

**Secretariat for Submissions on Environmental Enforcement Matters
United States - Peru Trade Promotion Agreement
Notification in accordance with Article 18.9 (1)**

Submitter



[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 submitted by five Peruvian citizens.

Submission No:

SACA-SEEM/PE/002/2019

Date of receipt:

July 25, 2019

Date of notification:

July 13, 2020

The Secretariat for Submissions on Environmental Enforcement Matters, after reviewing Submission SACA-SEEM/PE/002/2019, and the response provided by the Government of Peru dated July 1st, 2020, and under Article 18.9 (1) of the United States—Peru Trade Promotion Agreement, considers that **the Submission merits the development of a Factual Record.**

I. INTRODUCTION

1. Any natural or legal person of the Governments that are 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 enforcement of environmental laws 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., in the United States.
3. The Secretariat, among its main functions, receives and considers submissions on Environmental Enforcement Matters (hereinafter “submissions”) filed by any natural or legal person of a Party, in accordance with 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 meet these criteria, 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 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 regarding 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 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 of Peruvian citizenship who identified their personal information as confidential (hereinafter, the Submitters) filed submission to the Secretariat, by electronic mail dated July 25, 2019, a Submission under Article 18.8 of the TPA; in which they assert the lack of effective enforcement by the Peruvian Government of Article 3 of Law N° 28694, Law that regulates the sulfur content in diesel fuel in Peru.
10. The Secretariat registered the Submission assigning it number SACA-SEEM/PE/002/2019.
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 Submitter with a copy to the EAC.
12. The Secretariat determined that Submission SACA-SEEM/PE/002/2019 meets what is stipulated in Article 18.8 (1) and the admissibility requirements of Article 18.8 (2) of the TPA.
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 dated October 18, 2019.
14. The Secretariat determined, through Determination SACA-SEEM/PE/002/2019/D2 dated April 2, 2020, that Submission SACA-SEEM/PE/002/2019 merits a response from the Peruvian Government.

15. The Peruvian Government requested an extension to the deadline to respond to Determination SACA-SEEM/PE/002/2019/D2, in accordance with the provisions of article 18.8 (5) of the TPA.
16. The Peruvian Government provided a response with the document named “Regarding the Submission on Environmental Enforcement Matters SACA-SEEM/PE/002/2019 – Position of the Peruvian Government (hereinafter, “Response of the Peruvian Government”) sending it to the Secretariat on June 1, 2020, via electronic mail.
17. In this stage, it is the responsibility of the Secretariat to inform the EAC if Submission SACA-SEEM/PE/002/2019 warrants the development of a Factual Record.

II. ANALYSIS

On the criteria provided by the Party under Article 18.8 (5) of the TPA

18. Under what is established in Article 18.8 (5) of the TPA, the Secretariat requested a response of the Party, regarding:

“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 the Party wishes to submit, such as:

(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.

19. On the issue, the Peruvian Government has stated the following:

“(…) in consultation with the Public Prosecutors of the aforementioned ministries, there is no ongoing or judicial proceeding under Law No. 28694; additionally, there is no procedure on the matter in administrative channels ”

“(…) in accordance with the provisions of Article 18.8 (5) of the TPA, the Peruvian Government informs the Secretariat that the specific matter in question is not the subject of a pending judicial or administrative proceeding and that it has not previously been subject of a judicial or administrative process.

20. The Peruvian Government has not mentioned *“iii) information concerning relevant capacity-building activities under the ECA”* in accordance with Article 18.8 (5) (b) (iii) of the TPA.

21. In its response, the Peruvian Government puts forth additional matters that the Secretariat proceeds to consider.

On meeting the requirements of Article 18.8 (2) of the TPA

22. The Peruvian Government, in its response document, states:

“14. (...) that the communication had been addressed to the Congress of the Republic of Peru as the relevant institution is appreciated.”

“16. Following the provisions of the aforementioned law, the Congress of the Republic has the responsibility of issuing the laws; while the Executive Power, represented by the President of the Republic, regulate the laws; as well as issuing decrees and resolutions.”

