

SALA
US-PANAMA TPA

Secretariat for Environmental Legislation Enforcement
United States-Panama Trade Promotion Agreement

Contamination by agrochemicals. Crops.
Communication No.: SALA-CA-PMA/003/2021
Determination No. 003/2022
Date: Friday, 3 June 2022.

Determination No. 003/2022 on the analysis to determine whether the Communication submitted about the Party's response warrants recommending the preparation of a factual record following the provisions of Article 17.8 numeral 5, and Article 17.9 numerals 1, 2, and 3 of the Trade Promotion Agreement between the United States and Panama (US-Panama TPA).	
Communication No.: SALA-CA-PMA/003/2021 Contamination by agrochemicals. Crops.	Date of receipt: 31 December 2021
Petitioner/signatory of the Communication:	Mr. Moises Montero Identification Card No.: 8-521-1659
Party: Panama	

I. Introduction

Article 17.8 of the Trade Promotion Agreement (TPA) between the United States and Panama establishes the procedure for Submissions for Environmental Enforcement Matters by which "any person of a Party may submit communications asserting that a Party is failing to comply with the effective enforcement of its environmental legislation. Such communications shall be addressed to a secretariat or other appropriate body ("secretariat"), designated by the Parties."¹

In keeping with the above provision, on 31 December 2021, Mr. Moises Montero presented via email a Submission to the Secretariat for Environmental Enforcement Matters of the United States-Panama Trade Promotion Agreement (SEEM US-Panama TPA) asserting that the Government of the Republic of Panama is failing to comply with the effective enforcement of its environmental legislation.

By numeral 2 of the Article mentioned above 17.8 and section 5 of the Working Procedure for Submissions, it is incumbent upon the Secretariat to verify the content of the submitted document and determine whether it complies with the requirements established by the Agreement. If it is decided that the Submission meets the specified requirements, it will be determined whether it merits the request for a response to the Party, following the parameters of numeral 4 of Article 17.8.

These stages were exhausted through Determination No. 001/2022 dated 19 January 2022, which verified and confirmed compliance with the formal requirements established for the admission of Communication, and Determination No. 002/2022 of 6 February 2022. After analyzing the substantive requirements specified in Article 17.8.4, it was determined that there was merit

¹ Article 17.8 numeral 1 on Communications relating to Environmental Legislation Enforcement. Chapter 17. US-Panama TPA.

to request a response from the Party by the provisions of numeral 5 of Article 17.8 of the Agreement and the corresponding sections of the Working Procedure for Communications.

Article 17.8.5 of the Agreement provides that "The Party shall notify the secretariat within 45 days or in exceptional circumstances and notify the secretariat within 60 days of the delivery of the request." In compliance with this term, the Party submitted a timely request for an extension of the period for the delivery of the response, justifying this in a meeting held to gather information from different Directorates of the institution. Following this request, the final delivery deadline was extended to April 12, 2022, and before the expiration of this deadline, the Party's response notes were received on March 18, 2022, and April 7, 2022.

Given the preceding, it is appropriate to analyze the documentation gathered to date by the provisions of Article 17.9 of Chapter 17 on Factual Record and Related Cooperation and to determine whether the Submission warrants the Secretariat's recommendation to prepare a Factual Record².

II. Summary of the content of the Submission

In the Submission, which has been identified with No. SALA-CA-PMA/003/2021 entitled "Contamination by agrochemicals. Crops," the submitter asserts, by the provisions of Chapter 17 of the United States-Panama TPA, Article 17.8, that the Government of the Republic of Panama has committed a breach in the effective enforcement of its environmental legislation provisions about Law 47 of 1996 establishing Phytosanitary Protection Measures³; Law 41 of 1998, General Law on the Environment of Panama, which regulates the Assessment of Environmental Impact Studies⁴, and Law 125 of 2020, which approves the Regional Agreement on Access to Information, Public Participation, and Access to Justice on Environmental Matters.

In the description of facts, the submitter states that in January 2021, the Panama Oeste Regional Directorate of the Ministry of the Environment drafted ex officio Technical Report 010-2021, in which it said, in its technical analysis, that the

² Article 17.9.1 "When the secretariat considers that, in light of the response given by the Party, the communication merits preparation of a factual record, the secretariat shall inform the Council and indicate its reasons."

³ **Law 47 of 9 July 1996**, regulates all actions related to plant protection of the national agricultural heritage, with the primary objective of preventing and controlling, in an integral way, phytosanitary problems, of achieving phytosanitary quality of plants and plant products in the process of production, classification, packaging, storage, and transport, and of avoiding the introduction, establishment, and dissemination of plant pests and plant products in the territory of the Republic of Panama. It also aims to establish an adequate use of phytosanitary inputs.

In accordance with this Law, the fundamental objectives of the State, in the phytosanitary aspect, are actions to coordinate, through its institutions, aspects that for reasons of protection of public health, environment, biological diversity, and others, are directly related to plant health.

⁴ **The single text of Law 41 of 1998**, General Law on the Environment of the Republic of Panama, provides in Article 7, that activities, works, or projects, public or private, by their nature, characteristics, effects, location, or resources could generate environmental risks, and thus, require an environmental impact study prior to the start of its execution, in accordance with the regulations of this Law. These activities, works, or projects must undergo an environmental impact assessment process, including those carried out in the Canal basin and indigenous regions.

The regulation of this law in this matter is **Executive Decree No. 123 of 14 August 2009**, which provides in Article 16 a list of projects, works, or activities that are under the Environmental Impact Assessment process, including in the Agriculture, Livestock, Hunting, and Forestry Sector, the cultivation of fruit trees in areas greater than or equal to 15 hectares.

company Inversiones JPW, S.A. "lacks an Environmental Management instrument" to start operating.

