

**Secretariat for Submissions on Environmental Enforcement Matters
United States - Peru Trade Promotion Agreement
Determination in accordance with Article 18.8 (4)**

Submitters: José César Remigio Santos Farfán, Michelle Sánchez del Carpio y Andrea Mariana Domínguez Noriega, in their capacity as members of Clínica Jurídica Ambiental de la Facultad de Derecho de la Pontificia Universidad Católica del Perú (PUCP)

Party: Peru

Reference: Submission on Matters of Environmental Enforcement filed by the Submitters.

Submission No.: SACA-SEEM/PE/001/2024

Subject: Implementation of the Wildlife Submodule in the Control Module of the National Forestry and Wildlife Information System

Date of receipt: March 29, 2024

Date of Determination: August 16, 2024

The Secretariat for Submissions on Environmental Enforcement Matters, after reviewing Submission SACA-SEEM/PE/001/2024 pursuant to Article 18.8 (4) of the United States - Peru Trade Promotion Agreement, considers **the Submission merits a response from the Party.**

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. Three (3) applicants submitted to the Secretariat, via email dated March 29, 2024, a Submission under Article 18.8 of the TPA; in which they invoke the lack of effective application, by the State of Peru, of the legislation on the protection of wild fauna, because, in their opinion, the National Forestry and Wildlife Service (SERFOR) would not have complied with implementing the wildlife submodule within the Control Module of the National Forestry and Wildlife Information System (also known as MC-SNIFFS), which would be non-compliance with provisions of the Regulation for the Management of Wildlife, approved by Supreme Decree No. 019-2015-MINAGRI as well as the Single Environmental Control Regime, approved by Ministerial Resolution No. 247-2013-MINAM.
9. The Secretariat registered the Submission as SACA-SEEM/PE/001/2024.
10. The Secretariat acknowledged receipt of the Submission via email dated March 29, 2024, through letter SACA-SEEM/PE/001/2024, addressed to the Submitters with a copy to the EAC.
11. The Secretariat determined that Submission SACA-SEEM/PE/001/2024 complied 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/001/2024/D1, communicating it to the EAC and to the Submitters via emails of July 12, 2024.
13. Pursuant to the provisions of Article 18.8 (4) of the TPA, it rests on the Secretariat to determine whether the Submission merits a response from the Party.

II. ANALYSIS

A. On the criteria established in Article 18.8 (4)

14. Article 18.8 (4) of the TPA establishes four criteria the Secretariat must consider to determine if the Submission merits requiring a response from the Party. Below is the evaluation of the aforementioned criteria:

a) [whether] the Submission is not frivolous and alleges harm to the person making the Submission;

15. In Submission SACA-SEEM/PE/001/2024, the Submitters allege the lack of effective application, by the State of Peru, of the current environmental legislation regarding the protection of wildlife, because, in their opinion, SERFOR would not have complied with implementing the wildlife submodule within the MC-SNIFFS, which would be failing to comply with provisions of the Regulation for the Management of Wildlife, approved by Supreme Decree No. 019-2015-MINAGRI as well as the Regime Single Environmental Control System, approved by Ministerial Resolution No. 247-2013-MINAM.
16. Additionally, the submitters point out that by not implementing the wildlife submodule within the MC-SNIFFS and failing to comply with the standards indicated in the previous paragraph, the Peruvian State would be violating the commitment established in Annex 18.3.4 of the TPA Peru – States United States, which provides that the Parties must combat illegal trade in wildlife, as well as Article 18.11 of the TPA, which contains the commitment of the Parties to conserve biological diversity. According to the submitters, lacking the aforementioned instrument (that is, the wildlife submodule) in Peru, there is a limitation to confront illicit wildlife trafficking.
17. Likewise, the submitters stated in the communication that they sent to SERFOR on February 9, 2024, which they have attached to their submission, that the illicit trafficking of wildlife “constitutes a crime that generates very serious damages for our Society. Because it affects the biodiversity within our territory, it generates the risk of zoonoses and causes great suffering to a large number of wild animals”. Likewise, the submitters have indicated that the lack of implementation of the wildlife submodule “represents a significant limitation for the authorities in the exercise of their oversight functions over transported or exported wildlife resources”.
18. Regarding elements that would evidence environmental damage derived from non-compliance with the aforementioned regulations by the Peruvian State, the submitters point out the following sources:
 - The National Conservation Plan for Endangered Primates of Perú (Period 2019 – 2029) located at the following link: <https://www.gob.pe/institucion/serfor/informes-publicaciones/1467153-plan-nacional-de-conservacion-de-primates-amenazados-en-el-peru>. In this regard, they point out that this document indicates some ecosystem function fulfilled by the threatened fauna species mentioned there (case of the yellow-tailed woolly monkey, the black woolly monkey, as well as the gray woolly monkey, among others).
 - The National Conservation Plan for the Conservation of the Suri (Rhea Pennata), period 2015- 2020, located at the following link: <https://www.gob.pe/institucion/serfor/informes->. This document indicates that inadequate management for the conservation of the suri and its habitats, can cause the loss of diversity of high andean ecosystems; and
 - The National Plan for the Conservation of the Andean Tapir in Perú, period 2018 – 2027, located at the following link: <https://repositorio.serfor.gob.pe/bitstream/SERFOR/581/1/SERFOR%202018%20Plan-de-Conservacion-del-Tapir.pdf>. This document highlights the role of the tapir in seed dispersal, as well as the implications of the impact on said species.

