

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

**Submitters:** 53 submitters (49 natural persons and 4 legal entities)  
**Party:** Peru  
**Reference:** Submission on Environmental Enforcement Matters filed by 53 Submitters  
**Submission N°:** SACA-SEEM/PE/003/2023  
**Date of receipt:** May 19, 2023  
**Date of Notification:** November 08, 2023

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The Secretariat for Submissions on Environmental Enforcement Matters, after reviewing Submission SACA-SEEM/PE/003/2023, and the response provided by the Government of Peru dated July 6, 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**

1. 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.
2. In 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.
3. 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.
4. 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.
5. 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.

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. On May 19, 2023, 53 Submitters filed a Submission, via email, under Article 18.8 of the TPA to the Secretariat, in which they assert the failure of the Peruvian Government to effectively enforce the law in matters of the protection of air quality, as well as the approved legislation related to the climate emergency.
9. The Secretariat registered the Submission as SACA-SEEM/PE/003/2023.
10. The Secretariat acknowledged receipt of the Submission via email dated March 13, 2023, through letter SACA-SEEM/PE/003/2023, addressed to the Submitters with a copy to the EAC.
11. On June 16, 2023, at the request of the Secretariat, the Submitters filed the response they had received from the Government of Peru and also sent their position on that response.
12. On June 27, 2023, and July 05, 2023, at the request of the Secretariat, the Submitters who had signed the request on behalf of legal entities provided information regarding their incorporation as a legal entity.
13. The Secretariat determined that Submission SACA-SEEM/PE/003/2023 complies with Article 18.8 (1) and with the criteria established in Article 18.8 (2).
14. Based on the above, the Secretariat issued Determination SACA-SEEM/PE/003/2023/D1, communicating it to the Environmental Affairs Council and to the Submitters via email on July 16<sup>th</sup>, 2023.
15. The Secretariat, through Determination SACA-SEEM/PE/003/2023/D2 dated August 16, 2023, indicated that Submission SACA-SEEM/PE/003/2023 merited a response from the Peruvian Government, notifying both the Council on Environmental Affairs and the Submitters via email on the same date.
16. The Peruvian Government requested an extension to the deadline to respond to Determination SACA-SEEM/PE/003/2023/D2, in accordance with the provisions of article 18.8 (5) of the TPA.
17. The Peruvian Government provided a response with the document named “Regarding the Submission on Environmental Enforcement Matters SACA-SEEM/PE/003/2023 – Position of the Peruvian Government”, sending it to the Secretariat on October 13, 2023, via email.

18. In this stage, it is the responsibility of the Secretariat to inform the EAC if Submission SACA-SEEM/PE/003/2023 warrants the development of a Factual Record.

## II. ANALYSIS

### II.1. Previous allegations

#### *A. Regarding the linking of environmental commitments to trade between the Parties:*

19. The Peruvian Government points out, as a preliminary matter, aspects related to the scope of the Secretariat for Submissions on Environmental Enforcement Matters established in Chapter Eighteen of the USA-Peru Trade Promotion Agreement. In this regard, it is noted that the obligations assumed in that Chapter have not been established independently of the trade obligations adopted in this Agreement, as environmental matters are not regulated on their own as they would be in an instrument that is primarily environmental in nature.
20. It is noted that, under the Vienna Convention on the Law of Treaties (1969), treaties must be interpreted in good faith, in accordance with the ordinary meaning of their terms, their context, and taking into account their object and purpose. In this regard, the Peruvian Government notes that the Preamble of the Agreement indicates the commitment to ensure a predictable legal and commercial framework for business and investments, which should be taken into account. Furthermore, they emphasize that one of the objectives of Chapter Eighteen is to contribute to the efforts of the Parties to ensure that trade and environmental policies are mutually supportive and strive to strengthen the links between trade and environmental policies and practices of the Parties. Additionally, they cite Article 18.10 (1), which establishes that the Parties recognize the importance of strengthening their capacity to protect the environment and promote sustainable development, in harmony with the strengthening of their trade and investment relationships.
21. Based on the above, the Government of Peru maintains that the TPA regulates a voluntarily and sovereignly agreed-upon framework between the Parties that establishes an irrefutable link between the obligations assumed in Chapter Eighteen on environmental matters with trade and investment. In this sense, all elements that do not comply with being related to trade and investment must be rejected, as otherwise, the Secretariat would be acting outside the TPA.
22. In particular, the Government of Peru states that the Submission under review does not present elements that demonstrate the relationship between the alleged lack of effective enforcement of environmental legislation and trade or investment between the Parties, and that it does not explain how what is alleged by the Submitters would be affecting trade or investment. They also state that the concept of environmental law included in the TPA is framed within a trade agreement, which makes the scope of requests in this forum clear.

