

Final Environmental Review
United States - Peru Trade Promotion Agreement
Executive Summary

Pursuant to authority delegated by the President in Executive Order 13277 (67 *Fed. Reg.* 70305) and consistent with Executive Order 13141 (64 *Fed. Reg.* 63169) and its guidelines (65 *Fed. Reg.* 79442), the Office of the United States Trade Representative (USTR) submits this Final Environmental Review of the United States-Peru Trade Promotion Agreement (PTPA), in accordance with section 2102(c)(4) of the Trade Act of 2002 (Trade Act).

On November 18, 2003, in accordance with section 2104(a) of the Trade Act, U.S. Trade Representative Robert B. Zoellick notified the Congress of the President's intent to enter into negotiations for a free trade agreement with the Andean Countries of Colombia, Peru, Ecuador and Bolivia. The formal launch of negotiations took place on May 18, 2004 with Colombia, Peru and Ecuador. A trade capacity building group has been meeting in parallel with the negotiating groups. Negotiations with Peru concluded on December 7, 2005, and the PTPA was signed on April 12, 2006.

On May 10, 2007, the Administration and the bipartisan leadership of Congress agreed on a path forward for Congressional consideration of a number of free trade agreements, including the PTPA. This agreement included proposed changes in the PTPA to address Congressional concerns related to a number of elements of the agreement, including with respect to the Environment Chapter. On June 24 and June 25, 2007, respectively, the United States and Peru signed a protocol of amendment modifying the PTPA.

The environmental review process examines possible environmental effects that may be associated with the PTPA. In identifying and examining these possible effects, the Administration drew on public comments submitted in response to notices in the *Federal Register* (69 *Fed. Reg.* 19261, April 12, 2004 and 70 *Fed. Reg.* 10463, March 3, 2005), comments provided at public outreach events held in Peru and a variety of sources of published information. The review also draws on the environmental and economic expertise of federal agencies. Consistent with Executive Order 13141 and its Guidelines, the focus of the review is on potential impacts in the United States. Additionally, this review includes consideration of global and transboundary effects.

Findings

1. In this Final Environmental Review, the Administration has concluded that changes in the pattern and magnitude of trade flows attributable to the PTPA will not have any significant environmental impacts in the United States. Based on existing patterns of trade and changes likely to result from provisions of the PTPA, the impact of the PTPA on total U.S. production through changes in U.S. exports appears likely to be small. As a result, the PTPA is not expected to have significant direct effects on the U.S. environment. While it is conceivable that there may be instances in which the economic and associated environmental impacts are concentrated regionally or sectorally in the United States, we could not identify any such instances.

2. In considering whether provisions of the PTPA could affect, positively or negatively, the ability of U.S. federal, state, local or tribal governments to enact, enforce or maintain environmental laws and regulations, the Administration took into account the full range of PTPA obligations, including those related to services, sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT), as well as provisions of the PTPA Environment Chapter and related dispute settlement provisions. We concluded that the PTPA will not adversely affect the ability of U.S. federal, state, local or tribal governments to regulate to protect the U.S. environment, and that these and related PTPA provisions should have positive implications for the enforcement of environmental laws and the furtherance of environmental protection in both the United States and Peru.

3. This review also carefully examined the provisions of the Investment Chapter and their environmental implications. We were unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the PTPA's substantive investment obligations. We do not expect the PTPA to result in a significantly increased potential for a successful challenge to U.S. environmental measures under the PTPA's investor-state mechanism.

4. As compared to the expected effects in the United States, the PTPA may have relatively greater effects on the economy of Peru. In the near term, however, net changes in production and trade are expected to be relatively small because exports to the United States from Peru already face low or zero tariffs. Longer term effects, through investment and economic development, are expected to be greater but cannot currently be predicted in terms of timing, type and environmental implications.

5. Through increased economic activity in Peru, the PTPA may have indirect effects on the U.S. environment, for example through effects on habitat for wildlife, including migratory species. This review examined a range of these possible impacts, but did not identify any specific, significant consequences for the U.S. environment. Nevertheless, the possibility of such effects requires ongoing monitoring. Monitoring of conditions in the U.S. environment will continue as an element of existing domestic environment programs. Monitoring of environmental conditions in Peru will be enhanced as a component of an Environmental Cooperation Agreement (ECA) between the Parties.

6. The PTPA may have positive environmental consequences in Peru by reinforcing efforts to effectively enforce environmental laws, accelerating economic growth and development through trade and investment, promoting sustainable development of natural resources and disseminating environmentally beneficial technologies. The public submissions process established by the Environment Chapter has significant potential to improve environmental decision-making and transparency in Peru and to inform capacity-building activities.

7. Reflecting the bipartisan agreement, the PTPA Environment Chapter includes a groundbreaking Annex on Forest Sector Governance. This Annex details specific steps that Peru will take to improve sustainable management of its forests. These commitments are subject to the PTPA's dispute settlement procedures and enforcement mechanisms. The Annex also establishes mechanisms for the United States and Peru to promote legal trade in timber products, including procedures for regular audits of producers and exporters of timber products and

verifications to ensure that Peru's exports of timber products to the United States have complied with Peru's laws and regulations.