19. In this regard, it is necessary to point out that Article 18.14 of the TPA refers to the harmful effects that are sought to be avoided through the application of environmental legislation. In effect, said device establishes that the aforementioned regulations are aimed at *“the protection of the environment or the prevention of a danger to human, animal or plant life or health”*; Consequently, the damage referred to in Chapter Eighteen of the TPA includes those actions or omissions that negatively impact at least one of the elements just described.
20. Once this is identified, it is essential to understand what literal a) of Article 18.8 (4) of the TPA refers to when it indicates that *“alleges harm to the person making the Submission”*.
21. In this regard, it is necessary to point out that although the interests that are usually the subject of a procedure of any kind are of an individual nature (they concern a single specific person) or collective (they link a specific group of people who maintain some nexus between themselves), we must not forget the diffuse interests, which are those that belong to an indeterminate universe of people. As the authors Campos, Cruz and Cornejo¹ explain *“This indeterminacy is explained by the lack of a legal link or relationship between the members of the affected community, but at the same time the presence of a link between them that is based on the fact that threatens or violates the diffuse interest of said community”*. These authors comment that *“one of the most common situations in which diffuse interest is evident is in environmental cases (...)”*.
22. Likewise, the Constitutional Court of Perú has indicated that² *“diffuse rights have a special characteristic, which gives them a particularity: no one in particular is the exclusive owner and at the same time all the members of a certain group or category are their owners”*. For this reason, when analyzing a specific case with environmental implications (protection of a forest), the Constitutional Court determined that *“its protection implies protecting constitutional assets and interests of a diffuse nature, since they are owned by each and every person”*.
23. Similarly, in another of its rulings, the Constitutional Court of Perú indicated that³ *“Usually, demands for environmental protection are conceived as collective or diffuse claims, since the satisfaction of the right of one of the members of such a community implies the satisfaction of the rest of the subjects of said community (...) This has meant the need to adapt the classic perspective of procedural law – focused on the resolution of individual interests – to contexts where the ownership of a right corresponds to an indeterminate or collective set of people.”*
24. In this order of ideas, when literal a) of Article 18.8 (4) of the TPA refers to the fact that when analyzing a submission, it is evaluated whether *“alleges harm to the person making the*

¹ CAMPOS RAMIREZ, Raúl, CRUZ CASTILLO, Manuel y CORNEJO ARISMENDI, Jesús Francisco. ¿Para Que Te Traje: En busca de una regulación más protectora de los intereses difusos. In: Ius Et Veritas N° 49, Lima – Perú, december 2014. Page 366.

² Sentence issued by the Constitutional Court of Perú on November 30, 2009 within the framework of the protección process (Amparo) followed under File N° 1757-2007-PA/TC related to the case of Mariscal Ramón Castilla Park (Forest of Lince).

³ Sentence issued by the Constitutional Court of Perú on March 06, 2013 within the framework of the protection process (Amparo) followed under File N° 04216-2008-PA/TC related to the case promoted by residents of the District of Ocaña, Province of Camaná in the Arequipa region in front of the company Pesquera Natalia S.A.C. due to impact on the environment in the area near the sea of the so-called Valle de Pescadores (Valley of Fishers).

