

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

Submitters: AIDSESP
Party: Peru
Reference: Submission on Environmental Enforcement Matters submitted by AIDSESP
Submission No.: SACA-SEEM/PE/002/2023
Date of receipt: March, 10 2023
Date of Notification: August, 3 2023

The Secretariat for Submissions on Environmental Enforcement Matters, after reviewing Submission SACA-SEEM/PE/002/2023, 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. 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.
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 March 10, 2023 the organization AIDSESEP filed a Submission under Article 18.8 of the TPA to the Secretariat, via email, in which they assert the failure of the Peruvian Government to effectively enforce the Forest and Wildlife Law, Law No. 29763 and the Regulations for Forest Management and Wildlife in Native Communities and Peasant Communities with regard to the regulation of granting forest concessions in Indigenous Reserves, as well as other related forest regulations.
9. The Secretariat registered the Submission as SACA-SEEM/PE/002/2023.
10. The Secretariat acknowledged receipt of the Submission via email dated March 13, 2023, through letter SACA-SEEM/PE/002/2023, addressed to the Submitters with a copy to the EAC.
11. The Secretariat determined that Submission SACA-SEEM/PE/002/2023 complies with Article 18.8 (1) and with the criteria established in Article 18.8 (2).
12. In merit of the aforementioned, the Secretariat issued Determination SACA-SEEM/PE/002/2023/D1, dated on April 10, 2023, communicating it to the Environmental Affairs Council and to the Submitter via email of April 10 and April 24, 2023, respectively.
13. The Secretariat issued Determination SACA-SEEM/PE/002/2023/D2 dated May 7, 2023, that Submission SACA-SEEM/PE/002/2023 merits a response from the Peruvian Government.
14. The Peruvian Government requested an extension to the deadline to respond to Determination SACA-SEEM/PE/002/2023/D2, in accordance with the provisions of article 18.8 (5) of the TPA.
15. The Peruvian Government provided a response with the document named “Regarding the Submission on Environmental Enforcement Matters SACA-SEEM/PE/002/2023 – Position of the Peruvian Government, sending it to the Secretariat on July 6, 2023, via email.

16. In this stage, it is the responsibility of the Secretariat to inform the EAC if Submission SACA-SEEM/PE/002/2023 warrants the development of a Factual Record.

II. ANALYSIS

A. On compliance with the criteria of article 18.8 (2) of the TPA

17. In its response document, the Peruvian Government indicates that, in the Annex to submission SACASEEM/PE/002/2023, where communications addressed to the Peruvian Government are attached, it does not appear that there was a communication from AIDSESEP addressed to the relevant institution of the Party, that is, as indicated, the Regional Government of Loreto. For this reason, according to the Peruvian Government's response, the admissibility criteria established in article 18.8 (2) (e) of the TPA referred to communicating the matter in writing to the relevant institutions of the Party and indicating the Party's response, if any, has not been met.
18. The Peruvian Government indicates that the Regional Government of Loreto is the competent entity, and therefore, the relevant authority of the Party in the subject matter of the submission; that is, in matters of forest concessions enforcement and compliance. This is in accordance with the provisions of Law No. 27867, Organic Law of Regional Governments (article 51 subsections e and q), and Ministerial Resolution No. 0793-2009-AG that declares the transfer process of these specific functions to the Regional Government of the department of Loreto as concluded, within the framework of the Annual Plan for the Transfer of Powers to Regional and Local Governments for 2005. In turn, it is indicated that the Regional Government of Loreto is a legal person under public law with political, economic, and administrative autonomy in matters within its competence, as indicated in article 2 of Law No.27867, Organic Law of Regional Governments.
19. In relation with the above paragraph, this Secretariat notes that in item 34 of Determination SACA-SEEM/PE/002/2023/D1, it was indicated that the submitters had presented the following information:
- b) Documents sent by ORPIO (an organization that is part of AIDSESEP):*
 - *Letter No. 105-CD-ORPIO-2021 (June 3, 2021), addressed to the Office for Institutional Control of the Government of Loreto.*
 - ...
 - *Letter No. 128-2021-CD-ORPIO (July 13, 2021) addressed to the Regional Management for the Development of Forest and Wildlife (GERFOR) of the Regional Government of Loreto (GOREL).*
20. As indicated on the Institutional website of the submitters, AIDSESEP represents 9 regional organizations, 109 federations, and 2,439 communities in the Peruvian Amazon. One of

these regional organizations is ORPIO (Organización Regional de los Pueblos Indígenas del Oriente). Therefore, the submitters did include in the documents contained in the Annex to their submission a copy of communications by one of the affiliated organizations (ORPIO) addressed to the Regional Government of Loreto.