8. The PTPA provides a context for enhancing cooperation activities to address both trade-related and other environmental issues. As a complement to the PTPA, the United States and Peru concluded an ECA that will enhance the positive environmental consequences of the PTPA. The ECA establishes a comprehensive framework for developing cooperative activities. An Environmental Cooperation Commission, consisting of high-level officials with environmental responsibilities from each Party, will oversee implementation of the ECA. The PTPA encourages the development of environmental performance measures and tasks the Environmental Affairs Council established by the Environment Chapter with reviewing the progress of cooperative activities. The Parties are currently developing a Plan of Work that will identify specific areas of cooperation and provide more detail on how the ECA's benchmarking and monitoring provisions will be implemented.

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I. LEGAL AND POLICY FRAMEWORK

A. The Trade Act of 2002

The Trade Act of 2002 (Trade Act) establishes a number of negotiating objectives and other priorities relating to the environment. As relevant here, the Trade Act contains three sets of objectives: (i) overall trade negotiating objectives; (ii) principal trade negotiating objectives; and (iii) promotion of certain priorities, including associated requirements to report to Congress.

Environment-related overall trade negotiating objectives include:

- (1) ensuring that trade and environmental policies are mutually supportive and seeking to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources (section 2102(a)(5)); and
- (2) seeking provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade (section 2102(a)(7)).

Environment-related principal trade negotiating objectives include:

- (1) ensuring that a party to a trade agreement with the United States does not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, while recognizing a party's right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to prioritize allocation of resources for environmental law enforcement (sections 2102(b)(11)(A)&(B));
- (2) strengthening the capacity of U.S. trading partners to protect the environment through the promotion of sustainable development (section 2102(b)(11)(D));
- (3) reducing or eliminating government practices or policies that unduly threaten sustainable development (section 2102(b)(11)(E));
- (4) seeking market access, through the elimination of tariffs and nontariff barriers, for U.S. environmental technologies, goods and services (section 2102(b)(11)(F)); and
- (5) ensuring that environmental, health or safety policies and practices of parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against U.S. exports or serve as disguised barriers to trade (section 2102(b)(11)(G)).

The Trade Act also provides for the promotion of certain environment-related priorities and associated reporting requirements, including:

- (1) seeking to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science and reporting to the Committee on Ways and Means and the Committee on Finance (“Committees”) on the control and operation of such mechanisms (section 2102(c)(3));
- (2) conducting environmental reviews of future trade and investment agreements consistent with Executive Order 13141 and its relevant guidelines, and reporting to the Committees on the results of such reviews (section 2102(c)(4)); and
- (3) continuing to promote consideration of multilateral environmental agreements and consult with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing exceptions under Article XX of the GATT 1994 (section 2102(c)(10)).

On May 10, 2007, the Administration and the bipartisan leadership of Congress agreed on a path forward for Congressional consideration of a number of free trade agreements, including the PTPA. This agreement included proposed changes in the PTPA to address Congressional concerns related to a number of elements of the agreement, including with respect to the Environment Chapter.

B. The Environmental Review Process

The framework for conducting environmental reviews of trade agreements is provided by Executive Order 13141–*Environmental Review of Trade Agreements* (64 *Fed. Reg.* 63169) and the associated Guidelines (65 *Fed. Reg.* 79442). The Order and Guidelines are available on USTR’s website at http://www.ustr.gov/Trade_Sectors/Environment/Section_Index.html.

The purpose of environmental reviews is to ensure that policymakers and the public are informed about reasonably foreseeable environmental impacts of trade agreements (both positive and negative), identify complementarities between trade and environmental objectives and help shape appropriate responses if environmental impacts are identified. Section 5(b) of Executive Order 13141 provides that “as a general matter, the focus of environmental reviews will be impacts in the United States,” but “[a]s appropriate and prudent, reviews may also examine global and transboundary impacts.” Reviews are intended to be one tool, among others, for integrating environmental information and analysis into the fluid, dynamic process of trade negotiations. USTR and the Council on Environmental Quality (CEQ) jointly oversee implementation of the Order and Guidelines. USTR, through the Trade Policy Staff Committee (TPSC), is responsible for conducting the individual reviews.

The environmental review process provides opportunities for public involvement, including an early and open process for determining the scope of the environmental review (“scoping”). Through the scoping process, potentially significant issues are identified for in-depth analysis, while issues that are less significant – or that have been adequately addressed in earlier reviews –

are eliminated from detailed study.

The Guidelines recognize that the approach adopted in individual reviews will vary from case to case, given the wide variety of trade agreements and negotiating timetables. Generally, however, reviews address two types of questions: (i) the extent to which positive and negative environmental impacts may flow from economic changes estimated to result from the prospective agreement; and (ii) the extent to which proposed agreement provisions may affect U.S. environmental laws and regulations (including, as appropriate, the ability of state, local and tribal authorities to regulate with respect to environmental matters).

II. BACKGROUND

As described in the Guidelines, the focus of this review is on the possible effects in the United States, although transboundary and global effects may be considered as appropriate and prudent. Public comments on scope for the review as well as the Interim Review emphasized the need to examine possible indirect effects on the U.S. environment through, for example, effects on shared migratory species, such as neo-tropical migratory birds. Recognition of existing environmental challenges in Peru suggests careful consideration of these possible effects of the PTPA. This review does not, however, provide a comprehensive assessment of environmental concerns in Peru or broad-scale consideration of the manner in which economic growth may affect Peru's environment.

