

The U.S.-Peru
Free Trade Agreement

Report of the
Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10)

February 1, 2006

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Report to the President, the Congress and the United States Trade Representative on the U.S.-Peru Free Trade Agreement (FTA or Agreement).

I. Purpose of the Committee Report

Section 2104 (e) of the Trade Act of 2002 requires that advisory committees provide the President, the U.S. Trade Representative, and Congress with reports required under Section 135 (e)(1) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth in the Trade Act of 2002. The report must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10) hereby submits the following report.

II. Executive Summary of Committee Report

The Free Trade Agreement with Peru continues to meet the high standards set by the ITAC and by the U.S. Government for its provisions on services and investment. Peru took few exclusions to the provisions of the agreement on services.

For example, the lack of any restrictions or exceptions for national treatment, most-favored-nation treatment, and market access, the absence of a local presence requirement, and the fair and transparent treatment of domestic regulation provide a welcoming environment for U.S. professional service providers.

An important element of the Agreement is its chapter on Investment. Foreign direct investment is particularly important for trade in services because many services can only be “traded” by establishing a commercial presence (investing) in a foreign market. The investment chapter in the Peru Agreement creates significant new opportunities for market access for investment (as discussed in a sector-by-sector manner below) and includes high standard protections for such investment, including investor-state arbitration, and protections related to expropriation, capital transfers, fair and equitable treatment and investment agreements.

Nonetheless the Committee continues to be disappointed by provisions in the Financial Services chapter of this Agreement, which, like other recent FTAs, could allow governmental restrictions on financial services activities through the use of a prudential carve-out for financial services measures taken by the host government. The procedure developed to review whether a measure properly falls within the prudential carve-out is extremely lengthy and onerous.

The Peru Agreement differs from some other free trade agreements in that it includes a so-called “fork-in-the-road” provision, such that investors are precluded from pursuing investor-to-state arbitration pursuant to the Agreement’s investment chapter if they have first brought the same claim in a local administrative or court tribunal. This is discussed more fully below.

It is worth noting the Anti-Corruption Principles included in Chapter 19, Section B of the Agreement. Corruption is an issue that goes to the very heart both of the business community’s ability to conduct business openly and fairly and to the ability of governments to use their resources for the benefit of all their people.

The absence of provisions addressing Mode 4 trans-border movement of personnel continues to be a major problem. Without them the liberalization of rights to perform services, encouraged by the market access provisions of the Agreement, cannot be fully realized. As in its prior reports, ITAC 10 strongly urges the appropriate Congressional Committees to participate in the development of appropriate ways by which the essential commitments undertaken in the GATS can, as a practical matter, be used. Without facilitation of temporary entry by service providers in each signatory country, the promise of market access in this, as in prior FTAs, is much diminished.

On balance, ITAC 10 strongly recommends the approval of this Agreement.

III. Brief Description of the Mandate of the ITAC 10

ITAC 10 performs such functions and duties and prepares reports, as required by Section 135 of the Trade Act of 1974, as amended, with respect to the services sector. To fulfill its mandate the ITAC meets at least monthly to review negotiations with U.S. trade officials and to advise as required by law.

ITAC 10 advises the Secretary of Commerce and the U.S. Trade Representative (USTR) concerning the trade matters referred to in Sections 101, 102, and 124 of the Trade Act of 1974, as amended; with respect to the operation of any trade agreement once entered into; and with respect to other matters arising in connection with the development, implementation, and administration of the services trade policy of the United States, including those matters referred to in Reorganization Plan Number 3 of 1979 and Executive Order 12188, and the priorities for actions there under.

In particular, ITAC 10 provides detailed policy and technical advice, information, and recommendations to the Secretary of Commerce and the USTR regarding trade barriers

and implementation of trade agreements negotiated under Sections 101 or 102 of the Trade Act of 1974, as amended, and Sections 1102 and 1103 of the 1988 Trade Act, which affect the services sector, and performs such other advisory functions relevant to U.S. trade policy as may be requested by the Secretary and the USTR or their designees.

IV. Negotiating Objectives and Priorities of the ITAC 10

ITAC 10's overall goal is to liberalize trade in the wide range of services provided by U.S. businesses, thereby promoting the expansion and health of the U.S. economy and, by extension, the economies of its trading partners.

U.S. services industries provide about 87 million jobs, or 80% of total private sector employment. Most new jobs are services jobs. Between 1993 and 2003 services added 20.3 million new U.S. jobs.

