhibit 2, Administrative decision on appeal for review in file XV/2006/58 of 20 April 2006, issued by the Minister of the Environment and Natural Resources, and Exhibit 3, Administrative decision in file B-0002/0775 of 20 December 2005.

⁶⁶ Response, p. 6.

⁶⁷ “In view of the commitment to the principle of transparency pervading the NAAEC, the Secretariat cannot construe the Agreement as permitting it to base its determination that it is before the situation contemplated by Article 14(3)(a), and that it shall proceed no further with a submission, on the mere assertion of a Party to that effect.” SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) (13 June 2001). *Cfr.* SEM-97-001 (*BC Hydro*), Secretariat Notification to Council pursuant to Article 15(1) (28 April 1998); SEM-03-003 (*Lake Chapala II*), Secretariat Notification to Council pursuant to Article 15(1) (18 May 2005); SEM-04-005 (*Coal-fired Power Plants*), Secretariat Notification to Council pursuant to Article 15(1) (5 December 2005); SEM-05-002 (*Coronado Islands*), Secretariat Notification to Council pursuant to Article 15(1) (18 January 2007).

⁶⁸ The applicable provisions of environmental law in force at the time of the inspection were LGEEPA Articles 1, 4, 5, 6, 11, 113, 139, 150, 151 bis, 155, 160, 161, 162, 163, 164, 165, 166, 170, 170 bis, 171, and 192; Articles 1, 2, 3 paragraphs III and VII, 5, 7 paragraphs VII and XII, 10, 11, 16, 17, 18, 21, 23, and 49 of the regulation to the LGEEPA respecting air pollution prevention and control; RRP Articles 1, 2, 5, 8, 9, 14, 15, 21, 31, and 61; Articles 1, 2, 4, 5, 7, and 48 of the regulation to the LGEEPA respecting environmental impact; and Articles 1, 2, 7, 8, 9, 11, 46, 52, 53, 54, 55, 56, 57, 58, and 59 of the regulation to the LGEEPA respecting noise pollution. Response, Exhibit 3, Administrative decision in file B-0002/0775 of 20 December 2005, p. 1.

⁶⁹ Response, Exhibit 52, Doc. PFFPA.MOR.07.952.97 of 2 August 1997, p. 2.

proceeding, from November 1997 to May 1998 the Profepa office issued 42 inspection orders for the purpose of supervising the collection of dismantlement waste deposited by BASF on lots in the community of Ex Hacienda El Hospital.⁷⁰

On 23 June 1998, Profepa's Industrial Inspection Branch (*Dirección General de Inspección Industrial*) ordered an inspection of the Facility, and, shortly after, in July it ordered urgent measures, opened administrative proceeding no. B/0002/750 against BASF and Roberto Abe Domínguez, and ordered the closing of the Facility.⁷¹ The proceedings initiated by the Profepa office and the Branch were later consolidated.⁷² As a result of the administrative proceeding opened against BASF, the Industrial Inspection Branch issued 51 inspection orders from July 1998 to May 2002 in order to supervise the site restoration measures applied to BASF.⁷³

In July 2002, Profepa ruled that there had been partial compliance with the restoration work at the Facility; subsequently, in August 2004, it ordered the company to remove the industrial drainage system.⁷⁴ On 20 December 2005, Profepa issued an administrative decision fining BASF a total amount of 1,872,000 pesos for violations of environmental law, and reiterated that the company had to complete the pending restoration work on the Facility. BASF filed an appeal for review (*recurso de revisión*) with Semarnat against the Profepa decision, which was decided on 20 April 2006. In its decision, Semarnat partially amended the fines imposed and the method of compliance with the measures ordered by Profepa.⁷⁵ In June 2006, BASF filed a motion for nullity (*demanda de nulidad*) against the Semarnat decision before an administrative tribunal; that action was pending in January 2007 when Mexico responded to the submissions.⁷⁶

The actions of Profepa and Semarnat do in fact fit within the definition of Article 45(3)(a) because they constitute an administrative proceeding opened against BASF that was apparently timely and resolved in accordance with the Party's law. The proceedings opened by Profepa and Semarnat are at the stage of the motion for nullity filed by BASF. The purpose of this proceeding is to interpret the provisions relating to the grounds for the decisions issued by Profepa and Semarnat, the statute of limitations to impose sanctions, the consolidation of proceedings, and the constitutionality of the environmental provisions applied by the authority. The action also challenges the alleged contamination of the Facility as well as the hazardousness of the waste collected from lots in the community of Ex Hacienda El Hospital.⁷⁷

⁷⁰ Response, Exhibit 3, Administrative decision in file B-0002/0775 of 20 December 2005, p. 2.

⁷¹ Response, Exhibit 29, Decision in file B/0002/750 of 1 July 1998, pp. 11-13.

⁷² In August 1998, the Industrial Inspection Branch ordered the consolidation of file 17/VI/040/97, opened by the Morelos branch office, and proceeding B-0002/750, opened by the Branch. In December of 1998, Profepa reorganized file B-0002/0775, dividing it in two: file B-0002/0775, concerning BASF, and file B-0002/0750, concerning Roberto Abe Domínguez. Response, Exhibit 23, Decision in file B/0002/750 of 10 December 1998, pp. 3, 9.

⁷³ Response, Exhibit 3, Administrative decision in file B-0002/0775 of 20 December 2005, pp. 7-8.

⁷⁴ Response, Exhibit 15, Decision DGIFC-053/2004 in file B-0002/0775 of 31 August 2004, by Profepa, Pollution Source Inspection Branch (*Dirección General de Inspección de Fuentes de Contaminación*).

⁷⁵ Response, Exhibit 2, Administrative resolution of appeal for review in file XV/2006/58 of 20 April 2006, issued by the Minister of the Environment and Natural Resources, pp. 51-2.

⁷⁶ Response, Exhibit 1, Motion for nullity filed by BASF before the Federal Tax and Administrative Court, 29 June 2006.

⁷⁷ *Ibid.*

Since Mexico designated the information relating to the motion for nullity as confidential, the Secretariat provides no further information in this regard.

In its analysis of whether the processing of the submission should continue, the Secretariat assessed whether there are issues comprised by the nullity proceeding that coincide with assertions made by the Submitters.⁷⁸ The Secretariat notes that the motion for nullity filed by BASF relates to some but not all of the Submitters' assertions:

- (i) The Secretariat finds that the Environmental Audit identified violations of environmental law related to the presence of contaminants in the soil as a result of BASF's activities at the Facility, which are pending matters.⁷⁹ The rest of the infractions noted by the Environmental Audit relating to wastewater management and treatment are not challenged by the motion for nullity, and therefore the Secretariat shall proceed with their analysis.
- (ii) Regarding the assertions of failure to effectively enforce provisions related to the conduct of the administrative proceeding and the application of sanctions by Profepa due to the presence of contaminants in the soil and to hazardous waste management during dismantlement of the Facility,⁸⁰ both these matters are addressed in the nullity proceeding, and therefore the Secretariat had decided not to proceed with the analysis thereof. As to the assertion concerning the exercise of Profepa's powers to order urgent measures for the Facility,⁸¹ the Secretariat determines to proceed with its analysis, since this matter is not addressed within the context of the nullity proceeding.
- (iii) Moreover, the Secretariat is proceeding with the analysis of the assertion concerning the alleged failure to characterize the site of the Facility, since this is not being addressed in the nullity proceeding.
- (iv) As to the assertion concerning the processing of citizen complaints, the Secretariat observes that it is not a matter being addressed in the nullity proceeding, and therefore cannot be considered pending.
- (v) The submitters assert that BASF illegally disposed of hazardous waste by allegedly burying pigment-filled bags at the Facility.⁸² The motion for nullity does not

⁷⁸ The similarity of issues presented in both the submission and the nullity proceeding is an important factor because it creates the risk that the development of a factual record could duplicate significant aspects of the legal proceeding and inadvertently interfere with strategic considerations between the parties to the dispute. See SEM-96-003 (*Oldman River I*), Determination pursuant to Article 15(1) (2 April 1997); SEM-00-004 (*BC Logging*), Notification pursuant to Article 15(1) (27 July 2001).

⁷⁹ The soil contamination-related violations at the Facility that were identified by the July 1997 inspection were penalized by the Profepa decision of December 2005 and later challenged by BASF in the nullity proceeding.

⁸⁰ This assertion is related to the effective enforcement of LGEEPA Articles 160, 161, 162, 167, 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4, 171, 172, 173, and 174.

⁸¹ This assertion is related to the effective enforcement of LGEEPA Articles 4, 5, 6, and 170.