“19. In accordance with the provisions of Article 3 of Law N 28693, the Ministry of Economy and Finance (hereinafter MEF), as well as CONAM (today the Ministry of the Environment, hereinafter MINAM), according to Legislative Decree N 1013 published in the Official Gazette of El Peruano on May 14, 2008 – both belonging to the Executive Branch – are the entities in charge of approving the index of noxiousness, so the Congress of the Republic has no power in establishing said index through supreme decrees, nor in enforcing said index in determining the Selective Consumption Tax (hereinafter ISC). In effect, in accordance with the provisions of Article 3 of Law N 28694, the Index of Noxiousness of Fuels (hereinafter INC) will be approved by a supreme decree signed by the President of the Republic and countersigned by the MEF in coordination with MINAM; while the ISC, is established according to Article 61 of the Single Ordered Text (TUO) of the General Sales Tax (IGV) Law by means of a Supreme Decree signed by the President of the Republic and countersigned by the MEF.”

“22. In accordance with the aforementioned statements, it is clear that the Submission does not meet the requirement regarding the communication process followed by the Submitters to the relevant institutions of the Peruvian Government (...).”

23. In effect, as mentioned in the Peruvian Government’s response, the Submitters sent a communication to the Congress of the Republic prior to filing Submission SACA-SEEM/PE/002/2019.

24. The Secretariat considered that the requirement of Article 18.8.2 (e) of the TPA has been met, since, as the Submitters themselves note, due to the principle of legality of the tax and budgetary regime enshrined in Article 74 of the Political Constitution of Peru, *“the taxes are created, modified or repealed, or an exemption is established, exclusively by law or legislative decree in the case of delegation of powers, except for tariffs and rates which are regulated by supreme decree. (...)”*

25. Additionally, Congress has powers such as political control, among other specific functions. The Political Constitution of Peru and the Regulations of the Congress recognize the supervisory function of Congress and states the following on this:

“Article 97.- Fiscal Function. Congress may initiate investigations on any matter of public interest (...) to accomplish their purposes, such committees may have access to any information (...)”(Political Constitution of Peru, 1993)

“Function of Political Control. Article 5. The function of political control includes (...) the acts of the administrative offices and the authorities of the Government, the exercise of the delegation of legislative powers, the issuance of emergency decrees and the audit of the use and disposal of public goods and resources (...)”(Rules of Congress of the Republic, 2020)

26. Therefore, and taking into account the purpose of the requirement established in sub-paragraph (e) of Article 18.8.2 of the TPA, the Secretariat considers that the Submitters have complied with communicating the matter to a relevant authority of the Party. This communication can be shared without any problem through the internal mechanisms of the Peruvian Government itself.
27. The Secretariat further considers that there should be no undue burden placed on the submitters to file submissions, as the requirements of Article 18.8.2 should have a relatively low threshold compared to those required under an international judicial procedure.

On the considerations of Article 18.8.4 (a) of the TPA

28. The Peruvian Government, in its response, mentions that:

“33. The Submission filed does not assert any harm to the people who make the Submission. The Submitters have not presented information that demonstrates that they have suffered any harm and the only mention made in point 5 of the Submission, is that of an alleged study on air quality, which is not adequate nor applicable in demonstrating the existence of real harm to the Submitters. ”

“34. The Submission refers to environmental damage in the atmosphere (represented in GHG emissions) and indicates in paragraph 8 of the Submission that it would have a diffuse, general and intergenerational scope. However, in Article 18.8.4 a) of the TPA, it is clearly established that harm done to the applicants must be asserted, which is why such claim would not be supported. ”

29. The emission of greenhouse gases (GHG) from burning fossil fuels affects the entire population of Peru. The connection between greenhouse gas emissions, climate change and human health has been sufficiently documented in national and international literature.
30. Sub-paragraph (a) of Article 18.8.4 of the TPA does not determine that it is necessary to delimit the harm only to the applicants. Likewise, it does not establish what type of harm

should be asserted. Therefore, the fact that the harm is “diffuse, general and intergenerational” does not in any way delegitimize the Submission.

On the approval of the Index of Noxiousness of Fuels and introduction of the criterion of proportionality to the degree of noxiousness in the Selective Consumption Tax

31. The Peruvian Government, in its response, mentions that:

“41. Regarding this matter, it is necessary to indicate that the last INC approved for the 2018-2019 period, remains in force until its update, that is, it does not expire (...).”