23. The subject matter of this previous allegation is of utmost importance, given the importance of having a common understanding (between the Parties, this Secretariat and, above all, the general public) regarding the scope of the mechanism established by the Secretariat for Submissions on Environmental Enforcement Matters.
24. On this matter, it should be noted that the TPA, in its Article 18.8 (1), establishes that any person from a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. In this regard, a mechanism open to the public has been established to promote compliance with environmental law in both countries.
25. This is reinforced by the same treaty when, in Article 18.14, it defines the scope of the concept of *environmental law* as including “any statute or regulation of a Party” whose primary purpose is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health.
26. This same article contains two explicit exclusions that delimit the scope of the concept of environmental law. On one hand, it is noted that the concept of environmental law does not encompass legal regulations directly related to the safety or health of workers. On the other hand, the scope of the concept of environmental law is specified, indicating that it only includes the regulations issued by the central level of government, thereby excluding from its scope legal regulations issued by the decentralized levels of government in both countries.
27. If the restrictive interpretation pointed out by the Peruvian Government regarding the scope of environmental legislation within the framework of the TPA had been intended, said scope could have been explicitly stated in this same section; however, this was not done.
28. The indicated aligns with the objectives established in Chapter Eighteen of the TPA, which states that:

*Objectives:*

*...the objectives of this Chapter are...to promote the optimal use of resources in accordance with the objective of sustainable development...*

29. In turn, within the content of the same Chapter, we find extensive references on the scope of the concept of environmental law:

***Article 18.7: Opportunities for Public Participation***

1. *Each Party shall promote public awareness of its environmental laws by ensuring that information is available to the public regarding its environmental laws, enforcement, and compliance procedures, including procedures for interested persons to request a Party’s competent authorities to investigate alleged violations of its environmental laws.*
2. *Each Party shall seek to accommodate requests from persons of any Party for information or to exchange views regarding the Party’s implementation of this Chapter.*

(...)

30. In addition to the above paragraphs, the TPA includes articles on matters unrelated to trade and investment between the Parties on matters of environmental cooperation, biological diversity, and environmental agreements, as can be verified below:

**Article 18.10: Environmental Cooperation (...)**

(...)

2. *The Parties are committed to expanding their cooperative relationship on environmental matters, recognizing it will help them achieve their shared environmental goals and objectives, including the development and improvement of environmental protection, practices, and technologies.*

(...)

**Article 18.11: Biological Diversity**

1. *The Parties recognize the importance of the conservation and sustainable use<sup>6</sup> of biological diversity and their role in achieving sustainable development\*.*
2. *Accordingly, the Parties remain committed to promoting and encouraging the conservation and sustainable use of biological diversity and all its components and levels, including plants, animals, and habitat, and reiterate their commitments in Article 18.1.*
3. *The Parties recognize the importance of respecting and preserving traditional knowledge and practices of indigenous and other communities that contribute to the conservation and sustainable use of biological diversity.*
4. *The Parties also recognize the importance of public participation and consultations, as provided by domestic law, on matters concerning the conservation and sustainable use of biological diversity. The Parties may make information publicly available about programs and activities, including cooperative programs, it undertakes related to the conservation and sustainable use of biological diversity.*
5. *To this end, the Parties will enhance their cooperative efforts on these matters, including through the ECA.*

*\* For purposes of this Chapter, sustainable use means non-consumptive or consumptive use in a sustainable manner.*

**Article 18.13: Relationship to Environmental Agreements**

1. *The Parties recognize that multilateral environmental agreements to which they are all party, play an important role globally and domestically in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives thereof. The Parties further recognize that this Chapter and the ECA can contribute to realizing the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness*

*of multilateral environmental agreements to which they are all party and trade agreements to which they are all party.*

31. As can be verified, Chapter Eighteen of the TPA itself includes commitments that allow us to confirm that the scope of the mechanism established in articles 18.8 and 18.9 of the TPA is comprehensive and not restrictive in nature, which is consistent with the ultimate goal of promoting the implementation of environmental law within the jurisdiction of each of the Parties.
32. Lastly, it is worth noting that it must be taken into consideration that the outcome that can be reached as a result of the presentation of a Submission is the preparation of a Factual Record, a document whose scope does not have any type of consequence in areas of trade and investment in both countries. This finding reaffirms that the nature of the Secretariat for Submissions on Environmental Enforcement Matters is that being a mechanism for citizen participation in environmental matters mutually agreed between the Parties. For this reason, the scope of its actions should not be restrictive, rather, and on the contrary, it should be understood in the sense of promoting the achievement of enhanced citizen participation through the implementation of this mechanism.

***B. Regarding compliance with the requirements of Article 18.8 (2) of the TPA:***

33. The Peruvian Government, in its response document, states that the Submission did not meet the admissibility criteria established in Article 18.8 (2), explicitly referring to those set out in subsections (c) and (e) of said article. In particular, it points out that while the requirements established in the aforementioned article must be verified concurrently in order to admit a Submission presented for processing, it should have been rejected and declared as inadmissible.
34. Next, the analysis of the objections raised by the Peruvian Government regarding the fulfillment with the mentioned criteria will be carried out.