⁸² Submission SEM-06-003, pp. 6-7.

address this assertion and, while it does refer to soil contamination at the Facility as a result of its operations, the matter of waste deposit for purposes of final disposal is not one of the aspects challenged by the motion. Neither is the alleged illegal waste disposal covered by the administrative decisions of Profepa and Semarnat that are challenged by BASF; therefore, since it is not the subject of a pending proceeding, the Secretariat has decided to proceed with the analysis of this assertion.

- (vi) As to the assertion concerning deposit of dismantlement waste from the Facility on lots in the community of Ex Hacienda El Hospital for purposes of illegal disposal, the Secretariat finds that the application of penalties for failure to keep a waste generation log and to characterize waste prior to its sale or donation to third persons is in effect a matter that is pending before the Mexican courts. However, the Submitters also assert that Profepa did not order the relevant safety measures for lots where dismantlement materials were dumped⁸³ and that not all sites where such deposit took place were identified.⁸⁴ Therefore, the Secretariat will proceed with the analysis of these assertions.
- (vii) As to the assertion concerning the effective enforcement of provisions governing the conduct of the administrative proceeding that Profepa opened against BASF,⁸⁵ the Secretariat will proceed no further with its analysis, since the nullity proceeding addresses the matter of the legality of the administrative decisions issued by Profepa and Semarnat. This is therefore a pending matter.
- (viii) Finally, the assertion concerning the existence of a drainage system not reported to the authorities as part of the BASF dismantlement plan is not covered by the motion for nullity filed by BASF, and is therefore not pending.

B. Mexico's procedural objections to the submission

1. Environmental laws cited in the submissions

Mexico asserts that it did not fail to enforce the provisions cited by the Submitters because these do not contemplate obligations of the Party, but rather powers, and therefore may not be considered in the Secretariat's analysis.⁸⁶ Mexico contends that other provisions should not be analyzed by the Secretariat because they are not applicable to the matter raised in the submissions,⁸⁷ they have no bearing on any documented assertion,⁸⁸ they were not in force

⁸³ *Ibid.*, pp. 4-6.

⁸⁴ LGEEPA Article 151.

⁸⁵ LGEEPA Articles 160, 161, 162, 167, 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4, 171, 172, 173, and 174.

⁸⁶ LGEEPA Articles 4-6; LGPGIR Article 78; Response, pp. 21, 29.

⁸⁷ LGEEPA Articles 134-5 paragraphs I, II, IV; Response, p. 23.

⁸⁸ LGEEPA Articles 135 paragraph III, 139, 160-2, 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4, 170-4; LAN Articles 29 paragraphs VI-VII and 119 paragraphs VI, VII, IX, XIV, XV; RLAN Articles 135 paragraphs IV-VI and 136 paragraph II; Response, pp. 24, 46-9.

when Profepa's acts of inspection and monitoring took place,⁸⁹ or they are not defined by environmental laws in terms of NAAEC.⁹⁰

Concerning LGEEPA Articles 4, 5, and 6 and LGPGIR Article 78, which vest certain powers to the environmental authorities, the Secretariat notes its finding that the corresponding assertions do not warrant the development of a factual record, as explained in section IV.C.5 of this notification.

Mexico argues that the criteria for control of soil contamination listed in LGEEPA Article 134 are only applicable to the case contemplated in Article 135 paragraph III, i.e., the generation, management, and final disposal of hazardous waste at the Facility. In its response, it adds that the Submitters did not document their assertion, and therefore that paragraph should not be reviewed.⁹¹ It is indeed clear from an analysis of LGEEPA Article 135 that paragraph III is applicable, and it is therefore retained for analysis. However, the Secretariat finds that the submissions contain sufficient information to support the assertion of failure to effectively enforce the criteria provided by law for sound waste management. Consequently, the Secretariat will proceed with the analysis of LGEEPA Articles 134 and 135 paragraph III.

Mexico asserts that the LGPGIR provisions cited by the Submitters were not in force at the time of the inspection and the order of sanctions against the company.⁹² Mexico notes that the administrative proceeding against BASF was opened prior to the entry into force of the LGPGIR. While it is clear that Mexico cannot retroactively apply the LGPGIR to an administrative proceeding initiated prior to the entry into force of the Act,⁹³ the Secretariat reiterates that this provision does apply to the legal situation created by acts which, although originating prior to the entry into force of the Act, were allegedly continuing and not being addressed by Mexico when submission SEM-06-003 was filed.⁹⁴

Concerning LGPGIR Articles 68 and 69,⁹⁵ Mexico argues that only Article 69 is applicable, asserting that the soil contamination resulted only from hazardous waste generation and management at the Facility. However, the Secretariat does not dismiss the allegations relating

⁸⁹ LGPGIR Articles 68, 69, 75, 78, 101, 103, and 106; LGEEPA Articles 167 bis, 167 bis 1, 167 bis 2, 167 bis 3, 167 bis 4; Response, pp. 28-32 and 53.

⁹⁰ CPF Articles 415 paragraphs I and II, 416 paragraph I in force in 1997; Articles 420 Quater and 421 in force after the revision of 6 February 2002; Response, pp. 57-58.

⁹¹ Response, pp. 23-24.

⁹² *Ibid.*, pp. 27-28, 30.

⁹³ LGPGIR Transitory Article 4: "Any proceedings, administrative remedies, or other matters relating to the matter of this Act that commenced prior to the entry into force of this Order shall be processed and resolved in accordance with the provisions in force at that time."

⁹⁴ *Cfr.* RETROACTIVITY OF THE LAW. IS DIFFERENT FROM ITS RETROACTIVE APPLICATION. Ninth época. SCJN Segunda Sala, *Semanario Judicial de la Federación y su Gaceta*, vol. XX, July 2004. Tesis 2a/J.87/2004, p. 415. Materia común. Jurisprudence. The Mexican courts have also held that the "theory of acquired rights" is not useful to a determination of the retroactivity of a provision that protects the public interest.

⁹⁵ LGPGIR Article 69: "Those persons responsible for activities relating to the generation and management of hazardous materials and waste who have caused contamination of sites with them shall take remediation measures as provided by this Act and any other applicable provisions." LGPGIR Article 68: "Anyone who is responsible for contamination of a site or for harm to health as a consequence thereof shall repair the harm caused in accordance with the applicable legal provisions."

to Article 68 because it explicitly refers to the obligation to repair environmental and human health harms, matters that are raised by the Submitters.

Finally, Mexico argues that the CPF provisions are not environmental law because they define offenses that are only punishable by criminal laws. Pursuant to NAAEC Article 45(2)(a), environmental law means “any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health.” NAAEC Article 45(2)(c) stipulates that the purpose of a provision is determined by reference to its primary purpose rather than to the primary purpose of the statute or regulation to which it belongs.

While the provisions cited by the Submitters are part of a criminal law statute, it was not until 6 February 2002 that Mexico incorporated the offenses in question into the CPF, concentrating the penalties for environmental offenses in a single statute. Prior to that date, environmental offenses were defined in LGEEPA Articles 183-187. The Secretariat is aware that the interest that is given legal protection through the definition of the offenses contained in the provisions that are cited in the submission is that of environmental conservation and protection. It is likewise clear that in defining the term “environmental law,” the NAAEC nowhere stipulates that in order to qualify as such, a provision must be of an administrative rather than a penal nature, as in this case, where the CPF assigns a custodial sentence to the commission of offenses against the environment, as prescribed by the articles cited in the submissions.

Thus, the Secretariat has determined that the environmental offenses defined in the CPF fit within the Agreement’s definition of environmental law and that these provisions are aimed at the protection of the environment and human health.⁹⁶ Furthermore, the Council has previously instructed the Secretariat to develop a factual record in regard to the effective enforcement of CPF provisions.⁹⁷ In conclusion, the CPF provisions cited by the Submitters are environmental law in the sense of the NAAEC.

2. Admissibility of submission SEM-06-003 pursuant to NAAEC Article 14(1)(d)

NAAEC Article 14(1)(d) provides that the Secretariat is authorized to consider a submission if it *appears to be aimed at promoting enforcement rather than at harassing industry*. Mexico affirms that the Submitter of SEM-06-004 obstructed the conduct of restoration actions imposed by Profepa on BASF and sought compensation from BASF in a civil action for alleged damage to his property.⁹⁸

Paragraph 5.4 of the Guidelines provides that:

⁹⁶ In previous determinations the Secretariat has admitted for review submissions relating to the failure to effectively enforce criminal provisions focusing on environmental stewardship. See SEM-98-007 (*Metales y Derivados*), Notification pursuant to Article 15(1) (6 March 2000); SEM-00-006 (*Tarahumara*), Determination pursuant to Article 14(1) and (2) (6 November 2001).

⁹⁷ SEM-03-004 (*ALCA-Iztapalapa II*), Council Resolution 05-05 (9 June 2005).

