

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

Submitters: [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 Matters of Environmental Enforcement filed by the submitters.

Submission No.: SACA-SEEM/PE/001/2022

Date of receipt: November 27, 2022

Date of determination: December 21, 2022

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 United States--Peru Trade Promotion Agreement, considers that the submission meets the criteria for submission established in article 18.8 (2), for the reasons stated in the following Determination.

Criteria of article 18.8 (2) of the United States– Peru Trade Promotion Agreement	Meets		Justification
	Yes	No	
<i>The Secretariat may consider a submission under this article if it finds that the submission:</i>			
<i>(a) is in writing in either English or Spanish;</i>	X		Submission SACA-SEEM/PE/001/2022, 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/001/2022 was filed by seven natural persons from Peru, duly identified. These people have requested to maintain the confidentiality of their personal data, in accordance with the provisions of 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 identification of the environmental 'laws of which the failure to enforce is asserted;</i>	X		Submission SACA-SEEM/PE/001/2022 provides sufficient information that has allowed the Secretariat to review it. Likewise, it identifies the law that the Government of Peru would have failed to enforce effectively.
<i>(d) appears to be aimed at promoting enforcement rather than at harassing industry;</i>	X		Submission SACA-SEEM/PE/001/2022 appears to be aimed at promoting the effective enforcement of the Party's environmental law and does not indicate that it seeks to harass an 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/001/2022 attaches a copy of a written communication addressed to 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/001/2022 is filed by seven natural persons from Peru, duly identifying themselves with their full names and national identity document number.

I. INTRODUCTION

1. Any person of the Parties to the United States—Peru Trade Promotion Agreement (TPA) may file a submission to the Secretariat for Submissions on Environmental Enforcement Matters (hereinafter, the "Secretariat") claiming that one of the Parties is failing to effectively enforce their environmental law, 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," which creates the Secretariat. A Memorandum of Understanding was also signed with the Organization of American States (OAS) whereby it is agreed that the OAS will house and support the Secretariat at its headquarters in Washington D.C., United States.
3. One of the main functions of the Secretariat is to receive and consider submissions on Environmental Enforcement Matters (hereinafter, "submissions") filed by natural or legal persons of any of the Parties, in accordance with the provisions of article 18.8 of the TPA.

4. The Secretariat determines the admissibility of the filed submissions, in accordance with the concurrent criteria of paragraph 2 of article 18.8 of the TPA. In case the submissions meet said criteria, the Secretariat will determine if they 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 from the Party or once the term established in article 18.9 of the TPA for receiving said response has expired, whether it warrants the development of a factual record. If the Secretariat determines that the development of a factual record is not warranted, the submission file is closed, thus concluding the process.
6. In case the Secretariat determines that the development of a factual record is warranted, it will notify this decision to the Environmental Affairs Council (EAC) of the TPA in compliance with article 18.9 of the TPA.
7. The Secretariat develops a Factual Record if any member of the EAC so orders.
8. Seven submitters who identified their personal information as confidential (hereinafter, the “submitters”) filed a submission under article 18.8 of the TPA to the Secretariat, via email dated November 27, 2022, in which they assert the failure of effective enforcement of the Second Complementary Transitory Provision of the Environmental Management Regulation of the Agriculture Sector approved by Supreme Decree No.019-2012-AG.
9. The Secretariat registered the submission as SACA-SEEM/PE/001/2022.
10. The Secretariat acknowledged receipt of the submission via email dated November 28, 2022, through letter SACA-SEEM/PE/001/2022, addressed to the submitters with a copy to the EAC.
11. After reviewing the submission in light of paragraphs 1 and 2 of article 18.8 of the TPA, the Secretariat considers the submission SACA-SEEM/PE/001/2022 meets all the admissibility criteria, for the reasons set forth below.

II. ANALYSIS

A. **Regarding 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 failing to effectively enforce its environmental laws.
14. Seven submitters of Peruvian nationality signed the submission SACA-SEEM/PE/001/2022.
15. The submitters assert that the Government of Peru has not effectively enforced the Second

Complementary Transitory Provision of the Environmental Management Regulation of the Agriculture Sector.

16. It should be noted that, likewise, the submitters indicate, in item III d) of their submission, that the non-compliance with the aforementioned environmental law does not follow article 118.1 of the Political Constitution of Peru, which expressly states that it is the responsibility of the President of the Republic to comply with and enforce laws nor does it follow article 8.1 of the Organic Law of the Executive Power, Law 29158, which states that the responsibility of the President of the Republic is to comply with and enforce the Political Constitution of Peru, treaties, laws and other legal provisions.
17. In this regard, we understand that item III d) of the submission was included to highlight the role that corresponds to the Executive Branch in relation to complying with and enforcing the laws of the Republic of Peru. Accordingly, the submitters do not classify these norms (article 118.1 of the Political Constitution of Peru and article 8.1 of the Organic Law of the Executive Power) as environmental law. This assertion is consistent with article 18.14 of the TPA.

