

Secretariat for Submissions on Environmental Enforcement Matters
United States - Peru Trade Promotion Agreement
Determination in accordance with Article 18.8 (4)

Submitter: Native Federation of the Madre de Dios River and its Tributaries
Party: Peru
Reference: Submission on Environmental Enforcement Matters filed by the Native Federation of the Madre de Dios River and its Tributaries
Submission N°: SACA-SEEM/PE/002/2018
Date of receipt: July 9, 2018
Date of determination: January 11, 2019

The Secretariat for Submissions on Environmental Enforcement Matters after reviewing Submission SACA-SEEM/PE/002/2018, pursuant to Article 18.8 (4) of the U.S.-Peru Trade Promotion Agreement, considers that the **Submission merits a response from the Party.**

I. INTRODUCTION

1. Any person, natural or legal, of the Parties of the United States-Peru Trade Promotion Agreement (TPA) may file a submission to the Secretariat for Submissions on Environmental Enforcement Matters (hereinafter “Secretariat”) asserting the lack of effective environmental law enforcement by a Party, in accordance with Article 18.8 (1) of the TPA.
2. In June 2015, the Parties signed the “Understanding for Implementing Article 18.8 of the United States-Peru Trade Promotion Agreement,” with which the Secretariat was established. A Memorandum of Understanding was also signed with the Organization of American States (OAS) by which it was agreed that the OAS will house and provide administrative and technical support to the Secretariat in its Washington D.C headquarters, in the United States.
3. The Secretariat has among its main functions to receive and process submissions on Environmental Enforcement Matters (hereinafter “submissions”) filed by any person of a Party, in accordance to the provisions of Article 18.8 of the TPA.
4. The Secretariat determines the admissibility of the submission, in accordance with the requirements set out in paragraph 2 of Article 18.8 of the TPA. If the submissions meets these requirements, the Secretariat will determine whether these submissions merit a response from the Party, in accordance with paragraph 4 of Article 18.8 of the TPA.
5. The Secretariat will determine, once it has received a response provided by the Party or once the timeline set forth in Article 18.9 of the TPA to receive such response has been met, if the development of a Factual Record is warranted. If the Secretariat determines that the preparation of a Factual Record is not warranted, the process is terminated with respect to that submission.

6. If the Secretariat determines that the preparation of a Factual Record is warranted, the Environmental Affairs Council (EAC) of the TPA will be notified of this decision in accordance with Article 18.9 of the TPA.
7. The Factual Record referred to in the above paragraph will be developed by the Secretariat if any member of the EAC so orders.
8. FENAMAD (hereinafter, the "Submitter") filed a Submission to the Secretariat, via email dated July 9, 2018, under Article 18.8 of the TPA, in which it asserts the lack of environmental law effective enforcement of by the Peruvian Government in the process of preparation, deliberation, approval and enactment of Law No. 30723, "Law that declares the construction of roads in border zones and the maintenance of dirt roads in the region of Ucayali as a national priority and interest."
9. The Submitter alleges that during the preparation, deliberation, approval and enactment of Law No. 30723, "Law that declares the construction of roads in border zones and the maintenance of dirt roads in the department of Ucayali as a national priority and interest," the Peruvian Government has failed to effectively enforce the following environmental laws:
 - a) Articles 1, 4, 5 and 8 of Law No. 28736, "Law for the protection of indigenous or tribal peoples in a situation of isolation and in a situation of initial contact," (hereinafter, "PIACI Law" for its Spanish acronym);
 - b) Law No. 29785, "Law on the right to prior consultation with indigenous or tribal peoples, recognized by the International Organization of Labor (ILO) Convention 169," (hereinafter, "Law of Prior Consultation");
 - c) Article 70 of Law No. 28611, "General Environmental Law";
 - d) Paragraph 12 of Article II of the Preliminary Title of Law No. 29763, "Forest and Wildlife Law"; and
 - e) Paragraph 3 of Article 18.11 of the United States-Peru Trade Promotion Agreement
10. The Secretariat registered the Submission and assigned the number SACA-SEEM/PE/002/2018 (hereinafter, the "Submission") to the Submission.
11. The Secretariat acknowledged receipt of the Submission via email dated July 19, 2018, through the Letter SACA-SEEM/PE/002/2018/01, addressed to the Submitter with a copy to the EAC.
12. The Secretariat determined that the Submission meets the admissibility requirements set out in Article 18.8 (2), asserting the lack of environmental law enforcement by a Party.
13. The Secretariat issued the Determination SACA-SEEM/PE/002/2018/D1, which was communicated to the Submitter and to the EAC with Letter SACA-SEEM/PE/002/2018/02 via e-mail dated December 28, 2018.