⁹⁸ Response, pp. 8-11.

A submission must appear to be aimed at promoting enforcement rather than at harassing industry. In making that determination, the Secretariat will consider such factors as whether or not:

- (a) the submission is focused on the acts or omissions of a Party rather than on compliance by a particular company or business; especially if the Submitter is a competitor that may stand to benefit economically from the submission;
- (b) the submission appears frivolous.

The Secretariat has found in previous determinations⁹⁹ that assertions of failures to comply with the environmental law by a particular company may be considered where the submission focuses on effective enforcement by the authorities. Contrariwise, the Secretariat has dismissed submissions where it found that the submitter was a competitor who stood to benefit economically from the review of a submission.¹⁰⁰

Mexico contends that Mr. Abe Almada obstructed restoration actions imposed by Profepa on BASF and asserts that submission SEM-06-004 focuses on performance of undertakings between private parties, not on effective environmental law enforcement.¹⁰¹ The response notes that Roberto Abe Domínguez received compensation for damage through a legal settlement with BASF. According to Mexico's response, Mr. Abe Domínguez considered the compensation paid to be insufficient and therefore took action before the civil courts, but a judge dismissed his claim with costs.¹⁰² Mexico adds that the withdrawal of Mr. Abe Domínguez' citizen complaint demonstrates that submission SEM-06-004 is not aimed at promoting environmental law enforcement.

The alleged obstruction by Mr. Abe Almada, and earlier by Mr. Abe Domínguez, of BASF's access to the Facility and the claims for compensation that he filed in court are not decisive grounds for terminating submission SEM-06-004. The situation explicitly described by guideline 5.4 as indicative that the Secretariat should consider a submission to be not aimed at effective enforcement is where the submitter is a *competitor* who stands to *benefit economically*. The information provided by Mexico does not indicate that Mr. Abe Almada is an economic agent acting in the same market as BASF, nor does it indicate a situation of economic competition between Mr. Abe Almada and BASF. Furthermore, the judicial settlement and the civil action brought by that Submitter are part of a proceeding for compensation in which the concept of economic advantage by one competitor over another contemplated in guideline 5.4 does not inhere. In any case, these facts appear to be consistent with the mechanism of repair of harm enshrined in Mexican civil law. As to the alleged obstruction of BASF's restoration activities, the Secretariat finds its inclusion in a factual record to be appropriate, since it is a factual matter relevant to acts that may have affected law enforcement.¹⁰³

⁹⁹ SEM-98-001 (*Cytrar II*), Determination pursuant to Articles 14(1) and 14(2) (24 April 2001). *A contrario sensu*: SEM-00-001 (*Molymex I*), Determination pursuant to Article 14 (1) (25 April 2000).

¹⁰⁰ SEM-05-001 (*Crushed Gravel in Puerto Peñasco*), Determination pursuant to Article 15(1) (24 October 2005).

¹⁰¹ Response, pp. 7-13.

¹⁰² *Ibid.*, p. 12.

¹⁰³ *Ibid.*, Appendix I, vols. V (folio 1645), XII (folio 4624).

As to the withdrawal of the citizen complaint by Mr. Abe Domínguez, the Secretariat does not consider that action by that submitter to indicate a clear lack of interest in effective enforcement. Neither Article 14(1)(d) nor guideline 5.4 provide any indication that such an action substantiates a lack of interest in the effective enforcement of environmental law.

In sum, the Secretariat does not find that Mexico's assertions in relation to Article 14(1)(d) constitute a reason for terminating submission SEM-06-004. In any case, the facts concerning the actions of Mr. Abe Almada and Mr. Abe Domínguez could be relevant to the preparation of the factual record recommended in this notification.

3. Admissibility of submission SEM-06-003 pursuant to NAAEC Article 14(1)(e)

NAAEC Article 14(1)(e) provides that the Secretariat may consider a submission if it *indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any*. Mexico affirms that the Submitters of SEM-06-003 “merely refer to complaints filed by other persons.”¹⁰⁴ In its determination of 30 August 2006, the Secretariat noted that this requirement is met even where the notification is not made by the submitters themselves and cited Secretariat determinations to that effect.¹⁰⁵ Nothing in the Guidelines or NAAEC Article 14(1)(e)—which is drafted in the passive voice—establishes that the submitter and not a third party must communicate the matter to the competent authorities of the Party. Clearly, the requirement of NAAEC Article 14(1)(e) is to demonstrate that the competent authorities are aware of the matter in question. The Secretariat observes that the letters of Roberto Abe Domínguez and Carlos Álvarez Flores and the responses given by Profepa, cited in submission SEM-06-003, meet the requirement of informing Mexico's competent authorities of the matter.

4. Pursuit of private remedies available under the Party's law

NAAEC Article 14(2)(c) provides that the Secretariat, where it finds that a submission warrants requesting a response from the Party, must consider whether *private remedies available under the Party's law have been pursued*. Mexico indicates in its response that the SEM-06-003 Submitters “have appended no document indicating that they did in fact pursue any remedy available under the Party's law” and that they only cite complaints filed by other persons.¹⁰⁶ Mexico adds, in relation to submission SEM-06-004, that the complaint filed by Mr. Abe Domínguez and Carlos Álvarez Flores cannot be considered, since they later withdrew it, whereas the purpose of the writ of *amparo* filed by the former was merely to oppose restoration work at the Facility.¹⁰⁷

Paragraph 7.5 (b) of the Guidelines provides that:

In considering whether private remedies available under the Party's law have been pursued, the Secretariat will be guided by whether:

¹⁰⁴ Response, p. 14.

¹⁰⁵ SEM-04-005 (*Coal-fired Power Plants*), Notification pursuant to Article 15(1) (5 December 2005); SEM-97-007 (*Lake Chapala*), Notification pursuant to Article 15(1) (14 July 2000).

¹⁰⁶ Response, p. 15. (Underlining in original.)

¹⁰⁷ *Ibid.*, pp. 17-18.

...

(b) reasonable actions have been taken to pursue such remedies prior to initiating a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.

Nothing in the Guidelines or in Article 14(2)(c), which is written in the passive voice, indicates that the Secretariat can only consider matters in which submitters, and not other parties, pursued remedies available under the Party's law. The Secretariat has found in previous determinations that where barriers to pursuing the remedies available under the Party's law exist, NAAEC Article 14(2)(c) does not provide grounds for terminating the review of a submission.¹⁰⁸ The Submitters of SEM-06-003 assert that the remedies pursued by third parties were insufficient to elicit action from the authorities on soil restoration at the Facility and at other sites in the community of Ex Hacienda El Hospital.¹⁰⁹ Regarding the citizen complaint and the writ of *amparo* cited in submission SEM-06-004, while one of them (the writ of *amparo*) might have obstructed access to the Facility during the environmental restoration plan, the other (the citizen complaint) focused on issues of effective enforcement raised in the submissions.

As to the withdrawal of complaints by Mr. Abe Domínguez and Mr. Álvarez Flores as alleged by Mexico in its response, it should be noted that Article 14(2)(c) of the Agreement does not establish that they must exhaust all remedies available under the Party's law.

Consequently, the Secretariat concludes that the existence of other remedies available to the Submitters does not stand in the way of proceeding with the review of the submission or the recommendation to prepare a factual record.

C. Analysis of whether the submission warrants the preparation of a factual record

Having considered submissions SEM-06-003 and SEM-06-004, the Secretariat concludes that in light of Mexico's response, central issues remain open that warrant the preparation of a factual record. The Submitters' assertions revolve around the failure to effectively enforce the environmental law in respect of Mexico's actions to ensure sound waste management and disposal and to control soil contamination during shutdown of operations and dismantlement of a pigment production plant in Ex Hacienda El Hospital, Cuautla, Morelos. The Secretariat finds that while certain assertions appear to be resolved by Mexico's response, others justify the recommendation of a factual record.

Mexico's response provides information on acts of enforcement that appears to respond to the assertions concerning characterization of the site of the Facility, compliance failures detected during the Environmental Audit, and processing of citizen complaints. Without reaching a conclusion as to whether Mexico has effectively enforced its environmental law with respect to these assertions, the Secretariat finds that they do not warrant inclusion in a factual record.

By contrast, Mexico's response leaves open central questions raised in assertions in the submissions that relate to alleged acts of illegal waste disposal at the Facility, disposal of

¹⁰⁸ SEM-04-005 (*Coal-fired Power Plants*), Notification pursuant to Article 15(1) (5 December 2005).

¹⁰⁹ Submission SEM-06-003, pp. 3-4.

materials and wastes at sites in the community of Ex Hacienda El Hospital, and prosecution of environmental offenses. Accordingly, the Secretariat recommends that a factual record be developed regarding these assertions.