***B.1. Regarding the criteria established in Article 18.8 (2) (c):***

35. Subsection (c) of Article 18.8 (2) states that it is the responsibility of the Secretariat to consider whether the Submission provides sufficient information to allow for its review, including documentary evidence on which the submission may be based and identification of the environmental laws of which the failure to enforce is asserted.
36. In this regard, we acknowledge that the Party has issued an opinion regarding the analysis conducted by the Secretariat regarding compliance with Article 18.8 (2) (c), as expressed in items 31 and 32 of the Determination SACA-SEEM/PE/003/2023/D1 (Determination 1), where it was noted that the information presented in the Submission does comply with the TPA as it constitutes sufficient information to enable the Secretariat to review the Submission.

37. In this regard, it should be noted that Chapter 18 of the TPA does not regulate a stage for forwarding a copy of the Submission to the Party for the purpose of receiving their considerations as a preliminary step to the issuance of Determination 1, which is the document in which the admissibility analysis of the Submission is conducted. Notwithstanding, and for explanatory purposes, we proceed to point out the arguments presented by the Peruvian Government in this regard.
38. The Peruvian Government notes that although the Submission identifies the environmental law for which it alleges a lack of effective enforcement, it does not provide sufficient information or documentary evidence, which is why it should have been rejected *in limine*. In particular, the Peruvian Government points out that the Submission does not provide sufficient documentary evidence regarding the following: (a) non-approval of Environmental Quality Standards (ECA), (b) non-approval of Maximum Permissible Limits (LMP). (c) non-compliance with public dissemination regarding air quality and (d) non-compliance of priority actions on the climate emergency by various Peruvian entities. The Government also raises the question regarding why the Submission does not include more information or relevant documentation that reliably shows harm to the health of the population and deterioration of the environment.
39. In this regard, it should be noted that the analysis that the Secretariat is required to conduct pertains to whether the information presented in the Submission is sufficient to allow for its review. To this end, the presentation of documentary evidence and the identification of applicable environmental law are evaluated. Regarding the latter aspect, the Peruvian Government acknowledges that the Submitters have complied with the requirement. However, the Peruvian Government questions the sufficiency of the attached documentary information, reaching the conclusion that it is not relevant as it does not duly demonstrate the existence of harm to public health and the environment.
40. Concerning this second aspect, it is necessary to clarify that section (c) of Article 18.8 of the TPA, under analysis, does not establish, as the Peruvian Government has indicated, that the documentation attached to the Submission must meet the standard mentioned in relation to “convincingly demonstrate harm to the public health and deterioration of the environment.”
41. Based on the above, we can conclude that there is an interpretative discrepancy regarding the standard that the Secretariat should use to determine whether the documentation attached to a Submission is or is not sufficient for its review.
42. In the Secretariat’s view, and considering that this is an admissibility criterion, the applicable requirement for evaluating the documentation attached to a Submission should be to identify whether or not said information is related to the scope of the Submission presented.
43. However, the Peruvian Government considers that the Secretariat, in conducting this particular admissibility analysis, should evaluate the content of the documentary information provided and consider this requirement as not met with respect to information that does not meet certain standards such as being up-to-date, that its object and objective

(in the case of scientific research) are strictly aligned to the subject matter of the Submission, and that it does not come from journalistic publications (even when they are scientific news publications<sup>1</sup>).

44. Likewise, the Peruvian Government points out that the communication presented by the Submitters, consisting of the communication (notarized letter) addressed to the Ministry of the Environment (MINAM), in which regulations pending approval that are the subject of this Submission are mentioned, is a document that contains mere allegations and does not allow for the verification of the alleged lack of effective enforcement of Peruvian environmental law. From this analysis, we can point out that the Peruvian Government interprets that the documentation attached to a Submission should meet the standard of providing documentary evidence of the lack of effective enforcement of environmental law.
45. On this matter, we must indicate that, in the present case, the non-approval of environmental standards (ECA and LMP) constitutes an objective fact of reality that, by its nature, does not require any documentary evidence.
46. In this regard, this Secretariat recommends to the Environmental Affairs Council that a specific procedure be approved to establish objectively and indisputably the applicable criteria in this stage of the Submission evaluation process.

***B.2. Regarding the criterion established in Article 18.8 (2) (e):***

47. Subsection e) of Article 18.8.2 states that it is the responsibility of the Secretariat to analyze whether the Submission indicates that the matter has been communicated in writing to the relevant institutions of the Party, attaching the response, if available.
48. In this regard, we acknowledge that the Party has issued an opinion regarding the analysis carried out by the Secretariat concerning compliance with Article 18.8 (2) (e), as expressed in items 37, 38, 39, 40, 41 and 42 of Determination SACA-SEEM/PE/003/2023/D1 (Determination 1), where it was noted that the information presented in the Submission does comply with the TPA regarding the communication to the relevant institutions of the Party, including their response.
49. On this matter, it should be noted that Chapter 18 of the TPA does not regulate a stage for forwarding a copy of the Submission and any supporting information provided with the Submission to the Party for the purpose of receiving the Party's considerations as a preliminary step to the issuance of Determination 1, which is the document in which the admissibility analysis of the Submission is conducted.
50. Despite the above, and for explanatory purposes, we proceed to point out the arguments presented by the Peruvian Government in this regard. The Peruvian Government notes that the Submission does not meet this requirement because the initial communication, presented by the Submitters in February of this year to MINAM, was not directed to the relevant

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<sup>1</sup> According to the Sitejabber website, Livescience, which is one of the sources cited by the Submitters, is ranked 7<sup>th</sup> among science news websites. [https://nz.sitejabber.com/reviews/livescience.com#google\\_vignette](https://nz.sitejabber.com/reviews/livescience.com#google_vignette)



institutions. Furthermore, the Government states that the national air quality and climate emergency policy is of a cross-cutting nature, which is why it should have been directed to the various relevant entities within the Executive Branch (Ministry of Health, Ministry of Economy and Finance, Ministry of Transportation and Communications, National Forest and Wildlife Service, and National Meteorology and Hydrology Service), which are distinct entities from MINAM.