Peru has a population of 26.2 million (about 8.8 percent of the population of the United States) and a gross domestic product of \$73.3 billion (see table 1, Annex II for detailed data). Prior to conclusion of the PTPA, the U.S. trade relationship with Peru was conducted in the framework of unilateral trade preferences. Congress enacted the Andean Trade Preferences Act (ATPA) in 1991, which included Peru, to promote regional economic development and to provide economic alternatives for the illegal drug trade, promote domestic development, and thereby solidify democratic institutions. In renewing and expanding the ATPA in 2002, as the Andean Trade Promotion and Drug Eradication Act (ATPDEA), Congress further stressed enhancement of trade with the United States as an alternative means for reviving and stabilizing the economies in the region. The ATPDEA renewed and amended the ATPA to provide duty-free treatment for certain products previously excluded under the ATPA. The PTPA will make this duty-free treatment permanent, promoting economic development in Peru while providing export opportunities for U.S. exporters. The ATPA, as amended, was set to expire on December 31, 2006. Before its expiration, Congress enacted the Andean Trade Preferences Extension Act (the "Act"), which extends benefits under the ATPA, as amended for Bolivia, Colombia, Ecuador, and Peru through June 30, 2007. The Act grants an additional six-month extension to any beneficiary country that concludes a trade promotion agreement with the United States, provided the Congress and that country's legislature both approve the agreement by June 30, 2007. On June 28, 2007, Congress extended ATPA for eight months.

A. Economy and Environment in Peru

Economy

Tables 1 and 2 (Annex II) illustrate the scale of the Peruvian economy in relation to the United States and provide data that compare economic and social conditions in Peru with those in the United States.

Peru's economic growth (over five percent, in real terms) led the hemisphere in the last five years and was driven by investment, domestic demand and exports. During the 1990s, Peru was transformed by market-oriented economic reforms and privatization and established many conditions for long-term growth. Nevertheless, the continuing importance of extractive industries and raw material exports contributes to Peru's vulnerability to fluctuations in world markets and prices.

The informal economy in Peru represents a large percentage of the gross national product. This informality makes government regulation difficult. In addition, some illegal activities such as drug trafficking, illegal logging and smuggling of fossil fuels and wildlife have significant economic effects. These illegal activities are increasingly interconnected.

Drug production is an on-going problem in Peru. While the exact figures are unknown, it is estimated that coca cultivation generates from \$300-\$600 million per year. In addition to its social and environmental effects, the scale of this illegal activity creates problems for Peru's economy. For example, the resulting flow of dollars into the banking system in Peru influences the exchange rate and creates a climate in which money laundering can flourish. As a result, the Central Bank is forced to engage in open market activities to prevent the price of the Peruvian Sol from rising to levels that would otherwise depress exports.

The ATPA and ATPDEA are designed to reduce production and exports of narcotics to the United States by allowing broader access to U.S. markets to provide incentives to farmers and others to engage in legitimate economic activities. The PTPA builds significantly on this effort. Alternative development programs in Peru, which the United States also supports, provide former drug-crop producers with alternative sources of income.

*Environment*¹

Peru is one of the most ecologically diverse countries of the world, accounting for a significant share of the world's biological diversity. The importance of Peru's biological diversity is well recognized and considerable attention is given to its preservation while promoting social and

¹ Information for this section was drawn from the following sources: República de Peru, Consejo Nacional de Ambiente, "Legislacion Ambiental," and specific sector databases, "agricultura, defensa, energía y minas, producción, salud, transportes y comunicaciones, turismo, legislacion tributaria, proyectos" (available at http://www.conam.gob.pe/Modulos/home/leg_amb.asp); UNEP, Latin American and Caribbean Region, "Cumbre de Johannesburgo 2002, Reseña de Peru" (available at <http://www.un.org/esa/agenda21/natlinfo>); and Bureau of National Affairs, International Environment Reporter, "Peru," Vol. 282, No. 175, pp. 0101-0301, Washington, D.C., 2001.

economic development. Nevertheless, economic development, combined with inadequate enforcement efforts, has led to a variety of pressing environmental issues that include: deforestation; water and air pollution; soil erosion; desertification; loss of biological diversity; damage to ecologically sensitive areas and a variety of problems associated with both the cultivation and processing of illegal drugs.²

Despite progress on environmental issues, Peru still faces challenges as it seeks to protect the environment and develop the economy. Tables 3 and 4 (Annex II) summarize selected land use data and biological diversity indicators for Peru and the United States. These data display both environmental challenges (such as rates of deforestation and threats to species) as well as progress in addressing environmental concerns (such as the share of land in protected status and the area of biosphere reserves). Data in Tables 3 and 4 should be examined in conjunction with data in Tables 1 and 2 in order to gain insights into the environment/development nexus.

Peru made a number of rapid advancements in promulgating environmental regulations throughout the 1990s and beyond, despite a changing and sometimes volatile political climate and, until recently, a slow economy. However, implementation of many of these laws has been hampered by failure to coordinate management policies, inadequate funding and lack of political will. Slow implementation of laws for natural resource protection has allowed natural resource depletion trends to continue. Forests, marine resources and marine water quality are particularly threatened.

Legal Regime

The concept of environmental protection is embodied in Title III, Chapter II, (“Environment and Natural Resources”) of Peru’s 1993 Constitution. Article 200 outlines various government obligations to provide citizens with legal tools they can use to pursue legal remedies for environmental wrongs. Additionally, Chapter II of the Constitution reserves the right to develop Peru’s natural resources to the national government, promotes the use of natural resources, obligates the government to promote conservation of biological diversity and protected natural areas and obligates the government to promote sustainable development of the Amazon Region through appropriate legislation.