The submitter said that, although the company lacked an environmental management instrument, in August 2021, it intensified clearing, plowing, planting, and spraying activities without reporting this or consulting the affected people in La Colorada, Corregimiento of Iturralde, District,,, of La Chorrera, Province of Panama Oeste.

The submitter states that other complaints were submitted to the Ministry of the Environment⁵ and that the Ministry conducted a second inspection on September 20, 2021, during which non-compliance was detected, and this was included in Technical Report 203-21, which states that the company "lacks any environmental management instrument, Environmental Impact Study, or Environmental Management Adaptation Plan."⁶

The submitter said in the text of his Submission that the Agriculture and Livestock Services Directorate, Region 5, Panama Oeste, of the Ministry of Agriculture and Livestock⁷ informed him that it does not have a registry of agrochemical products used by the company. The submitter added that on October 4, 2021, the Ministry of the Environment issued a Stoppage Certificate, but the company has continued to carry on with its earth moving, planting, harvesting, and spraying activities despite what was established by the authorities and the opposition of residents of the community of La Colorada, expressed in a letter addressed to the Regional Directorate of the Ministry of the Environment in La Chorrera dated on October 4, 2021⁸.

The submitter concludes the submission by stating that, given the violation of environmental regulations, on November 18, 2021, Susana Serracin filed a complaint against the company and officials of the Ministry of the Environment for action or omission of their functions involving a crime Against the Environment and Land Management committed to the detriment of the community of La Colorada. The submitter states that on December 26, he was informed at his residence that legal action had been filed against him by an employee of the company, which was recorded in File 2021 00085173 of the First Instance Prosecutor's Office of the District of La Chorrera. This action, he believes, has an "intimidating nature and seeks to prevent continuation of claims for the health rights, to a healthy environment, to information, and to environmental justice enshrined in Law 125 of 2020, which ratified the Escazu Agreement."⁹

The submitter provides a series of documents as evidence of what is stated in his written Submission, as follows:

1. Simple copy of ex officio Technical Report No. 010-2021, dated January 26, 2021, prepared by Edgar Murillo of the Regional Directorate of the Ministry of the Environment in Panama Oeste. This document indicates that on January 7, 2021, an ex officio inspection was carried out at a pineapple-producing farm in La

⁵The text of the Technical Report 203-21 describes that the inspection was carried out in response to a complaint filed by Mr. Montero through his attorney.

⁶Text of the Submission by Mr. Montero.

⁷Simple copy of Note No. DER-628-2021 dated 22 September 2021 provided as evidence in the Communication.

⁸A simple copy of a handwritten note, bearing reference No. 07/MM, dated 4 October 2021, with 75 signatures, provided by the submitter as evidence in his Communication.

⁹ Reference, final section of written Communication submitted by Mr. Montero.

Colorada because plowing was observed at the farm, and there was no Environmental Impact Study sign on display¹⁰.

The 6-page report contains the findings identified on the site by MiAmbiente staff. The report confirms the beginning of operations without an environmental management instrument, affecting components of the environment, such as sediments going into the creek bed and damming of a creek used for irrigation and spraying activities of the project. The report recommends that the document be sent to the Office of Legal Counsel and the National Directorate for Environmental Performance Verification to continue with the process and that the company be asked to undergo a mandatory environmental audit.

2. Simple copy of DRPO-SEVEDA-ALR Ruling. No. 218-2021 of May 26, 2021, by which, according to the content of ex officio Technical Report No. 010-2021 of January 26, 2021, the Regional Directorate of the Ministry of the Environment in Panama Oeste resolves to initiate administrative proceedings against the company Inversiones JPW, S.A., for alleged environmental infringement consisting of the start of activities without an Environmental Impact Study, It also orders the stoppage of all the activities of the company¹¹, manual removal of the dam that the company maintains in the water easement within 30 days, and presentation of its arguments within five days. The company's notification seal does not appear in the copy of this document.

3. Simple copy of Ruling No. DRPO-SEVEDA-ALR-No. 448-2021 of September 13, 2021, by which the Regional Directorate of the Ministry of the Environment in Panama Oeste resolves, ex officio, to accumulate files No. 0202121 and No. 195-2021, the latter being the complaint submitted by Mr. Moises Montero because both files deal with the same facts and target the same company. The copy provided shows the notification stamp for Mr. Montero but no notification stamp for the company.

4. Simple copy of Technical Complaint Report No. 203-21 of October 1, 2021, prepared by the Environmental Performance Verification Section of the Regional Directorate of the Ministry of the Environment to address the complaint that Mr. Moises Montero, filed through his attorney, Harley Mitchell, over environmental violations committed by a pineapple company in the Corregimiento of Iturralde, District of La Chorrera, Province of Panama Oeste.

This report refers to the inspection carried out on 20 September 2021, which was preceded, among others, by ex officio Technical Report No. 010-2021, which concluded that the inspected company is cultivating pineapples without an environmental management instrument. The report also describes that by note DRPO915-2021, the company, through its legal representative, was asked to produce a mandatory environmental audit, which was notified on September 15, 2021.

The 11-page report describes the findings during the inspection, including the sediments in the creek and the distance between the pineapple plantation and the complainant's residence, following Plant Health standards. The report concludes, among other things, that the company operates without an environmental management instrument and makes several recommendations, including reiterating the request to the company to submit a mandatory environmental audit.

5. Simple copy of handwritten note identified as Note 05/MM of September 20, 2021, addressed by Mr. Montero to Mr. Jose Barria, regional director of Zone 5 of the Ministry of Agriculture and Livestock Development, requesting a simple copy of the technical sheet about the phytosanitary or agrochemical products used by the company JPW, S.A.