14. The Secretariat has determined that the SACA-SEEM/PE/002/2018 Submission meets the admissibility requirements set out in Article 18.8 (2) of the TPA, through Determination SACA-SEEM/PE/002/2018/D1. The Secretariat shall then determine if the Submission merits a response from the Party, in accordance with Article 18.8 (4) of the TPA.

II. ANALYSIS

A. On the criteria set out in Article 18.8 (4)

15. The Secretariat, pursuant to the provisions of Article 18.8 (4) of the TPA, shall consider four criteria to determine whether the Submission merits a response from the Party. The evaluation of the mentioned criteria is listed below:

a) ***[if] the Submission is not frivolous and alleges harm to the person making the Submission;***

16. The Submitter alleges in the Submission that there may be potential harm to biodiversity and ecosystems of the indigenous peoples territories of the Ucayali region, in particular of the indigenous peoples in a situation of voluntary isolation and situation of initial contact (PIACI, for its Spanish acronym). It is clear from the Submission that this would endanger the life and/or health of these indigenous peoples.

17. Submission SACA-SEEM/PE/002/2018 asserts that:

- a) *"(...) the conservation of biodiversity and the ecosystems of their territories, to the extent that the PIACI depend on the habitat and flora and fauna existing within their territories, to survive and guarantee their physical and cultural, individual and collective existence." (P.15, B.9 of the Submission).*
- b) *"The PIACI are peoples that are deeply integrated in the ecosystems in which they live and of which they are a part, maintaining a close relationship of interdependence with the environment in which they develop their lives and their culture. They have a deep knowledge of their environment, which allows them to live in a self-sufficient manner, generation after generation, which is why the maintenance of their territories is of vital importance for all of them." (P.13, B.8 of the Submission).*
- c) *"Because of this special condition, the PIACI are highly vulnerable peoples since they depend on the biodiversity and ecosystems of their territories to guarantee their survival." (P.12, B.7 of the Submission).*
- d) *"When overlapping with the territory of the PIACI and, consequently, presenting potential in the territories of these peoples, it was mandatory that this project [Bill No. 1123/2016-CR¹] be referred to the Commission of Andean, Amazonian and*

¹ Our addition.

Afro-Peruvian Peoples, Environment and Ecology of the Congress, for its deliberation and discussion." (P.18, B.14 of the Submission).

18. The Secretariat will consider as frivolous those Submissions that do not have legal merit and are submitted in bad faith with the aim of harassing one of the Parties.
19. The Secretariat considers that the Submission is not frivolous since it asserts the failure of a Party to effectively enforce environmental laws, having communicated this failure to various relevant authorities of the Party, as detailed in the Determination SACA-SEEM/PE/002/2018/D1. In turn, the Secretariat has determined that the Submission meets the criteria set forth in Article 18.8 (2) of the TPA.
20. The Submission asserts potential harm to FENAMAD, the Submitter, as an indigenous organization that represents these peoples. FENAMAD is a legal entity registered in the Public Registries of Peru, under electronic heading No. 11000655, with legal address in Jiron 26 de Diciembre No. 276, Puerto Maldonado, Department of Madre de Dios, Peru, represented by its president Mr. Julio Cusurichi Palacios, identified with National Identity Document No. 04826553.
21. The Secretariat considers that the Submission SACA-SEEM/PE/002/2018 is not frivolous and asserts potential harm to the Submitter, in accordance with the provisions of Article 18.8 (4) (a).
 - b) *[iff]* the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Chapter and the ECA, taking into account guidance regarding those goals provided by the Council and the Environmental Cooperation Commission established under the ECA**
22. Submission SACA-SEEM/PE/002/2018 raises matters related to the participation and right to prior consultation of indigenous peoples as well as to the protection of the life and integrity of these peoples in relation to the environment and the conservation of biological diversity, in particular the vulnerability of the PIACI and their territories, as well as the possible impacts to vulnerable ecosystems of particular importance, such as protected natural areas.
23. Submission SACA-SEEM/PE/002/2018, establishes that Law No. 30723, "Law that declares the construction of roads in border zones and the maintenance of dirt roads in the region of Ucayali as a national priority and interest," aims to promote the construction of roads as it is essential to *"commercialize a variety of crops"* and develop *"focal points of economic development, tourism and trade."* The Submitter also notes that the Opinion on the aforementioned law identifies, among its objectives, the *"commercialization of different products of the region"*.
24. These issues are linked to the objectives of the eighteenth chapter of the TPA² with regard to *"... promoting the optimal use of resources in accordance with the objectives of sustainable*

² *"Chapter Eighteen - Environment.*

development and striving to strengthen the links between trade and environmental policies and practices of the Parties...".

