

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

Submitters: Ángela Lucila Pautrat Oyarzún and Kené – Instituto de Estudios Forestales y Ambientales
Party: Peru
Reference: Submission on Matters of Environmental Enforcement filed by the Submitters.
Submission No.: SACA-SEEM/PE/002/2024
Subject: Law Act 31973 which amends the peruvian Forest and Wildlife Law, Law 29763
Date of receipt: May 06, 2024
Date of Determination: December 05, 2024

The Secretariat for Submissions on Environmental Enforcement Matters, after reviewing Submission SACA-SEEM/PE/002/2024 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. Two (2) applicants submitted to the Secretariat, via email dated May 06, 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 environmental legislation. The submitters allege that with the approval of Law 31973 by the Congress of the Republic, which modifies the Forestry and Wildlife Law – Law 29763, the fundamental rights of Peruvian citizens, Peru's international commitments in the fight against climate change, and various international agreements and treaties on human rights, the environment and trade. Likewise, the submitters express their concern about the serious consequences of approving and implementing Law 31973, thereby generating non-compliance with various regulations.
9. The Secretariat registered the Submission as SACA-SEEM/PE/002/2024.
10. The Secretariat acknowledged receipt of the Submission via email dated July 05, 2024, through letter SACA-SEEM/PE/002/2024, addressed to the Submitters with a copy to the EAC.
11. The Secretariat determined that Submission SACA-SEEM/PE/002/2024 complied with Article 18.8 (1) and with the criteria established in Article 18.8 (2). In particular, it was identified that the submission met these requirements in the extreme referring to the allegation that the issuance of Law 31973 would be generating non-compliance with the Organic Law for the Sustainable Development of Natural Resources – Law 26821.
12. In merit of the aforementioned, the Secretariat issued Determination SACA-SEEM/PE/002/2024/D1, communicating it to the EAC and to the Submitters via emails of October 29, 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/002/2024, the Submitters allege the lack of effective application, by the State of Peru, of environmental legislation alleging that the issuance of Law 31973 would be generating non-compliance with the Organic Law for the Sustainable Development of Natural Resources – Law 26821, which provides for *“the sustainable use of natural resources, renewable and non-renewable, establishing an adequate framework for promoting investment, seeking a dynamic balance between economic growth, conservation of natural resources and the environment and the integral development of the human person.”*
16. In relation to this, the submitters state that Law 31973 is legalizing the illegal occupation of tropical forests without prior soil studies and that this is generating contraventions of the prohibition of Change of Land Use in Forest Lands and of Protection that are part of the Forest and Faunistic Heritage of the Nation. This situation, which the submitters describe as arbitrary, in their opinion, weakens forest protection and environmental regulation by encouraging new deforestation to promote and facilitate the cultivation of cocoa, as well as the trade in palm oil commodities.
17. The submitters add that Law 31973 exclusively benefits a small group of agro-industrial companies that have demonstrably violated Peruvian forestry and environmental regulations, some of them investigated for alleged organized crime, money laundering, corruption of officials, as well as various crimes. environmental, such as deforestation, illegal logging, usurpation of indigenous territories, destruction of biodiversity, wildlife and ecosystem services.
18. Likewise, the submitters mention that the expansion of oil palm, cocoa and rice plantations has caused deforestation of hundreds of hectares. They indicate that land invasions are often the starting point of these new areas, which are then formalized through the consolidation of property. This practice has led to serious social conflicts with local farmers and indigenous populations. The approval of Law 31973, according to the submitters, will facilitate the granting of property titles on parcels that overlap with indigenous territories, permanent production forests and protected natural areas, which will likely exacerbate social conflicts in these regions.
19. The submitters also mention that more than 120,000 hectares of illicit crops such as coca leaves, marijuana and poppies are grown on invaded forest lands that have been converted for agricultural use. These crops, along with areas subject to illegal logging and forest fires, as well as those in which indigenous lands and territories have been invaded that have been awaiting recognition and titling by the Peruvian State for more than 20 years, have already been 'formalized' by Law 31973.
20. Finally, the submitters mention that promoting speculation and disorderly occupation of land may increase the risk of encouraging social conflicts with indigenous peoples, which could disproportionately impact the most vulnerable populations, including indigenous peoples in isolation and initial contact.

