

Pollution by Agrochemicals. Crops.

Submission No.: SALA-CA-PMA/003/2021

Determination No. 002/2022

Date: February 6, 2022.

Determination No.002/2022 pertaining to the analysis for determining if the Submission merits a response from the Party in accordance with Article 17.8 paragraph 4 of the Trade Promotion Agreement between Panama and the United States (TPA Panama - U.S.).	
Submission No.: SALA-CA-PMA/003/2021 Pollution by Agrochemicals. Crops.	Date of receipt: December 31, 2021
Petitioner/signatory of the Communication :	Mr. Moisés Montero Personal I.D. No.: 8-521-1659
State Party: Panama	

I. Introduction

On December 31, 2021, Mr. Moisés Montero, submitted via email a Submission to the Secretariat for Environmental Enforcement Matters of the Trade Promotion Agreement between the United States and Panama (SEEM TPA US-Panama), in which he claims that the Government of the Republic of Panama is failing to effectively enforce its environmental legislation.

Pursuant to Article 17.8 of the Trade Promotion Agreement between the United States and Panama, which establishes the Submissions procedure for Environmental Enforcement Matters, under which "any person of a Party may file a submission claiming that a Party is failing to effectively enforce its environmental laws. Such submissions shall be submitted with a secretariat or any other appropriate entity ("secretariat"), designated by the Parties".

Based on paragraph 2 of the aforementioned Article 17.8, and section 5 of the Working Procedure for Submissions, it is the Secretariat's responsibility to verify the content of the Submission filed and determine if it meets the requirements established by the Treaty. If the Submission complies with the stipulated requirements, the Secretariat shall proceed to determine whether the Submission merits a response from the Party, pursuant to Article 17.8 paragraph 4.

On Wednesday January 19, 2022, Determination No. 001/2022 was issued, which after verifying compliance with the stipulated requirements, determined that the Submission complied with the admissibility requirements, and therefore it is appropriate to continue with the substantive analysis.

II. Content overview in Submission filed

The Communication, identified as No. SALA-CA-PMA/003/2021 entitled "**Pollution**

¹ Article 17.8 paragraph 1 on Submissions on Environmental Enforcement Matters. Chapter 17. TPA Panama - USA.

by agrochemicals. Crops", the sender states according to the provisions of Chapter 17 of the Trade Promotion Agreement between the United States and Panama, Article 17.8, that the Government of the Republic of Panama has failed to effectively enforce the provisions of its environmental legislation in respect to Law 47 of 1996, which establishes Phytosanitary Protection Measures²; Law 41 of 1998, General Environmental Law of Panama, which regulates the Environmental Impact Studies Assessment³ and Law 125 of 2020, which approves the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters.

In a factual description, the sender claims that in January 2021 the Panama West Regional Directorate of the Ministry of the Environment prepared the Technical Report 010-2021 stating in its technical analysis that the company Inversiones JPW, S.A., "*has no Environmental Management Tools*" for initiating operations. "

The sender continues describing that even though the company did not have any Environmental Management tool, its activities of cleaning, ploughing, sowing and fumigation were intensified in August 2021, without informing or consulting the affected people in the community of La Colorada, Iturralde town, district of La Chorrera, Province of Panama West.

The sender asserts further complaints were submitted to the Ministry of the Environment ⁴ in which a second inspection was performed on September 20, 2021, during which non-compliance findings were identified and recorded in Technical Complaint Report 203-21, which states that the company "*does not have any environmental management tool, Environmental Impact Study, nor an Environmental Management Adaptation Plan*"⁵.

² **Law 47 of July 9, 1996**, regulates all actions relevant to plant protection of the national agricultural heritage, with the main objective of preventing and controlling, in a comprehensive manner, phytosanitary problems and achieving the phytosanitary quality of plants and plant products in the process of production, classification, packaging, storage and transport, as well as preventing the entry, settlement and spread of pests of plants and plant products in the territory of the Republic of Panama. Similarly. Furthermore, its objective is to establish the adequate use of phytosanitary inputs.

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

³ **Article 7 of the Single Text of Law 41 of 1998**, General Environmental Law of the Republic of Panama, provides that activities, works or projects, public or private, which by their nature, characteristics, effects, location or resources may generate environmental risk shall require an environmental impact study prior to the start of their execution, in accordance with the regulations of the present Law. These activities, works or projects shall be subject to an environmental impact assessment process, including those within the Canal watershed and indigenous districts.

The regulation of this law in this matter is **Executive Decree No. 123 of August 14, 2009**, which provides in Article 16 the list of projects, works or activities that are subject to 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.

