

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

Submitters: [REDACTED] and Derecho, Ambiente y Recursos Naturales (DAR)

Party: Peru

Reference: Submission on Environmental Enforcement Matters filed by the submitters

Submission N°: SACA-SEEM/PE/001/2022

Date of receipt: November 27, 2022

Date of Notification: August 19, 2023

The Secretariat for Submissions on Environmental Enforcement Matters, after reviewing Submission SACA-SEEM/PE/001/2022, and the response provided by the Government of Peru dated June, 27 2023, 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

- a) Any person of a Party of the United States-Peru Trade Promotion Agreement (TPA) may make 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.
- b) On June, 2015, the Parties signed the “Understanding for Implementing Article 18.8 of the United States—Peru Trade Promotion Agreement,” which established the Secretariat. 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.
- c) The Secretariat, among its main functions, receives and considers Submissions on environmental enforcement matters (hereinafter “Submissions”) filed by any person, natural or legal, of a Party, in accordance with the provisions of Article 18.8 of the TPA.
- d) The Secretariat determines the eligibility of the Submission, in accordance with the criteria 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.

- e) The Secretariat will determine, once it has received a response from the Party or once the timeline set forth in Article 18.9 of the TPA in which such response is received has been met, whether the preparation of a Factual Record is warranted. If the Secretariat determines that the preparation of a Factual Record is not warranted, the process is then terminated with respect to that Submission.
- f) 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.
- g) The Secretary prepares a Factual Record if any member of the EAC so orders.
- h) 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. Likewise, the Submitters indicated that, under the provisions of literal a) of Article 8 of the Understanding, they request that the confidentiality of their personal data be granted before the Government of Peru and the Government of the United States of America.
- i) The Secretariat registered the Submission as SACA-SEEM/PE/001/2022.
- j) 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. In said communication, the Secretariat granted the confidentiality requested by the Submitters.
- k) On November 30, 2022, at the EAC meeting held in Washington D.C., the Secretariat informed the Council of the receipt of this Submission, including the reference to the requested confidentiality; pending the issuance of the opinion of the EAC regarding the scope of the interpretation of the aforementioned Article 8 of the Understanding.
- l) On December 21, 2022, the Secretariat issued Determination SACA-SEEM/PE/001/2022/D1, where it was indicated that Submission SACA-SEEM/PE/002/2022 complies with the provisions of Article 18.8 (1) and with the admissibility requirements contained in Article 18.8 (2) communicating it to the Submitters and to the Environmental Affairs Council by email of the same date.
- m) As of March 22, 2023, the Secretariat received a letter sent by Derecho, Ambiente y Recursos Naturales (DAR) through which that civil society organization adheres to all ends of the present Submission. On the same date, the Secretariat informed the EAC of the receipt of

this communication.

- n) As of March 28, 2023, upon request of the Secretariat, DAR sent, through email, information about the legal status of its organization.
- o) On April 4, 2023, the Secretariat received instructions from the EAC regarding the scope of Article 8 of the Understanding. These instructions indicate that this rule does not establish the non-disclosure of confidential information to the Parties, but to the public, which is why the Secretariat, in this case, may not grant the confidentiality requested by the Applicants. At the same time, the EAC suggested that the Secretariat inform the Submitters about the scope of Article 8 of the Understanding, since in case the Submitters wish to continue with this Submission, their personal information will be protected from being disclosed under the aforementioned scope of Article 8 of the Understanding and that, alternatively, the Submitters could withdraw their Submission and explore other options such as working with a civil society organization to resubmit the Submission so as not to disclose their confidential information to the Parties.
- p) On April 12, 2023, the Secretariat informed the EAC that on that same date it had held a virtual meeting with the Submitters in this case and that most of them expressed their oral consent to the disclosure of their personal information to the EAC. In turn, at that meeting a person had mentioned its decision to present a withdrawal on an individual basis, procedure which was consulted to the EAC, having received the acceptance by the representatives of the United States and Peru, through emails dated April 17 and April 18, respectively.
- q) On April 18, 2023, the Secretariat sent a communication via email requesting a written expression of the names of the Submitters who express their consent to the disclosure of their personal data to the Parties.
- r) On April 19, 2023, the Secretariat received a response from the Submitters indicating the full name of the 5 applicants who agree to the disclosure of their personal information, which was informed by the Secretariat to the Parties by email of the same date.
- s) On April 20 and 25, 2023, the Secretariat received two documents with the withdrawal of 2 of the Submitters in this case.
- t) The Secretariat, through Determination SACA-SEEM/PE/001/2022/D2 dated April 26, 2023, indicated that Submission SACA-SEEM/PE/001/2022 merited a response from the Peruvian Government.
- u) The Peruvian Government requested an extension of the deadline to respond to Determination SACA-SEEM/PE/001/2022/D2, in accordance with the provisions of Article 18.8 (5) of the TPA.
- v) The Peruvian Government responded through the document titled "Regarding the Submission on Environmental Enforcement Matters SACA-SEEM/PE/001/2022 – Position

of the Peruvian Government” (hereinafter “Response of the Peruvian Government”) and sent it to the Secretariat on June 27, 2023 via email.