21. In other words, the submitters are alleging that the harm (damage) caused by Law 31973 is improperly allowing the deforestation of forests, protected natural areas, as well as territories corresponding to indigenous peoples, to improperly make way for to the development of agricultural activities on said soils, affecting biodiversity, wildlife, as well as indigenous peoples.
22. 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:
- Documents that they have called “official documents prior to the approval of Law 31973”, in which various entities and people question the intention of the Congress of the Republic to modify the Forestry and Wildlife Law, as well as other related documents¹.
 - Documents that they have called “civil society documents prior to the approval of Law 31973”².
 - Documents that they have called “official documents subsequent to the approval of Law 31973”, in which various agents express their concern and/or rejection of the promulgation of said legal norm³; and
 - Documents that they have called “civil society documents subsequent to the approval of Law 31973”⁴.

¹ These documents are: An official letter from the Presidency of the Republic observing the signature of the law issued by Congress referring to the modification of Law 29763 – Forestry and Wildlife Law; a statement and statement from the Ministry of the Environment - MINAM; a report from the Presidency of the Council of Ministers -PCM; a statement from the National Forestry and Wildlife Service – SERFOR; Two official letters issued by the Ombudsman's Office; Two official letters from the Ministry of Agrarian Development and Irrigation – MIDAGRI that contain the opinions of said ministry and SERFOR; a statement from the Interfaith Initiative; A mandatory jurisdictional ruling issued by the Superior Court of Justice of the Judicial Branch that establishes the obligation of prior consultation in favor of indigenous and native peoples before any legislative or other measure that may affect them is adopted; Request presented by the Federation of Native Communities of Ucayali and Tributaries (FECONAU) to the Congress of the Republic in order to submit to prior consultation the Autograph of the Law that modifies Law 29763, Forestry and Wildlife Law ; Request presented by Miss Ángela Lucila Pautrat Oyarzun, addressed to the Agrarian Commission of the Congress of the Republic, in order to refrain from supporting the opinion due to insistence regarding the signature of the law issued by Congress referring to the modification of the Law 29763 – Forestry and Wildlife Law, after the observations made by the Presidency of the Republic; and, Writ of Amparo Claim filed by Miss Ángela Lucila Pautrat Oyarzun against the Congress of the Republic, in order to refrain from continuing with the process referring to the modification of Law 29763 – Forestry and Wildlife Law, as well as the order admitting said claim issued by the Judiciary.

² These documents are: A statement entitled “We express our concern about the weakening of the regulatory framework for the sustainable management of the territory” signed by more than 300 natural and legal persons; Legal report analyzing the constitutionality of the regulatory projects to modify Law 29763 – Forestry and Wildlife Law prepared by the Legal Defense Institute; Statement from the Inter-Ethnic Association for the Development of the Peruvian Jungle (AIDSEPP) rejecting the modification of the Forestry and Wildlife Law; and, Letter sent by various indigenous, union and civil society organizations to the European Commission on deforestation risks due to the regulations approved by the Peruvian Congress.

³ These documents are: Communiqués issued by the Embassies of Germany, Canada, the United Kingdom and Norway expressing their concern about the impact of Law 31973; SERFOR statement; Presentation of the MINAM before the PCM explaining the negative effects of the approval of Law 31963; Agreement of the Regional Government of Pasco rejecting Law 31973; Complaint for Constitutional Infraction filed by Miss Ángela Lucila Pautrat Oyarzun against the President of Congress and another member of the board of directors of said entity for violation of the Constitution by having promoted the approval of Law 31973; Unconstitutionality lawsuit filed by the College of Sociologists of Peru against Law 31973, and Admission Order of said lawsuit; and, Admission Order of the Unconstitutionality Lawsuit filed by the Regional Government of San Martín against Law 31973. In addition to this, the criminal complaint filed by Miss Ángela Lucila Pautrat Oyarzun against PCM, MIDAGRI, MINAM and SERFOR.