B. On the environmental law asserted

18. 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 or health, 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 areas¹; 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 any statute or regulation, or provision thereof, directly related to worker safety or health.”*

19. Article 18.14 of the TPA further establishes that the laws and regulations are:

“Laws, regulations, and all other measures to fulfill its obligations under a covered agreement means a Party’s laws, regulations, and other measures at the central level of government. (...)

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

¹ ¹² The Parties recognize that such protection or conservation may include the protection or conservation of biological diversity

a) On the Environmental Management Regulation of the Agriculture Sector

20. The submitters asserts that the Government of Peru has ceased to effectively enforce the Second Complementary Transitory Provision of the Environmental Management Regulation of the Agriculture Sector, which states the following:

REGULATION OF ENVIRONMENTAL MANAGEMENT OF THE AGRICULTURE SECTOR. SUPREME DECREE No.019-2012-AG.

TRANSITORY SUPPLEMENTARY PROVISIONS

SECOND. – Environmental Adjustment

Within a period of no more than one hundred and eighty (180) business days, the Ministry of Agriculture will approve, by means of a Ministerial Resolution, the Schedule for the Environmental Adjustment of the ongoing activities under the responsibility of the Agriculture Sector.

Said Schedule will establish the deadlines for the presentation of the environmental management instrument (DAAC or PAMA), and for environmental adjustment.

If the owner of the activity in progress does not make the environmental adjustments according to the provisions of this Regulation and within the deadlines established in the Schedule, the owner will be subject to the administrative sanctioning procedure, in accordance with the current legal framework.

21. To understand the scope of this Complementary Provision, it is appropriate to present some normative provisions contained in this Regulation.
22. The content of this Regulation is presented below with regards to the purpose of this regulation, the responsibilities and obligations of the holders of agricultural activities, as well as the applicable environmental management instruments, which is presented below:

REGULATION OF ENVIRONMENTAL MANAGEMENT OF THE AGRICULTURE SECTOR

TITLE I

GENERAL DISPOSITIONS

Article 1.- Purpose

The purpose of this Regulation is to promote and regulate environmental management in the development of activities under the jurisdiction of the Agriculture Sector in accordance with article 4, paragraph 4.2 of Legislative Decree No. 997 - Law of Organization and Functions of the Ministry of Agriculture and its Regulation of Organization and Functions, approved by Supreme Decree No. 031-2008-AG; as well as the conservation and sustainable use of renewable natural resources, water, soil, flora and fauna, which are under the administration of the Agriculture Sector. Likewise, the Regulation also aims to regulate the instruments of environmental management, the procedures, measures and other specific aspects for the activities under the scope of the

Agriculture Sector.

**TITLE VII
RESPONSIBILITIES AND OBLIGATIONS
CHAPTER I
OWNER'S RESPONSIBILITIES AND OBLIGATIONS**

Article 66.-The owner's environmental responsibility

The owner of any activity included within the scope of the Agriculture Sector is responsible for emissions, effluents, sewage, discharge of pollutants, solid waste, noise, as well as harm to human health or safety, to ecosystems, natural resources, biological diversity in its multiple forms and any other aspect that occurs as a result of its operations and/or activities. Consequently, it must adopt the appropriate prevention, control, mitigation, recovery, rehabilitation, or compensation measures in environmental terms, in accordance with the mandates established in this Regulation and the other relevant regulations, in order to minimize negative environmental impacts of its activity and magnify its positive impacts.

Article 67.- The owner's obligations

Without prejudice to compliance with the general provisions of environmental protection, the owner of any activity included within the scope of the Agriculture Sector is obliged to:

- 1. Execute its project, work or activity, according to the guidelines of the National Environmental and sectoral Policy, as well as the conditions, mandates, and limitations established in the environmental management instruments of the Agriculture Sector.*
- 2. Prepare, submit for approval, and execute, if applicable, the environmental management instruments established in this Regulation.*
- 3. Adopt measures to prevent and minimize possible damage to renewable natural resources when necessary, considering the ecosystems, habitats, species of wild flora and fauna, and the genetic material they contain. Complementarily, control, management, and recovery measures must be implemented, as required by law...*

**ANNEX II
GLOSSARY OF TERMS**

Environmental management instruments.- *They are guiding environmental management mechanisms for compliance with the National Environmental Policy based on the principles established in the General Environmental Law, its complementary and regulatory standards. They constitute operational means that are designed, regulated, and applied with a functional or complementary nature, to enforce compliance with the National Environmental Policy and the environmental regulations that govern the country.*

This definition includes both environmental studies and environmental management instruments for environmental adjustment and management and environmental instruments complementary to the National Environmental Impact Assessment System (SEIA).