- w) Upon receipt of the response from the Peruvian Government, this Secretariat identified that the information requested in item 36 of Determination SACA-SEEM/PE/001/2022/D2 had not been included. For this reason, the Secretariat requested, via email dated July 6, 2023, that the Peruvian Government send the indicated information as soon as possible.
- x) The Peruvian Government, via email dated July 19, 2023, responded to what was requested by the Secretariat.
- y) It is the responsibility of the Secretariat, at this stage, to inform the EAC if Submission SACASEEM/PE/001/2022 merits the development of a Factual Record.

II. ANALYSIS

A. On the information provided by the Party under Article 18.8 (5) of the TPA

26. Pursuant to the provisions of Article 18.8 (5) of the TPA, the Secretariat, in item 36 of Determination SACA-SEEM/PE/001/2022/D2, requested a response from the Party on:

- “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.”*

27. In this regard, the Peruvian Government, by email dated July 19, 2023, has indicated the following:

“...we inform you that... the specific matter in question is not nor has been the subject of a pending judicial or administrative proceeding, nor has it previously been the subject of a judicial or administrative proceeding, nor have remedies been requested or available, and this issue has not been the subject of capacity building activities under the ECA.”

28. In its response, the Peruvian Government raises other additional points that the Secretariat proceeds to consider.

B. On compliance with the criteria of Article 18.8 (2) (c) of the TPA

29. The Peruvian Government, in its response document, indicates that the filed submission does not meet the admissibility criteria established in Article 18.8 (2) (c) of the TPA that refers to providing sufficient information to allow the Secretariat to review the submission, including documentary evidence. It also notes that the submission has not presented sufficient grounds to establish a legal basis for non-compliance with the TPA, and therefore it should have been rejected *in limine* at the appropriate time. In particular, they point out that the documentation presented in the submission is not sufficient, as it is not directly linked to the subject of the submission, does not prove any non-compliance of the TPA, nor does it have scientific evidence.

30. In this regard, we acknowledge that the Party has issued an opinion in relation to the analysis carried out by the Secretariat in relation to compliance with Article 18.8 (2) (c) which is expressed in items 31, 32, 33 and 34 of Determination SACA-SEEM/PE/001/2022/D1 (Determination 1), that indicated that the information presented in the submission, in opinion of the Secretariat, does comply with the TPA as long as it constitutes sufficient information to allow its assessment.

31. Here it should be noted that the procedure established in Chapter 18 of the TPA regarding submissions does not include a stage in which a Party's opinion is requested prior to the issuance of Determination 1, that is the document in which the admissibility analysis of the submission is developed.

32. In addition to what has been stated, it should be noted that the Peruvian Government, in relation to this matter, has indicated that "sufficient grounds, including documentary evidence, have not been presented to establish a legal basis for non-compliance with the TPA."

33. In this regard, it should be noted that it is not the function of this Secretariat to issue an opinion on non-compliance with the TPA, as this Secretariat does not constitute a jurisdictional or decision-making body on compliance with an international treaty such as the TPA.

C. On compliance with the criteria of Article 18.8 (4) (a) of the TPA

34. The Peruvian Government, in its response document, also indicates that the submission filed does not comply with the criteria established in Article 18.8 (4) (a) of the TPA referring to the environmental harm asserted since no information has been submitted. that demonstrates that the submitters have suffered any actual harm. In relation to Report No.00028-2022-

OEFA/DSP of August 16, 2002, issued by the Directorate of Environmental Supervision in Productive Activities of the Agency for Environmental Assessment and Enforcement (OEFA), and Report No.001-2017-DP titled "Deforestation due to agro-industrial crops of palm oil and cacao: Between the illegality and the inefficiency of the Government" issued by the Ombudsman's Office in June 2017, they indicate that these constitute documents that seek to emphasize the enforcement role of OEFA and the environmental problems related to the development of agro-industrial activities. In turn, it is noted that these do not constitute binding documents that issue recommendations addressed to the government administration and do not make direct reference to the subject matter of the submission.