According to the U.S. Bureau of Labor Statistics, 90% of all the 21.3 million new jobs to be created over the next 8 years will be services jobs.

ITAC 10's objective for this and other trade agreements is to achieve substantial additional market access for U.S. service industries. This means commitments to greater access to foreign markets for U.S. cross border trade, to investment abroad, and to the temporary movement of persons who provide services. Without similar U.S. commitments extended to our trading partners, U.S. service providers will be less able to realize the full opportunities this Agreement and others like it appear to offer.

With respect to the protection of U.S. investment abroad, ITAC 10's objective is to ensure high levels of protection for U.S. investors. These include: assurance of national treatment and most-favored nation treatment, protection against expropriation without prompt and full compensation; the free transfer of capital both into and out of the country, fair and equitable treatment and full protection and security by local agencies and courts, a prohibitions of performance requirements on foreign investors, and effective and efficient investor-state dispute settlement procedures.

ITAC 10 also sees an opportunity to advance U.S. policy objectives to liberalize foreign markets by focusing U.S. agencies' and private entities' efforts to provide technical assistance and trade-related capacity-building abroad, especially in developing countries and transitional economies. ITAC 10 believes that intensive technical assistance is imperative in many parts of the world if mutual trade liberalization goals are to be attained.

V. Advisory Committee Opinion on Agreement

Overall, the Committee believes that the U.S.-Peru Free Trade Agreement meets the Committee's objective of achieving new and expanded trade and investment opportunities and recommends that Congress implement it.

A. Crosscutting Provisions. The Committee's opinions on investment, temporary entry, and transparency follow:

Investment

The Agreement will help promote a secure and predictable legal framework for U.S. investors in Peru. Such provisions are of particular interest to service providers, whose services often require a local presence.

With respect to the protection of U.S. investment, the investment chapter of the Agreement generally contains the primary protections sought by the Committee and included in the Trade Promotion Authority legislation, enacted as part of the Trade Act of 2002. These include a broad definition of "investment," guarantees of prompt, adequate and effective compensation for expropriation, fair and equitable treatment and full protection and security by local authorities, a ban on performance requirements, commitments to provide national treatment, most-favored nation treatment, fair and equitable treatment and full protection and security by local agencies and courts and the free transfer of capital. Very importantly, the Agreement includes the investor-state dispute settlement mechanism that is vital to afford U.S. investors the opportunity to ensure that their investments are protected against arbitrary, discriminatory and unfair government actions.

In addition, the Agreement importantly provides for investor-state dispute settlement with respect to the breach of existing and prospective investment agreements that a U.S. investor has entered into with the government of Peru. At the same time, the Agreement protects the legitimate exercise of each government's regulatory authority to protect "public welfare objectives, such as public health, safety, and the environment" that does not rise to the level of an expropriation. The Agreement also seeks improved transparency in investor-state mechanism as sought by the Trade Act of 2002 and provides for the consideration of a bilateral appellate mechanism after three years.

The Committee notes that while the Agreement includes strong commitments to guarantee the free transfer of capital into and out of the country, the provisions are weakened somewhat through the incorporation of modified dispute settlement procedures with regard to disputes involving certain capital transfers as detailed in Annex 10-F, including a lengthened period before the filing of an investor-state claim. Given the importance of capital transfers to U.S. investors abroad, the Committee would prefer that these modifications not be included, but recognizes that limitations in this Agreement are of a modest nature.

The Committee has closely reviewed the language in the Agreement in Annex 10-I regarding stability agreements that the Government of Peru enters into with private investors. The Committee notes that these provisions clarify that a stability agreement can be considered an investment agreement if, alone or in combination with other instruments, it meets the definition of an investment agreement. In such cases, a breach of a stability agreement could be subject to the investor-state dispute settlement

provisions of Chapter 10 as are breaches of other investment agreements. Stability agreements that do not (alone or in combination with other instruments) meet the definition of an investment agreement would, conversely, not be subject to investor-state dispute settlement for breaches of such stability agreements.

The Committee notes that unlike several other U.S. investment agreements, the Peru Agreement includes a so-called fork-in-the-road provision, such that investors are precluded from pursuing investor-to-state arbitration pursuant to the Agreement's investment chapter if they have first brought the same claim (e.g., the breach of an investment agreement or the violation of the Agreement's provisions on expropriation, fair and equitable treatment or other protections) in a local administrative or court tribunal. While the Committee does not object to this provision in particular, it is concerned that the differing standards in recent Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) could too easily cause confusion for investors overseas who may inadvertently bring a domestic challenge, only to find that they have unwittingly lost access to the investor-to-state dispute settlement system. The Committee urges that the U.S. Government work to ensure that investors in Peru and in other countries with which the United States has an FTA or a BIT are apprised of this issue in order to avoid an inadvertent loss of investor-to-state rights.

