

**Secretariat for Submissions on Environmental Enforcement Matters  
 United States - Peru Trade Promotion Agreement  
 Determination in accordance with Article 18.8 (1) and (2)**

**Submitters:** [REDACTED], [REDACTED], [REDACTED]  
 [names are kept confidential in accordance with Article 8 of the Understanding for Implementing Article 18.8 of the United States - Peru Trade Promotion Agreement]

**Party:** Peru

**Reference:** Submission on Environmental Enforcement Matters filed by the submitters.

**Submission No.:** SACA-SEEM/PE/002/2019

**Date of receipt:** July 25, 2019

**Date of determination:** October 18, 2019

The Secretariat for Submissions on Environmental Enforcement Matters after reviewing Submission SACA-SEEM/PE/002/2019, pursuant to Article 18.8 (1) and (2) of the US-Peru Trade Promotion Agreement, considers that **the Submission meets the requirements** established in Article 18.8 (2), for the reasons stated in the following Determination.

Requirements under article 18.8 (2) of the US-Peru Trade Promotion Agreement	Meets		Justification
	Yes	No	
<i>The Secretariat may consider a submission under this Article if the Secretariat finds that the submission:</i>			
<i>a) is in writing in English or Spanish;</i>	X		Submission SACA-SEEM/PE/002/2019, as well as all additional documentation, is written in Spanish.
<i>b) clearly identifies the person making the submission;</i>	X		Submission SACA-SEEM/PE/002/2019 was submitted by five natural persons, duly identified. However, they have requested that their identity be kept confidential, in accordance with the procedures established in Article 8 of the Understanding for Implementing Article 18.8 of the United States - Peru Trade Promotion Agreement

<i>(c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based and on the identification of environmental laws of which the failure to enforce is asserted;</i>	X		Submission SACA-SEEM/PE/002/2019 provides sufficient information that has allowed the Secretariat to review it. Likewise, the Submission identifies the law that the Peruvian state is not effectively enforcing.
<i>(d) appears to be aimed at promoting enforcement rather than at harassing industry;</i>	X		Submission SACA-SEEM/PE/002/2019 appears to be aimed at promoting the Party's effective environmental law enforcement and does not indicate that it aims to harass industry.
<i>(e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and</i>	X		Submission SACA-SEEM/PE/002/2019 attaches a copy of the written communication addressed to the relevant authorities of the Party.
<i>(f) is filed by a person of a Party, except as provided in paragraph 3.</i>	X		Submission SACA-SEEM/PE/002/2019 is submitted by five natural persons of Peru, duly identifying themselves with their full names and national identification document number.

## I. INTRODUCTION

1. Any natural or legal person 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, the "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 is agreed that the OAS will house and provide administrative and technical support to the Secretariat in its headquarters in Washington D.C., United States.
3. The Secretariat, among its main functions, receives and considers 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 submission meets these

requirements, the Secretariat will determine whether these submission merits 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 in which such response is received 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 to Article 18.9 of the TPA.
7. The Secretariat prepares a Factual Record if any member of the EAC so orders.
8. Article 8 of the Understanding for Implementing Article 18.8 of the United States – Peru Trade Promotion Agreement establishes that the Secretariat shall not furnish to the public or allow public access to any information it may receive that the submitter has identified as confidential.
9. Five submitters who identified their personal information as confidential (hereinafter, the “Submitters”) filed a Submission with the Secretariat, via email dated July 25, 2019, under Article 18.8 of the TPA, in which they assert the lack of effective enforcement of Article 3 of Law No. 28694, the Law that regulates the sulfur content in diesel fuel.
10. The Secretariat registered the Submission and assigned the number SACA-SEEM/PE/002/2019 to the Submission.
11. The Secretariat acknowledged receipt of the Submission via email dated July 26, 2019, through the Letter SACA-SEEM/PE/002/2019/01, addressed to the Submitters with a copy to the EAC.
12. After examining the Submission under paragraphs 1 and 2 of Article 18.8 of the TPA, the Secretariat considers that the SACA-SEEM/PE/002/2019 Submission meets all the admissibility requirements for the reasons set forth below.

## **II. ANALYSIS**

### **A. On the environmental law that would not have been effectively enforced, in accordance with Article 18.8 (1)**

13. Any person of a Party may file a submission to the Secretariat under paragraph 1 of Article 18.8 of the TPA asserting that a Party is not effectively enforcing its environmental laws.
14. Five submitters of Peruvian nationality have signed Submission SACA-SEEM/PE/002/2019.
15. The Submitters allege that the Government of Peru has not effectively enforced Article 3 of Law No. 28694, Law that regulates the sulfur content in diesel fuel.

**B. On the environmental law asserted**

16. Article 18.14 of the TPA defines the term "environmental law" as follows:

*"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, animal or plant life, through:*

- (a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;*
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto;*
- (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat and specially protected natural areas; or*
- (d) for Peru, the management of forest resources, in areas with respect to which a Party exercises sovereignty, sovereign rights, or jurisdiction, but does not include statute or regulation, or provision thereof, directly related to worker safety or health."*

17. Article 18.14 of the TPA also establishes that statutes and regulations are:

*"Laws, regulations and any other measures to fulfill its obligations under a covered agreement means a Party's laws, regulations and other measures of a Party at the central level of government. (...)*

*For Peru, statute or regulation means a law of Congress or Decree or Resolution enacted by the central level of government to implement a law of Congress that is enforceable by the central level of government."*

18. It is important to highlight that the definition provided by Article 18.14 of the TPA establishes that "law or regulation" is considered a law or regulation as a whole or one or more provisions contained in said law or regulation.