6. Simple copy of note DER-628-2021 of September 22, 2021, of the Directorate of Agriculture and Livestock Services, Region 5, Panama Oeste of the Ministry of

¹⁰Fact asserted by the appellant in its written Communication.

¹¹Ibid.

Agriculture and Livestock Development responding to a request for information by Mr. Montero on the agrochemical products used by the company, noting that there are no records of the products it uses, but that the company must have a technical sheet indicating the products approved by the plant health office.

7. Simple copy of handwritten note identified as Note 07/MM of October 4, 2021, attaching a series of signatures (75 are mentioned) addressed to the Regional Director of MiAmbiente in La Chorrera by residents of La Colorada, Corregimiento of Iturralde, concerning the pineapple planting activities of the company, indicating that this worries them, because *"it affects health, environment, and our water sources; mainly the well and tank that supplies more than 100 families located around the grounds of this company."*

8. Simple copy of the complaint filed with the Accusatory Criminal System, Unique Note No. 202100076860, filed by Susana Serracin on behalf of the community of La Colorada for the crime Against the Environment and Land Management, Article 399 of the Criminal Code.

9. Simple copy of the Stoppage Certificate of October 4, 2021, issued by the Regional Directorate of the Ministry of the Environment in Panama Oeste in compliance with the provisions of Ruling DRPOSEVEDA-ALR No. 218-2021 of May 26, 2021. The certificate reaffirms the stoppage order, describes the activities the company cannot continue to carry out and allows it to harvest pineapples until October 9, 2021.

10. Simple copy of Edict No. DRPO-096-2021, issued by the Legal Counsel Office of the Panama Oeste Regional Directorate of the Ministry of the Environment, where within an ex officio administrative process over an alleged environmental infraction against Sociedad Inversiones JPW, S.A., eight working days were granted for the presentation of evidence and five working days for the presentation of written pleadings. This edict is dated October 6, 2021.

11. Simple copy of handwritten note identified as Note 13/MM of December 1, 2021, addressed to the Regional Directorate, Zone 5 of the Ministry of Agriculture and Livestock Development, requesting copies of the follow-up of the complaint reports presented by Mr. Harley Mitchell to the company Inversiones JPW, S.A.

12. Simple copy of note DER-846-2021 of December 9, 2021, issued by the Regional Directorate of Agriculture and Livestock Services of the Ministry of Agriculture and Livestock Development, in which, in response to the request note 13/MM, it suggests that a complaint be filed before the House of Peace corresponding to the Corregimiento.

III. Summary of the content of the Party's response

By Determination No. 002/2021 of 6 February 2022, and given that the Communication submitted met all the requirements of form and substance, the secretariat determined that there was merit to request a response from the Part. Under the procedure, this request was formally sent on February 10, 2022, through Note SALA No. 03-2022 to the Ministry of the Environment, which is the representative of the Party on environmental issues.

That numeral 5 of Article 17.8 provides as follows:

"17.8 Submissions relating to Environmental Law Enforcement:

... 5. The party shall notify the Secretariat within 45 days or in exceptional circumstances and notify the Secretariat within 60 days after the delivery of the request:

a. If the particular matter is the subject of a judicial or administrative proceeding pending resolution, in which case the secretariat will not continue with the process; and

b. Any other information that the Party wishes to submit, such as:

i. If the matter in question has previously been the subject of judicial or administrative proceedings;

ii. If there are resources available to individuals related to the matter that is available to the person presenting the communication and if they have been approached; or

iii. Information relating to relevant capacity-building activities developed under the ACA¹²."

In implementing this Agreement provision, the Procedural Manual of the Secretariat Section 5 establishes that: "... The Party shall submit its written response to the Secretariat within 45 calendar days from the date the Secretariat submits the request or in exceptional circumstances no later than 60 calendar days after submission of the request. After receipt of the Party's response or after the deadline for response has expired, the Secretariat shall consider whether the communication warrants preparing a factual record and shall post its response on the Secretariat's web page."

Regarding the date for sending the request for a response to the Party, the deadline for its receipt was March 27, 2022. As established by the procedure, the Party, through note OCTI-041-2022 submitted by the Office of International Technical Cooperation of the Ministry of the Environment, requested an extension to 60 days of the term, indicating that evidence was being gathered to issue a formal response. Considering the justification given, the requested 15-day extension was granted, setting April 12, 2022, as the new final date to deliver a response.

Within the established term, the Party sent two response notes as follows:

- Note OCTI-046-2022, dated March 18, 2022, attaching response information issued by the Directorate of Environmental Impact Assessment (Memorandum-DEEIA-0143-1503-2022) and by the Water Safety Directorate of the Ministry of Environment (Note DSH-0161-2022).
- Note OCTI-057-2022 of April 7, 2022, attaching the response note DIVEDA-DCVCA-179-2022 issued by the Environmental Performance Verification Directorate of the Ministry of the Environment, specifically from the Department of Environmental Quality Control and Verification.

The response notes refer to different actions carried out by the Ministry of the Environment's directorates regarding the pineapple cultivation activity carried out by the company INVERSIONES JPW, S.A., which was mentioned in Mr. Montero's Submission.

Memorandum DEEIA-0143-1503-2022 issued by the Department of Environmental Impact Studies Assessment of the Directorate of Environmental Impact Assessment of the Ministry of the Environment, after verifying the documents provided in Submission No. SALA-CA-PMA/003/2021, Contamination by agrochemicals. Crops, stated in its response the following:

"Taking the above into account, we can point out that the assessment process is an early warning system that allows decisions to be made regarding the protection of the environment, reflecting it in an Environmental Impact Study, which describes the characteristics of a human action that predicts, identifies, and interprets the impacts to the environment that aim to avoid, reduce, correct, and control, with the referred to measures.