⁴ The text in the Technical Complaint Report 203-21 describes that the inspection was done in response to a complaint filed by Mr. Montero through a lawyer.

⁵ Text of the Submission sent by Mr. Montero.

The sender also states in the text of the Submission that the Agricultural Services Directorate Region 5, Panama West, of the Ministry of Agricultural Development⁶ informed that there is no record of the agrochemical products used by the company. In addition to the above, the sender asserts that on October 4, 2021, the Ministry of the Environment issued a Settlement Act, but that the company continues to perform its activities related to earthmoving, planting, harvesting and spraying, despite orders from the authorities and the opposition of La Colorada community residents, as expressed in a letter dated October 4, 2021 and addressed to the Regional Directorate of the Ministry of the Environment in La Chorrera⁷.

The sender ends the Submission by stating that, given the violation of environmental regulations, on November 18, 2021, Susana Serracín filed a complaint against the company and the officials of the Ministry of the Environment, for acts or omissions in their duties, for a crime Against the Environment and Land Use and Planning, committed to the detriment of the La Colorada Community. The petitioner states that on December 26 a notification was sent to his residence informing that a legal action had been filed against him by an employee of the company. The action is recorded in File 2021 00085173, of the District Attorney's Office of La Chorrera, which the petitioner considers to be *"intimidatory in nature in order to prevent the continuation of claims for the rights to health, to a healthy environment, to environmental information and justice provided for in Law 125 of 2020, which ratifies the Escazú Agreement"*⁸.

The submitter provides a series of documents as evidence of the assertions made in the written Submission, which are as follows:

1. Non-certified copy of the Official Technical Report No. 010-2021 dated January 26, 2021, prepared by Eng. Edgar Murillo of the Regional Directorate of the Ministry of the Environment in Panama West. This document describes that on January 7, 2021, an official inspection was performed on a pineapple producing farm in the sector of La Colorada, since soil movements were observed on the farm and there was no Environmental Impact Study notice⁹.

The report consists of 6 pages describing the findings identified on site by the MiAmbiente staff. The report's conclusions confirm the start of operations without an environmental management tool, the impact on environmental components such as sediments that go into the riverbed of the stream and the damming of a stream for irrigation and spraying activities for the project. The report recommends forwarding the document to the Legal Advice Office and the National Directorate for Environmental Performance Verification to continue with the process and to request a mandatory environmental audit from the company.

2. Non-certified copy of Ruling DRPO-SEVEDA-ALR. No. 218-2021 of May 26, 2021, by which the Regional Director of the Ministry of Environment in Panama West, in accordance with the content of Technical Report No. 010-2021 of January 26, 2021, resolves to initiate administrative proceedings

⁶ Non-certified copy of Note No. DER-628-2021 of September 22, 2021, submitted as an exhibit to the Submission.

⁷ Non-certified copy of handwritten note, reference No. 07/MM, dated October 4, 2021, referring to 75 signatures, provided by the sender as an exhibit to the Submission.

⁸ Reference, final part of the Submission letter submitted by Mr. Montero.

⁹ Fact asserted by the complainant in the Submission text.

against the company Inversiones JPW, S.A., for alleged environmental infringement consisting of initiating activities without an Environmental Impact Study. The decision also ordered the suspension of all activities of the company¹⁰ the manual removal of the dam that the company kept in the water easement for a period of 30 days and it allows a period of 5 days for the submission of discharges. The document's copy shows an empty stamp on the company's notification.

3. Non-certified copy of Ruling No. DRPO-SEVEDA-ALR-No. 448-2021 of September 13, 2021, in which the Regional Directorate of the Ministry of Environment of Panama West, resolves to accumulate the official files No. 020-2121 and No. 195-2021, complaint filed by Mr. Moisés Montero, since both files address the same facts and are against the same company. The copy provided shows the full notification stamp for Mr. Montero, but no notification stamp for the company.
4. Non-certified copy of Complaint Technical Report No. 203-21 dated October 1, 2021, prepared by the Environmental Performance Verification Section of the Regional Directorate of the Ministry of the Environment, for the purpose of addressing a complaint filed by Mr. Moisés Montero through his lawyer, Mr. Harley Mitchell, for environmental violations committed by a company engaged in the cultivation of pineapple in the town of Iturralde, district of La Chorrera, Province of West Panama.

The report refers to an inspection performed on September 20, 2021, based on, among others, the Official Technical Report No. 010-2021, which concluded that the inspected company is dedicated to the cultivation of pineapples, without an environmental management tool. The report also describes that due to note DRPO-915-2021, a compulsory environmental audit was requested to the company through its legal representative, who was notified on September 15, 2021.