21. In addition to these two communications addressed by ORPIO to the Regional Government of Loreto, the submitters also included a copy of communications that had been sent by various authorities to the Regional Government of Loreto on the subject matter of the submission, as indicated in item 34 c) of Determination SACA-SEEM/PE/002/2023/D1. These communications are as follows:

- *Official Letter No. 171-2017-VMI/MC (December 26, 2017), sent by the General Directorate for the Rights of the Indigenous Communities of the Ministry of Culture to the Regional Governor of Loreto.*
- *Official Letter No. 900067-2018/VMI/MC (September 24, 2018) sent by the Vice-Ministry of Interculturality of the Ministry of Culture to the Regional Governor of Loreto.*
- ...
- *Official Letter No. 0585-2018-DP/OD-LORETO (October 10, 2018) sent by the Chief of the Loreto Ombudsman Office to the Loreto Regional Governor.*
- *Official Letter No. 000433-2020-DGPI/MC (May 26, 2020) sent by the General Director for the Rights of Indigenous Communities to the Ministry of Culture to the Regional Governor of Loreto.*
- *Official Letter No. 1160-2020-2021/CPAAAAE-CR (June 24, 2021) sent by the Presidency of the Commission of Andean, Amazonian and Afroperuvian Peoples, Environment, and Ecology (CPAAAAE) of the Congress of the Republic to the Office of the Prosecutor of the Nation, the Office of the Comptroller General of the Republic, the Office of the Ombudsman, and ORPIO.*
- *Official Letter No. 228-2020-2021/CPAAAAE-CR (August 3, 2020) sent by la Presidency of the Commission of Andean, Amazonian and Afroperuvian Communities, Environment, and Ecology (CPAAAAE) of the Congress of the Republic to the President of the Regional Government of Loreto.*
- *Official Letter No. 000656-2020-DGPI/MC (August 20, 2020) sent by the General Director of Indigenous Communities of the Ministry of Culture to the Regional Governor of Loreto.*
- *Official Letter No. 088-2020-DP/AMASPPI-PPI (September 30, 2020) sent by the Headquarters of the Program of Indigenous Communities of the Loreto Ombudsman Office to Manager of the Regional Management for the Development of Forest and Wildlife – GERFOR of the Regional Government of Loreto.*
- *Multiple Official Letters No. 003-2021-DP/AMASPPI/PPI (July 16, 2021) sent by the Head of the Program of Indigenous Communities to the Regional Governor of the Regional Government of Loreto, the National Superintendent of the National Superintendent of Public Registries, as well as the General Director of the General Directorate of the Rights of Indigenous Communities of the Ministry of Culture.*
- *Official Letter No. D000254-2021-MIDAGRI-SERFOR-DE, sent by Executive Director*

of SERFOR to the Regional Manager of the Regional Management of Development of Forest and Wildlife of the Regional Government of Loreto.

- *Official Letter No. 090-2022-DP/AMASPPI-PPI (July 8, 2022) sent by the Headquarters of the Program of Indigenous Communities of the Ombudsman to the Regional Governor of Loreto.*

22. Now, it should be noted that as mentioned by the submitters (on page 11 of their submission), jurisdiction over the matter that is the subject of the submission lies directly with both the Regional Government of Loreto (GOREL), as well as in the National Forest and Wildlife Service (SERFOR) authority that, under the mandate of Legislative Decree No. 1319, which establishes measures to promote trade in forest products and wildlife of legal origin, is competent to suspend administrative procedures carried out by forest and wildlife authorities or stop actions that affect or put at risk the sustainable use or conservation of forest and wildlife heritage, in case non-compliance with forest and wildlife law is identified and is empowered to adopt measures to protect the forest and wildlife heritage in administrative, civil and criminal matters, if applicable.