According to the competence of the Environmental Impact Assessment Directorate, our opinion is that an Environmental Impact Study does not apply to the company JPW, S.A. Thus, another environmental management instrument should be considered because it has been operating for more than two years."

Note DSH-0161-2022 issued by the Water Safety Directorate of the Ministry of the Environment, using the Submission as a reference, stated in its response the following:

¹² Environmental Cooperation Agreement (ACA).

"...the Environmental Verification and Performance Directorate (DIVEDA) requested the presence of an official of the Water Safety Directorate (DSH) on September 21, 2021, during a drone overflight of the Company INVERSIONES JPW, S.A., and which is in charge of the Pineapple Cultivation Project in the sector of Zangenga. This support generated high-resolution images of the environmental impact caused by the pineapple cultivation activity; four overflights were carried out, surveying approximately 40 hectares... Then the corresponding maps of the analysis were generated, diagnosing the hierarchical order of drainage, the creek's name, the path, and the confluence of downstream water sources with other sources..."

In our fieldwork, we were able to verify that the bodies of water contaminated by the project are located within the Panama Canal Watershed (Basin No. 115). This watershed management is regulated in the Political Constitution of the Republic of Panama by Article 316...

In conclusion, we want to indicate that our Directorate has no jurisdiction over water resource issues within Basin No. 115, so the legal and legitimate competence lies with the Panama Canal Authority. However, given that we were asked to support the overflights, we sent the information on the support provided to DIVEDA on 21 September 2021."

Memorandum DIVEDA-DCVCA-179-2022, issued by the Department of Environmental Quality Control and Verification of the Directorate of Environmental Performance Verification, is the response to the Submission, and it took into account what was done in the Regional Directorate of Panama Oeste both in the Environmental Performance Verification and the Legal Counsel sections. This memorandum summarizes different actions carried out in response to the case raised in the Communication, namely:

"... the case related to what was presented to SALA by Mr. Moises Montero on December 31, 2021, is under the Administrative Investigation Process initiated on May 26, 2021, through Ruling DRPO-SEVEDA-ALR-No. 218-2021 against the company Inversiones JPW, S.A., whose file was subsequently accumulated... filed by Mr. Moises Montero against the same company on August 20, 2021, pending resolution."

As described in the response note, the institution has carried out a series of ex officio actions requesting a mandatory environmental audit of Inversiones JPW, S.A. by Executive Decree No. 57 of 10 August 2004. Earth movement was identified in La Colorada, Corregimiento of Iturralde, District of La Chorrera, but there was no sign on display indicating that an Environmental Impact Study was approved (January 2021). As a result of this inspection, a technical report¹³ was issued, which concluded that the company began operations without any environmental management instrument and recommended that it be asked to submit a mandatory environmental audit.

On August 24, 2021, the Regional Directorate of Panama Oeste asked the company to submit a Mandatory Environmental Audit, and on October 11, 2021, the company delivered a Mandatory Environmental Audit Plan, and on October 15, 2021, the institution issued observations, comments, and aspects for corrections to be made in the Plan mentioned above. The company submitted such corrections on November 2, and the institution accepted them on November 12, 2021. The 150 working days for the presentation of the Mandatory Environmental Audit and The Environmental Adaptation and Management Program for their corresponding assessments start on November 22, 2021.

The response describes the actions the institution took regarding the facts' ex officio administrative investigation process. This started on May 26, 2021, and was based on the inspection of January 2021 and the technical report of January 26,

¹³The response memorandum refers to ex officio technical report No. 010-2021 of 26 January 2021.

2021. The institution concluded that the activity was carried out without having an environmental management instrument. At the beginning of the administrative investigation, it ordered the stoppage of the activities related to the actions under investigation.

The response note explains that on August 20, 2021, a complaint filed by Mr. Montero against Inversiones JPW, S.A. was received and admitted on September 8, 2021, creating file 195-2021,¹⁴ and an Inspection of the site was requested on the same day. Such inspection was carried out on September 20, 2021, in the area where the investigated company conducts its pineapple cultivation activities, generating technical report No. 203-21.

As described in the response note, procedural stages of evidence and allegations were attended to within the accumulated investigation file for these actions. The works were stopped on October 4, 2021. Still, the product's harvesting was allowed until October 9, 2021, and ripening, induction, and fertilization irrigation activities were also allowed to continue. Still, phytosanitary spraying was not allowed, given that the complainant reported the chemicals used as being harmful.

The response letter states that the company requested the stoppage measure be lifted on October 15, 2021. Technical Report No. 213-2021 of October 19, 2021, explains that this was ordered because the company complied with the presentation of an audit plan. It also asked that the company be granted 30 days to harvest the product.

Among the additional actions described in the response are consultations with the Ministry of Agriculture and Livestock Development to determine whether the products used in this activity comply with the requirements established by the institution, to which it noted that "*all agrochemicals have a registration number and can be used for pineapple cultivation,*" and "*in the case of the products OXAIL and ETORROPHOS, they can be used in pineapple cultivation under an ATF or agronomist, and the company has the qualified personnel to do this.*"

It adds that it consulted the National Directorate of Environmental Health of the Ministry of Health on whether Decree No. 71 of February 1964, "*which approved regulations on the location of industries constituting hazards or public nuisances and the minimum sanitary conditions that must be complied with,*" applies to the activity of pineapple cultivation. The answer was that it does not apply to pineapple cultivation and its processes.

As described in the note, activities were carried out within this process in conjunction with other institutions. On November 15, 2021, a field inspection was carried out at the polygon where the pineapple cultivation activities are carried out in response to a citizen complaint filed by the community of Cerro Cama before the Panama Canal Authority (ACP). This inspection generated the Technical Report No. 257-2021 by the MiAmbiente that concluded the following:

"In the inspection tour carried out by technicians of the Ministry of Environment, ACP, and the Ministry of Agriculture and Livestock Development, we observed an artificial lake, and according to the ACP official who accompanied us, this activity was authorized by that institution at the request of the company Inversiones JPW, S.A., to allow it to accumulate water to meet cultivation demands."