51. In this regard, it should be noted that the Submission under analysis comprises two themes. The first pertains to air quality standards, under the competence of MINAM, and the second relates to climate emergency regulations, under the competence of a range of authorities, including MINAM, which are subject to MINAM's follow-up actions.
52. The issue raised by the Peruvian Government focuses on pointing out that the initial communication was not addressed to authorities other than MINAM, which are relevant institutions of the Party.
53. In this regard, it should be noted that, the notarized letter the Submitters sent to MINAM in the month of February of the current year, states the following:

***“2. We require the implementation of the priority actions for the climate emergency approved in Article 3 of Supreme Decree No. 003-2022-MINAM***

*The legal basis for this requirement comes from Article 5 of Law 30754 (2018) on climate change, which establishes that "the Ministry of the Environment is the national authority in matters of climate change and the technical-regulatory authority at the national level in this regard within the framework of its competencies: it monitors and evaluates the implementation of the comprehensive management of climate change at the three levels of government, promoting the participation of the public sector, economic actors, and civil society, in order to strengthen the comprehensive management of climate change and sustainable development in harmony with nature."*

54. As can be verified, the legal basis asserted in this communication is found in Article 5 of the Framework Law on Climate Change. This norm states the following:

***Article 5. Competent authorities***

***5.1. The Ministry of the Environment is the national authority on climate change and the technical-regulatory authority at the national level on this matter within the scope of its competencies; it monitors and evaluates compliance with comprehensive climate change management at the three levels of government, promoting the participation of the public sector, economic actors and civil society, in order to strengthen comprehensive climate change management and sustainable development in harmony with nature.***

*5.2. Ministries, regional governments, and local governments act as competent authorities in matters of climate change and, as such, promote, coordinate, articulate, implement, monitor, and evaluate the comprehensive management of climate change within the scope of their jurisdictions, and issue the corresponding regulations within the scope of their competencies and functions.*  
(emphasis added)

55. In turn, in Supreme Decree No.003-2022-MINAM that declares the climate emergency as national interest, reference is also made to article 5.1 of the Framework Law on Climate Change, as can be verified below:

***Article 4.- Follow-up***

*The Ministry of the Environment follows-up what is stated in this Supreme Decree, within the framework of its functions as National Climate Change Authority, established in section 5.1 of article 5 of Law No. 30754, the Framework Law on Climate Change.*

(emphasis added)

56. Therefore, the Submitters approached MINAM in its capacity as the entity responsible for following up, monitoring, and evaluating the implementation of the set of actions indicated in the declaration of the climate emergency. For this reason, the Submitters included in their notarized communication to MINAM the legal basis referring to the responsibilities that are inherent to said Ministry, as well as regarding the responsibilities that correspond to the competence of other authorities to whom MINAM monitors in its capacity as national authority on climate change. This does not negate the fact that these other authorities are also competent authorities on climate change.
57. MINAM itself, when it responds to the notarized communication sent by the Submitters, also points this out. Indeed, as indicated in Report No. 00191-2023-MINAM/VMDERN/DGCCD/DMGEI of April 22, 2023:

***Of the competencies and functions of the Ministry of the Environment and the General Directorate of Climate Change and Desertification (DGCCD)***

...

*2.6. On the other hand, Article 117 of the Single Ordered Text of Law No. 27444, Law of General Administrative Procedure, approved by Supreme Decree No. 004-2019-JUS, states that the right of administrative petition includes the powers to present requests that are in the public's private interest, to make requests in the general interest of the wider community, to challenge administrative acts, the powers to request information, make inquiries, and to submit requests for acts of grace; and it implies the obligation to provide the interested party with a written response.*

*2.7. In this regard and given that the citizens' request is aimed at implementing the priority actions for climate emergency contained in article 3 of Supreme Decree*

***No. 003-2022-MINAM; it is the responsibility of this Directorate to provide information on the progress and results of the implementation of priority actions carried out by MINAM, as well as the progress and results reported by the sectors mentioned in the Climate Emergency DS.***

(emphasis added)

58. Furthermore, in the conclusions of the same Report, MINAM makes reference to its own actions, as well as the actions corresponding to the sectors, as can be verified below:

### III. CONCLUSIONS

***3.1 MINAM, in its capacity as the national authority on climate change, has implemented a series of activities, in accordance with the provisions of article 3 of Supreme Decree No. 003-2022-MINAM, which declares the climate emergency of national interest. Thus, with regard to the priority actions under its responsibility, these are detailed in sections 2.16 and 2.17 of this Report: also, in its capacity as technical secretariat of the CANCC, it has also implemented actions, which are mentioned in section 2.18 of this Report.***

***3.2 Regarding the results and progress of the sectors, information is provided on the progress and achievements reported by the sectors 120 days after the entry into force of the Supreme Decree, in the extraordinary session of the CANCC held on October 11, 2022, which were systematized in the matrix included in section 2.22 of this Report.***

(emphasis added)

59. The fact that the Submitters did not send the indicated initial communication to the sectors included in the declaration of climate emergency does not undermine the validity of the initial communication sent to MINAM regarding the actions under its responsibility, as well as the actions that have been reported to MINAM by the sectors. In any case, what this initial communication would have established is the scope of the Submission, which is exclusively directed to MINAM.

#### ***C. Regarding meeting the criteria of article 18.8 (4) (a) of the TPA:***

60. The Peruvian Government states that the Submission, in turn, does not meet the criteria established in Article 18.8.4 of the TPA in relation to the Submission alleging harm to the person filing it.
61. In this regard, we acknowledge that the Party has issued an opinion in relation to the analysis carried out by the Secretariat regarding compliance with Article 18.8 (4) (a), as expressed in items 21, 22 and 23 of the Determination. SACA-SEEM/PE/001/2022/D2 (Determination

- 2) where it was noted that the Submission under analysis is not frivolous and asserts harm to the Submitters.
62. In this regard, it should be noted that Chapter 18 of the TPA does not regulate a stage for forwarding a copy of the Submission to the Party in order to receive its considerations as a preliminary step before the issuance of Determination 2, which is the document in which the analysis is conducted as to whether or not it is appropriate to request the Party's response.
63. Notwithstanding the above, and for illustrative purposes, we proceed to point out the arguments presented by the Peruvian Government on this matter. It is noted that the Submitters have not presented information demonstrating that they have suffered any harm and have only made reference to general reports, which are not directly related to the subject matter or make reference to academic literature that lack scientific rigor on the quality of the air and the climate emergency, which are neither suitable nor applicable to demonstrate the existence of real harm to those who have signed the Submission. The Peruvian Government states that the Submitters have not asserted direct harm against them but rather environmental harm resulting from the alleged lack of effective enforcement of the asserted environmental regulations.
64. In relation to the harm asserted, indeed, this Secretariat considers that the information presented is sufficient to prove the existence of environmental harm.
65. In this regard, it is relevant to note the concept of environmental harm included in Law 28611, General Environmental Law:

***“Article 142 – On the responsibility for environmental harm***

...

*142.2 Environmental damage is defined as any material harm suffered by the environment and/or any of its components, which can be caused in compliance or non-compliance with legal provisions, and which generates current or potential negative effects.”*

(emphasis added).

66. Regarding the scope of environmental harm, under Peruvian environmental legislation, the Environmental Assessment and Enforcement Agency (OEFA), an organization attached to the Ministry of the Environment of Peru, points out that environmental harm violates the fundamental right of every person to live in a healthy, balanced and suitable environment for their full development. This is because it affects the health of people individually and collectively, the conservation of biological diversity, and the sustainable use of natural resources<sup>2</sup>.

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<sup>2</sup> Agency for Environmental Assessment and Enforcement (OEFA). Guidelines for the application of corrective measures foreseen to in sub-paragraph d) of paragraph 22.2 of Article 22 of Law No. 29325 – Law of the National System of Environmental Assessment and Enforcement, approved by Resolution of the Board of Directors No. 010- 2013-OEFA/CD, of March 23, 2013. p. 2.

67. Additionally, OEFA states that environmental harm can be real or potential, and includes the following concepts<sup>3</sup>:
- **Real harm:** *Detrimental impact, loss, negative impact or current and proven damage caused to the environment or its components as a consequence of the development of human activities.*
  - **Potential harm:** *Environmental contingency, proximity to environmental hazards, environmental events causing any type of detriment, loss, negative impact or damage to the environment or any of its components as a result of phenomena, incidents, or circumstances with the sufficient capacity to cause them and which originate from the development of human activities.*
68. Therefore, when the TPA mentions harm to the person making the Submission, it is not necessarily referring to real harm but rather this concept can also include potential harm.
69. It should be noted that in accordance with the provisions of Article 31 of the Vienna Convention on the Law of Treaties, treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
70. In this regard, it should be noted that the same article of the Vienna Convention states that “the context for the purpose of the interpretation of a treaty shall comprise...its preamble...” In this sense, it is relevant to refer to the content of the Preamble of the TPA where, on environmental matters, the following is stated:
- “The Government of the United States of America and the Government of the Republic of Peru, resolved to:*
- ...
- IMPLEMENT this Treaty in a manner consistent with the environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters.”*
71. In this sense, the application of the contents of the TPA in the context of addressing Submissions under the responsibility of this Secretariat is in compliance with the provisions of Article 31 of the Vienna Convention; taking into consideration, in relation to the context, the scope of the Preamble of the TPA, which includes the commitment (of both countries) to implement this Treaty in a manner consistent with the environmental protection and conservation, and to promote sustainable development.
72. Based on the aspects mentioned above in relation to the lack of evidence of harm under the scope of article 18.8 (4) (a) of the TPA, in the view of the Secretariat, the concept of harm to the person should be understood in the context provided by the Preamble of this Treaty. Therefore, interpreting that the Submitters are required to present information that

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<sup>3</sup> Ibid.p.3

demonstrates that they have suffered some real and direct harm is not consistent with both Peruvian environmental law and the Preamble of the TPA; therefore, the aforementioned article should be understood in the context of environmental harm (real or potential) as defined in Peruvian environmental law.