Throughout the 1990s, Peru took several legislative steps that were designed to broaden the scope of natural resource and environmental protection. The law creating the National Council of the Environment (CONAM) was implemented in 1994, about the same time that Peru implemented a framework law on private investment that contained some environmental components. A 1990 law established a System of Natural Areas Protected by the State. In the period 1997-2001, laws were passed to address the sustainable development of natural resources and biological diversity, protection of natural areas and water resources, solid waste disposal and national environmental impact assessment. The nation’s Supreme Court also has issued decrees

²The processing of coca involves leeching alkaloid from the leaf to make cocaine, requiring large quantities of toxic chemicals such as acetone, sulfuric acid and kerosene which are released into the ground water and rivers. According to GOP official estimates, drug producers release around 13000 metric tons of toxic chemicals annually into the Amazon basin, and a large area of tropical forest in Peru has been destroyed due to illegal coca cultivation.

establishing strategic regulations on biological diversity and regulations to implement the 1997 law establishing protected natural areas.

The Constitution is more recent than the 1990 Peruvian Environment and Natural Resources Code, which set responsibility for administration of environmental policies across several ministries. As a result, a Peruvian Congressional Commission prepared a comprehensive update of Peru's Environment and Natural Resources Code in order to establish a new environmental framework law for the country. The result was a new "General Environmental Law" that was passed by the Peruvian Congress on November 15, 2005.³ This law regulates national environmental policy priorities, establishes the legal framework for environmental management in Peru and defines a national environmental management process to reach the objectives of the policy it establishes. The scope of the law is broad, encompassing environmental quality, natural resources and people (including indigenous peoples) and the environment. Although the national government retains control of the design of national environmental policies and standards, specific laws and regulations continue to be implemented by autonomous agencies and national, regional and local authorities.

Peru does not have an environmental ministry, but spreads environmental protection program management across several ministries. The new General Environmental Law establishes a National Environmental Authority (NEA) to coordinate implementation of national environmental policy among the decentralized implementation authorities. The new law does not create a new agency, but instead assigns the function of the NEA to CONAM, which has historically acted as a coordinating body on environmental policies to guide the activities of government, the private sector and civil society. Among the various authorities, the National Natural Resources Institute (INRENA) plays a particularly important role. INRENA acts as a semi-autonomous institution within the Ministry of Agriculture and administers programs related to the sustainable use of renewable natural resources, conservation of biological diversity and rural land management. In practice, while CONAM is consulted on regulatory matters, regulatory functions have continued to rest in the environmental divisions of the various ministries. For example, the Environmental Directorate of the Mining and Energy Ministry continues its lead role in evaluating environmental management plans for mining operations; the Minister makes the final decisions after consultations with CONAM.

Because enforcement responsibilities are dispersed over a number of agencies, it has been historically difficult for the Peruvian government to coordinate institutions responsible for law enforcement, judicial and environmental program management. The new General Environmental Law includes several provisions to address this issue. Specifically, the new law establishes an explicit framework to coordinate environmental management, including enforcement.

Article 200 of the Peruvian Constitution provides citizens four legal tools: (i) a governmental

³ For additional background information on Peru's environmental laws, see <http://www.elaw.org/resources/regional.asp?region=South%20America>. A copy of the new law (in Spanish) is available at <http://www.elaw.org/assets/pdf/pe.gen.env.law.pdf>.

obligation to provide legal remedies for infractions of environmental law; (ii) a similar governmental obligation to force government authorities to comply with relevant environmental laws; (iii) a governmental obligation to provide “popular action” to more generally correct violations of environmental law; and (iv) a guarantee that violations of the environmental provisions of the Constitution will be considered by Peru’s Constitutional Court.

CONAM and other government agencies with environmental authority can impose administrative fines, but the fines have historically been very modest and have generally not acted as a deterrent. Additionally, Peru’s system of administrative and judicial proceedings allows environmental offenders numerous opportunities to appeal, which results in delays in the implementation of sentences. Although the new law may provide the basis for improvements, it is too early to judge whether it will help address this and other enforcement problems: early experience suggests continued implementation challenges.

Natural Resources

Peru has three distinct geographic regions, and each has distinctive environmental features and challenges. The western part of Peru along the Pacific Ocean is mostly desert, punctuated by several dozen small rivers that flow down from the Andes Mountains. The Andes themselves form the backbone of Peru, running north-south and featuring many permanent glaciers. The eastern part of Peru is marked by cloud forests and a vast area of lowland rainforests that make up the Peruvian portion of the Amazon jungle.

These distinct regions are endowed with considerable natural resources, including biological diversity. Peru is one of only 17 countries classified as “megadiverse.”⁴ Peru is home to 1,703 bird species, 3,532 butterfly species, 1,200 fish species, 175 species of reptiles and 3,200 native plant species. Many of these species are contained in the 675,000 square kilometers of the Amazon region in Peru. Peru also has an abundance of certain types of minerals, notably gold and copper, and a lengthy coastline that supports a thriving fisheries sector. Peru’s major exports consist of gold, copper and fishmeal.

Peru’s Amazon forests contain commercially valuable trees, such as mahogany, cedar and rosewood, as well as oil and gas reserves that are not yet fully mapped. Peru’s 78 million hectares of forests cover 70 percent of the country’s territory. Of this, more than 65 million hectares are moist tropical forests, among the world’s most biologically diverse forests.

Environmental Pressures

A number of factors, notably population growth and the need to generate income for development, generate widespread pressure on the environment in Peru. Peru faces rapid population growth, increasing urbanization and widespread poverty. As is common in many

⁴ Megadiverse countries are those countries in which less than the 10% of the global surface has more than the 70% of the biodiversity. For additional information see, for example: <http://www.biodiversityhotspots.org/xp/Hotspots>.