The 11-page report describes the findings identified during the inspection, including the sediments in the stream and the distance between the pineapple plantation and the complainant's residence, in accordance with the Plant Health regulations. The report concludes, among other findings, that the company operates without an environmental management tool and made several recommendations, which included restating its request to the company for a mandatory environmental audit.

5. Non-certified copy of a handwritten note labelled as Note 05/MM of September 20, 2021, addressed by Mr. Montero to Mr. José Barría, Regional Director of Zone 5 of the Ministry of Agricultural Development, requesting for a non-certified copy of the technical specifications of the phytosanitary or agrochemical products used by the JPW, S.A. company.
6. Non-certified copy of note DER-628-2021 of September 22 issued by the Directorate of Agricultural Services, Region 5, Panama West of the Ministry of Agricultural Development, which replies to the request for information submitted by Mr. Montero regarding the agrochemical products used by the company. The note states that the registration information for the products used by the company is unavailable, but that the latter should have the technical specifications that were approved by plant health.

¹⁰ Ibidem.

7. Non-certified copy of a handwritten note labelled as Note 07/MM dated October 4, 2021, which includes a series of signatures (accounted for 75 signatures), addressed to the Regional Director of MiAmbiente in La Chorrera by residents of La Colorada, Iturrialde town, pertaining to the pineapple cultivation activities undertaken by the company, which is a concerning matter to them, since it “affects health, the environment, and water sources; mainly the well and tank that supply more than 100 families, who live around the grounds of this company.”
8. Non-certified copy of the complaint filed before the Adversarial Criminal Justice System, Single Notice Number 202100076860. The complaint was filed by Attorney Susana Serracín, as representative for the community of Colorada, for a crime Against the Environment and Land Use and Planning Regulations, article 399 of the Criminal Code.
9. Non-certified copy of the suspension order, dated October 4, 2021, issued by the Panama West Regional Directorate of the Ministry of the Environment, in accordance with the provisions of Disposition DRPO-SEVEDA-ALR No. 218-2021 of May 26 , 2021. The document reiterates the suspension order, and describes which activities the company can no longer perform and that it will allow the harvest of pineapples until October 9, 2021.
10. Non-certified copy of Edict No. DRPO-096-2021, issued by the Office of the Legal Counsel of the Panama West Regional Directorate of the Ministry of the Environment, in which, as part of an official administrative proceeding for an alleged environmental infringement against the company Inversiones JPW, S.A., grants the latter 8 business days to submit evidence, and 5 business days to present written legal arguments. The edict is due to be served on October 6, 2021.
11. Non-certified copy of a handwritten note labeled Note 13/MM of December 1, 2021, addressed to the Regional Directorate, Zone 5 of the Ministry of Agricultural Development, which requests copies of the follow-up to the complaint reports filed by Attorney Harley Mitchell against the company Inversiones JPW, S.A.
12. Non-certified copy of note DER-846-2021 of December 9, 2021, issued by the Regional Directorate of Agricultural Services of the Ministry of Agricultural Development, which in reply to request note 13/MM, suggests filing a complaint with the local Peace Council.

III. Submission Analysis

Given that, in accordance with Determination No. 001/2022 of January 19, 2022, the requirements of Submission No. SALA-CA-PMA/003/2021 Pollution by Agrochemicals. Crops, and concluded it complies with the provisions of paragraph 2 of Article 17.8 of the Treaty on the formal requirements for its admissibility, it is then up to the Secretariat to analyse the substantive content of the Submission to determine whether it merits a response from the Party in accordance with the provisions of paragraph 4 of Article 17.8, which states as follows:

"17.8 Submissions on Environmental Law Enforcement Matters: ... 4. On finding that a Submission meets the requirements set out in paragraph 2, the Secretariat shall determine whether the Submission merits a response from the Party. When deciding whether to request a response, the Secretariat shall be guided by whether:

- a. the submission is not frivolous and alleges harm to the person making the submission;*
- b. 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;*
- c. the private remedies available under the Party's law have been pursued; and*
- d. the petition is based exclusively on media reports."*