35. In this regard, we acknowledge that the Party has issued an opinion regarding the analysis carried out by the Secretariat in relation to compliance with Article 18.8 (2) (c) which is stated in items 22, 23, 24 and 25 of Determination SACA-SEEM/PE/001/2022/D2 (Determination 2) that indicates that the information presented in the submission, in opinion of the Secretariat, does comply with the TPA in relation to the environmental harm asserted.
36. As mentioned before, it should be noted that the TPA does not regulate a stage to transfer the submission to the Party in order to receive their considerations as a step prior to the issuance of Determination 2, which is the document in which the analysis on whether a response of a Party is merited. which elaborates on the substantive matters of the submission.
37. However, it should be noted that the mentioned reports have been issued by competent authorities in matters within their scope of intervention, and they address topics relevant to the subject of the submission.

D. Analysis of the Response of the Peruvian Government on the substantive matters that are the subject of the submission

38. In the response of the Peruvian Government, in relation to substantive matters of the submission, two issues are addressed: the schedule for the environmental adaptation of the ongoing activities under the responsibility of the agriculture sector and the draft regulation that provides a schedule for the environmental adaptation of the ongoing activities under the responsibility of the Agriculture Sector. Following, both issues are analyzed in order to determine whether or not the Secretariat should recommend that the Environmental Affairs Council request the development of a Factual Record regarding this submission.

D.1. On the schedule for the environmental adaptation of the ongoing activities under the responsibility of the Agriculture Sector

39. The Peruvian Government, in relation to the schedule for the environmental adaptation of the ongoing activities under the responsibility of the Agriculture Sector, states the following:

- a) The Environmental Management Regulation of the Agriculture Sector (hereinafter, the Regulation), approved by Supreme Decree No.015-2012-AG, established (in Article 40) two instruments applicable to the owners of the ongoing activities (that began before November 15, 2012) in order to adapt their activities to the new environmental requirements.
 - b) Accordingly, they note that the Ministry of Agricultural Development and Irrigation (MIDAGRI) does, and has been doing, the environmental assessment of agriculture activities that began before the Regulation entered into force. Thus, they mention, agriculture activities that started before November 15, 2012, have been allowed to continue being adapted to environmental regulations, as has been the case so far.
 - c) They state that natural or legal persons could have started their agricultural investment projects after November 15, 2012 without having obtained an environmental certification or the approval of a preventive environmental management instrument. Although these projects might have caused alterations in environmental physical and biological components. These alterations might not be the result of the lack of approval of the aforementioned schedule.
 - d) Further, they note that, to guarantee the sustainable development of agriculture activities, MIDAGRI has been applying the aforementioned Article 40 of the Regulation only to environmental assessments of agriculture activities that provide evidence that the activities started prior to the effective date of the Regulation (November 15, 2012).
 - e) Regarding the relationship between the lack of approval of the schedule and the exercise of the environmental enforcement function, they indicate that it is the responsibility of the supervisory and enforcement authority to determine, on a case-by-case basis, the existence of administrative responsibility, as well as the enforcement of administrative measures and corresponding sanctions.
 - f) With regard to the impact on the environment that might be produced due to the lack of approval of the schedule for adaptation of ongoing activities, they mention that the impact could only be confirmed through a technical environmental study that should include field information and conclude that there was an impact on the physical and biological components as a result of the development of activities initiated by the owners that do not have the approved environmental certification or environmental management instrument of adaptation.
40. It should be noted that the subject matter of the submission under analysis does not refer to MIDAGRI's exercise of functions as the sectorial authority in charge of environmental assessments. Rather, the submission asserts that the lack of a defined deadline (which would be established by the approval of the adaptation schedule) for owners of agricultural activities to present and obtain the approval of environmental management instruments is what is compelling OEFA (the environmental enforcement agency) to close administrative

sanctioning procedures initiated for the infraction related to the lack of approval of said environmental management instruments. It is a fact that the environmental adaptation for ongoing agriculture activities initiated before November 2012, as indicated in paragraphs 38 b) and c) of this document, has been in place for over 10 years, which represents a significant difference compared to similar timelines regulated in other sectors.

41. Regarding OEFA's sanctioning procedures, the Secretariat notes that the Peruvian Government response mentions that the enforcement authority exercises its functions on a case-by-case basis. It is worth noting that the submission under analysis explicitly mentions the matter of closing the files on sanctioning procedures. In particular, the submission mentions Report No.00090-2020-OEFA/DPED-SMER issued by OEFA which mentions that, as of 2020, 51 cases of administrative sanctioning procedures had been closed due to the lack of the adaptation schedule mentioned in the Regulation. As it is mentioned in the submission, the reference to this report is included in the supporting documents of the pre-publication of the new sectoral environmental regulation (approved by Ministerial Resolution No.141-2022-MIDAGRI).
42. Additionally, this same report developed by OEFA (that is literally quoted in the submission) mentions the closing of 82 administrative supervisory files due to the aforementioned lack of approval of the said adaptation schedule.
43. Therefore, it is necessary to have detailed and up to date information regarding the number of sanctioning procedures and supervisory files initiated by OEFA that have been closed due to said adaptation schedule not being approved.
44. Regarding the environmental harm related to the subject matter of the submission under analysis, it is worth noting that the submitters have presented documents supporting their assertion, which could be supplemented by technical information that might be present in the same supervisory and enforcement documents issued by OEFA in the course of its duties, concerning the aforementioned cases that have been closed. The search for this information could be carried out within the framework of the preparation of a Factual Record.