In accordance with paragraph 10.1 of the Guidelines, the Secretariat hereby provides an explanation of its reasoning.

1. Preparation of a factual record is recommended in relation to the assertion of failures of effective enforcement in connection with alleged waste deposit on lots in the community of Ex Hacienda El Hospital for purposes of illegal disposal

The Submitters assert that during dismantlement of the Facility, BASF allowed hazardous waste to leave the Facility and be dumped on property in the community of Ex Hacienda El Hospital.¹¹⁰ The Submitters state that the company “gave or sold at low prices to former workers and neighbors of the site...containers, boards, drying trays, and other materials that had been in contact with or contained hazardous waste.”¹¹¹ The Submitters allege that Mexico failed to effectively enforce CPF, LGEEPA, LGPGIR, and RRP provisions as well as Mexican Official Standards¹¹² applicable to hazardous waste management and final disposal of waste on sites in Ex Hacienda El Hospital.

Mexico’s response does not directly address the assertion of alleged illegal waste disposal at sites in the community of Ex Hacienda El Hospital. However, it appends documents indicating the donation and sale of debris and materials¹¹³ and the deposit thereof on approximately 42 lots, including a primary school¹¹⁴ and public lands in Ex Hacienda El Hospital.¹¹⁵ The documentation describes the domestic use of the pigmented material delivered by BASF to former employees and to residents of Ex Hacienda El Hospital.¹¹⁶

The appendices to the response present information concerning inspection, monitoring, and sanctions imposed by Profepa in relation to hazardous waste dumped on third-party property during dismantlement of the Facility.¹¹⁷ Profepa also applied a sanction to the company for failure to characterize debris from the Facility before delivering it to third parties¹¹⁸ and for disposal of hazardous waste on sites in Ex Hacienda El Hospital. This sanction is pending as part of the nullity proceeding initiated by BASF. The information in Mexico’s response partially refers to the assertion of lack of government action on illegal waste disposal at the Facility and on the property of residents of Ex Hacienda El Hospital. Nevertheless, the

¹¹⁰ Submission SEM-06-003, p. 5, and Appendix 8, Study by Roberto Flores Ortega.

¹¹¹ Submission SEM-06-003, p. 6.

¹¹² CPF Article 415 paragraph I; LGEEPA Articles 134-6, 139, 152 bis, 169-70, 173; LGPGIR Articles 68-9, 75, 78, 101, 103, 106; RPP Articles 6, 8, 10, 12, 14, 15 paragraphs II and VII, 17 paragraph II; NOM-052-Semarnat-1993; NOM-053-Semarnat-1993.

¹¹³ Response, Appendix I, vol. I (folio 0425).

¹¹⁴ Response, Exhibit 3, Administrative resolution in file B-0002/0775 of 20 December 2005, issued by the Federal Attorney for Environmental Protection, p. 22, and Appendix I, vol. II (folio 335).

¹¹⁵ Response, Appendix I, vol. II (folio 309).

¹¹⁶ Response, Exhibit 3, Administrative decision of 20 December 2005 in file B-0002/0775, p. 24.

¹¹⁷ Response, Exhibit 3, Administrative decision in file B-0002/0775 of 20 December 2005, pp. 74-75.

¹¹⁸ *Ibid.* pp. 48, 74.

Secretariat finds that central issues remain open in regard to several of the Submitters' assertions, leading the Secretariat to recommend the preparation of a factual record on the following matters:

a) Existence of safety measures to control health and environmental risks on property owned by residents of Ex Hacienda El Hospital

The Submitters assert that Profepa did not order the safety measures authorized by law on sites where hazardous waste was dumped during dismantlement, nor did it notify the public health authorities of the situation.¹¹⁹ LGEEPA Article 170 provides that where there is an imminent risk to public health or the environment, the authorities may order safety measures including closure of facilities, seizure of hazardous waste, or similar actions that prevent negative impacts on ecosystems, their components, or public health. The same article invests Semarnat with the power to request that other competent authorities apply safety measures provided by other laws.

The Profepa administrative decision whereby BASF was sanctioned found that the acts of delivery of waste to residents of Ex Hacienda El Hospital jeopardized public health and the environment:

[T]he hazardous waste found on the sites visited should have been managed in such a way that it never came in contact with other non-hazardous waste; i.e., it should have been kept properly inventoried in the appropriate temporary hazardous waste storage facility in order for it ultimately to be sent for treatment and/or final disposal, as applicable, whereas in this case, the waste left the industrial bay dismantled by the corporation in question [BASF] and was delivered to residents of "El Hospital", Municipality of Cuautla, State of Morelos, jeopardizing public health and the environment and its components...¹²⁰

Given the risk to public health and the environment noted by the authority in its decision, Mexico's response does not address the issue of the preparation and implementation of the safety measures authorized by LGEEPA Article 170 in such cases, nor does it discuss any action taken to request that other authorities apply safety measures provided by other laws. Profepa was authorized by the environmental law cited in the submissions to take actions similar to those taken in regard to the Facility. Such measures included, *mutatis mutandis*, sampling programs making possible the systematic identification not only of hazardous soil contaminants but also of any contaminant that might have degraded the lots on which dismantlement waste from the Facility was dumped; they also included the implementation of the corresponding remediation programs. The outcome of such measures might have led to the production of technical reports that could have been presented as evidence before other bodies.¹²¹

A factual record would help to identify any safety measures provided by LGEEPA Article 170 that were in fact applied by Profepa when it discovered the delivery to and deposit of uncharacterized waste on lots owned by residents of Ex Hacienda El Hospital during

¹¹⁹ Submission SEM-06-003, pp. 4-6.

¹²⁰ Response, Exhibit 3, Administrative decision in file B-0002/0775 of 20 December 2005, pp. 49-50.

¹²¹ See LGEEPA Article 204.

dismantlement of the Facility. These facts are not addressed in the motion for nullity filed by BASF in June 2006 and therefore, the Secretariat finds that they are not pending.

b) Identification of contaminated sites and characterization

The Submitters assert that Profepa did not identify all sites, nor did it produce an inventory of all waste dispersed in the community of Ex Hacienda El Hospital. The LGEEPA provides that responsibility for sound waste management rests with the waste generator.¹²² It further provides that where final disposal of hazardous waste causes soil contamination, the actions necessary to rehabilitate the soil must be taken, with a view to allowing it to be used for any of the activities set out in the urban development or ecological zoning plan applicable to the lot or zone in question.¹²³ LGPGIR Article 75 establishes Semarnat's obligation to "identify, inventory, record, and categorize sites contaminated with hazardous waste, with a view to determining the advisability of remediation."

Mexico's response presents information on sites identified as having received debris and materials from the dismantlement. However, the Secretariat finds that the identification of the sites where hazardous wastes were dumped does not coincide in all cases with the sites from which material was removed. The response does not explain why the quantities initially identified do not coincide with the quantities removed subsequently, nor is it clear whether soil and material samples were taken at all sites before and after their removal.

Mexico appended documents showing BASF's proposal to develop a soil sampling program in the vicinity of Ex Hacienda El Hospital¹²⁴ and Profepa's determination to produce such a study,¹²⁵ as well as an expert report concluding that no harm to the environment has been caused by the deposit of waste from the dismantlement.¹²⁶ However, the response leaves open certain issues relating to the assertion of failures of enforcement in connection with the failure to identify all sites allegedly contaminated by delivery of uncharacterized waste. Likewise, the expert report leaves open the issue relating to the presence of chromium and lead in pigment-containing materials on third-party property, since it is not evident that analytical procedures were carried out for all cases.

The Secretariat assessed the probability of interference with a pending dispute and found that the matter of the identification and characterization of sites where contaminants have been detected is not pending.

The Secretariat finds that the response as a whole does not respond to the assertion concerning identification of all sites where hazardous waste from dismantlement was dumped. A factual

¹²² LGEEPA Article 151.

¹²³ LGEEPA Article 152 bis. The Secretariat notes that Mexico has maintained that urban development is not a matter falling within the scope of environmental law; see SEM-06-006 (*Los Remedios National Park*), Response (15 June 2007). In this regard, the Secretariat's understanding is that in order for soil to be rehabilitated, it is necessary to consider the land use for which it is designated; hence the need to consider the urban development plan in which this land use is defined.

¹²⁴ Response, Appendix I, vol. XV (folio 5744).

¹²⁵ *Ibid.*, vol. XII (folio 5093).