Analysis of the provisions in Article 17.8, paragraph 4, of the U.S. - Panama TPA to determine whether the Environmental Submission merits a request for a response from the Party.	
Provisions	Analysis
<p><i>a. The submission is not frivolous and alleges harm to the person making the submission;</i></p>	<p>The notice of Submission refers to contamination by agrochemicals and affectation of water sources and biodiversity. The document describes findings of non-compliance detected in official and complaint processes accumulated by the MiAmbiente, where it is accredited that the company indicated by the sender operates without an environmental management tool.</p> <p>Within the copies of documents provided by the sender as evidence, a handwritten note signed by a diverse group of people stated, among other details, their opposition to the pineapple plantation activities, their concern on how this will affect their health, their concern on the well and the water supply tank of 100 families in the surrounding area since, as they indicate, <i>"these agrochemicals are cumulative in the organism of all living beings"</i>.</p> <p>This Secretariat does not consider that there is any element of frivolity in the arguments put forward, but rather an interest in knowing what products are being used in the area and in regulating the activities of the company which lacks management tools, as shown in the other copies provided as evidence.</p> <p>In regards to the alleged harm by the person filing the Submission, the Secretariat considers the requirement is met, since the sender provides information which demonstrates the activities reported are performed in the area of La Colorada, Iturralde town, district of La Chorrera, his area of residence. The note with signatures provided as evidence also highlights this area and signatories concern by indicating at the end of their note that <i>"it is a community, not an agricultural area"</i>.</p>

	<p>In addition to the above, the General Environmental Law of the Republic of Panama establishes that "... collective and diverse interests are recognised in order to actively legitimise any citizen or civil organisation in administrative, civil and criminal proceedings for environmental damage"¹¹ and therefore any person who feels affected by possible environmental damage or non-compliance has the right to resort to the processes established by the environmental legislation for the solution of such damage or non-compliance.</p>
<p><i>b. 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, considering guidance regarding those goals provided by the Council and the Environmental Cooperation Commission established under the ECA;</i></p>	<p>Pursuant to Article 17.1 of the Treaty, on Levels of Protection, one of the goals of the Chapter is for each Party shall strive to ensure that its laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies.</p> <p>Article 17(3)(iii) provides that <i>"The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws..."</i>. Article 17.4.1. on the rules of proceedings, describes that: <i>"Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings, in accordance with its law, are available to sanction or remedy violations of its environmental laws... c. Each Party shall provide appropriate and effective remedies or sanctions for a violation of its environmental laws that..."</i>, it is followed in the same article by paragraph 2, which states that: <i>"Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws, and that each Party's competent authorities shall give such requests due consideration in accordance with its law"</i>.</p> <p>According to the Submission, it is also in line with the provisions of Article 17.14.1 (a) and (b) of the Treaty, which provide that: <i>"1. For purposes of this Chapter: environmental law means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through: the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related there to..."</i>.</p> <p>It is therefore the opinion of this Secretariat that the study undertaken in relation to the filed Submission may help to identify means for effective environmental law enforcement and thus meet the objectives of Chapter 17 of the Treaty and the Environmental Cooperation</p>

¹¹ Article 106 of the Single Text S/N of September 8, 2016, of Law 41 of July 1, 1998, General Environmental Law of the Republic of Panama, as amended by Law 8 of March 25, 2015.

	Agreement (ECA), providing supportive information to the Environmental Affairs Council and the Commission for Environmental Cooperation.
<p><i>c. The private remedies available under the Party's law have been pursued; and</i></p>	<p>The Panamanian legislation establishes the right of every person to submit respectful petitions and complaints to public servants for reasons of social or private interest, and to obtain a prompt resolution. The public servant to whom a petition, query or complaint is submitted must respond within thirty days¹².</p> <p>The facts described in the Submission and the documents provided as evidence show that the sender has submitted information request notes to competent institutions¹³, an administrative complaint to the Ministry of the Environment¹⁴ and a criminal complaint¹⁵ to the Public Prosecutor's Office, all of which are available to private individuals under Panamanian law.</p> <p>Besides the references to the notes and criminal complaint presented as evidence, the sender also provided an Official Technical Report and orders issued by the competent institution, which show that an investigation was initiated¹⁶ on the possible non-compliance with the legislation and that the complaint presented by the sender was added to this investigation; however, no additional documents are provided to show if the process was concluded, if the measures ordered by the institution were complied with, if the competent institution had any final pronouncement within the process, which is already</p>

¹² Article 41 of the Political Constitution of the Republic of Panama, developed by Article 40 of Law 38 of July 31, 2000 governing the General Administrative Procedure, which is also complemented by Articles 74 and 82 of the same law.

¹³ The right of access to information and transparency is established in Panamanian legislation through Law 6 of 22 January 2002, which dictates rules for transparency in public management, establishes the action of Habeas Data and dictates other provisions, which in its Article 2, provides: "Any person has the right to request, without the need to support any justification or motivation, access information in possession or knowledge of the institutions indicated in this Law". Similarly, Law 125 of February 4, 2020, which approves the Regional Agreement on Access to Information, Public Participation, and Access to Justice in Environmental Matters in Latin America and the Caribbean, also protects this right in environmental matters."