**D. Regarding the information provided by the Party under Article 18.8 (5) of the TPA:**

73. In accordance to the provisions of Article 18.8 (5) of the TPA, the Secretariat requested a response from 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.”

74. In this regard, the Peruvian Government has informed 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 the subject of a judicial or administrative proceeding.

**II.1. Substantive issues**

**A. Regarding environmental standards pending approval**

75. With regard to the environmental standards indicated by the Submitters as pending approval despite being committed to approval, the response sent reaffirms that, in effect, said standards have not yet been approved.

76. In summary, regarding the process of approval of environmental standards indicated in the Submission as not approved, the Government of Peru states the following:

INSTRUMENT	SITUATION
Supreme Decree that approves the Maximum Permissible Limits for atmospheric emissions from brick manufacturing activities	Pre-published regulatory project by Ministerial Resolution No.111-2021-MINAM of June 30, 2021.
Supreme Decree that approves the Maximum Permissible Limits for atmospheric emissions from boilers used in various applications.	Pre-published regulatory project by Ministerial Resolution No.206-2022-MINAM of October 5, 2022.

Supreme Decree that approves the Environmental Quality Standards for Air for the parameters of cadmium, arsenic, and chromium in particulate matter less than 10 microns (PM <sub>10</sub> ).	Pre-published regulatory project by Ministerial Resolution No.107-2021-MINAM of June 27, 2021.
Supreme Decree that approves the Maximum Permissible Limits for emissions from steel activities, ferrous and non-ferrous foundries.	It does not have a pre-published regulatory project.

77. Additionally, the different stages in which the approval process of the indicated environmental standards is found are indicated, and likewise, other regulatory projects related to air quality management that are in the process of preparation are indicated.
78. Reference is also made to the Second Transitory, Complementary and Final Provision of Law No.28611, General Environmental Law, which indicates that in the absence of LMP, international reference limit values can be used.
79. On the matter, it should be noted that the Submitters maintain that, despite the existence of various legal mandates that have set deadlines (which have already expired) for the approval of the indicated environmental standards, said approval has not been achieved. Therefore, the Submitters do not mention that there are regulatory gaps in the Peruvian environmental law and, rather, they assert the lack of effective enforcement of the environmental law that orders the need to approve the indicated environmental standards.
80. In relation to the sulfur dioxide parameter of ECA for air, the Peruvian Government indicates that its update is included in the ECA and LMP Plan for the period 2021-2023, approved by Supreme Decree No.020-2021-MINAM. Therefore, in this case, the deadline for its approval is still valid. In this regard, we agree with the statement made by the Peruvian Government.
81. Regarding the reference to the mentioned ECA and LMP Plan, it is worth noting the scope provided by this standard in terms of the importance of approving these environmental standards.
82. Indeed, this norm establishes the legal framework for the approval of environmental standards in Peru, explicitly stating that the development and approval of the ECA and LMP are useful and necessary tools for the management of environmental quality and making explicit reference to the following norms:
  - Article 2, paragraph 22 of the Political Constitution of Peru, which establishes that every person has the right to a balanced and appropriate environment for the development of his life.
  - Article 3 of Law No. 28611, General Environmental Law, which states that the Government, through its relevant entities and bodies, designs and applies, among other

things, the necessary regulations to ensure the effective exercise of the rights and fulfilment of the obligations and responsibilities contained in this Law.

- Sub-paragraph d) of Article 7 of Legislative Decree No. 1013, Legislative Decree that approves the Law of Creation, Organization, and Functions of the Ministry of the Environment, which indicates that this ministry has the specific function of preparing the ECAs and LMPs, in accordance with the respective plans.

83. Therefore, the approval of environmental standards is an environmental management instrument that is an inherent function of the Ministry of the Environment, whose implementation allows for the protection of the environmental rights of the population, as well as the establishment of environmental obligations and responsibilities. Its non-approval, therefore, signifies, in addition to the omission in the exercise of the authority's functions, the omission in defining of rights, obligations, and responsibilities in environmental matters.
84. Based on the above, this Secretariat considers it necessary to prepare a Factual Record to further investigate the environmental and health benefits expected to be achieved through the approval of the environmental standards, which are the object of the Submission, referred to in item 76 of this document.