“43. (...) Therefore, following the provisions of both the Constitution itself, and the Constitutional Court and majority doctrine, the last INC approved is still in force, as it has not been modified, suspended or repealed by another regulation. For this reason, the Peruvian Government is in compliance with the provisions of Article 3 of Law No. 28694.”

“54. Although Supreme Decree N 211-2007-EF established a schedule with the fixed amounts of the ISC for fuels determined according to their noxiousness until 2016, the tax proposed in said schedule is referential, and represents the desirable direction towards which the tax policy tends in relation to updating the ISC on fuels; but not a commitment to annually modify said tax.”

“57. The inclusion of the INC as one of the criteria to consider in determining the fixed amounts of the ISC is important, since it establishes functional parameters of the greater or lesser tax burden by the ISC. It should be noted that the INC is one of the criteria to be used to determine the ISC applicable to fuels, but it does not establish direct values related to the amount of the ISC (...).”

“60. It should be noted that the Peruvian Government has not only complied with Article 3 of Law N 28694, but has also carried out a series of necessary actions that respond to the objective established in Article 18.1 of the TPA regarding ensuring laws and policies that provide and encourage high levels of environmental protection (...).”

32. In accordance with the provisions of Submission SACA-SEEM/PE/002/2019, the Peruvian Government has not effectively enforced Article 3 of Law No. 28694, since the index of noxiousness of fuels has been approved without continuity and in an infrequent manner.

33. As observed in the Supreme Decree No. 006-2014-MINAM published on May 1, 2014, which approved the index of noxiousness of fuels for the 2014 – 2015 period, in which the following is expressly stated in the considerations section: *“That through Supreme Decree No. 211-2007-EF and amendments, fixed amounts of the Selective Consumption Tax were established, applicable to fuels as determined based on the criterion of proportionality to the degree of noxiousness of the pollutants they contain for the population, considering the index of noxiousness of fuels approved by Executive Board Decree No. 018-2005-CONAM-CD”*. Additionally, in a subsequent recital of the same Supreme Decree No. 006-2014-MINAM, it is noted that *“the Ministry of the Environment, through the General Directorate*

of Environmental Quality, has prepared the Index of Noxiousness of Fuels for the 2014 - 2015 Period with information on emission factors by pollutant and weighting according to toxicity level”.

34. What is stated in the aforementioned decree, initialed and signed by the President of the Republic and the ministers of the MEF and MINAM who held these positions in Peru in 2014, shows that the public entities of the Peruvian Government and those responsible for complying with the imperative mandate included in Article 3 of Law No. 28694 (referring to the fact that each year starting from 2008, without exception, the relative index of noxiousness of fuels is approved), have accepted in an expressly manner that up until the time of approval of said device (May 2014), the annual obligation to determine the aforementioned indices had not been met in Peru, which is why in Supreme Decree No. 006-2014-MINAM, the Directive Council Decree is taken as an immediate antecedent that was approved in 2005 by the National Environment Council - CONAM.
35. Additionally, Supreme Decree No. 006-2014-MINAM was issued in May 2014, since the regulations in Peru, unless otherwise stated, come into force from the day following their publication¹. Therefore, even during the first four (4) months of 2014, from January to April, there was also no index of noxiousness of fuels, which was enforced only starting in May of that year.
36. Furthermore, by means of Supreme Decree No. 003-2018-MINAM, published on May 9, 2018, the index of noxiousness of fuels for the 2018 - 2019 period was approved. In the considerations section of that regulation the following is expressly stated: *"that, Article 3 of Law No. 28694 (...) establishes that the Ministry of the Economy and Finance, in coordination with the Ministry of the Environment, will annually approve the index of relative noxiousness of fuels"*.
37. As stated in a subsequent section of the same considerations section of the Supreme Decree No. 003-2018-MINAM, the following is added, *"(...) by means of Supreme Decree No. 006-2014-MINAM, endorsed by the Ministers of Environment and Economy and Finance, the Index of Noxiousness of Fuels for the 2014-2015 Period was approved"*. Lastly, in a subsequent recital the following is mentioned in the decree, that *"(...) it is necessary to approve the Index of Noxiousness of Fuels for the 2018 - 2019 Period"*.
38. As mentioned previously, what is stated in the aforementioned Supreme Decree No. 003-2018-MINAM shows that the public entities that are members of the Peruvian Government and responsible for complying with the imperative mandate contained in Article 3 of Law No. 28694, have undoubtedly accepted that up until the approval of said device (May 2018), the closest antecedent of approval of the index of noxiousness of fuels is that corresponding to the years 2014 and 2015.
39. Likewise, similar to what happened in 2014, Supreme Decree No. 003-2018-MINAM was also approved in the month of May, this time in 2018, which means that the index of