Environmental Adjustment and Management Program (PAMA).- *It is an environmental management instrument designed to facilitate the adjustment of an economic activity to new environmental obligations and has to ensure its due compliance within the timeframe established by the respective norms through explicit environmental performance goals, and a progress compliance schedule, as well as the corresponding prevention, control, mitigation, recovery and eventual compensation measures. Its objective is to prevent, progressively adjust or mitigate, within a rational timeframe, the negative environmental impacts that an ongoing activity has been causing, and must, to this end, include the proposals for action and the necessary programs to incorporate clean technologies, good practices and/or alternative measures for prevention of pollution and/or deterioration of the components of the environment or natural resources, considering the environmental quality standards and maximum permissible limits established in current environmental norms.*

23. The submission notes the failure of effective enforcement of a Transitory Provision of the Environmental Management Regulation for the Agriculture Sector of 2012 that would allow for the requirement to present environmental management instruments applicable to ongoing activities at the time when this Regulation was approved in order to achieve the environmental adjustment of these activities. Therefore, the law that is the focus of the submission under analysis is included in the concept of "environmental law" established in the TPA as long as said Regulation establishes rules applicable to potential environmental impacts of agricultural activities, particularly in reference to the establishment of measures through environmental management instruments to achieve the prevention of contamination and/or deterioration of natural resources related to these activities.

C. On meeting the admissibility criteria of article 18.8 (2)

24. Article 18.8 (2) of the TPA establishes six criteria that all submissions must meet concurrently to be considered by the Secretariat. Below is the review of the aforementioned requirements:

a) *[if]* it is in writing in either English or Spanish

25. The submission SACA-SEEM/PE/001/2022, as well as all additional documentation submitted by the submitters, is written in Spanish.
26. The Secretariat considers the submission meets the criteria of article 18.8 (2) (a).

b) *[if]* it clearly identifies the person making the submission

27. Submission SACA-SEEM/PE/0021/2022 was filed by seven persons of Peruvian nationality.

28. The submitters have provided their full names, as well as their national identity documents' number.
29. The submitters have indicated that they wish to maintain the confidentiality of their personal data, in accordance with the provisions of article 8 of the Understanding for Implementing Article 18.8 of the United States–Peru Trade Promotion Agreement.
30. The Secretariat considers that the submission meets the criteria of article 18.8 (2) b).

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

31. The Submission under review offers the following information:
 - The Draft Environmental Management Regulation of the Agriculture and Irrigation Sector in public consultation through Ministerial Resolution No.0141-2022-MIDAGRI.
 - The Report of the Ombudsman's Office No. 001-2017-DP "*Deforestation due to agro-industrial crops of palm oil and cacao- Between the illegality and inefficiency of the Government*".
 - The academic article *Deforestation risks posed by palm oil expansion in the Peruvian Amazon* written by Varsha Vijay et al. and published in the Environmental Research Letter. 13 (2018).
32. According to what was analyzed in this Determination, the SACA-SEEM/PE/001/2022 submission includes sufficient information that allows the Secretariat to review it, as well as to identify the environmental laws that the Government of Peru would have failed to effectively enforce.
33. Attached to the submission is the letter the submitters sent to the Government of Peru regarding the failure of effective enforcement of the Second Complementary Transitory Provision of the Environmental Management Regulation of the Agriculture Sector approved by Supreme Decree No.019-2012-AG.
34. The Secretariat considers that the submission meets the criteria of article 18.8 (2) (d).

d) *[if]* it appears to be aimed on promoting enforcement rather than harassing industry

35. Submission SACA-SEEM/PE/001/2022 appears to be aimed at promoting the effective enforcement of the law. The Secretariat considers the submission does not indicate it seeks to harass an industry.

36. The Secretariat considers that the submission meets the criteria of article 18.8 (2) (d).

e) *iff* it indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any

37. Submission SACA-SEEM/PE/001/2022 provides information in a communication in writing, addressed by the submitters to a relevant authority of the Party.

38. This communication was addressed to the Ministry of Agricultural Development and Irrigation (MIDAGRI), and a copy of it was sent to the Ministry of the Environment (MINAM).

39. In this regard, it should be noted that MIDAGRI is responsible for issuing sectoral environmental regulations, as established in article 10 of the Regulations of the Framework Law of the National Environmental Management System, Law No. 28245, which establishes that the Ministries are responsible for environmental regulation of productive, trade, and service activities that are within their scope of competence.

40. In turn, MINAM, in its capacity as governing body of the National Environmental Impact Assessment System (SEIA) and in accordance with the provisions of paragraph c) of article 17 of the SEIA Law, Law No. 27446, is responsible for issuing a prior favorable opinion regarding the aforementioned sectoral environmental regulation issued by MIDAGRI.

41. The Secretariat considers that the submission meets the criteria of article 18.8 (2) (e).

f) *iff* it is submitted by a person of a Party, except as provided in paragraph 3

42. The submission SACA-SEEM/PE/001/2022 is filed by seven natural persons of Peruvian nationality, duly identifying themselves, providing their National Identity Document number.

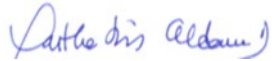
43. The Secretariat considers that the submission meets the criteria of article 18.8 (2) (f).

III. DETERMINATION

44. For the reasons stated above, the Secretariat considers that submission SACA-SEEM/PE/001/2022 asserts the failure of enforcement of the environmental law of a Party, in accordance with the provisions of paragraphs 1 and 2 of article 18.8 of the TPA.

45. Therefore, the Secretariat determines that the Submission complies with the provisions of paragraphs 1 and 2 of article 18.8 of the TPA.

46. Pursuant to article 18.8(4), the Secretariat will determine whether the submission merits a response from the Party.



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United States - Peru Trade Promotion Agreement