The Committee remains disappointed by provisions in the Financial Services chapter, which, like other recent FTAs, could allow governmental restrictions on financial services activities through the operation of a prudential carve-out for financial services measures taken by the host government. The procedure developed to review whether a measure properly falls within the prudential carve-out is extremely lengthy and onerous, allowing not only a government-to-government review, but also a separate dispute settlement proceedings if the two governments cannot agree that the measure taken properly fits within the prudential carve-out.

With respect to ensuring access to U.S. investment, the Agreement makes substantial progress in reducing the barriers to such investment. Overall, the Agreement assures U.S. investors greater opportunities to establish, acquire and operate investments in Peru in all sectors, except where a reservation has been taken in a particular sector area as discussed below.

Movement of Personnel

The U.S.-Peru Free Trade Agreement does not include provisions that will facilitate business travel, that is, the temporary entry of key business personnel. As noted in the introduction, ITAC 10 is disappointed by the absence of such provisions in this and other FTAs.

Skilled personnel are essential to world trade and investment. They are the means by which U.S. service companies provide services to their customers. Without the ability to move their personnel with speed and agility, American services businesses simply cannot fulfill their obligations to clients around the world and compete with other powerful

global corporations. Thus, a commercially significant trade agreement should contain meaningful personnel mobility provisions.

U.S. service providers face complex, cumbersome and time-consuming requirements to obtain work permits and visas for their workers on short-term secondments and/or transfer to company facilities, projects or assignments in the U.S. and in other countries. Increasingly, visa and other entry permit barriers face foreign employees and U.S. employers seeking temporary entry into this country for their employees and contract workers. These undermine the spirit and purpose of bilateral trade agreements.

The Committee well understands that temporary entry provisions are not being included in this Agreement and other Agreements because of Congressional view that it should not do so. The responsible committees of Congress should develop guidelines for the negotiation of business travel facilitation provisions for future FTAs so that USTR has the flexibility to negotiate provisions for highly skilled individuals, senior corporate executives, professional personnel (accountants, architects, educators, lawyers, health care personnel, as examples) and others with unique skills and experience.

At a minimum, a bilateral trade agreement should include, in the case of business visitors, and in particular professionals, a binding for access to the most common short-term business activities and a prohibition of prior approval procedures, petitions, labor certification tests or numerical limitations. For intra-company transferees, neither party to the agreement should be subject to employment tests, labor certification or numerical limits.

The Committee notes the recent announcement by the Secretaries of State and Homeland Security of measures intended to improve the processing of visas. It notes that a number of these are tests to be carried out in one or two markets, and that others have been previously announced. And it notes that while improving the efficiency of visa processing is critical to U.S. business, this initiative falls short of that mark. The fundamental need for new legal visa mechanisms to facilitate business travel has not been addressed.

Transparency

The Peru Agreement continues the extremely valuable U.S. drive to obtain bilateral commitments to transparency disciplines for domestic regulation, though several of these will not come into effect until two years after the Agreement's entry into force. These disciplines are an important achievement, because they commit our FTA partners to apply transparency disciplines that have been extensively tested and very widely applied by the United States Government. The U.S. experience is that they have improved the quality of U.S. government regulation practices, which are governed by the U.S. Administrative Procedures Act. Many state governments have comparable procedures. Nowhere is transparency in domestic regulation more important than in the services sector, where government regulation is prevalent. We can only hope that Peruvian and other foreign government agencies, companies, and consumers will find them equally

useful.

B. Sectoral Issues. The Committee's opinions on specific service sectors follow:

Architecture and Engineering Services

The general provisions of Professional Services Annex 11-9, on the development of professional standards and criteria, temporary licensing and review, provide for equity and reciprocity in this sector.

Further, the lack of any restrictions or exceptions for national treatment, most-favored-nation treatment, and market access, the absence of a local presence requirement, and the fair and transparent treatment of domestic regulation provide a welcoming environment for professional service providers. The non-conforming measure affecting the practice of architecture is acceptable in allowing for temporary licensing for nonresident foreign architects in contractual association with a Peruvian architect.

However, with respect to Government Procurement, Annex 9.1, Section E, specifically excludes from coverage architectural services, engineering and design services, and engineering services during construction and installation phase. We would like to see this exception removed over time.