"During this inspection, we did not observe any pineapple remains within the stream bed or its vicinity."

¹⁴ The response note indicates that complaint file No. 195-2021 was accumulated to ex officio file No. 020-2021.

As a result of this inspection, the ACP also issued a report on 22 November 2021 that mentioned the following, according to the response note:

- *The company Inversiones JPW, S.A. does not maintain approval for projects in CHCP because JPW's predecessor, the company Piñas del Oeste, S.A., started operations without project authorization.*
- *Inversiones JPW, S.A. does not hold a permit to extract raw water during the dry season (January-April).*
- *At the water extraction site, bare soil slopes were observed with sedimentation contributions to the reservoir, which is part of the harvest irrigation system.*
- *It was observed that the edges of the water source remain without vegetation cover, contributing a large amount of sediments due to rainfall.*
- *A visit was made to other polygons bordering the creek and the production polygon, where some significant sediment was observed due to earth movement in sites outside of the company's pineapple production activities.*
- *No decomposed pineapples were observed in the water source, the complainant reported."*

The response note indicated that, at the request of Mr. Montero, an inter-institutional meeting was held on December 21, 2021, involving representatives of the Ministry of Agriculture and Livestock Development, Ministry of Health, ACP, Ministry of the Environment, the company Inversiones JPW, S.A., five members of the community, and a lawyer. Minutes of this meeting were taken and sent to the participants for follow-up on the issues.

The final points of the response note describe actions carried out within the process, such as the request for information from the Environmental Policy Directorate on the technical reports for economic assessment of environmental damages within the investigation process. The Regional Director of Panama Oeste was also asked to analyze the water quality of a well located on the road leading to the community of La Colorada, given the proximity of this well to the pineapple cultivation activities.

The response note concludes by stating that *"Mr. Moises Montero has requested, both in the Environmental Performance Verification Directorate and in the Regional Directorate of Panama Oeste, copies of different documents kept on file, and he received a response within the terms established in the corresponding legislation, in the same way, that queries and demands for attention through meetings have been attended...."*

IV. Analysis of the Communication and the Response of the Party to reach a determination on the Development of a Factual Record.

It is the responsibility of the Secretariat, by the procedure, after analyzing the available information, to decide whether the submission warrants preparing a factual record and, if so, to voice this recommendation to the Environmental Affairs Council.

Given the above, the analysis is framed by what is established in Article 17.9.1 of Chapter 17 of the Trade Promotion Agreement between the United States and Panama, which provides: *"If the secretariat considers that, in light of the response given by the Party, the communication merits preparation of a factual record, the secretariat shall inform the Council thereof and indicate its reasons."*

That in furtherance of the above, Section 7 of the Secretariat's Procedural Manual provides that: *"The Secretariat, during the assessment of the submission and the response of the Party concerned, if any, it shall determine whether the preparation of a factual record is warranted within a period of no more than 45 calendar days, or in exceptional circumstances within 60 calendar days,*

counted from the receipt of the response from the party concerned or from the expiration of the time limit for receiving such response."

A. Assessment of the Communication

From the reading and analysis of the communication submitted and the information provided as evidence, this Secretariat identifies as the substance of the request the following:

1. The Submitter asserts that there is non-compliance in the effective enforcement of environmental legislation because the pineapple planting activity, as confirmed by technical reports from the Ministry of the Environment, "does not have any Environmental Management instrument" as of January 2021.

2. The submitter said that cleaning, plowing, planting, and fumigating intensified in August 2021 without informing about this or consulting with those affected in the community of La Colorada.

3. The submitter stated that *"although the Ministry of the Environment issued a Stoppage Order on October 4, 2021, the company has continued earth movement, planting, harvesting, and spraying activities without interruptions despite what the authorities established and the opposition of residents of La Colorada...."*

4. The submitter asserts that, in the face of the violation of environmental regulations, he filed a complaint about crime against the environment and land management against the company and officials of the Ministry of the Environment in November 2021, and that in December 2021, he was notified that the company filed legal action against him with the Prosecutor's Office, which the submitter describes as an act of intimidation to prevent the continuation of claims for the health rights, to a healthy environment, information, and justice.

As referred to by the submitter in the Communication, the regulations, which are considered to have been violated or not enforced, are:

- Law 47 of 1996, on Phytosanitary Protection Measures.
- Law 41 of 1998, regarding the carrying out of an Environmental Impact Assessment before the execution of any work, and
- Law 125 of 2020 approves the Regional Agreement on Access to Information, Public Participation, and Access to Justice in Environmental Matters.

B. Assessment of Party's response.

After reading and analyzing the response note submitted by the Party, this Secretariat identifies the following:

1. The notes sent by the Ministry of the Environment describe different actions that have been carried out by the institution to address the pineapple planting activity without an environmental management instrument and some activities carried out in coordination with other competent institutions in the subject.

2. The first response note, which refers to the information provided by the Environmental Impact Assessment and Water Safety Directorates, states that after analyzing the documents and the actions taken, it is not within the competence of any of these directorates to address the issue.

3. The second response note that refers to the information provided by the Environmental Performance Verification Directorate (DIVEDA) describes chronologically the actions that have been taken by DIVEDA and the Regional

Directorate of the Ministry of the Environment in Panama Oeste. The response shows that the Ministry of the Environment initiated an administrative proceeding for the order to present a Mandatory Environmental Audit and that an administrative investigation proceeding is also underway, which accumulates both the ex officio proceeding initiated by the Regional Directorate and the complaint proceeding filed by Mr. Montero.