Latin American countries, a large portion of Peru's population (about 40 percent) live in poverty and more than 70 percent of the population resides in urban areas. About 25 percent of the population lives in extreme poverty, mostly in rural areas. These conditions produce environmental pressures such as air and water pollution and deforestation.

Deforestation is among the most significant and widespread sources of environmental damage in Peru. Subsistence agriculture and destructive (as well as illegal) logging have resulted in a significant loss of Peru's native forests. Isolated reforestation efforts have been only partly successful. Less than 600,000 hectares have been restored, and net annual deforestation is estimated at 0.4 percent of forest cover. This rate of deforestation threatens to substantially reduce Peru's rich biological diversity and a continuation could mean the loss of up to 40 percent of the genetic resources of Peruvian forests. Peruvians consider many of these resources to be important for agriculture, forestry and new medicines. Peru's national government has established a number of protected forest areas, but these are threatened by weak regulation and illegal activity.

Air pollution is particularly acute in the larger urban areas of Peru, most notably in Lima. Air quality regulations are very recent in Peru and have not yet had time to effectively address the worst urban air pollution. It was only in 1998 that technical working groups were authorized to establish national standards for air and water quality, as well as maximum allowable limits for polluting gas emissions and liquid effluents. Water pollution is a problem as well.

Additionally, unsustainable fishing practices, production of fishmeal and nearly unchecked municipal wastes from large cities along Peru's coasts have all contributed to severe deterioration of Peruvian coastal water quality and equally severe depletion of marine resources. Peru also suffers from periodic threats from El Niño.⁵ El Niño has led to devastating effects on Peruvian agriculture, including both droughts and flooding. El Niño has also impacted fish catches in the Pacific Ocean.

B. United States – Peru Goods Trade

Goods trade between the United States and Peru has grown substantially since enactment of the ATPA in 1991. Two-way trade with Peru was nearly \$8.8 billion in 2006, an increase of nearly five times as compared to 1991. Table 5 (Annex II) summarizes recent United States goods trade with Peru.

Current U.S. goods exports are more than \$2 billion per year and increased 26 percent from 2005 to 2006. The value of U.S. goods exports to Peru has increased almost 50 percent over the past 10 years. Top export categories include machinery for power generation, mineral fuel, plastics and organic chemicals.

⁵ El Niño refers to the large-scale ocean-atmosphere climate phenomenon linked to a periodic warming in sea-surface temperatures across the central and east-central equatorial Pacific (between approximately the date line and 120° W). El Niño represents the warm phase of the El Niño/Southern Oscillation (ENSO) cycle and is sometimes referred to as a Pacific warm episode.

The United States is one of Peru's major trading partners; in 2006, shipments to the United States accounted for 23 percent of Peru's exports. U.S. goods imports from Peru totaled \$5.9 billion in 2006, more than double the value of U.S imports in 2003. Peru's major goods exports to the United States include precious metals, apparel, copper, mineral fuels and tin.

III. THE UNITED STATES – PERU TRADE PROMOTION AGREEMENT

A. Overview of the United States – Peru Trade Promotion Agreement

The PTPA is expected to enhance our efforts to strengthen democracy and support for fundamental values in Peru, such as, respect for internationally recognized worker rights, greater respect for the rule of law, sustainable development and government accountability.

The United States built on experience with other trade agreements as well as the ATPA, as amended by the ATPDEA, which has driven the U.S.-Peru trade relationship since 1991. By moving from unilateral trade preferences to a reciprocal trade promotion agreement, the PTPA will eliminate duties and unjustified barriers to trade in goods of U.S. and Peruvian origin. The PTPA also addresses trade in services, trade in agricultural products, investment, trade-related aspects of intellectual property rights, government procurement and trade-related environmental and labor matters.

The PTPA consists of a preamble and the following 23 chapters and associated annexes: initial provisions and general definitions; national treatment and market access for goods; textiles and apparel; rules of origin procedures; customs administration and trade facilitation; sanitary and phytosanitary measures; technical barriers to trade; trade remedies; government procurement; investment; cross-border trade in services; financial services; competition policy; telecommunications; electronic commerce; intellectual property rights; labor; environment; transparency; administration and trade capacity building; dispute settlement; exceptions; and final provisions. The complete text of the PTPA, related annexes and side letters, and summary fact sheets are available on USTR's website at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Section_Index.html.

Based on the scoping process (see Section IV), public comments and developments since the Interim Review, the following is a summary of the PTPA provisions most relevant to this Final Environmental Review. The provisions of the Environment Chapter are described in Section III.B.

Market Access for Goods

Tariff commitments by the United States and Peru provide immediate benefits for both Parties. More than 80 percent of U.S. exports of consumer and industrial products to Peru will become duty free immediately upon entry into force of the PTPA and 85 percent will be duty free within five years. All remaining tariffs will be eliminated within ten years of entry into force. As

previously noted, under the ATPDEA many products from Peru already enter the United States duty free. The PTPA will consolidate those benefits and make them permanent, so that nearly all non-textile consumer and industrial products made in Peru will enter the United States duty free immediately on entry into force of the agreement.

Customs Procedures and Rules of Origin

The PTPA sets out methods for valuing products used to qualify for preferential treatment under certain product-specific rules of origin. The PTPA includes specific obligations on customs procedures to ensure compliance with laws governing importation. The PTPA requires the Parties to provide transparency and efficiency in administering customs procedures, with commitments to publish laws and regulations and ensure procedural certainty and fairness. The PTPA also includes a commitment to share information to combat illegal trans-shipment of goods.