#### ***B. Regarding public information on air quality monitoring***

85. Regarding public information on environmental air quality monitoring, the Submitters request that the citizens' right to access environmental information be fulfilled, and that the state of air quality in Lima and other cities in Peru be published in a transparent manner in real time with the purpose of protecting the health of citizens.
86. On this matter, the Government of Peru points out that since 2019, there has been the National Protocol for Monitoring Environmental Air Quality, approved by Supreme Decree No. 010-2019-MINAM, which standardizes the processes for generating environmental information related to the air and is in the process of implementation.
87. Furthermore, the Peruvian Government indicates that access to information on environmental air quality is provided through the "INFOAIRE" platform, which is an information system that is part of the National Environmental Information System (SINIA) that consolidates and disseminates air quality information produced by public and private institutions through direct mechanisms and historical records. It also mentions the number and location of installed and/or operational monitoring stations, which are managed by different national entities. Additionally, it is noted that efforts are being made to expand the coverage of air quality information and strengthen the mechanisms for disseminating information in real time through INFOAIRE.



88. On this particular matter, it should be noted that what was stated by the Submitters in relation to the publication of information on the state of air quality in real time is not explicitly regulated in environmental regulations.
89. In this regard, the Submitters assert that *“it is essential to provide public information that is adequate and in real time on air pollution levels in the country through the necessary investment projects that lead to this end, so that the population will be properly informed of air pollution levels as an act of transparency in the government's environmental management.”* This reference should be understood as a proposal for regulatory improvement, as an operational recommendation to achieve better levels of environmental protection. However, this is not regulated in national environmental legislation.
90. For this reason, in the opinion of this Secretariat, it would not be appropriate to continue the analysis and consideration of this assertion contained in the Submission. Therefore, it would not be appropriate to proceed to the stage of preparing a Factual Record in this regard, and instead, it would be appropriate to archive the allegation of the Submission that refers to public information on air quality monitoring.

***C. Regarding the actions carried out within the framework of the climate emergency:***

91. The regulation that declares climate emergency as a matter of national interest, approved by Supreme Decree No. 003-2022-MINAM, it is stated that, within the framework of the climate emergency, a set of priority actions must be carried out. These priority actions are listed in article 3 of said rule, granting a period of no more than one hundred eighty (180) business days, from the entry into force of this regulation. This norm was published on January 25, 2022 and came into effect on January 26, 2022. Therefore, the actions included in the indicated article 3 should have been completed in October 2022.
92. This norm establishes, in article 3, a set of priority actions applicable to both MINAM and other authorities (sectoral and regional governments). It is important to note that it is regarding these activities categorized as priorities that a deadline has been established for their compliance by each entity.
93. However, as previously noted, the scope of the Submission under analysis focuses on the functions of MINAM, both, as the authority responsible for certain actions under its purview, as well as the entity responsible for monitoring the compliance with the priority actions under the responsibility of sectors (the Submission does not mention the priority actions assigned to the regional governments).
94. Regarding the priority actions carried out by MINAM, the Peruvian Government notes the following:

PRIORITY ACTION	SITUATION
Approval of the update of the National Strategy for Climate Change with a vision for 2050, as proposed by MINAM	CEPLAN has provided compliance with deliverables 1, 2 and 3 of this Strategy. Deliverables 4 and 5 are in the formulation process.
Design the process of receiving, managing, and distributing benefits from various national and/or international sources, that allows for the implementation of the phases for the Reduction of Emissions derived from Deforestation and Forest Degradation (REDD+) as well as the implementation of the REDD+ phases stemming from the Joint Declaration of Intent (DCI).	The draft Guidelines for the reception and administration of financing for the REDD+ phases were pre-published. The Contribution Agreement for the updated implementation of the DCI 2021-2025 was signed. Supreme Decree No.001-2023-MINAM was approved, which modifies article 3 of Supreme Decree No.003-2022-MINAM, which declares the climate emergency as national interest, entrusting PROFONANPE with the administration of funds for the implementation of the REDD+ phases that come from the DCI.
The High-Level Commission on Climate Change (CANCC) proposes mitigation and adaptation measures that allow the implementation of the Nationally Determined Contributions of a 40% reduction in greenhouse gas emissions and resilience to the adverse effects of climate change, respectively, in order to contribute to the reactivation of the economy and reduce socioeconomic gaps and poverty.	On June 30, 2022, the programming for effective management in ACR in Mitigation and the programming in forests in Adaptation (sic). In December 2022, a new Mitigation measure to reduce N2O emissions was approved. In June 2023, the mitigation measure on Amazonian peatlands prepared by MINAM was approved. Through Supreme Decree No.006-2020-MINAM, the formation of the Multisector Commission called the High-Level Commission on Climate Change was modified, incorporating new actors.