Asset Management and Pension Services

Negotiators for the United States and Peru are to be commended for the substantive and meaningful provisions included on pensions and asset management. U.S. portfolio managers will be able to provide asset management services to both Peruvian mutual funds and pension funds, including to funds that manage Peru's privatized social security accounts (AFPs). This will provide the Peruvian pension and mutual fund consumer with the expertise of skilled U.S.-based portfolio managers. The inclusion of pension funds expands on cross border commitments received in other FTAs and should serve as a model for other bilateral trade agreements in the Hemisphere and globally. By providing for cross border provision of portfolio management services, the FTA allows U.S. firms to achieve economies of scale in serving Peruvian clients. The financial services commitments in the agreement also will benefit the asset management industry. It is unfortunate that law and regulation restrict the amount of assets an AFP may invest outside Peru. These types of regulations are inconsistent with the prudent person concepts used in the U.S. and other countries and endorsed by the OECD. The industry hopes the Financial Services Committee called for in the FTA will discuss this matter with a view toward eliminating the restrictions.

Audiovisual Services

The FTA generally ensures that U.S. audiovisual services enjoy access to the Peruvian market, with only a few reservations. The Annex I reservations will have minimal impact on the current access U.S. services suppliers enjoy in the Peruvian market. The 40%

ownership restrictions on radio and TV broadcast services and the Peruvian content requirements only affect free to air radio and TV broadcasting. Given that U.S. service supplier interest is generally in the pay TV segment of the market, these free to air restrictions do not impact U.S. interests.

In Annex II, Peru's MFN exemption for cultural related industries is not commercially problematic as Peru agrees to provide national treatment in this area and we do not expect that Peru will provide better terms to third parties than it provides to its own producers very often. Similarly the up to 20% screen quota has been significantly limited to take into account local factors that would prevent the quota from ever being met. Importantly, the quota also does not apply to advertising or movie trailers.

There is one troubling reservation that should be avoided in future agreements the USG negotiates with respect to national treatment and MFN for AV, publishing and music provided on a cross-border basis. In this Annex II reservation, Peru essentially reserves the right to discriminate against U.S. service suppliers providing services on a cross border basis. While this reservation does not apply if suppliers set up a commercial presence, the reality is that U.S. service suppliers tend not to provide most services in these sectors in Peru through a commercial presence.

Relatedly, the high standard IP commitments included in a separate chapter of the agreement are a valuable complement to Peru's market access commitments and help to ensure that U.S. creative content is better protected from piracy.

Construction Services

With respect to construction services the general provisions of the agreement provide for reciprocity and equity and there are no non-conforming measures affecting this sector. Further, for Government Procurement, Annex 9.1 provides acceptable access to construction projects of the central government and the regional governments.

Education Services

Peru's agreement to exceed its commitments made to the WTO and to dismantle significant services and investment barriers enables a positive trading environment for all services, including education. Further, a predictable legal framework for U.S. investors in education services operating in Peru is welcomed, including but not limited to the acquisition of property and laws related to fair labor practice.

Energy Services

Peru has proven reserves of both oil and natural gas. Because its natural gas reserves are the fourth largest in South America, in coming years Peru is likely to become an important supplier of Liquefied Natural Gas (LNG). This circumstance makes Peru an attractive prospect for many energy services suppliers from the United States, Europe and other countries.

While the Peruvian government maintains financial interests in a number of energy sectors, including electricity, private companies also hold substantial investments in power plants and distribution systems, and, among other opportunities, are exploring investing in a natural gas pipeline.

A number of U.S. energy services providers have considerable experience working in Peru. The Peru FTA, however, and in particular its chapters on investment, government procurement, cross-border trade in services, and transparency, provides a framework that can increase opportunities in Peru for many more U.S. energy services firms.

Overall, we believe that the Peru FTA improves the conditions under which energy services will operate and provides for equity and reciprocity.

Financial Services (other than insurance and asset management)

Peru's commitments in the financial services sector contained in its proposed free trade agreement with the United States (insurance and asset management which are considered elsewhere in this report) are comprehensive and quite strong. We are pleased that Peru has not imposed limitations on the acquisition of full equity ownership of domestic banks or securities firms by foreign firms, although we regret that Peru has chosen to retain its capital dotation rules for bank branches and that it has not agreed to permit branching in the case of securities firms.