¹²⁶ *Ibid.*, vol. V (folio 1993).

record could gather information concerning actions taken by Mexico to identify, characterize, remove waste from, and restore or, depending on the time that these actions are carried out, remediate sites allegedly contaminated by hazardous waste delivered to residents and dumped on lots in Ex Hacienda El Hospital for purposes of illegal disposal.

c) Prosecution of offenses

The Submitters assert that Mexico did not investigate the alleged commission of environmental offenses related to alleged illegal hazardous waste disposal on lots in Ex Hacienda El Hospital. LGEEPA Article 169 obligates the authority to notify the office of the public prosecutor of acts that may constitute environmental offenses. CPF Article 415 paragraph I in force at the time of the events defines the offense of harm or risk to the environment caused by unlawful or unsound management of hazardous materials or wastes.

Mexico's response includes a document offering evidence that was filed by a citizen with the federal public prosecutor on June 1998.¹²⁷ The document contains information filed with the investigative authority relating to removal of hazardous waste from sites in the community of Ex Hacienda El Hospital. The version of CPF Article 415 paragraph I in force prior to 6 February 2002 provided as follows:

Article 415. Anyone who commits any of the following acts is liable to a penalty of three months' to six years' imprisonment and one thousand to twenty thousand days' fine:

I. Engages, without the authorization of the competent federal authority or in violation of the terms of such authorization, in any activity with hazardous materials or wastes that causes or may causes harm to public health, natural resources, fauna, flora, or ecosystems.

The assertion of Mexico's alleged failure to prosecute environmental offenses and Profepa's obligation to report facts that may constitute offenses in a timely manner is a matter that Mexico does not address directly in its response. Instead, Mexico refers to access to the information contained in the criminal proceeding, stating that "as manifested by Profepa, the Party is unable to issue copies of said proceedings or any documents ensuing from them because the preliminary investigations further to the facts were initiated by the Attorney General of the Republic (PGR)..."¹²⁸

The Secretariat finds that the fact that the PGR has in its possession information from the criminal proceeding does not stand in the way of Mexico's providing it. Mexico's response presents no legal justification for such an impediment.

Mexico argues that the provisions applicable to the conduct of proceedings prohibit Mexico from disclosing the content of the preliminary investigation. CFPP Article 16 provides as follows:

¹²⁷ Ibid., vol. I (folio 0409).

¹²⁸ Response, p. 58.

Article 16. The Judge, the Office of the Public Prosecutor, and the Federal Judicial Police shall be accompanied, in the course of their procedures, by their secretaries, if applicable, or by two witnesses, who shall attest to all that takes place during those procedures.

Only the defendant, his counsel, and any victim or aggrieved party and/or his legal representative shall have access to the records of the preliminary investigation. Any public servant who improperly violates the confidentiality of the proceedings or provides copies thereof or of documents in the investigation file is liable to the administrative or criminal liability proceeding, as applicable.

At trial, the courts shall preside over the giving of evidence and shall receive the statements.

In the course of the procedures, as applicable and at the discretion of the public servant who carries them out, speedwriting, dictaphone, or any other medium serving to reproduce images or sounds may be used, and the medium used shall be noted in the corresponding record.

It is true that the criminal law classifies preliminary investigations as confidential. However, this provision appears among the general rules for criminal procedure in CFPP Title I, which clearly refers to an ongoing criminal investigation.

The existence of an ongoing criminal investigation into the alleged commission of environmental offenses could potentially constitute reasonable grounds for classifying the information from the preliminary investigation as confidential. Mexico's response concludes that the information in the criminal proceeding is confidential but does not clarify whether there is in fact an ongoing investigation justifying that classification, nor does it indicate whether there is any criminal investigation that has concluded.

Therefore, bearing in mind that there is no risk of interfering with an ongoing investigation, the Secretariat finds that there are grounds for the preparation of a factual record, which could gather information concerning the criteria used by Mexico to determine the possible existence of facts constituting an environmental offense, the manner in which such facts meet the legal definition of the specific offense, and the severity of the sanctions applied to BASF for deposit of waste on the property of Ex Hacienda El Hospital residents for purposes of illegal disposal, among other criteria. The information would also serve to ascertain whether the authorities took action to investigate environmental offenses consisting of the delivery and disposal of waste in Ex Hacienda El Hospital that were committed by BASF.

2. Preparation of a factual record is recommended in relation to lack of action to determine soil contamination arising from the deposit of hazardous waste for the purpose of illegal disposal at the Facility

The Submitters assert that during the operation and dismantlement phases, BASF illegally disposed of hazardous waste by allegedly burying bags full of pigment at the Facility¹²⁹ and note that the environmental studies carried out by BASF did not consider the identification of all the illegal hazardous waste burial sites.¹³⁰ The submission contains information about alleged hazardous waste burial sites at the Facility that were documented during the site

¹²⁹ Submission SEM-06-003, pp. 6-7.

¹³⁰ *Ibid.*, p. 9.

restoration activities.¹³¹ The Submitters assert that although the environmental authority was aware of these facts, it failed to effectively enforce the relevant provisions in connection with waste disposal at the Facility.

LGEEPA Articles 150 and 151 establish the hazardous waste generator's obligation to manage its waste in conformity with the applicable law¹³² and provide that the responsibility for management and final disposal of waste rests with the generator thereof. LGEEPA Article 152 Bis provides that where the generation, management, or final disposal of hazardous materials or wastes give rise to soil contamination, the persons responsible for such operations shall take action to rehabilitate the soil with a view to allowing it to be used for any of the activities set out in the urban development or ecological zoning plan applicable to the lot or zone in question. LGPGIR Articles 68-9 provide the basis for environmental liability due to site contamination, which includes soil contamination,¹³³ while Article 75 authorizes the taking of measures to determine the obligation to remediate a contaminated site. RRP Articles 8 paragraph X, 10, and 12 establish the obligations of hazardous waste generators and the requirements for the operation of authorized containment facilities.¹³⁴ Finally, CPF Article 416 paragraph I establishes the offense of harm and/or risk to the environment caused by illegal or improper hazardous waste management.

At the time that waste was being generated by the Facility, the law classified waste from the production of certain pigments as hazardous¹³⁵ and provided that final disposal of hazardous waste was required to take place at sites and under conditions sufficient to prevent harm to the environment,¹³⁶ and therefore its disposal was required to adhere to RRP Article 8 paragraph X, so as to comply with the criteria set out in LGEEPA Article 135 paragraph III.

The appendices to the response and to submission SEM-06-003 contain information concerning investigative procedures that documented findings of material containing yellow pigment buried at the Facility.¹³⁷ Likewise, the inspection records produced by Profepa during

¹³¹ *Ibid.*, Appendices 11-12.

¹³² The Secretariat is mindful that the entry into force of the LGPGIR on 6 January 2004 may have given rise to the repeal of such provisions.

¹³³ LGPGIR Article 5 paragraph XL: "Contaminated site: A place, space, soil, body of water, facility, or combination thereof that has been contaminated with materials or wastes which, due to the quantity or characteristics thereof, may pose a risk to human health, live organisms, or the use and enjoyment of the property of persons."

¹³⁴ The Secretariat is mindful that LGEEPA Article 151 Bis, in force as of 14 December 1996, clarifies the obligations of persons who wish to carry out activities with hazardous wastes.

¹³⁵ Mexican Official Standard NOM-052-SEMARNAT-1993, Appendix 2, Classification of hazardous waste by industrial sector and process, Table 1, paragraphs 16.5 and 16.6, and Appendix 4, table 3, paragraph 3.

¹³⁶ RRP Article 3: "Final disposal.- Action of permanently depositing waste at sites and under conditions adequate to prevent harm to the environment."

¹³⁷ Response, Appendix I, vols. XXII (folios 8908, 8746, 8717), XXV (folios 10039, 10014, 9997), XXVII (folios 11411, 11409, 11405, 11403, 11393, 11389, 11382, 11375); XXIX (folios 12229, 12206, 12199); submission SEM-06-003, p. 6, and Appendix 11, Certification of facts drawn up 14 May 2005 by Lic. Neftalí Tajonar Salazar, Notary Public no. 4, VI district, state of Morelos.

dismantlement of the Facility note the presence of material with yellow pigment found in bands or strips below floor level.¹³⁸

Mexico's response does not directly address the assertion of alleged illegal deposit of waste pigment at the Facility. The Secretariat did not find in the appendix to the response any administrative decision whereby Mexico took into consideration these facts, which were documented by Profepa inspectors, in order to ascertain whether acts of illegal waste deposit took place. The administrative decision of 20 December 2005 refers to inspection records in which environmental violations were identified, but there is no citation of any of the inspections in which buried pigment waste was found. That decision included a sanction "for soil contamination caused by hazardous waste stockpiled, dumped, or leaking during operations,"¹³⁹ which appears to refer to activities performed by BASF while it operated the Facility and does not appear to encompass illegal acts of *disposal* inside the Facility subsequent to the time when it was operating.