23. Thus, it should be specified that, within the documentation attached to the filed submission, and as detailed in item 34 of Determination SACA-SEEM/PE/002/2023/D1, the submitters have presented the following communications to SERFOR:

a) Documents sent by AIDSESEP:

- *Letter No. 225-2021-Aideseep (September 27, 2021), addressed to the Presidency of the Republic of Peru, the Ministry of Agricultural Development and Irrigation, the Executive Directorate of the National Forest and Wildlife Service (SERFOR), the General Directorate of the Rights of Native Communities of the Ministry of Culture, and the Ombudsman.*

...

- *Letter No. 331-2021-Aideseep (December 10, 2021) addressed to the Executive Directorate of SERFOR, as well as General Management of the same entity.*
- *Letter No. 191-2022-Aideseep (May 20, 2022), addressed to the Executive Directorate of SERFOR*

...

- *Letter No. 425-2022-CD-AIDSESEP (November 17, 2022) addressed to the Executive Directorate of SERFOR.*

b) Documents sent by ORPIO (an organization that is part of AIDSESEP):

...

- *Letter No. 125-2021-CD-ORPIO (July 6, 2021), addressed to the Executive Directorate of SERFOR.*

...

- *Letter No. 175-2021-CD-ORPIO (August 17, 2021), addressed to the Presidency of the Republic of Peru, the Ministry of Agricultural Development and Irrigation, the Ministry of Culture, the Executive Directorate of SERFOR.*

24. Therefore, based on the above, the submission under analysis (including its Annex) has complied with the admissibility criteria established in article 18.8 (2) (e) of the TPA referred to communicating the matter in writing to the relevant institutions of the Party .

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

25. Pursuant to the provisions of article 18.8 (5) of the TPA, the Secretariat 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.”

26. In this regard, the Peruvian Government has indicated the following:

“In accordance with the provisions of article 18.8. (5) (b) of the TPA, we comply with the following:

- i. The matter that is the subject of the submission has previously been the subject of a judicial process remitted in File No.00299-2020-0-1903-JR-CI-02¹.
- ii. Private reparations in relation to the matter have been requested through an amparo action before the Peruvian Judiciary.”

27. In relation to the aforementioned judicial process, it is noted that in their submission, the submitters had indicated that there is a final judgment (through Resolution 14 of November 4, 2022) issued in the aforementioned File No.00299-2020-0-1903- JR-CI-02 (amparo action) of the Second Civil Court - Headquarters of the Loreto Superior Court of Justice, which ordered the Regional Management for the Development of Forest and Wildlife (GERFOR) and the Loreto Regional Government (GOREL) to refrain from initiating a process of granting and/or reactivating forest concessions within the scope of the indigenous reserves requested Yavarí Tapiche and Yavarí Mirim.

28. In this regard, the Peruvian Government attaches a copy of the File Report² that indicates that the aforementioned Resolution 14 was appealed on March 16, 2023 (that is, after the presentation of the submission under analysis, which occurred on March 10, 2023). In turn, a copy of Resolution 21, of May 23, 2023³, issued by the Civil Chamber - Central

¹ In the communication sent by Peru, "XXX" is added to the file identification. However, we understand that this constitutes a typing error.

² In Annex 3 of the Response of the Peruvian Government.

³ In the Response of the Peruvian Government, it is mentioned that the date of issuance of the indicated second

Headquarters of the Superior Court of Justice of Loreto⁴ is attached, through which the previously indicated Resolution 14 is confirmed specifically regarding the matter that resolves to declare the amparo action filed to be well-founded.

