

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

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:

April 2, 2020

The Secretariat for Submissions on Environmental Enforcement Matters after reviewing Submission SACA-SEEM/PE/002/2019, 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 admissability of the submission, in accordance with the requirements set out in paragraph 2 of Article 18.8 of the TPA. If the submissions meet 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. 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. The Secretariat considers that Submission SACA-SEEM/PE/002/2019 complies with article 18.8 (1) and meets all the admissibility requirements set forth in article 18.8 (2).
13. The Secretariat issued the Determination SACA-SEEM/PE/002/2019/D1, which was communicated to the Submitter and to the EAC with Letter SACA-SEEM/PE/002/2019/02 on October 18, 2019.
14. The Secretariat has determined that Submission SACA-SEEM/PE/002/2019 meets the admissibility requirements set out in Article 18.8 (2) of the TPA, through Determination SACA-SEEM/PE/002/2019/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 Submitters allege in Submission SACA-SEEM/PE/002/2019 an environmental harm and consequently an ongoing harm to Peruvian citizen's health due to the alleged lack of enforcement of Law N 28694, article 3.
17. Submission SACA-SEEM/PE/002/2019 asserts that:
- a) *"The burning of fossil fuels for transportation generates various damages to the health of the population, in particular due to the occurrence of various diseases, such as cancer and respiratory diseases. All this translates into a significant deterioration in the quality of life of the population."* (page 7)
 - b) *"By not effectively enforcing article 3 of Law N 28694, the use of fossil fuels would not be discouraged, and therefore the environmental damage in the atmosphere (represented in GHG emissions) would be aggravated and, consequently, the health of all residents in Peru".* (page 7)
 - c) *"Keep in mind that environmental damage does not affect some, but has a diffuse, general and intergenerational scope".* (page 7)
18. As determined in Determination SACA-SEEM/PE/002/2018/D1¹, 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 relevant the Party in writing, as detailed in the Determination SACA-SEEM/PE/002/2019/D1².
20. The Secretariat considers that Submission SACA-SEEM/PE/002/2019 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***
21. Submission SACA-SEEM/PE/002/2019 raises matters related to burning of fossil fuels, air quality, measures to reduce contaminating emissions, reduction of the sulfur content in diesel fuel, disincentivize consumption of harmful fuels and incentivize less polluting fuels, environmental and human health harm.

¹ Number 18.

² Number 31.

22. These issues are linked to the objectives of the eighteenth chapter of the TPA³ with regard to *"... promoting the optimal use of resources in accordance with the objectives of sustainable development ..."*.
23. Likewise, Article 18.5 of the TPA establishes that each Party shall encourage the development and use mechanisms such as *"incentives, including market-based incentives where appropriate, to encourage conservation, restoration, sustainable use, and protection of natural resources and the environment..."*.
24. Likewise, the matters related to the Submission 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.
25. Article 4 of the ECA regarding the Work Program and Cooperation Areas establishes the development and promotion of incentives, including economic incentives and instruments as part of the bilateral and/or regional projects and activities that may be included.
26. The Secretariat believes that Submission SACA-SEEM/PE/002/2019 addresses matters of which its analysis throughout this process will contribute to achieve 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

27. 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.
28. The Secretariat believes that it does not appear from Submission SACA-SEEM/PE/002/2019 that remedies have been pursued under the Party's law, in accordance with the provisions of Article 18.8 (4) (c).

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

29. In accordance with the information presented in the Submission, the Secretariat considers that it has not been drawn exclusively from mass media reports. Instead, the Submission is based on the opinion of submitters that support an alleged lack of the effective enforcement of Law N 28694, article 3.

³ *"Chapter Eighteen - Environment.*

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."

30. The Secretariat believes that Submission SACA-SEEM/PE/002/2019 is not exclusively drawn from media reports, in accordance with the provisions of Article 18.8 (4) (d).

III. DETERMINATION

31. 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/002/2019 merits a response of the Peruvian Government for the alleged lack of effective environmental law enforcement as asserted by the Submitter.

32. 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. ”

33. In accordance with Article 18.8 (5) of the TPA⁴, the Party may provide a response until May 17th, 2020 or, in exceptional circumstances and on written notification to the Secretariat, within 60 calendar days⁵ of delivery of the request, that is June 1st, 2020.

⁴ “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

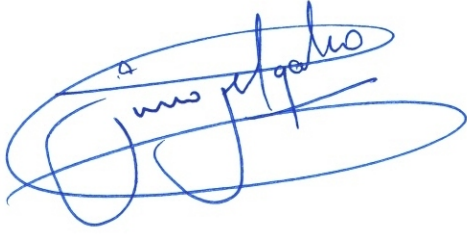
b) Of any other information that the Party wishes to submit, such as:

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. ”

⁵According to Chapter 1, Section B: General Definitions, Article 1.3: Definitions of General Application "days" means "calendar days."



Dino Delgado Gutiérrez
Executive Director
Secretariat for Submissions on Environmental Enforcement Matters
U.S.- Peru Trade Promotion Agreement