¹⁴ The written complaint is not provided directly, however, the background of one of the technical reports provided as evidence describes that the inspection was conducted in order to address a complaint filed by the sender through a lawyer. Administrative complaints in environmental matters are governed by Executive Decree No. 57 of March 16, 2000, Title V, on Complaints for Administrative Violations of the Law.

¹⁵ Criminal complaints are subject to the types established in Title XIII of the Criminal Code of the Republic of Panama, which regulates Crimes against the Environment and Land Management.

¹⁶ Official investigations by public entities are governed by the provisions of Law 38 of 2000, which establishes in Article 64 that "the initiation of administrative proceedings may originate official or at the request of an interested party". It is ex officio when it is originated by provision of the corresponding administrative office. On the other hand, Article 88 of the same law provides that: "Any investigation by complaint must be completed within a period of no more than two months, counted from the date of its presentation. The decision on the merits of a complaint or denunciation shall be issued within thirty days of the date on which the respective investigation was exhausted."

	<p>more than a year old since the date of the inspection provided.</p> <p>With this reference, it is the view of this Secretariat that recourse has been had to the remedies available under the Party's legislation.</p>
<p><i>d. The petition is based exclusively on media reports.</i></p>	<p>None of the evidence submitted and the facts described in the communication submitted are media reports.</p> <p>The documents provided consist mostly of copies of official documents and notes that the sender has submitted to public institutions.</p>

IV. Determination of Secretariat

After analysing the substantive content of the Submission filed by the sender, the Secretariat concludes that the substance of the petition seeks the application of environmental legislation related to the prevention, reduction or control of possible contamination events resulting from the use of agrochemicals in a pineapple production activity that has no environmental management tool and the procedures established for its regulation.

The foregoing is compatible with the objectives of Chapter 17 of the US-Panama TPA, with respect to Article 17.1 on Levels of Protection, which requires each Party to ensure that its laws and policies provide for and encourage high levels of environmental protection and should strive to improve those laws and policies. It is also consistent with Article 17.4 on procedural rules, which provides as follows:

"1. Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings, in accordance with its law, are available to sanction or remedy violations of its environmental laws...

...c. Each Party shall provide appropriate and effective remedies or sanctions for a violation of its environmental laws...

2. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws, and that each Party's competent authorities shall give such requests due consideration in accordance with its law."

Furthermore, it is also compatible with the provisions of Article 17.14.1 of the US-Panama TPA, in which the definitions applicable for the purposes of the Chapter are established as follows:

"1. For purposes of this Chapter:

environmental law means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

a. The prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;

- b. The control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto..."

Once verified compliance with the formal requirements for the admissibility of the Submission, as established in paragraph 2 of article 17. 8 of the Treaty, and having analysed the considerations set forth in paragraph 4 of the same article in reference, in conjunction with the provisions of the Working Procedure for Submissions on Environmental Law Enforcement, the Secretariat in compliance with its functions hereby **DETERMINES** that the Submission **MERITS** a response from the Party, in this case Panama, in accordance with the terms set forth in paragraph 5 of article 17.8 of the Treaty and the corresponding sections of the Working Procedure for Submissions.

The Environmental Affairs Council and the sender of the Submission are hereby **NOTIFIED** as provided for in Chapter 17, Environmental, of the U.S.-Panama TPA and the Working Procedure for Environmental Enforcement Submissions.

Formally **SUBMIT** the Environmental Submission, its annexed documents, as well as the Determinations issued by this Secretariat, to the Party in order to provide a response to the assertions of petitioners, pursuant to the terms of paragraph 5 of Article 17.8 of the U.S.-Panama Trade Promotion Agreement¹⁷.



Bethsaida E. Carranza Ch.
Executive Director.

¹⁷ Article 17.8.5 of the US-Panama TPA: "The Party shall notify the Secretariat within 45 days or, in exceptional circumstances and by notifying the Secretariat, within 60 days of delivery of the request:

- a. If the particular matter is the subject of a pending judicial or administrative proceeding, in which case the secretariat shall not proceed further with the matter; and
- b. Any other information that the Party wishes to submit, such as:
 - i. Whether the matter in question has previously been the subject of judicial or administrative proceedings;
 - ii. Whether there are remedies available to individuals in relation to the matter that are available to the person submitting the communication and whether they have been pursued; or
 - iii. Information relating to relevant capacity-building activities carried out under the ACA".