**a) On Law No. 28694**

19. The Submitters assert that the Peruvian Government may have failed to effectively enforce Article 3 of Law No. 28694, Law that regulates the sulfur content in diesel fuel, according to which:

*"Article 3.- Taxation measures of clean fuels  
The Selective Consumption Tax on fuels will be determined on a gradual basis, starting from January 1, 2008, and will introduce the criterion of proportionality into the degree of harmfulness that the fuel pollutants have on the health of the population. To this end, the Ministry of Economy and Finance, in coordination with the National Environment Council (CONAM), will annually approve the indices of relative noxiousness that will be used. This restructuring must be carried out*

*gradually until January 1, 2016, at the latest, when the taxation of fuels will fully consider the criterion of harmfulness.”*

20. According to Article 1 of Law No. 28694, the purpose of the Law is:

*“The regulation of the levels of sulfur contained in diesel fuel should be declared as a public need and of national interest, in order to safeguard air quality and public health.”*

21. According to the definition of “environmental law” provided by the TPA, as indicated in paragraphs 16, 17 and 18 of this Determination, Law No. 28694 qualifies as environmental law since it establishes the purpose of safeguarding air quality and public health through the regulation of pollutants.

22. In particular, the provision referred to in the Submission (Article 3 of Law No. 28694) introduces the criterion of proportionality into the degree of noxiousness that the fuel pollutants have on the health of the population. This provision qualifies as “environmental law” in accordance with the definition provided by Article 18.14 of the TPA, in particular subparagraph (a).

**C. On meeting the admissibility requirements of Article 18.8 (2)**

23. Article 18.8 (2) of the TPA establishes six requirements that any Submission must meet concurrently to be considered by the Secretariat. The evaluation of the aforementioned requirements is listed below:

**a) [Whether the Submission] is written in English or Spanish**

24. Submission SACA-SEEM/PE/002/2019, as well as all additional documentation filed by the Submitters are written in Spanish.

25. The Secretariat considers that the Submission meets the requirements of Article 18.8 (2) (a).

**b) [Whether the Submission] clearly identifies the person filing the submission**

26. Submission SACA-SEEM/PE/002/2018 was presented by five persons of Peruvian nationality.

27. The Submitters have provided their full names, as well as the number of their national identity documents.

28. The Submitters have indicated that they wish their personal data be kept confidential, in accordance with the provisions of Article 8 of the Understanding for Implementing Article 18.8 of the United States—Peru Trade Promotion Agreement.

29. The Secretariat considers that the Submission meets the requirement of Article 18.8 (2) (b).

**c) *[Whether the Submission]* provides sufficient information to allow the Secretariat to review the Submission, including any documentary evidence on which the Submission may be based and on the identification of environmental laws of which the failure to enforce is asserted**

30. Submission SACA-SEEM/PE/002/2019, in accordance with what is analyzed in this Determination, includes sufficient information that allows the Secretariat to evaluate it, as well as the identification of the environmental law that the Peruvian Government may have stopped effectively enforcing.
31. Attached to the Submission is the letter sent by the Submitters to the Government of Peru regarding the lack of effective enforcement of Article 3 of Law No. 28694.
32. The Submitters do not attach additional documentary evidence. Because the Submission focuses on the alleged lack of regulations that would have approved the indices and application of the criteria of harmfulness in certain years from the date Law No. 28694 was enacted, the Secretariat considers that this situation is easily verifiable and does not need greater evidence.
33. The Secretariat considers that the Submission meets the requirement of Article 18.8 (2) (c).

**d) *[Whether the Submission]* seems to be aimed at promoting enforcement rather than at harassing industry**

34. Submission SACA-SEEM/PE/002/2019 seems to be focused on promoting the effective enforcement of the law. The Secretariat considers that the Submission does not appear to be aimed to harass industry.
35. The Secretariat considers that the Submission meets the requirement of Article 18.8 (2) (d).

**e) *[Whether the Submission]* indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response if any**

36. Submission SACA-SEEM/PE/002/2019 provides information on a written communication by the Submitters addressed to a relevant authority of the Party.
37. The Secretariat considers that the Submission meets the requirement of Article 18.8 (2) (e).

**f) *[Whether the Submission]* is presented by a person of a Party, except as set forth in paragraph 3.**

38. Submission SACA-SEEM/PE/002/2019 is presented by five natural persons of Peruvian nationality, duly identifying themselves, providing their national identity document number.

39. The Submission is signed by the five Peruvian citizens, attaching their signature as Annex 2 of the Submission.
40. The Secretariat considers that the Submission meets the requirement of Article 18.8 (2) (f).

### **III. DETERMINATION**

41. For the aforementioned reasons, the Secretariat considers that Submission SACA-SEEM/PE/002/2019 asserts the lack of environmental law enforcement of a Party, in accordance with what is established in Article 18.8 (1) of the TPA. Likewise, it meets the admissibility requirements contained in Article 18.8 (2) of the TPA.
42. Therefore, the Secretariat determines that the Submission meets the provisions of paragraphs 1 and 2 of Article 18.8 of the TPA.
43. In accordance with Article 18.8 (4), the Secretariat will determine whether the Submission merits a response from the Party.

*(signature in the original copy)*

Dino Delgado Gutiérrez

Executive Director

Secretariat for Submissions on Environmental Enforcement Matters

U.S.- Peru Trade Promotion Agreement