Submission", this concept includes both individual interests, as well as collective interests and diffuse interests. This means that the damage does not necessarily have to be individualized exclusively to the submitters, since in matters of an environmental nature, the typical and usual thing is that the impact is diffuse, reaching an indeterminate universe of people (within which they may be including, of course, those people who have assumed the role of submitters).

25. Taking into account what has just been stated, and considering what was previously developed in paragraphs 15 to 19, it is noted that the submitters have invoked damage (allege harm) to the extent that the lack of implementation of the wildlife submodule within the MC-SNIFFS would imply an impact to the environment and the life of various species of animals in Peru.
26. On the other hand, as the Secretariat has explained on previous occasions, as is the case of Determination SACA-SEEM/PE/002/2018/D2⁴, those submissions that do not have legal merit and that are presented in bad faith with the purpose of harassing one of the parties, will be considered frivolous.
27. In the present case, the Secretariat considers that the request is not frivolous since it invokes the lack of effective application of the environmental legislation of a Party, having communicated it in writing to that Party, as detailed in the Determination SACA-SEEM/PE/001/2024/D1.
28. Under these reasons, this Secretariat considers that the Submission SACA-SEEM/PE/001/2024 is not frivolous and asserts harm to the Submitters, in accordance with the provisions of Article 18.8 (4) (a) of the TPA.

b) [whether] the Submission, alone or in combination with other Submissions, raises matters whose further study in this process would advance the goals of this Chapter and the ECA, taking into account guidance regarding those goals provided by the Council and the Environmental Cooperation Commission established under the ECA;

29. Submission SACA-SEEM/PE/001/2024 addresses issues related to the protection of wildlife in Perú.
30. These issues are linked to the objectives of Chapter Eighteen of the TPA regarding "...promot[ing] the optimal use of resources in accordance with the objective of sustainable development...".
31. Likewise, the matters related to the Submission in question are linked to the objectives of the Environmental Cooperation Agreement (ECA) signed by the Parties, which has the objective of "...enhancing bilateral and/or regional environmental cooperation between the Parties aimed at protecting, improving and preserving the environment, including the conservation and sustainable use of their natural resources," in accordance with the provisions of Article 1 of the ECA.

⁴ Submission referred to Law 30723 – Roads in Border Areas.

32. Article 4 of the ECA, on the Work Program and Cooperation Areas, establishes that this program may include projects and/or activities such as the strengthening of national and local environmental governance and management, as well as the capacity to develop, implement, monitor and enforce environmental and natural resource laws, regulations and policies.
33. The Secretariat considers that Submission SACA-SEEM/PE/001/2024 addresses issues whose study in this process would advance the goals of Chapter Eighteen and the ECA, in accordance with the provisions of Article 18.8 (4) (b) of the TPA.

c) [whether] private remedies available under the Party's law have been pursued;

34. Based on the information presented in the Submission, there is no evidence that the Submitters have requested the remedies available under the Party's legislation or have asserted to date any type of remedy related to this Submission.
35. The Secretariat notes that Submission SACA-SEEM/PE/001/2024 does not indicate that remedies available under the Party's legislation have been requested, in accordance with the provisions of Article 18.8 (4) (c).

d) [whether] the Submission is drawn exclusively from mass media reports

36. Based on the information presented in the Submission, the Secretariat considers that it has not been taken exclusively from mass media reports but is based on the legal and technical arguments presented.
37. The Secretariat considers that Submission SACA-SEEM/PE/001/2024 is not taken exclusively from media reports, in accordance with the provisions of Article 18.8 (4) (d).

III. DETERMINATION

38. For the reasons stated and in accordance with the provisions of Article 18.8 (4), the Secretariat considers that Submission SACA-SEEM/PE/01/2024 merits the response of the Peruvian Government, regarding the alleged failure of effective enforcement of the environmental law asserted by the Submitters.
39. In accordance with the provisions of Article 18.8 (5), the Party shall advise the Secretariat:
 - 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.*

40. In accordance with the provisions of Article 18.5 (5) of the TPA, the Party may provide a response until September 30, 2024. In exceptional circumstances, the Party may notify the Secretariat, in writing, of the extension of such date up to 60 days of delivery of this Determination, meaning: October 15, 2024.



Daniel Schmerler Vainstein
Executive Director
Secretariat for Environmental Enforcement Matters
US- Peru Trade Promotion Agreement