Similarly, the Secretariat did not find in the appendix to the administrative file any reference to a criminal investigation relating to the alleged illegal waste disposal. LGEEPA Article 169 cited by the Submitters provides that where the federal authority identifies facts that may constitute an offense, it shall so notify the office of the public prosecutor.¹⁴⁰ The response provides documents notifying the PGR's special prosecutor for environmental offenses of certain administrative decisions, but it is unclear whether that official was specifically notified of the alleged illegal waste deposit at the Facility.¹⁴¹ The version of CPF Article 416 paragraph I in force in 1997 provided that:

Article 416. Anyone who, without any required authorization or in contravention of the provisions of law, regulation, or Mexican official standard, commits any of the following acts is liable to a penalty of from three months to six years of imprisonment and from one thousand to twenty thousand days' fine:

I. Discharges, deposits, spills, or authorizes or orders the discharge, deposit, or spill of wastewater, chemical or biochemical liquids, waste, or pollutants into soil, marine waters, rivers, watersheds, reservoirs, or any other watercourse or water body under federal jurisdiction, causing or potentially causing harm to public health, natural resources, flora, fauna, quality of water in watersheds, or ecosystems.

Furthermore, Mexico did not indicate whether the assertion of alleged deposit of waste for purposes of illegal disposal in the Facility is being or was investigated to determine the possible existence of environmental offenses. However, the Party stated that it is unable to provide a copy of any criminal investigation, since the preliminary investigation was allegedly initiated

¹³⁸ Ibid., Appendix I, vol. XXII (folio 8717). The same reference to "bands" of pigment is found in inspection records cited in folios 11411, 10039, 10014, and 9997 of the appendix to the Response.

¹³⁹ Response, Exhibit 3, Administrative resolution in file B-0002/0775 of 20 December 2005, issued by the Federal Attorney for Environmental Protection, p. 73.

¹⁴⁰ LGEEPA Article 169, fifth paragraph: "In appropriate cases, the federal authority shall notify the Office of the Public Prosecutor of the occurrence of acts or omissions noted during the exercise of its powers that may constitute one or more offenses."

¹⁴¹ Viz. Response, Appendix I, vol. IV (folios 1496, 1286).

by the PGR.¹⁴² In this regard, as stated in the previous section, the Secretariat did not find in Mexico's response any impediment to the provision of information from the criminal proceeding for the preparation of a factual record. It therefore concludes that preparation of a factual record should not interfere with any ongoing litigation or investigation.

In light of Mexico's response, the assertion of alleged deposit of hazardous waste for purposes of illegal disposal at the Facility is an issue that remains open. A factual record could present information on investigation and effective enforcement actions taken by Mexico in connection with the alleged illegal hazardous waste disposal at the Facility.

3. Preparation of a factual record is not recommended in relation to the assertion concerning the existence of a drainage system not reported to the authorities

The Submitters assert that the Facility is equipped with a drainage system allegedly used to discharge process wastewater that is not documented on the plans submitted by BASF to the environmental and municipal authorities.¹⁴³ They assert that the submission of incomplete information on the drainage system for the purposes of implementation of the dismantlement plan constitutes the offense against environmental management described in CPF Article 420 Quater.¹⁴⁴

On 20 July 2000 Profepa decided to order the implementation of a plan to dismantle the Facility's industrial drainage system. This decision established cleanup standards, soil analysis parameters, and sampling methodology, among other aspects. In addition, Profepa ordered the removal and cleanup of industrial wastewater conduction structures, including the drainage system leading off the company's premises to the outfall into Espíritu Santo creek.¹⁴⁵

On 24 October 2000 Profepa modified the scope of the drainage system dismantlement plan, considering the results of lead and hexavalent chromium analyses in the drainage system and Espíritu Santo creek. Profepa specified the characteristics of the sampling program, including data on parameters, plans, sampling procedure, nomenclature, and validation of results, and authorized the commencement of site restoration work.¹⁴⁶ On 5 August 2004 the environmental authority identified new actions for desilting, cleanup, and systematic verification of the historical and industrial drainage systems, as well as sample analysis parameters. This decision included plans for identification of restoration areas, sampling points, and sketches for removal of drainage systems and soil.¹⁴⁷ Finally, the administrative decision of 20 December 2005

¹⁴² Response, p. 58.

¹⁴³ Submission SEM-06-003, pp. 7, 10; Appendix 14, Doc. PFPA/SJ/067/06 of 27 February 2006, issued by the Assistant Director, Legal Affairs, Profepa; Appendix 16, Certification of facts drawn up 11 May 2005 by Lic. Neftalí Tajonar Salazar, Notary Public no. 4, VI district, state of Morelos; Appendix 17, Administrative decision in file SII-DGIFC-023/2004 of 5 August 2004, issued by the Director General, Pollution Source Inspection, Profepa; Appendix 20, unnumbered memo of 3 June 2005 issued by the Director, Urban Development and Municipal Public Works and Services, Cuautla.

¹⁴⁴ CPF Article 420 Quater came into force with the reform of 6 February 2002.

¹⁴⁵ Response, Appendix I, vol. XI (folio 4040).

¹⁴⁶ Ibid. (folio 4126).

¹⁴⁷ Submission SEM-06-003, Appendix 17, Administrative decision in file SII-DGIFC-023/2004 of 5 August 2004, issued by the Director General of Pollution Source Inspection, Profepa.

confirmed the order to the company to complete the cleanup and restoration of the drainage system.¹⁴⁸

The Submitters' assertion focuses on the discovery of a water pipe that was not contemplated in the cleanup and dismantlement plan, and emphasizes that it was not found in the records kept by the municipal authority. In this regard, it is noted in the appendices to the response that Profepa ordered, modified, and confirmed the systematic evaluation and restoration of the drainage systems affected by contamination. The Submitters' assertion, in light of the response, does not appear to remain open when examining the environmental restoration plan. In any case, the assertion relates to the updated record of water piping systems under the responsibility of municipal authorities, which is not associated with central aspects of both submissions.

In conclusion, the Secretariat finds that the assertion concerning a drainage system not reported to the authorities does not warrant inclusion in a factual record.

4. Preparation of a factual record is not recommended in relation to the assertion of lack of action to determine the existence of soil and construction material contamination at the Facility

The Submitters assert that Profepa did not order or take measures to prevent and control contamination at the Facility during its dismantlement. They assert a failure to effectively enforce the provisions of the LGEEPA and the LGPGIR that provide for the identification, assessment, and characterization of contaminated sites.¹⁴⁹

The information provided by Mexico indicates that based on the legislation in force, Profepa set cleanup criteria for restoration of the construction materials, the soil, and the industrial drainage system of the Facility, indicated soil sampling criteria and locations for a characterization study, and authorized a restoration plan for the Facility.¹⁵⁰ Profepa identified lead in the construction materials used in the process area, lead and hexavalent chromium in the wastewater treatment plant, and lead in the drainage system.¹⁵¹ The information in the response includes results of soil sample analyses in various areas of the Facility, in which total chromium, hexavalent chromium, lead, and molybdenum were identified at depths from 0.07 to 2.0 m.¹⁵² Profepa considered the total lead, molybdenum, and chromium analysis results for sediments taken from the Facility's historical drainage system at depths from 0.0 to 3.10 m.¹⁵³ Based on the results of the study that Profepa ordered BASF to perform, it was concluded that:

¹⁴⁸ Response, Exhibit 3, Administrative decision in file B-0002/0775 of 20 December 2005, issued by the Federal Attorney for Environmental Protection, p. 73.

¹⁴⁹ LGEEPA Article 152 bis; LGPGIR Articles 68, 69, 75 and 78.

¹⁵⁰ Response, Exhibit 13, Administrative decisions in file B-0002/775 of 20 July and 19 September 2000, issued by the Industrial Inspection Branch, Profepa.

¹⁵¹ Response, Exhibit 3, Administrative decision B-0002/0775 of 20 December 2005, issued by the Federal Attorney for Environmental Protection, p. 51.

¹⁵² *Ibid.*, p. 56. The areas identified include raw material receiving area, wastewater treatment area, area XXII and container and tray storage, area III and drum filling and emptying area, raw material warehouse, precipitating area, area I outside the Hacienda near the service drainage, and storage and drying area.