¹ Article 109 of the Political Constitution of Peru establishes that "The law comes into force the day following its publication in the official gazette, unless a provision of the same law delays its effect in whole or in part."

noxiousness of fuels, to which said device refers, is in force from the month of May 2018 onwards, which is why there was no annual update of such index in the months of January to April 2018, either.

40. In addition to the aforementioned statement, it is necessary to highlight that both in Supreme Decree No. 003-2018-MINAM, and in Supreme Decree No. 003-2018-MINAM, the index of noxiousness of fuels was approved for two-year periods. (2014 - 2015 and 2018 - 2019, respectively), which is not consistent with Article 3 of Law No. 28694, which provided that said index must be approved annually, an issue also expressly mentioned in the two supreme decrees mentioned in this paragraph.
41. In this regard, it is important to highlight that the mandatory and specific legal requirement of Article 3 of Law No. 28694, which is also precisely the central subject of Submission No. SACA-SEEM/PE/002/2019, consists of the Peruvian Government annually approving the index of noxiousness of fuels from the year 2008 to 2016 inclusive.
42. According to the available information, the Peruvian Government determined the index of noxiousness of the periods 2014-2015 and 2018-2019, which is the reason for Article 3 of Law No. 28694 not being effectively enforced in the annual approval of the index of noxiousness of fuels for the years: 2008, 2009, 2010, 2011, 2012, 2013, 2016, 2017 and so far in 2020.
43. Additionally, Article 3 of Law No. 28694 requires that the approval of the index of noxiousness of fuels be gradually adjusted every year. The aforementioned gradual adjustment would not have occurred because no index of noxiousness of fuels was approved in most years since 2008 that would allow such gradual adjustment to be determined.
44. In addition to this, Article 3 of Law No. 28694 requires that, as of January 1, 2016, the gradualness in the index of noxiousness of fuels cease, and that, from that date onwards, the criteria of noxiousness be fully considered.
45. Lastly, the final section of Article 3 of Law No. 28694, establishes that as of 2016 the taxes levied on fuels fully considers the criteria of noxiousness. Therefore, it is important to mention that the ISC is not the only tax levied on fuels, which requires the analysis of whether these other taxes, such as general sales tax, road tax and import duties, have been considered in the restructuration to which Article 3 of Law No. 28694 refers.

III. ON THE DEVELOPMENT OF THE FACTUAL RECORD

46. In accordance with Article 18.9 (1) of the TPA, *"If the Secretariat considers that the Submission, in light of any response offered by the Party, warrants the development of a factual record, the Secretariat will inform the Council of this decision and will present its reasons"*.

47. Having taken into consideration the response of the Peruvian Government, the Secretariat considers that the Submission contains central issues that must be addressed and developed in further detail. Therefore, the Secretariat recommends the development of the Factual Record regarding the effective enforcement of Article 3 of Law N° 28694, Law that regulates the sulfur content in diesel fuel. The Factual Record will be developed taking into consideration the regulatory steps taken by the Peruvian Government in its response to the Secretariat.

IV. NOTIFICATION

48. The Secretariat, addressing the aforementioned reasons and acting in accordance with that established in Article 18.9 (1) of the TPA, considers that Submission SACA-SEEM/PE/002/2019 warrants the development of a Factual Record, in the matters described in paragraphs 41, 42, 43, 44, 45 and 47 of this notification.

49. In accordance with that established in Article 18.9 (1) of the TPA, the Secretariat notifies the Council of Environmental Affairs of the TPA of its decision, respectfully submitting it for their consideration.

50. In accordance with that established in Article 18.9 (2) of the TPA, *“The secretariat shall prepare a factual record if any member of the Council instructs it to do so”*.

(original signed)

Dino Delgado Gutiérrez

Executive Director

Secretariat for Submissions on Environmental Enforcement Matters

United States-Peru Trade Promotion Agreement