In particular, we are pleased by innovative additional commitments pursuant to which Peru has agreed to guarantee national treatment and establishment rights to foreign financial services firms in connection with any privatized portion of its social security system. In that connection, we recognize that Peru has reserved the right to cap the size of its privatized social security system in the future. We take comfort from the fact that any such cap may not be applied in a discriminatory manner. On a separate note, industry is very pleased that Peru has agreed to the high level regulatory transparency provisions that have come to be standard in U.S. free trade agreements, even though several will not become effective until 18 months after the agreement's entry into force.

Finally, we note that Peru's cross-border commitments in the financial services (other than those in insurance and asset management which are considered elsewhere in this report) are more or less comparable to those contained in other U.S. Free Trade Agreements and are limited to the provision, transfer, and processing of financial data and information; related software; and the provision of advisory and other auxiliary financial services, excluding intermediation.

As we have noted in the past, the minimal commitments in the area of cross-border supply of financial services are not unique to this agreement, but evidence of the need for a broader policy discussion – and policy shift -- that we believe must take place sooner rather than later in light of the rapid globalization of the financial markets. Given the number of free trade agreements the U.S. is proposing to negotiate in the near future, and

the significance of many of the trading partners with which it is proposing to negotiate such agreements, we believe a discussion of the circumstances under which a broad array of financial services can be offered on a cross border basis to sophisticated customers, consistent with investor protection and prudential regulation, would be particularly timely.

Financial Services (insurance)

The U.S. obtained high-standard commitments for national treatment and market access. This includes the ability to establish direct branches, subject to solvency and capital requirements that we consider prudential in nature. There are no limits on foreign equity participation and no market caps. On cross-border trade, Peru committed to allow its citizens and residents to consume insurance services abroad. It also matched our standard commitment to allow our financial service suppliers to provide cross-border insurance intermediation and supply of reinsurance and retrocession into Peru. It will also allow cross-border supply and brokerage of MAT insurance, but not until two years after the agreement's entry into force. The only auxiliary insurance services that may be supplied cross-border in Peru are consultancy, risk assessment, and actuarial and claims settlement services.

Healthcare Services

As in previous Free Trade Agreements, the Peru FTA establishes a process to begin discussions to create a credentialing system for professional services including health care that is recognized by the other party. The particulars for such a system are left to a Working Group to be formed no later than one year after the approval of the Agreement. This is an encouraging process, but only if the Working Group is formed and accomplishes its task.

We also are encouraged that developing a process for temporary licensing of professionals is specifically mentioned in the text.

One troubling section in Annex II of the Nonconforming Measures regarding professional services reserved the right of Peru to adopt or maintain any measure with respect to the provision of social services, including health, that are established or maintained for a public purpose. This provision seems overly broad, and does not explicitly differentiate between health care's role as a social service and as a private, commercial service. We are hopeful the interpretation of this clause is that private hospitals, clinics, consulting and other commercial applications of health care do not fall under this clause.

Legal Services

Chapter 11 of the proposed FTA addresses Cross-Border Trade in Services. Pursuant to this Chapter, services are presumptively provided on a national treatment and MFN basis.

Annex I and II are free of specific limitations applicable to legal services, except the U.S. preserves its existing requirements that only U.S. citizens and residents may serve as patent attorneys, patent agents or otherwise practice before the U.S. Patent and Trademark Office.

Annex 11.9 to the Services Chapter addresses Professional Services. This Annex provides that each of the U.S. and Peru shall encourage the "relevant bodies in its respective territory to develop mutually acceptable standards and criteria for licensing and certification of professional service suppliers...."

Those standards and criteria include education, examination, experience, conduct and ethics, professional development and re-certification, scope of practice, local knowledge and consumer protection.

Each of these standards and criteria are relevant to lawyers. However, the "relevant bodies" for further development of these standards within the U.S. and Peru are not identified. No national authority exists within the U.S. to regulate such issues; state supreme courts and bar associations generally regulate these standards.

As a practical matter, what is most important for U.S. providers of legal services is that foreign legal consultants be allowed to establish a presence in Peru without undue limits or interference. This FTA does not appear to impose any undue limits on such activities.

Transportation Services

The U.S.-Peru Free Trade Agreement does not include provisions that will allow the United States or Peru to engage in the other nation's maritime transportation services. Indeed, both countries have made an explicit reservation of their maritime transportation services to the FTA.

Importantly, both nations made specific reservation of their cabotage trades to the vessels and nationals of their respective countries. For the United States, this is consistent with the longstanding position of the U.S. Trade Representative.

VI. Membership of ITAC 10

A membership roster for the Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10) is attached.

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