¹⁵³ *Ibid.*

In summary, more than 50% of the samples of original and non-original coverings, materials underlying the coverings, and apparent construction materials show concentrations of hexavalent chromium, total chromium, molybdenum, and lead in excess of the decontamination criteria for industrial sites.¹⁵⁴

With the exception of actions to identify alleged illegal waste disposal at the Facility, the information provided by Mexico in its response indicates that Profepa's enforcement acts forced the company to characterize the soil, construction materials, and drainage system of the Facility that were contaminated by BASF's operational activities. The studies ordered by the authority yielded information that it used to ascertain the degree of contamination, modify the scope of the study, and devise restoration actions.¹⁵⁵ The Submitters assert that Profepa based its conclusions on biased studies provided by BASF. Nevertheless, the information in the response indicates that while the cost of the environmental studies was borne by BASF, Profepa supervised the soil and water sampling¹⁵⁶ and obtained triplicate samples¹⁵⁷ that were analyzed by Profepa's Laboratory Branch (*Dirección General de Laboratorios*).¹⁵⁸ This would appear to corroborate the integrity of the information used by the authority to determine the restoration of the site occupied by BASF.

The Submitters annexed copies of geophysical studies to support their assertions of lack of characterization and existence of contamination at the Facility. In this regard, Profepa gave due consideration to the advisability of performing studies based on ground penetration radar and magnetic induction — proposed by BASF — and determined that such methods would not detect with certainty the presence of the contaminated material. Instead, it ordered soil probes and samples.¹⁵⁹

The Secretariat finds that the assertion of lack of action to assess contaminants in the soil and structure of the Facility as a result of BASF's activities is not a matter that warrants inclusion in a factual record. Mexico's documentation presents sufficient information on the selection of alternatives, including the methods that the Submitters appended to the submissions.

In light of the information about characterization of contaminants at the site resulting from BASF's activities, the Secretariat does not recommend the preparation of a factual record in regard to this assertion.

¹⁵⁴ Ibid., p. 46.

¹⁵⁵ Response, Appendix I, vols. XI (folios 4094) and 4126, XII (folio 4637), XVII (folio 6911), XXV (folio 10347), XXIX (folio 12464), XVIII (folio 7254), XXIX (folio 12464).

¹⁵⁶ Response, Exhibit 3, Administrative resolution in file B-0002/0775 of 20 December 2005, p. 29; Appendix I, vols. V (folios 1702 and 1820), VI (folios 2376 and 2478), XXI (folio 8648), XXXIV (folio 14607), XLVI (folio 20203).

¹⁵⁷ Triplicate samples were delivered simultaneously to BASF, Profepa, and the PGR, as noted in Appendix I, vol. V, folio 1930, Inspection record 17-0006/98-D-V-13 of 11 March 1999.

¹⁵⁸ Response, Appendix I, vols. IV (folio 1592), XVI (folio 6404), XVII (folios 6763, 6905), XVIII (folios 6973, 6991, 7038, 7092, 7108, 7119), XIX (folios 7468, 7506), XXIII (folio 9303), XXIV (folios 9902, 9929), XXVII (folio 11276), XXVI (folios 10762, 10961), XXXVII (folios 16112, 16220, 16311), XXXVIII (folio 16786), XL (folio 17577).

¹⁵⁹ Response, Appendix I, vol. XIII (folio 5095); Appendix I, vol. V (folio 1334).

5. Preparation of a factual record is not recommended in relation to the assertion of the exercise of Profepa’s powers and the order of urgent measures relating to the Facility

The Submitters assert that Mexico is failing to effectively enforce LGEEPA Articles 4-6 and 170 in relation to the exercise of Profepa’s powers and the ordering of urgent measures relating to the Facility. The cited provisions give the federal authorities powers to carry out acts of authority and order safety measures in cases of imminent risk of ecological imbalance.

In this regard, Mexico cites an administrative decision of August 1997 ordering the commencement of a dismantlement program for the Facility, the control of hazardous waste, and the submission of the results of soil characterization studies.¹⁶⁰ In July 1998, Profepa required BASF to produce an inventory of construction materials¹⁶¹ used in the Facility that would be subject to a cleanup plan as well as the implementation of a hazardous waste documentation system. It further ordered the preparation of plans for drainage dismantlement and cleanup of walls at the Facility, as well as a soil, subsoil, and water table characterization.

The Secretariat finds that the submission, in light of Mexico’s response, does not warrant the preparation of a factual record that presents information about the exercise of Profepa’s authority to order urgent measures in relation to the Facility, since Mexico appears to have responded to that assertion by invoking the measures that BASF was ordered to take during dismantlement of the Facility.

6. Preparation of a factual record is not recommended in respect of assertions relating to the Environmental Audit

The Submitters assert Mexico’s alleged failure to effectively enforce the environmental law in respect of deficiencies identified during the Environmental Audit conducted from August 1996 to March 1997. The Submitters assert that Profepa had timely knowledge of deficiencies or instances of non-compliance that were not targeted by effective enforcement of LGEEPA Articles 134 and 152; RRP Articles 8 paragraphs II-III, VI-VII, and IX, 14, 15 paragraphs II and VII, and 17 paragraph II; LAN Articles 29 paragraph VII and 119 paragraphs VI-VII, XI, and XIV-XV; RLAN Articles 135 paragraphs IV-VII and 136 paragraph II; and Mexican Official Standard NOM-052-ECOL-1993. The self-regulation mechanism provides for the signing of a compliance agreement at the end of the audit, which, the Submitters allege, BASF refused to sign. They assert that it used Profepa’s voluntary program to elude law enforcement during the auditing period.

Mexico maintains in its response that LGEEPA Article 38 bis allows for environmental self-regulation processes whereby economic agents, companies, and organizations seek to improve their environmental performance and comply with the applicable environmental law.¹⁶² Mexico argues that the environmental audit is a systematic review that addresses both regulated and

¹⁶⁰ Response, p. 50.

¹⁶¹ Note: The term “construction materials” comprises the floors, walls, ceilings, roofs, and arches of the Facility.

¹⁶² Response, p. 59.

unregulated issues and aims to demonstrate a company's degree of compliance. Mexico asserts that the executive summary cited by the Submitters and the agreement, which BASF did not sign, are only a part of the environmental auditing process.¹⁶³ Mexico maintains that the provisions identified by the Submitters are not applicable to that voluntary process and observes that Profepa did use the information relating to company deficiencies identified during the Environmental Audit to carry out acts of inspection and monitoring.¹⁶⁴

The Secretariat's understanding is that the environmental auditing mechanism has a self-regulatory function when, as a result of an audit, a company takes measures in addition to those prescribed by the environmental law. Furthermore, the Secretariat is mindful that another function of auditing is to regularize the operations of a company with a view to achieving levels of environmental compliance.¹⁶⁵

NAAEC Article 5(1) enumerates a list of governmental actions that qualify as environmental law enforcement activities.¹⁶⁶ Environmental audits are one such activity. The Secretariat hereby analyzes whether, in suspending efforts under the voluntary process, Mexico took any measures such as on-site inspections or initiation of proceedings designed to seek appropriate sanctions for deficiencies detected at the Facility.¹⁶⁷

The Secretariat observed, in requesting a response from Mexico, that the alleged failure of effective enforcement referred to the environmental law applicable to the deficiencies revealed by the Environmental Audit, not — as Mexico states — to provisions establishing voluntary self-regulation processes.¹⁶⁸ In this notification, the Secretariat does not analyze those aspects identified in the Environmental Audit that are unregulated¹⁶⁹ or related to provisions that do not

¹⁶³ Mexico asserts that the environmental auditing process comprises ten stages grouped into three phases: audit planning, audit execution, and post-audit. The last phase, which was not completed, includes negotiation of the action plan (the agreement between the parties on terms of compliance) and signing of an agreement.

¹⁶⁴ Response, Exhibit 34, Doc. B.O.O.A.A.- DGO 652/97 of 20 May 1997, issued by the Director General of Environmental Auditing, Profepa; Exhibit 35, Doc. B.O.O.A.A.-DGO 1357/98 of 22 July 1998, issued by the Director General, Operations, Profepa; Doc. E.O.O.-SVI.-DGATI.-110/2000 of 10 April 2000, issued by the Director General, Industrial Technical Assistance, Profepa, Doc. PFPA-MOR-04-378/2000 of 29 August 2000, issued by the Profepa Officer in Morelos, unnumbered memo of 7 January 2002, to the Federal Attorney for Environmental Protection; Appendix I, vol. XIX (folio 7341).

¹⁶⁵ See Response, p. 59

¹⁶⁶ SEM-98-003 (*Great Lakes*) Article 14(1) and (2) Determination (8 September 1999).

¹⁶⁷ The Secretariat does not discount the possibility of a submission's asserting failure to effectively enforce environmental law in connection with the activities listed in Article 5(1) of the Agreement, including environmental auditing.

¹⁶⁸ "...the Submitters' assertion is that the deficiencies or instances of non-compliance documented by the Environmental Audit were not used to guide Profepa's actions in the case of Ex Hacienda El Hospital." SEM-06-003 (*Ex Hacienda El Hospital II*) Article 14(1) and (2) Determination (30 August 2006), p. 11.

