

For: Environmental Affairs Council – U.S. – Peru Trade Promotion Agreement
From: Dino Delgado Gutiérrez
Executive Director
Secretariat for Submissions on Environmental Enforcement Matters
Subject: Report in response of document “Respecto a la recomendación de la Secretaría para las Solicitudes sobre Asuntos de Cumplimiento Ambiental para el desarrollo de un Expediente de Hechos” - Posición del Gobierno del Perú

I. Background

1. On June 17th, 2019, the United States issues an instruction to the Secretariat for Submissions on Environmental Enforcement Matters (hereinafter, the “Secretariat”), to prepare a Factual Record for Submission SACA-SEEM/PE/002/2018, in accordance with the provisions of article 18.8 of the TPA¹.
2. On August 17th, 2019, the Government of Peru forwards to the Secretariat the document “Respecto a la recomendación de la Secretaría para las Solicitudes sobre Asuntos de Cumplimiento Ambiental para el desarrollo de un Expediente de Hechos” - Posición del Gobierno del Perú.
3. The Secretariat, through this report, proceeds to respond to the aforementioned document.

II. Analysis

A. Regarding the laws identified by the Submitter that in the discretion of the Secretariat qualify as environmental law

4. The document sent by the Government of Peru cites:
 - A. *“(...) the Secretariat considers that the Submission meets all article 18.8 requirements (...) However, as indicated in the Peruvian Government Position document of March, 2019, FENAMAD’s Submission does not meet the admissibility requirements, given that the laws invoked by the Submitter and admitted by the Secretariat do not qualify as environmental laws within the framework established in article 18.14 of the TPA ”*
5. 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 region of Ucayali as a national priority

¹ The referred instruction is a consequence of the recommendation made by the Secretariat in this regards. The full background of Submission SACA-SEEM/PE/002/2018 can be found at www.saca-seem.org/fenamad-details.

and interest," the Peruvian Government 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) Paragraph 12 of Article II of the Preliminary Title of Law No. 29763, "Forest and Wildlife Law";
 - d) Paragraph 3 of Article 18.11 of the United States-Peru Trade Promotion Agreement; and
 - e) Article 70 of Law No. 28611, "General Environmental Law".
6. The Secretariat, through Notification SACA-SEEM/PE/002/2018/N1 dated May 24, 2019, recommended the preparation of a Factual Record in relation to three of the laws asserted by the Submitter: (a), (b) y (c) of the previous paragraph.²
7. As mentioned in Notification SACA-SEEM/PE/002/2018/N1, the Secretariat considers that a proper analysis of the environmental laws cited by the Submitter has been carried out³. In this sense, the Secretariat considers that as long as the laws -or provisions thereof- invoked by the Submitters has the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through one or more of the four of the conditions offered by the definition of the TPA, such legislation can be considered "environmental law" according to the definition provided by the TPA.⁴
8. According to the analysis carried out in the Determination SACA-SEEM/PE/002/2019/D1, the Secretariat has considered the laws as a whole, but also certain provisions thereof, as indicated in the definition of "environmental law" provided by article 18.14 of the TPA. In this sense, it has not analyzed exclusively the article referring to the Object of each one of the laws cited by the Submitter, as the Peruvian Government's document suggests. The Secretariat considers that analyzing solely the object of each law (when the Submitters has no cited that article exclusively), is inappropriate, as it restricts reviewing the complete content of the law.

² Notification SACA-SEEM/PE/002/2018/N1, numbers 68 and 69.

³ Determination SACA-SEEM/PE/002/2018/D1.

⁴ Determination SACA-SEEM/PE/002/2018/D1, number 48.

B. Regarding the Submission's information

9. The document sent by the Government of Peru cites:

"(...) the Submission failed to sufficiently substantiate how the Party failed to effectively enforce each of the cited laws and only presents arguments with respect to Law 28736."

10. With respect to what is mentioned by the Government of Peru in the preceding paragraph, article 18.8 number 2 (c) establishes as one of the requirements for the Secretariat to consider a submission:

"provides sufficient information to allow the secretariat to review the submission, including any documentary evidence on which the submission may be based and identification of the environmental laws of which the failure to enforce is asserted"

11. The Secretariat has already analyzed, in Determination SACA-SEEM/PE/002/2018/D1⁵ and then in Notification SACA-SEEM/PE/002/2018/N1⁶, the information provided by the Submitter and the identified environmental laws. At the discretion of the Secretariat, the Submitter offered sufficient information that has allowed the full analysis of the Submission.
12. The information provided in the Submission text, as well as in the multiple attached documents, allowed the Secretariat to understand the purpose of the Submission and carry out an individualized analysis of each of the environmental laws.

C. Regarding the Secretariat functions, TPA procedures and Bilateral Understanding

13. The document sent by the Government of Peru cites:

"48. In the document SACA-SEEM/PE/002/2018/N1, the Secretariat includes in paragraphs 32, 33, 34, 35 y 36, references to Law proposals and sectorial reports that have not been cited by the Parties."

"52. In this regard, it should be noted that, in accordance with article 18.9.4 of the TPA, the Secretariat in the preparation of a factual record may use information that is publicly available. Note that said function is not attributed

⁵ Numbers 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 y 47.

⁶ Numbers 54, 55, 56 y 57.

to the Secretariat at an earlier stages such considering a Submission, or requesting a response to the Party (indicated in Article 18.8 of the TPA)“

14. The Secretariat, through Notification SACA-SEEM/PE/002/2018/N1, complied with analyzing the information provided with the Submission and annexes, to determine if the development of a factual record was warranted.
15. The analysis carried out by the Government of Peru and what is expressed in numbers 48, 49, 50, 51, 52 y 53 of its document is not correct. A review of FENAMAD's Submission allows verifying that it is the Submitter himself who refers to Law Proposal 1123/2016-CR (pages 7 and 8 of the Submission), to the Opinion of Law 30723 (pages 7 and 9 of the Submission), to Report N 050-2017-CDR-OAGJ/SG/MC of the Ministry of Culture (page 20 of the Submission), to Report N 490-2017/MINAM/SG/OAJ of the Ministry of Environment (page 20 of the Submission) and Legal and Technical Report N 30-2017-SERNANP-DGANP-OAJ of the National Service for Protected Areas (page 20 of the Submission). Likewise, the annexes to the Submission refer to these and more documents that the Secretariat has analyzed in its determinations and notification.
16. In this sense, the statement given by the Government of Peru that the Secretariat has exceeded its functions is emphatically rejected. The Secretariat has made its analysis with independence and respecting the TPA procedures, based on Article 18.8 and 18.9 of the TPA.

(original signed)

Dino Delgado Gutiérrez

Executive Director

Secretariat for Submissions on Environmental Enforcement Matters

U.S. – Peru Trade Promotion Agreement