⁴ These documents are: Communication sent by Kené – Institute of Forestry and Environmental Studies to the United States Embassy in Peru; Statement from the Legal Defense Institute; Pronouncement of the Peruvian Chapter of the Laudato SÍ Movement; Statement signed by more than 3,800 people against the modification of the Forestry and Wildlife Law; Statement of the Bishops of the Peruvian Amazon; Statement of the Pastoral Network of Indigenous Peoples and Integral Ecology; Statement from the Observatory of Illegal Mining and Related Activities in Key Biodiversity Areas; Statement of the Ecclesial Conference of the Amazon; Multiple Letter sent by the NGO Environmental Law and Natural Resources – DAR to various authorities; Statement of the National Council of Deans of the Professional Colleges of Peru; Letter sent by 13 indigenous organizations, 24 agricultural sector associations, 46 non-governmental organizations and 29 natural persons, addressed to the Environmental Affairs Council of the APC Peru – United States; Letter sent by 7 indigenous organizations to the President of Congress; Pronouncement of the National Assembly of Regional Governments; Statement from the Faculty of Forestry Sciences of the National Agrarian University La Molina; Document called “Declaration of Iquitos” signed by the National Coordinator of Forestry Engineering Chapters of the College of Engineers of Peru; Statement of the Awajún Autonomous Territorial Government; Statement by the Coordinator of Development and Defense of the Indigenous Peoples of the San Martín Region; Statement of the General Confederation

23. 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.
24. 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”*.
25. 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 Cornejo⁵ 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 (...)”*.
26. Likewise, the Constitutional Court of Perú has indicated that⁶ *“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”*.
27. Similarly, in another of its rulings, the Constitutional Court of Perú indicated that⁷ *“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.”*
28. 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 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

of Workers of Peru; and, Message from the Peruvian Episcopal Conference.

⁵ 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.

⁶ 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).

⁷ 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).

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).

29. Taking into account what has just been stated, and considering what was previously developed in paragraphs 25 to 28, it is noted that the submitters have invoked damage (allege harm) to the extent that the application of Law 31973 would imply an impact on the environment and the protection or conservation of wild flora (including protected natural areas), as well as a danger to biodiversity, for wildlife and forest resources in Peru.
30. On the other hand, as the Secretariat has explained on previous occasions, as is the case of Determination SACA-SEEM/PE/002/2018/D2⁸, 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.
31. 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/002/2024/D1.
32. Under these reasons, this Secretariat considers that the Submission SACA-SEEM/PE/002/2024 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;**
33. Submission SACA-SEEM/PE/002/2024 addresses issues related to the protection of addresses issues related to the protection of forests, protected natural areas, as well as territories corresponding to indigenous peoples, against the improper development of agricultural activities on the soils that correspond to said forests, areas and territories.
34. 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...”.
35. 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.

⁸ Submission referred to Law 30723 – Roads in Border Areas.

36. 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.
37. The Secretariat considers that Submission SACA-SEEM/PE/002/2024 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;

38. 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.
39. The Secretariat notes that Submission SACA-SEEM/PE/002/2024 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

40. 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.
41. The Secretariat considers that Submission SACA-SEEM/PE/002/2024 is not taken exclusively from media reports, in accordance with the provisions of Article 18.8 (4) (d).

III. DETERMINATION

42. For the reasons stated and in accordance with the provisions of Article 18.8 (4), the Secretariat considers that Submission SACA-SEEM/PE/002/2024 merits the response of the Peruvian Government, regarding the alleged failure of effective enforcement of the environmental law asserted by the Submitters.
43. 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.*

44. In accordance with the provisions of Article 18.5 (5) of the TPA, the Party may provide a response until January 19, 2025. 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: February 03, 2025.



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