¹⁶⁹ The inspection visit order of 22 July 1997 was founded, *inter alia*, on RRP Articles 8, 14, 15 paragraphs II and VII, and 17 paragraph II. Likewise, the purpose of the inspection visit order of 23 June 1998 was to verify compliance with LGEEPA Articles 136, 139, and 150-152; RRP Articles 5 and 8 paragraphs II, IV, V, VII, IX and X, and Mexican Official Standards NOM-052-ECOL-1993 and NOM-053-ECOL-1993. Finally, the decision in file B-0002/775 of 20 July 2000 issued by the Industrial Inspection Branch was founded on LGEEPA Articles 134 and 152. These acts were the basis of the decision of December 2005 issued by Profepa and challenged by BASF in June 2006 by means of the motion for nullity.

qualify as environmental law;¹⁷⁰ nor does it analyze provisions governing environmental audits in Mexico.¹⁷¹ Concerning the deficiencies related to water pollution identified by the Environmental Audit,¹⁷² while these matters fall within the scope of a self-regulation process, Profepa had no jurisdiction to verify their effective enforcement. In any case, Mexico provided information about the Facility's water quality reports, such that in the absence of more specific assertions, the Secretariat will not proceed with analysis of this aspect.¹⁷³

Concerning the assertion that Profepa allowed the use of its voluntary program to enable BASF to elude law enforcement, the Secretariat found that in March 1997, at the conclusion of the Environmental Audit, BASF allegedly gave notice of the decommissioning of the Facility and commenced to dismantle it. In May of that year, the Profepa unit in charge of implementing the environmental auditing program informed the Profepa office in Morelos of the of the Facility decommission and provided it with the executive summary of the Environmental Audit and the dismantlement plan prepared by BASF.¹⁷⁴ In July of that year, Profepa initiated inspection and enforcement, opening an administrative proceeding against the company. The proceeding initiated by the Profepa office addresses violations related to the unsound management of hazardous materials and waste and to soil contamination that coincide with central aspects of the Environmental Audit.¹⁷⁵

Without addressing the alleged use by BASF of the auditing program to elude environmental law enforcement, the information in the response appears to indicate that the authorities gave priority to acts of inspection and monitoring over BASF's participation in the voluntary program.

In light of Mexico's response and in the absence of more specific assertions concerning the use of the information contained in the Environmental Audit to perform acts of inspection and monitoring and the correction of the deficiencies noted in the executive summary of the Environmental Audit, the Secretariat finds that the preparation of a factual record is not warranted in this regard.

¹⁷⁰ LGEEPA Articles 15 paragraph I, 110 paragraph II, and 113; RLAN Article 31 paragraph VI; RPCCA Article 7 paragraph I; and Mexican Official Standards NOM-021-ECOL-1993 and NOM-043-ECOL-1993. Likewise, the Secretariat's determination of August 30 only addressed aspects governed by environmental law. SEM-06-003 (*Ex Hacienda El Hospital II*), Article 14(1) and (2) Determination (30 August 2006).

¹⁷¹ LGEEPA Articles 38, 38 bis, and 38 bis 1.

¹⁷² LAN Articles 29 paragraph VII and 119 paragraphs VI, VII, XI, XIV, and XV; RLAN Articles 135 paragraphs IV, V, VI and VII and 136 paragraph II.

¹⁷³ Response, Exhibit 38, Wastewater discharge monitoring results for 1996, and copy of concession document for use of national waters.

¹⁷⁴ Response, Exhibit 34, Doc. B.O.O.A.A.-DGO 652/97 of 20 May 1997, issued by the Director of Operations; Response, Exhibit 35, Doc. E.O.O.-SVI.-DGATI.-110/2000 of 10 April 2000, issued by the Director, Industrial Technical Assistance, Profepa.

¹⁷⁵ The violations of environmental law identified by the Profepa office concerned LGEEPA Articles 150 and 151 and RRP Articles 6 and 8 paragraph III. Response, Exhibit 3, Administrative decision in file B-0002/0775 of 20 December 2005, issued by the Federal Attorney for Environmental Protection, p. 54.

7. Preparation of a factual record is not recommended in relation to the assertion concerning processing of citizen complaints

The Submitters assert that Mexico is failing to effectively enforce LGEEPA Articles 191, 192, and 193 in connection with the processing of citizen complaints filed with Profepa in relation to the matter raised in the submission. Concerning the citizen complaint filed by Carlos Álvarez Flores, Mexico affirms that Profepa issued a decision on the initial status of the complaint within ten days of its filing, ordered inspection procedures,¹⁷⁶ and made an inspection visit to the Facility.¹⁷⁷ Mexico notes that in May 2006, Mr. Álvarez withdrew his complaint, and therefore Profepa closed the corresponding file.¹⁷⁸

In relation to the complaint filed by Roberto Abe Domínguez, Mexico notes that it issued a status decision in which the complaint was allowed,¹⁷⁹ summoned the complainant to provide evidence in support of his complaint,¹⁸⁰ informed him that its processing would not affect the exercise of other rights or remedies,¹⁸¹ and instructed the Profepa office in the state of Morelos to process the complaint in that office.¹⁸² Mexico asserts that it gave timely notice of the status of the complaint, the inspections performed at the Facility, and the bringing of an administrative proceeding against BASF.¹⁸³ Mexico states that in compliance with a court order, Profepa requested Mr. Abe Domínguez to participate as a third party to the administrative proceeding, for the purpose of allowing BASF access to the Facility,¹⁸⁴ and that furthermore he was given standing to present evidence in the administrative proceeding against the company.¹⁸⁵ Finally, Mexico notes that Mr. Abe Domínguez withdrew his citizen complaint and that Profepa therefore closed the corresponding file in December 1999.¹⁸⁶

In light of Mexico's response, the Secretariat concludes that the preparation of a factual record is not warranted in relation to the assertion of alleged deficiencies in the processing of citizen complaints.

In conclusion, the submission, in light of Mexico's response, warrants the preparation of a factual record in relation to the assertion of offenses against environmental management. The Secretariat finds that a factual record could document effective enforcement actions in relation to the alleged commission of offenses against environmental management during dismantlement of the Facility and would help to understand the scope of the PGR investigations, Profepa's institutional cooperation, and the operation of other specialized agencies.

¹⁷⁶ Response, Exhibit 39, Doc. PFFA.MOR.05.713.2005 of 1 November 2005, issued by the Profepa Officer in the state of Morelos.

¹⁷⁷ Response, p. 66.

¹⁷⁸ Ibid., p. 67.

¹⁷⁹ Ibid., Exhibit 41, Complaint status decision in file 710/812/17 of 23 October 1997, issued by the Complaints Branch (*Dirección General de Denuncias y Quejas*), Profepa.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Response, p. 69.

¹⁸⁴ Ibid., p. 70.

¹⁸⁵ Ibid., Appendix I, vol. V (folio 1619).

¹⁸⁶ Ibid., Appendix I, vol. XI (folio 4008).

V. RECOMMENDATION

For the foregoing reasons, the Secretariat finds that the submission, in light of Mexico's response, warrants the preparation of a factual record, and so informs Council. The submission and the response leave open central questions. A detailed presentation of the facts could help to ascertain whether Mexico is failing to effectively enforce its environmental law with respect to the dismantlement of the Facility in Ex Hacienda El Hospital.

As stated in this notification, a factual record is warranted in order to gather and present information relating to the Submitters' assertions that the government of Mexico is failing to effectively enforce LGEEPA Articles 134, 135 paragraph III, 136, 139, 150-1, 152 bis, 169, and 170; LGPGIR Articles 68-9, 75, and 78; CPF Article 421, as well as Articles 415 paragraph I and 416 paragraph I of the text in force prior to 6 February 2002; RRP Articles 8 paragraph X, 10, and 12; and Mexican Official Standards NOM-052-SEMARNAT-1993, and NOM-053-SEMARNAT-1993, with respect to assertions of illegal hazardous waste disposal at the Facility, illegal waste disposal on sites in the community of Ex Hacienda El Hospital, and commission of environmental offenses during the operation, decommissioning, and dismantlement of a pigment production plant located in Ex Hacienda de Nuestra Señora de la Concepción El Hospital, state of Morelos, Mexico.

Accordingly, pursuant to NAAEC Article 15(1), and for the reasons set forth in this notification, the Secretariat informs the Council of its determination that the objectives of the NAAEC would be well served by developing a factual record regarding the submission, as recommended herein.

Respectfully submitted for your consideration this 12th day of May 2008.

(original signed)

Per: Paolo Solano
Interim Director
Submissions on Enforcement Matters Unit