4. The Party's response note refers to the institution's technical reports confirming the submitter's information, that the company operates without any environmental management instrument, and that the presentation of a mandatory environmental audit is recommended. Still, no copies of these reports are provided to allow their analysis in the light of the legislation that the Submission indicated was not enforced or of the legislation itself cited in the Party's response note.

5. The response note mentions actions carried out jointly with the Ministry of Agriculture and Livestock Development, the Ministry of Health, and the Panama Canal Authority, among others, where reference is also made to an inspection report prepared by the latter and meeting minutes to follow up on the issues. However, no copies of these documents are provided to allow their analysis in the light of the legislation that the Communication indicated was not enforced or of the legislation itself cited in the Party's response note.

6. The response note does not provide information regarding the criminal proceedings for possible crimes against the environment and land management referred to by the submitter, nor does it mention whether the institution has sent information to the Public Prosecutor's Office regarding the possible commission of a crime about these actions.

B. Reasons why the Secretariat finds merit for preparing a Factual Record.

Considering the assertions made by the submitter and the information sent by the Party in its response notes, the Secretariat, referring to the environmental regulations said to not have been enforced, proceeds to describe the reasons why it finds merit for the preparation of a Factual Record, divided into three sections:

- Aspects related to the administrative process of mandatory environmental audits,
- Aspects related to the administrative process of investigation for possible infringements, and
- Aspects related to the criminal complaint process for an alleged crime against the environment and land management.

The Secretariat's analysis is made considering the provisions of Chapter 17 of the US-Panama TPA, particularly Article 17.14 on Definitions, which in its numeral 2 establishes that for Article 17.7.5, judicial or administrative proceeding means:

"a. a domestic judicial, quasi-judicial, or **administrative proceeding carried out by a Party promptly and in accordance with its legislation**. Such proceedings include: mediation; arbitration; **issuance of a license, permit, or authorization**; seeking a promise of voluntary compliance or a compliance agreement; **seeking sanctions or reparation measures in an administrative forum** or judicial forum; **the process of issuing an administrative ruling**; and

b. an international dispute settlement procedure to which the Party is a party." -highlighting was added-

Regarding the fact asserted by the submitter, and confirmed by the Party's response, that a pineapple farming activity is being carried out without an

environmental management instrument and that a Mandatory Environmental Audit was ordered, the related environmental regulations provide the following:

As established in Article 7, Chapter III, on Environmental Impact Assessment of Law 41 of 1998 (Single Text): "Activities, works or projects, public or private, that by their nature, characteristics, effects, location or resources may pose an **environmental risk will require an environmental impact study before the beginning of its execution**, by the regulations of this Law. These activities, works, or projects **must undergo an environmental impact assessment process, including those carried out in the Canal basin and indigenous regions...**" -highlighting was added-

The regulation of this law regarding Environmental Impact Assessment is Executive Decree No. 123 of 2009. This regulation establishes in Article 16 the list of projects, works, or activities that are admitted to the Environmental Impact Assessment process, including in the Agriculture, Livestock, Hunting, and Forestry sector and the "cultivation of fruit trees in areas greater than or equal to 10 hectares."

Article 15 of the aforementioned Law 41 of 1998 (Single text) provides that: "**In the event of findings of non-compliance in the presentation or execution of the environmental impact study or any other environmental management instrument that corresponds, during the technical inspection, the Ministry of the Environment may suspend, as a precautionary measure, the activities of the project, work or activity in question, without prejudice to the imposition of sanctions that correspond. The Ministry may also immediately adopt any other provisional measure to prevent damage to the environment and human health.**" -highlighting was added-

Article 29 of the same Law provides that: "The owners of **activities, works or projects that are in operation at the time of entry into force of the environmental regulations that are issued**, may carry out an environmental audit with the express commitment to comply with the Environmental Adaptation and Management Program that derives from said audit, which must be previously approved by the Ministry of the Environment. In this case, while the audit is being carried out and during the validity of the Environmental Adaptation and Management Program, no other environmental standards and parameters will apply to them other than those contained in said Program" -highlighting was added-

Article 17 of Executive Decree No. 57 of 2004, which regulates the above provision and was quoted in the Party's response note, provides:

"ANAM (now the Ministry of the Environment) may request at any time, by written notice, through the National Directorate of Environmental Quality Protection (now the Directorate of Environmental Performance Verification) and/or Regional Administrations (now Regional Directorates) that a company undergo a Mandatory Environmental Audit and the corresponding PAMA, **due to an accident, an incident, environmental risk inherent to the activity or the need to clean up, recover or rehabilitate a site, whether due to the cessation of operations or other causes.** These criteria shall be developed in the procedure's manual according to types" -highlighting was added-

Resolution No. DM 0427-2021 of 11 August 2021, which establishes the procedure for reporting the occurrence of environmental incidents and/or accidents to the Ministry of the Environment, provides in Article 1 that: "...1. **Environmental Accident:** Unexpected and sudden event that occurs in a natural or legal person that can generate immediate serious consequences for its personnel, neighboring populations, property and/or the environment. 2. **Environmental Incident:** An event that occurs in a company, which indicates that an accident

could have occurred and that, under slightly different circumstances, could have generated serious consequences for its personnel, neighboring populations, property, and/or the environment..."

Observing the definitions of Environmental Impact Assessment described in the response note and in the Law, as well as the definition of Environmental Impact Study contemplated in the General Environmental Law and its regulations¹⁵, and the regulations that regulate the request for Mandatory Environmental Audits also mentioned in the response, we consider that the technical reports that were prepared during the actions carried out by the institution may contain the information that supported the decision to request the Mandatory Environmental Audit and/or why the Environmental Impact Study is not appropriate. However, as these were not provided as part of the Party's response, the Secretariat does not have all the data to determine whether the actions within this administrative procedure have been timely by Panamanian legislation.