25. Likewise, Article 18.11 of the TPA recognizes "...the importance of respecting and preserving the knowledge and practices of its indigenous communities and other communities, which contribute to the conservation and sustainable use of biological diversity," as well as "... the importance of public participation and consultation (...) in matters related to the conservation and sustainable use of biological diversity."
26. Likewise, the matters referred to in paragraph 22 of this document are linked to the objectives of the Environmental Cooperation Agreement (ECA) signed by the Parties, which aims to "... increase bilateral and/or regional environmental cooperation between the Parties, in order to protect, improve and preserve the environment, including the conservation and sustainable use of their natural resources," as stated in Article 1 of the ECA.
27. The aforementioned matters are linked to this objective with regard to the importance of public participation, a matter that the Parties highlight in the preamble of the TPA:

"Recognizing that the broad participation of civil society is important to achieve effective cooperation"

28. The matters mentioned in paragraph 22 of this Determination with which the Submission is concerned, will contribute to achieving the objectives of Chapter 18 of the TPA, particularly in cases of vulnerable environments, such as protected natural areas and vulnerable populations, such as the PIACI and their territories.
29. The Secretariat believes that the Submission SACA-SEEM/PE/002/2018 addresses matters of which its analysis throughout this process will contribute to achieving the objectives of Chapter 18 of the TPA and those of the ECA, in accordance with the provisions of Article 18.8 (4) (b).

c) *[if]* private remedies available under the Party's law have been pursued

30. According to the information presented in the Submission, there is no evidence that the Submitter has pursued remedies available under the Party's law or has, to date, asserted any type of remedies related to this Submission.
31. The Secretariat believes that it does not appear from Submission SACA-SEEM/PE/002/2018 that remedies have been pursued under the Party's law, in accordance with the provisions of Article 18.8 (4) (c).

Objectives: Recognizing that each Party has sovereign rights and responsibilities with respect to its natural resources, the objectives of this Chapter are to contribute to the efforts of the Parties' efforts to ensure that trade and environmental policies are mutually supportive, to promote the optimal use of natural resources in accordance with the objective of sustainable development, and to strive to strengthen the links between Parties' trade and environmental policies and practices, which may take place through environmental cooperation and collaboration."

d) *if* the Submission is drawn exclusively from mass media reports

32. In accordance with the information and communications presented in the Submission, the Secretariat considers that it has not been drawn exclusively from mass media reports. Instead, the Submitter files reports issued by civil society organizations, as well as by relevant entities of the Party that support an alleged lack of the effective enforcement of environmental laws.
33. The Secretariat believes that the SACA-SEEM/PE/002/2018 Submission is not exclusively drawn from media reports, in accordance with the provisions of Article 18.8 (4) (d).

III. DETERMINATION

34. The Secretariat, considering the reasons given and acting in accordance with the provisions of Article 18.8 (4) of the TPA, considers that the Submission SACA-SEEM/PE/002/2018 merits a response of the Peruvian Government for the alleged lack of effective environmental law enforcement as asserted by the Submitter.
35. The Party must inform the Secretariat of the points detailed below, in accordance with the provisions of Article 18.8 (5) of the TPA:

“a) if the precise matter at issue is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and

b) any other information the Party wishes to submit, including:

i) whether the matter was previously the subject of a judicial or administrative proceeding;

ii) whether private remedies in connection with the matter are available to the person making the submission and whether they have been pursued; or

iii) information concerning relevant capacity-building activities under the ECA. ”

36. In accordance with Article 18.8 (5) of the TPA³, the Party may provide a response until February 25, 2019 or, in exceptional circumstances and on written notification to the Secretariat, within 60 calendar days⁴ of delivery of the request, that is March 12, 2019.

(original signed)

Dino Delgado Gutiérrez

Executive Director

Secretariat for Submissions on Environmental Enforcement Matters

U.S.- Peru Trade Promotion Agreement

³ “5. The Party shall advise the Secretariat within 45 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:

a) whether the precise matter at issue is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; and

b) Of any other information that the Party wishes to submit, such as:

i) whether the matter was previously the subject of a judicial or administrative proceeding,

ii) whether the private remedies in connection with the matter are available to the person making the Submission and whether they have been pursued, or

iii) information concerning capacity-building activities under the ECA. ”

⁴According to Chapter 1, Section B: General Definitions, Article 1.3: Definitions of General Application "days" means "calendar days."