Sanitary and Phytosanitary Measures

The United States and Peru reaffirm their commitments under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The PTPA also creates a process for enhanced cooperation and coordination among the Parties on sanitary and phytosanitary issues.

Technical Barriers to Trade

The United States and Peru reaffirm their commitments to the WTO Agreement on Technical Barriers to Trade (TBT), and the PTPA creates a process for enhanced cooperation and coordination on technical regulations and standards.

Intellectual Property Rights

The Intellectual Property Rights (IPR) Chapter provides for strong protection of copyrights, patents, trademarks and trade secrets, including enhanced enforcement and non-discrimination obligations for all types of intellectual property. Through the copyright provisions, Parties will address the challenge of providing protection in the digital environment of the Internet and provide important protection for performers and producers of phonograms. Under the PTPA, the Parties will provide strong protections for trademarks and limit the grounds for revoking a patent. The Chapter provides for streamlined trademark filing processes and improved protection of trademark owners' rights.

Services

The PTPA permits substantial market access across the entire services regimes (based on the "negative list" approach), subject to limited exceptions. Peru has agreed to exceed its commitments made in the WTO, and to dismantle significant services and investment barriers. The PTPA requires the Parties to provide national treatment and most-favored-nation (MFN) treatment to each other's services suppliers. Commitments apply across a wide range of sectors

and provide for non-discriminatory treatment through strong disciplines on both cross-border supply of services and the right to invest and establish a local services presence. Regulatory authorities must use open and transparent administrative procedures, consult with interested parties before issuing regulations, provide advance notice and comment periods for proposed rules and publish all regulations.

Investment

The PTPA establishes a secure, predictable legal framework for U.S. investors operating in Peru. The PTPA imposes major obligations pertaining to non-discrimination (national treatment and MFN treatment), expropriation, free transfers related to covered investments, prohibition on the use of performance requirements, minimum standard of treatment, and limitations on requirements on senior managers. The PTPA also provides a mechanism for investor-State dispute resolution, including a commitment to consider the establishment of an appellate or similar mechanism to review awards made by tribunals under the PTPA.

Government Procurement

The PTPA will provide a more predictable procurement environment for U.S. suppliers. Parties have committed to using open, transparent and non-discriminatory procurement procedures. The Chapter includes requirements for advance public notice of procurement opportunities and provision of tender documentation to all interested suppliers in a timely fashion, as well as timely and effective bid review procedures.

Transparency

The Transparency Chapter requires Parties to ensure that laws, regulations, procedures and administrative rulings on matters covered by the PTPA are published or otherwise made available to the public. In addition, the Chapter requires Parties whenever possible to publish advance notice of proposed measures and provide a reasonable opportunity for interested parties to comment. Further, the Chapter requires Parties to establish and maintain procedures for review and appeal of administrative actions regarding matters covered by the PTPA.

Trade Remedies

The PTPA includes provisions governing imposition of bilateral safeguard measures and states that the Parties maintain their respective rights and obligations under the WTO Safeguards Agreement. The Chapter provides that a Party may exclude imports from the other Party from a WTO safeguard measure, if imports from that Party are not a substantial cause of serious injury or threat of serious injury. The PTPA also establishes procedures for safeguard measures on agricultural, textile and other goods.

Labor

The PTPA Labor Chapter reaffirms the Parties' obligations as members of the International

Labor Organization (ILO), commits the Parties to adopt and maintain in their laws and practice the core internationally-recognized labor rights, as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and includes a prohibition on the worst forms of child labor. The PTPA further provides that neither Party may waive or otherwise derogate from the laws that implement this obligation in a manner affecting trade or investment between the Parties. The Chapter commits each Party to effectively enforce its labor laws related to the fundamental rights in addition to those related to acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Procedural guarantees ensure that workers and employers will continue to have fair, equitable and transparent access to labor tribunals. All obligations in the Chapter are subject to the same dispute settlement procedures and enforcement mechanisms as obligations in other chapters of the PTPA. The Parties also establish a mechanism for further cooperation on labor matters.

Dispute Settlement

The PTPA contains a dispute settlement mechanism. The mechanism sets high standards of openness and transparency, requiring public hearings and the public release of Parties' legal submissions. It provides opportunities for interested third parties, such as non-governmental organizations, to submit views. The Chapter includes an enforcement mechanism whereby if a Party fails to comply with an arbitral panel decision and the Parties cannot reach a mutually acceptable solution, the Parties may have recourse to compensation, trade sanctions, or the payment of a monetary assessment.

Exceptions

For certain chapters, the Parties agreed to incorporate into the PTPA Article XX of the GATT 1994 and Article XIV of the GATS. The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources. The Parties also understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health. Nothing in the PTPA shall be construed to compel a Party to reveal confidential information or information contrary to its essential security interests or prevent it from applying measures that it considers necessary to its essential security interests.

Trade Capacity Building

Building on the Parties' experience with the Trade Capacity Building (TCB) process during the PTPA negotiations, the PTPA creates a Committee for Trade Capacity Building for the purpose of defining and identifying priority needs so that Peru can effectively implement commitments and maximize the long-term benefits of free trade.