The response note submitted by the Party on this point does not provide details as to what elements are taken into account after two years or more of operations to consider an environmental management instrument different other the environmental impact study.

Regarding the Mandatory Environmental Audit, although the response note describes the procedural actions carried out to date for the processing of this process, it does not clearly show what the inherent accident was, incident, environmental risk, or the need to clean up, reclaim or rehabilitate any site, whether due to cessation of operations or other causes, or which environmental regulation has entered into force that motivates the request for a mandatory environmental audit.

Concerning the fact asserted by the submitter of the Communication, and confirmed by the Party's response, that as a result of the finding that a pineapple cultivation activity was being carried out without having an environmental management instrument, an ex officio proceeding was ordered, a complaint

¹⁵ Article 2 of the Single Text of Law 41 of 1998, General Environment of the Republic of Panama:

...

41. Environmental Impact Study: Document resulting from the integration of environmental variables in the design, formulation, and execution of works, activities, and projects; describes its characteristics and provides informed background for the identification, interpretation, and projection of environmental impacts and, in addition, describes measures to avoid, reduce, correct, compensate and control significant adverse impacts.

43. Environmental Impact Assessment: Early warning system for decision-making, whose purpose is to continuously verify compliance with environmental standards and policies of public and private projects. This instrument allows anticipating, preventing, and managing environmental impacts, as well as integrating environmental considerations into the design, formulation, and execution of works, activities, and projects.

Article 2 of Executive Decree No. 123 of 2009: ...

Environmental Impact Study (EslA): Document that describes the characteristics of a human action and provides informed background for the prediction, identification and interpretation of environmental impacts, and describes, in addition, measures to avoid, reduce, correct, compensate, and control significant adverse impacts.

Environmental Impact Assessment (EIA): Early warning system that operates through a continuous analysis process and, through an orderly, coherent, and reproducible set of background information, allows preventive decisions to be taken on environmental protection.

was filed that was accumulated to the file. The stoppage of activities was ordered, and the governing regulations on procedural matters provide the following:

Article 102 of the Single Text of Law 41 of 1998 establishes that: "*Pollution produced in violation of permissible limits, or of the rules, processes, and mechanisms of prevention, control, monitoring, evaluation, mitigation, and restoration, established in this Law and other legal regulations in force, entails civil, administrative or criminal liability, as the case may be.*"

Article 107 of the regulation above provides that: "Failure to comply with environmental quality standards, the environmental impact study, its Environmental Management Plan or its approval resolution, the Environmental Adaptation and Management Program, this Law, laws and other complementary regulations constitutes an administrative infraction. Such infraction will be sanctioned by the Minister of the Environment through written reprimand and/or temporary or definitive suspension of company activities and/or fine, as the case may be and the gravity of the infraction, without prejudice to the main and accessory sanctions provided in the existing complementary regulations "-highlighting was added-

As described in the information received in the Party's response note and the evidentiary information provided by the submitter of the Communication, an ex officio investigation was opened as a result of these events by the Ministry of the Environment. Subsequently, a complaint was filed and accumulated in the file of the ex officio process. Ex officio procedures are governed by Law 38 of 2000,¹⁶ which regulates the General Administrative Procedure, which provides in article 88 the following:

"Any complaint investigation must be completed within a period of no more than two months from the date of its filing. The resolution by means of which the merits of a complaint are resolved shall be issued within 30 days following the date on which the respective investigation was exhausted."

The documents sent to the Secretariat show that the events leading to the discovery of the pineapple planting activity occurred in January 2021, as stated in the Party's response note, but the initiation of the ex officio administrative investigation was formalized in May 2021,

¹⁷ therefore, as of the date of issuance of the Party's response, the term established by law for the conclusion of the process had elapsed, but the content of the response sent does not indicate that this administrative investigation process has concluded or whether an administrative resolution has been issued in this regard.

¹⁶ Law 38 of 2000 of 31 July 2000. Article 37: "*This Law applies to all administrative processes that are carried out in any state agency, whether central, decentralized or local administration, including state enterprises, unless there is a special rule or law that regulates a procedure for specific cases or matters.*

In the latter case, if such special laws contain gaps in basic aspects or important formalities contemplated in this Law, such gaps must be overcome by the application of the rules of this Law."

It should be noted that although the Ministry of the Environment has a special procedure for dealing with environmental complaints, which is regulated by Executive Decree No. 57 of 2000, in this case, since the proceedings are accumulated, both files are governed by the administrative procedure law. Notwithstanding the foregoing, the term for the attention of the complaints established in the Executive Decree is basically the same as that provided by the Law.

In addition, although the response of the Party describes chronologically the actions carried out within the administrative investigation file, it is not observed in said response if provisional measures have been adopted to prevent damage to the environment and human health around this activity, as provided for in Article 15 of the General Law on the Environment cited previously.

As for the fact asserted by the submitter that a complaint was filed for a crime against the Environment and Land Management against the company and the officials of the Ministry of the Environment and that it was subsequently notified that the company filed legal action against him, the governing regulations on criminal procedure provide as follows:

The Party's response does not include any reference as to whether it is aware of these criminal proceedings or has forwarded documents related to these facts to the Public Prosecutor's Office for opening a criminal investigation.

This Secretariat is unaware of a formal investigation involving a defendant in this process or what course it has taken. Therefore, the general regulations for criminal investigations are applicable in the aspect of the term established for an investigation to be carried out promptly.