29. For this reason, the Government of Peru notes that the matter that is the subject of the submission has already been addressed by the Judiciary through a judgment that has the status of *res judicata* in accordance with the provisions of the Code of Constitutional Procedure; which is the reason why, they point out, there would be a lack of subject matter.
30. In turn, the submitters have indicated that, despite the judicial decision in their favor, the illegal forest concessions continue to exist and operate illegally and with total impunity in the survival territories of the indigenous peoples in isolation of Yavarí Tapiche and Yavarí Mirim, to this day. They mention that they turned to the competent institutions asking them to take action regarding this serious complaint but that, however, they have not received conclusive responses to this violation to the rights of indigenous brothers in isolation.
31. In this regard, it should be noted that, pursuant to the provisions of article 18.8 (5) of the TPA, this Secretariat had requested (through Determination SACA-SEEM/PE/002/2023/D2 (item 31)) that the Peruvian Government provide information on the judicial or administrative proceedings related to the case. In this sense, the analysis to be carried out regarding whether or not it is appropriate to continue with the processing of this submission is developed in this Notification based on the information existing in the submission as well as considering the information that the Party has presented.
32. The subject matter of this submission refers to the assertion that the Peruvian Government has ceased to effectively enforce current environmental law because the Regional Government of Loreto granted 47 forest concessions in contravention of the Forest and Wildlife Law.
33. In this regard, it is appropriate to recall the environmental law asserted by the submitters that assert non-effective enforcement in this case. This topic was developed in items 19 and 20 of Determination SACA-SEEM/PE/002/2019/D1, where the following environmental regulations were indicated:
 - a) The norms of the Forest and Wildlife Law, Law No.29763, dated July 21, 2011, which in its Fifth Final Complementary Provision provided that "*...Forest and wildlife authorization titles are not granted in areas in process for the establishment of territorial reserves for peoples in isolation or in initial contact, in accordance with the international treaties in force.*" This norm was developed in the Regulation for Forest and Wildlife Management in Native Communities and Rural Communities approved by Supreme Decree No. 021-2015-MINAGRI, which stated that "*...Forest and wildlife authorization titles are not granted in any case in territorial reserves or*

instance judgment is June 9, 2023, but in the judgment itself (sent as Annex 2 of the indicated Response) it is indicated that the date this sentence was issued is May 23, 2023.

⁴ In Annex 2 of the Response of the Peruvian Government.

in areas in the process for the establishment of indigenous reserves for indigenous peoples in isolation or in initial contact. The Fifth Final Complementary Provision of the Law is in force until said proposals are formalized.”

- b) The Legislative Decree that establishes measures to promote the trade of forest products and wildlife of legal origin, Legislative Decree No.1319, of January 5, 2017, in particular, its article 7 regarding the protection of forest and wildlife heritage pointed out that SERFOR, as the governing body of SINAFOR, has the power to “*suspend administrative procedures in charge of the forest and wildlife authorities or stop actions that affect or put at risk the sustainable use or conservation of forest and wildlife heritage if non-compliance with forest and wildlife law is identified. Notwithstanding what is stated in this article, SERFOR may establish measures aimed at safeguarding forest and wildlife heritage, and must notify the competent authorities in administrative, civil, and criminal matters, if applicable, so that they can determine the corresponding responsibility*”.
34. In relation to this environmental regulation asserted as not being effectively enforced, and as indicated in item 22 of this Notification, the competent authorities are, on the one hand, the Regional Government of Loreto, in matters of granting forestry rights and, on the other hand, SERFOR, regarding the establishment of measures to protect forest and wildlife heritage.
35. With regard to the Regional Government of Loreto, it should be noted that although the submitters have turned to the Judiciary to obtain the protection of the right of indigenous peoples in voluntary isolation in relation to the granting of forest rights by the Regional Government of Loreto and have obtained favorable judgments in both first and second instances, as they themselves indicate, the aforementioned illegal forest concessions continue to operate, endangering the survival of the isolated indigenous peoples of Yavarí Tapiche and Yavarí Mirim.
36. In this regard, it should be noted that the petition formulated in the aforementioned amparo judicial process refers to the fact that the Regional Government of Loreto refrains from initiating a process of granting and/or reactivating forest concessions within the scope of the requested indigenous reserves Yavarí Tapiche and Yavarí Mirim. The effects of this judicial process will be verified, in the future, in the actions of the indicated Regional Government, and for this purpose the Judiciary of Peru will proceed with the respective execution of the sentence.
37. However, and given its legal nature, the amparo judicial process does not include the annulment of the forest concessions granted. Now, the matter that is the subject of this submission refers to the fact that the Peruvian Government has ceased to effectively enforce the current environmental law because the Regional Government of Loreto granted 47 forest concessions in contravention of the Forest and Wildlife Law. For this reason, when the submitters mention that the forest concessions continue to operate, they are referring to those already granted in the past by the said Regional Government with respect to which

the Government of Peru has not submitted information.