95. Of the three aforementioned priority actions, we can point out that their implementation is still in progress by MINAM. In this regard, even though, as the Peruvian Government notes, important progress has been made, the established deadline has passed. It should be noted that, to date, no regulations have been approved that extend the deadlines established in the declaration of climate emergency.
96. Regarding the role of MINAM in monitoring compliance with the priority actions by the sectors, the Peruvian Government's response makes explicit reference to two specific issues. It mentions, concerning the commitment of the Ministry of Economy and Finance (MEF) to evaluate the inclusion of the carbon price in the framework of macroeconomic policies, and that it has not been established that MEF has to determine a carbon tax but rather it was

given the responsibility to conduct a comprehensive assessment of instruments for determining carbon pricing in the country's context. Nevertheless, it is also noted that in Peru carbon pricing instruments are currently applied within the framework of economic policies, particularly in relation to public investment projects. Furthermore, it is noted, in relation to the mechanisms for the promotion of electromobility, that the Selective Consumption Tax already includes a rate of 0% for vehicles that use cleaner energy and higher rates for vehicles that use other energy sources.

97. In the response issued by MINAM to the notarized letter sent by the Submitters, in February 2023, said authority attached the aforementioned Report No. 00191-2023-MINAM/VMDERN/DGCCD/DMGEI dated 22 April 2023, which states the:

### III. CONCLUSIONS

...

**3.3 MINAM, through Multiple Official Letter No. 018-2023-MINAM/SG, requested all entities responsible for implementing priority actions established in article 3 of Supreme Decree No. 003-2022-MINAM, to submit a report with updated information within a period of no more than 180 days, with the purpose of identifying the achievements, progress, and challenges that each sector must undertake or continue, within the framework of climate action. These reports, once received and systematized, will be sent to you for your knowledge and purposes.**

(emphasis added).

98. However, in the aforementioned Multiple Official Letter No. 00018-2023-MINAM/SG, dated April 12, 2023, issued by the General Secretariat of MINAM and addressed to various sectoral authorities, the following was stated:

*“I have the pleasure of addressing you, regarding the regulation referenced, which declared the climate emergency a matter of national interest with the purpose of implementing, as a matter of urgency, climate actions aimed at achieving our Nationally Determined Contributions by 2030, and, thereby, contribute to the global effort to reduce greenhouse gas emissions, as well as the risks and vulnerability to the adverse effects of climate change.*

*In this regard, priority actions were established in this norm by the different sectors and regional governments involved in the implementation of climate action in the country, which had to be completed within a maximum period of 180 business days from the entry into force of the said norm.*

*In this way, considering that the deadline provided set in the supreme decree expired on October 13, 2022, your respective offices are requested to report on the fulfillment of the priority actions established in article 3 of the said supreme decree. For this purpose, a report form is attached for completion, indicating the actions taken. The deadline for completing and sending the form, by official letter, to MINAM, is until Monday, April 17, 2023.”*

(emphasis added).

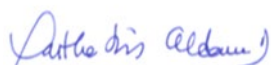
99. Therefore, there is no consistency between what is stated in the Report sent by MINAM to the Submitters and the content of the communication sent by MINAM to the sectors. In the first case, it is stated that the sectors should submit an updated report on their progress within a period of 180 days and in the second case, the sectors are requested to report on the fulfillment of the actions under their responsibility within a period of 5 days (the document is dated April 12, and the deadline for submitting the information was stated as April 17, 2023).
100. On this matter, it should be noted that the period of 180 days for fulfilling the priority actions is established in the very norm that declares the climate emergency, which is why it would not be legally viable for said period to be extended by Official Letter.
101. In turn, it should be noted that the mentioned Multiple Official Letter No. 00018-2023-MINAM/SG, dated April 12, 2023, is dated after the submission of the February communication by the Submitters and is prior to the response sent through the aforementioned Report No. 00191-2023-MINAM/VMDERN/DGCCD/DMGEI dated April 22, 2023. However, we have no knowledge regarding whether other additional follow-up actions were carried out by MINAM before February 2023, taking into consideration that the deadline established for fulfilling the priority actions was reached in the month of October 2022.
102. Therefore, it is necessary to carry out further inquiries regarding the exercise of the follow-up function under the responsibility of MINAM regarding fulfillment of the priority actions established in the declaration of climate emergency. This merits, in the opinion of this Secretariat, the preparation of a Factual Record that allows inquiries of the case to be carried out in order to have the information required to identify whether effective compliance of the environmental law asserted has been achieved, as related to the powers of MINAM.

### **III. REGARDING THE DEVELOPMENT OF A FACTUAL RECORD**

103. According to 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.
104. Having taken into account the response from the Government of Peru, and based on the reasons previously mentioned, this Secretariat considers that there are key issues of the Submission that need to be addressed and developed in further detail.
105. In this regard, the Secretariat recommends the development of a Factual Record regarding the effective enforcement of current environmental law in relation to the fulfillment of the functions of MINAM in matters of environmental air quality and climate emergency.

#### IV. NOTIFICATION

106. The Secretariat, based on the reasons stated above and in accordance with the provisions of Article 18.9 (1) of the TPA, considers that Submission SACA-SEEM/PE/003/2023 justifies the development of a Factual Record, specifically considering the points mentioned in paragraphs 75, 76, 77, 78, 79, 81, 82, 83, 84, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101 and 102 of this Notification.
107. In accordance with the provisions of Article 18.9 (1) of the TPA, the Secretariat forwards this Notification to the Environmental Affairs Council of the TPA for its consideration.
108. In accordance with the provisions of 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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U.S.— Peru Trade Promotion Agreement