In this regard, Article 116 of the Code of Criminal Procedure establishes the statute of limitations for criminal actions and provides: "...1. A term equal to the maximum term of imprisonment corresponding to the crime charged..." As the crime described by the submitter in his complaint, submitted as evidence to this Communication, is the one contemplated in article 399¹⁷ of the Criminal Code, and this has a maximum penalty of six years, this would be the statute of limitations for this proceeding.

In the case of the crimes of Urban Land Processing, Approval, and Compliance, the maximum penalties are four years for public servants¹⁸ and five years for promoters,¹⁹ so for all purposes and regardless of what criminal type is considered during the investigation, this process is within the term established by the procedure to be developed.

Thus, the facts asserted by the submitter, Mr. Moises Montero, were confirmed by the response of the Party, in that an activity was being developed without an environmental management instrument, and the institution took action.

The response sent by the Party described chronologically the procedural and documentary actions that have been adopted in the process. Still, the information related in the response sent does not provide the technical reports or copies of the file that would make it possible to observe the current status of the administrative procedure, whether it has ordered timely measures for compliance with environmental legislation, what was the justification used for the measures ordered, or whether any cases remain to be addressed.

¹⁷ Article 399 of the Criminal Code: "Anyone who, in violation of the established environmental protection regulations, destroys, extracts, contaminates or degrades natural resources, shall be punished with imprisonment of three to six years..."

¹⁸ Article 413 of the Penal Code: "The public servant who, in disregard of the corresponding environmental regulations in the exercise of his functions, promotes the approval or approves an environmental impact study, environmental adequacy and management program or other document approved by the National Environmental Authority -now the Ministry of Environment- shall be sanctioned with a prison term of two to four years".

¹⁹ Article 418 of the Penal Code: "The promoter or concessionaire who initiates the execution of a work or activities subject to prior approval of the environmental impact study, forest management plan or other similar documents that, in accordance with the law, are prior or conditional requirements to initiate the work or activity, without having obtained the approval of the corresponding competent authority, shall be punished with imprisonment of two to five years."

The Mandatory Environmental Audit Administrative Procedure is a process that, by Law 6 of 2002, which governs Transparency in Public Management, is classified as confidential information because, as provided in Article 14.2 of this law, it shall be considered restricted access. "2. Trade secrets or trade information of a confidential nature, obtained by the State, resulting from the regulation of economic activities..." Notwithstanding the above, the order to ask the company to submit an audit of this type was recommended in the technical inspection report and in the ex officio investigation initiated by the Ministry of the Environment, given a possible infraction, which is public information. It is thus considered appropriate to evaluate the information on which this order was based without undermining the environmental audit procedure itself.

Given the above considerations, this Secretariat finds merit in

preparing a factual record regarding the Mandatory Environmental Audit order and the Administrative Investigation Procedure for possible infringement in terms of compliance with the enforcement of environmental legislation, but it does not find merit as to the subject of the criminal investigation described because the same is within the term established by law for its execution.

The above shall be reported to the Environmental Affairs Council so that by the procedure, it may proceed to the corresponding vote.²⁰

V. Determination of the Secretariat

After analyzing the substance of the Environmental Submission filed by Mr. Moises Montero, the Secretariat determined, through Determination No. 002/2021 of February 6, 2021, that the submission seeks the enforcement of environmental legislation related, in general, to the enforcement of environmental laws²¹ on prevention, reduction or control of leaks, discharges or emissions of environmental pollutants, as well as recognition that it is inappropriate to promote trade or investment by weakening or reducing protections under environmental legislation.

After verifying compliance with the formal and substantive requirements for the admissibility of the Submission, merit was found to request a response from the Party. This was formally notified on February 10, 2022, and responses were received on March 18, 2022, and April 7, 2022.

Given the above and by numeral 1 of Article 17.9 of the Agreement, and section No. 7 of the Procedural Manual²², the Secretariat, in compliance with its functions, at this moment **DETERMINES** to inform the Environmental Affairs Council that Communication SALA-CA-PMA/003/2021 Contamination by Agrochemicals. Crops, **MERITS preparation of a Factual Record** concerning the order to present a Mandatory Environmental Audit and the Administrative

²⁰ Article 17.9.2: The Secretariat shall prepare a factual record if the Council orders it to do so by a vote of any of its members.

²¹ By Article 17.14 of the U.S.-Panama TPA, "... Environmental legislation means any law or regulation of a Party, or provisions thereof, the primary purpose of which is the protection of the environment or the prevention of any danger to human, animal or plant life or health, by: a. The prevention, reduction, or control of a leak, discharge, or emission of environmental pollutants; b. The control of environmentally hazardous or toxic chemicals, substances, materials, and wastes and the dissemination of related information; or c. the protection or conservation of wild flora and fauna, including endangered species, their habitat, and natural areas under special protection, in areas over which the Parties exercise sovereignty, sovereign rights, or jurisdiction.

²² SEEM Procedural Manual. Section 7. If the Secretariat considers that a communication merits the preparation of a factual record, the Secretariat shall notify the Council. Any Council member may vote for the preparation of a factual record by the Secretariat by written notice within no more than 60 calendar days.

Investigation Procedure for a possible infraction, but not concerning the criminal complaint procedure for a crime against the Environment and Land Management.

By the terms outlined in numeral 3 of Article 17.9 of the Agreement and Sections 7, 8, and 9 of the Working Procedures for Communications Related to Environmental Legislation Enforcement, the preparation of the Factual Record by the secretariat shall be done without prejudice to any subsequent actions of that may be taken concerning a Submission.

NOTIFY the submitter and the Environmental Affairs Council so that, if so ordered by a vote of any of the Parties, the respective Factual Record be prepared for the purposes outlined in Chapter 17 on the Environment of the US-Panama TPA and the Working Procedure for Submissions.

(Signature)

Bethzaida E. Carranza Ch.
Executive Director