B. The Environment Chapter and Related Environmental Provisions

Following guidance in the Trade Act and the bipartisan agreement between the Administration and Congress, the PTPA Environment Chapter requires a Party: (1) to strive to maintain high levels of environmental protection and to strive to improve those levels; (2) to effectively enforce its environmental laws and to adopt, maintain and implement laws and all other measures to fulfill its obligations under specified multilateral environmental agreements (MEAs) to which both Peru and the United States are party (“covered agreements”); and (3) not to waive or otherwise derogate from environmental laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment, except where the waiver or derogation is pursuant to a provision in law providing for waivers or derogations and is not inconsistent with the Party’s obligations under a covered agreement. All obligations in the Chapter are subject to the same dispute settlement procedures and enforcement mechanisms as obligations in other chapters of the PTPA.

To assist in the administration and implementation of the PTPA Environment Chapter, the Parties agree to establish an Environmental Affairs Council to oversee the implementation of the Environment Chapter. This Council will be composed of high-level government officials from the Parties. It will meet within the first year of the PTPA’s entry into force, and annually thereafter unless the Parties agree otherwise. The United States is supporting a Trade and Environment Unit based in CONAM to assist in implementing the environmental provisions of the PTPA. The Unit, made up of CONAM and the Ministry of Trade and Tourism (MINCETUR), began work in late 2005.

The PTPA Environment Chapter encourages a comprehensive approach to environmental protection. Provisions on procedural guarantees promote good environmental governance by obliging each Party to provide appropriate and effective remedies for violations of its environmental laws and to ensure that environmental enforcement proceedings comply with due process, and are open to the public except where the administration of justice requires otherwise. These procedural guarantees are accompanied by provisions that encourage incentives and other voluntary mechanisms to protect the environment, including market-based incentives. Provisions on the relationship between the PTPA and MEAs acknowledge the importance of effective domestic implementation of MEAs to which the United States and Peru are both party and the contributions that the PTPA Environment Chapter and the ECA can make to achieve the goals of those MEAs. Reflecting the bipartisan agreement, the PTPA further provides that in the event of an inconsistency between a Party’s obligations under the PTPA and a covered agreement, that the Party shall seek to balance its obligations under both agreements. The Environment Chapter also provides for consultation, as appropriate, with respect to negotiations on environmental issues of mutual interest.

Public Submissions Process

The PTPA contains a public submissions process that will allow members of the public to raise concerns regarding each Party’s enforcement of its environmental laws. The PTPA’s public submission provisions are similar to the public submissions process established in the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR). In both cases, the provisions are modeled on Articles 14 and 15 of the North American Agreement on

Environmental Cooperation (NAAEC), but contain a number of improvements to the NAAEC. Combined with other elements in the environment package (*e.g.*, robust environmental cooperation and capacity building under the ECA, see Section VII *infra*), the public submissions process should significantly contribute to improved environmental governance and transparency in Peru.

Under the PTPA, any person of a Party may file a submission alleging that a Party is failing to enforce its environmental laws with a designated “secretariat or other appropriate body,” and the secretariat will review the submission in light of specified criteria.⁶ In comparison with the NAAEC, the PTPA makes it easier for a meritorious concern to be addressed by providing that the secretariat will prepare a factual record if any member of the Council requests that it do so. (Under the NAAEC, a two-thirds vote of the Parties is required.) The PTPA also provides that the Council will review any factual record prepared in light of the objectives of the Environment Chapter and the ECA and may make recommendations to the ECA’s Environmental Cooperation Commission concerning matters addressed in the factual record that are relevant to potential environmental cooperation. This provision represents an important innovation to the NAAEC, which does not contain such a provision.

Further details of the submissions process, including measures to ensure effective public participation in that process in furtherance of PTPA environment package goals, will be established through working arrangements to be developed by the Parties.

Biological diversity

The PTPA Environment Chapter includes an article whose objective is to enhance efforts to protect biological diversity. Both Peru and the United States are classified as “mega-diverse” countries, meaning that they along with 15 other countries possess more than 70 percent of the world’s biological diversity.⁷ Therefore, the Parties recognize the importance of conservation and sustainable use of biological diversity and affirm that they are committed to promoting and encouraging conservation and sustainable use of biological diversity and all its components and levels, including plants, animals and habitat. The importance of public participation on biological diversity issues is also recognized.⁸

Forest Sector Governance

Reflecting the bipartisan agreement, the Environment Chapter includes a groundbreaking Annex on Forest Sector Governance. This Annex details specific steps that Peru will take to improve sustainable management of its forests and these commitments are subject to the Agreement’s

⁶ The PTPA’s public submissions procedure is not available to U.S. persons wishing to raise concerns regarding U.S. enforcement of U.S. environmental laws, because such persons already have available to them other remedies including the procedures under Articles 14 and 15 of the NAAEC.

⁷ See Section II and Annex II for additional background information on biodiversity in Peru and the United States.

⁸ These commitments are supported by ongoing cooperative activities to protect Peru’s biodiversity, implemented by the U.S. Agency for International Development, as directed by Congress.

dispute settlement procedures and enforcement mechanisms. The Annex also establishes mechanisms for the United States and Peru to promote legal trade in timber products, including procedures for regular audits of producers and exporters of timber products and verifications to ensure that Peru's exports of timber products to the United States have complied with Peru's laws and regulations.

IV. PUBLIC AND ADVISORY COMMITTEE COMMENTS

To determine the scope of this review, the Administration considered information provided by the public and solicited comments through notices in the Federal Register and at a public hearing. Section IV.A summarizes public comments. In addition to providing guidance on the scope of the environmental review, any information, analysis and insights available from these sources were taken into account throughout the negotiations and were considered in developing U.S. negotiating positions.