38. Notwithstanding what has been indicated, the following is mentioned on the website of the Instituto de Defensa Legal (IDL – Legal Defense Institute), where comments are made on the first instance judgment of the same amparo judicial process mentioned above⁵:

“This sentence is also very important, in a context where GOREL does not want to declare the nullity of the forest concessions that it granted illegally in PIACI territory, despite the fact that the Fifth Final and Complementary Provision of the Forest Law approved by Law 29763 specifies that, “*Forest and wildlife authorization titles are not granted in areas in the process of recognition, titling or expansion of farming and native communities, as well as in areas in the process for the establishment of territorial reserves for peoples in isolation or in initial contact.*” **This problem is the subject of another constitutional process currently being processed in the Superior Court of Justice of Loreto by IDL.**”
(our emphasis).

39. For this reason, it is necessary to carry out further investigations in relation to the existence of judicial processes related to the annulment of the forest concessions granted, which merits, in the opinion of this Secretariat, the preparation of a Factual Record.
40. With regard to SERFOR, it should be noted that, among the information presented by the submitters, attached is an Act of Agreements and Commitments of the *Work Meeting on the Indigenous Reserves Yavari Tapiche, Yavari Mirim, Napo-Tigre, western mountain range of Sierra del Divisor Indigenous Reserves and Kakataibo, and the Matsés cross-border people* held on June 6, 2019 at the Commission of Andean, Amazonian, Afro-Peruvian Communities, Environment and Ecology of the Congress of the Republic. Said document included the following list of agreements with SERFOR:

“With the SERFOR:

- *SERFOR commits to, in coordination with MINCUL, promoting protection measures in the PIACI areas ... to eliminate forest concessions granted that violate rights and endanger the territories where the uncontacted populations live.*
- *SERFOR will initiate legal actions against the Regional Government of Loreto if it does not declare the nullity of the concessions granted in violation of the law within the term that has been granted.*
- *SERFOR commits to enforcing that the permanent production forests will function only when the indigenous reserve has been declared. Not before, making explicit the will to preserve said territories for the PIACI that live in said spaces.*
- *SERFOR commits to reviewing the Maps of Concessions or Biddable Units that it has promoted and allows the Regional Government of Loreto to grant forest concessions, in order not to include in said units those areas that overlap with the territories in which studies are underway to be declared as indigenous reserves.”*

⁵ <https://www.idl.org.pe/poder-judicial-ordena-al-gorel-abstenerse-de-entregar-concesiones-forestales-en-las-reservas-indigenas-de-proteccion-de-pueblos-en-aislamiento/>

41. However, in the response presented by the Government of Peru, there is no mention of what is related to SERFOR's competencies in the matter that is the subject of the submission, which is why it is necessary to develop a Factual Record in order to carry out the investigations of the case that allows having the information required to identify whether, in effect, effective compliance with the environmental law asserted in relation to the competencies of this authority has been achieved.

III. ON THE DEVELOPMENT OF A FACTUAL RECORD

42. 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."

43. 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.

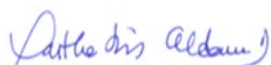
44. Therefore, the Secretariat recommends the development of a Factual Record regarding the effective enforcement of current environmental law in relation to the granting of 47 forestry concessions in contravention of the Forest and Wildlife Law by the Regional Government of Loreto.

IV. NOTIFICATION

45. The Secretariat, addressing the aforementioned reasons and acting in accordance with Article 18.9 (1) of the TPA, considers that Submission SACASEEM/PE/002/2023 warrants the development of a Factual Record, particularly considering the matters described in paragraphs 32, 33, 34, 35, 36, 37, 38, 39, 40 y 41 of this Notification.

46. 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.

47. 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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