D.2. On the draft Regulation that provides for a schedule for the environmental adaptation of the ongoing activities under the responsibility of the Agriculture Sector

45. The Peruvian Government states the following in relation to what is stated in the Second Transitory Complementary Provision of the Regulation that explicitly establishes the mandate to approve the Environmental Adaptation Schedule within a period of 180 business days and through Ministerial Resolution:
 - a) This normative mandate constitutes an obligation of the Peruvian Government and remains in force despite the expiration of the deadline established for the issuance of the

schedule by Ministerial Resolution.

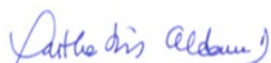
- b) After the approval of the Regulation in 2012, various regulatory provisions have been issued, which generated the need for an environmental legal tool in accordance with the sectoral reality and with said regulatory changes.
 - c) Thus, since 2017, a new Regulation has been under development that considers applicable regulatory changes, as well as a citizen-oriented public management approach. Accordingly, the respective pre-publication of the Regulation was issued through Ministerial Resolution No.0446- 2018-MIDAGRI, dated November 13, 2018. As a result of the public consultation of this regulatory project, its comprehensive review was ordered with the aim of incorporating matters not originally included in the project.
 - d) In this regard, MIDAGRI has prepared a new regulatory proposal called "Regulation for Environmental Management of the Agriculture and Irrigation Sector," which has been subject of a second pre-publication authorized by Ministerial Resolution No.141-2022-MIDAGRI dated April 13, 2022, and which includes, a disposition referring to environmental formalization procedures for owners of ongoing activities.
 - e) This regulatory proposal, its mentioned, has been subject to a socialization process and has received 118 comments which are in the process of being systematized. Additionally, the need to develop working meetings with a group of the competent public entities has been identified. In turn, it is noted that MIDAGRI specialists have been participating in sessions of an Executive Committee convened by the Ministry of Economy and Finance to discuss contributions made to this regulatory proposal.
 - f) Regarding the participatory socialization workshops to disseminate this regulatory project, it is mentioned that they began in December 2022 but were suspended due to force majeure, and instead, virtual workshops are being held.
 - g) In turn, it is noted that after obtaining the final version of the Regulation, it is necessary to carry out a series of actions with the Ministry of the Environment and the Presidency of the Council of Ministers, which is why it is estimated that this regulation will be approved in the second quarter of 2023.
 - a) The Government of Peru, it is pointed out, has been making efforts to comply with the normative mandate established in the Regulations, despite the difficulties it faces.
46. In relation to what is stated above and considering that it has been indicated that the new Regulation would be approved in the second quarter of 2023, and taking into consideration that we are currently in the third quarter of 2023, it would be appropriate to have updated information regarding the status of the approval process of the aforementioned regulatory proposal that would establish new rules regarding the environmental adaptation process for ongoing activities that started prior to November, 2012.

III. ON THE DEVELOPMENT OF A FACTUAL RECORD

47. In accordance with Article 18.9 (1) of the TPA, "If the secretariat considers that the submission, in light of any response provided by the Party, warrants developing a factual record, the secretariat shall so inform the Council and provide its reasons."
48. Having taken into consideration the response of the Peruvian Government, and based on the reasons aforementioned, the Secretariat considers that the Submission contains central issues that must be addressed and developed in further detail.
49. Therefore, the Secretariat recommends the development of a Factual Record regarding the effective enforcement of the Second Transitory Complementary Provision of the Environmental Management Regulation of the Agriculture sector approved by Supreme Decree No.015-2012-AG.

IV. NOTIFICATION

50. The Secretariat, addressing the aforementioned reasons and acting in accordance with Article 18.9 (1) of the TPA, considers that Submission SACASEEM/PE/001/2022 warrants the development of a Factual Record, particularly considering the matters described in paragraphs 36, 37, 38, 39, 40, 41 and 42 of this Notification.
51. In accordance with that established in Article 18.9 (1) of the TPA, the Secretariat submits the Council of Environmental Affairs of the TPA this Notification, for its consideration.
52. 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".



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