Pursuant to Trade Act requirements (section 2104(e)), advisory committees, including the Trade and Environment Policy Advisory Committee (TEPAC), submitted reports on the PTPA to the President, USTR and Congress within 30 days after the President notified Congress of his intent to enter into the agreement. The TEPAC report is summarized in section IV.B.

A. Public Comments

This review was formally initiated by publication of a notice in the *Federal Register*, which requested public comment on the scope of a review of the proposed free trade agreement with the Andean countries of Colombia, Ecuador and Peru (see 69 *Fed. Reg.* 19261, April 12, 2004). A notice in the *Federal Register* also requested public comments on the overall negotiation and announced a public hearing on the proposed free trade agreement (see 69 *Fed. Reg.* 7532, February 17, 2004). Comments and testimony addressing environmental issues received in response to that notice were taken into account in the preparation of this final environmental review. Further public comment was requested in response to an Interim Environmental Review of the proposed free trade agreement with Colombia, Ecuador and Peru (see 70 *Fed. Reg.* 10463, March 3, 2005). Comments responding to the *Federal Register* notices were made in the context of a proposed free trade agreement with Colombia, Ecuador and Peru and, as such, typically made reference to one or more of the three countries. In the preparation of this Final Environmental Review of the PTPA, we drew on all submissions to the extent that they included comments applicable to Peru and the PTPA.

We received two sets of comments on the scope for the review of the proposed free trade agreement with Colombia, Ecuador and Peru (one of which was a joint submission on behalf of five organizations), and five sets of comments (including one joint submission) on the Interim Review of the proposed free trade agreement with Colombia, Ecuador and Peru. Annex I lists all organizations from which comments were received.

Two comments on scope made specific reference to Peru and issues relevant to the PTPA.⁹ One comment provided advice on the process of conducting the environmental review and raised a wide range of environmental concerns. The comment notes the wealth of biological diversity in the Andean region, the size of indigenous populations (as well as their close link to the region's biological diversity) and the role of extractive industries in the economies of the region, including Peru. Topics suggested for particular attention included: agriculture, indigenous peoples, mahogany and illegal logging, aquaculture, port facilities and the investment provisions of the agreement. Specific reference was made to perceived shortcomings of Peruvian legislation to meet obligations under international treaties to protect endangered species. A second comment requested that duty free access to the U.S. market not be permanently granted for sugar, noting differences in environmental standards between the United States and Peru.

Comments on the Interim Environmental Review generally confirmed that its scope covered the relevant issues to be considered. Some comments emphasized the importance of protection of migratory birds, guarding against invasive species and reducing threats to biological diversity. A number of the comments also recognized the value of the opportunities offered by the environmental cooperation mechanisms expected to be put in place through the PTPA and provided specific recommendations for additional cooperation activities, such as promoting wild bird conservation and strengthening implementation and compliance with international treaties, such as the Convention on International Trade in Threatened and Endangered Species (CITES).

B. Advisory Committee Report

Under Section 135(e) of the Trade Act of 1974, as amended, advisory committee reports must include advisory opinions as to whether and to what extent an 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 reports must also include advisory opinions as to whether an agreement provides for equity and reciprocity within the sectoral or functional area of the particular committee. The advisory committee reports are available at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Section_Index.html.

A majority of TEPAC members supported the conclusion that the PTPA provides adequate safeguards to ensure that Congress's environmental negotiating objectives will be met. The majority also welcomed the requirement that each Party convene a national advisory committee to seek views on matters related to implementation of the Environment Chapter. However, while welcoming their inclusion, the majority also regretted that public participation provisions were not as extensive as those in the United States-Dominican Republic-Central America Free Trade Agreement (CAFTA-DR). The report reiterates TEPAC's view that public participation helps ensure that an agreement and its provisions operate as intended, while guaranteeing more effective enforcement of environmental laws.¹⁰ The TEPAC majority also noted with regret the

⁹ All comments on scope for the proposed U.S.-Andean Free Trade Agreement are summarized in the Interim Review, available at http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html.

¹⁰ At the time of the release of the TEPAC report this component of the PTPA was still under negotiation. Taking account of TEPAC concerns, and following consultations with Peru, the text of the Environment Chapter was revised to include a public participation mechanism like that in the CAFTA-DR.

fact that the public submission process in the PTPA does not include a requirement that dispute resolution panels accept submissions from civil society. A majority of members also expressed the view that trade agreements can create opportunities to enhance environmental protection. TEPAC noted, however, that trade can create and amplify adverse externalities that require enhanced regulatory oversight.

A majority of TEPAC members expressed concern that the ECA lacks specificity regarding areas of cooperation and affords little guidance on the areas that might be addressed. TEPAC also expressed concerns regarding the availability of funds for activities to be undertaken through the ECA. The TEPAC majority noted that the PTPA's investment provisions demonstrate continued improvements, as compared to earlier free trade agreements, but raised concerns related to the language used in reference to expropriation. TEPAC recommended that the governments continue to communicate and exchange views to clarify the mutual understanding of the meaning of terms to help ensure that the resolution of disputes under the agreement remain consistent with U.S. law.

The TEPAC majority concluded that the PTPA's market access provisions fulfill Congress' mandate. However, a majority of TEPAC members noted the absence of a corporate stewardship provision and reiterated its value in promoting good corporate behavior. At the same time, the inclusion of an article on biological diversity was viewed positively by the majority while at the same time drawing attention to the need to clarify the meaning of the term "sustainable use" in the context of biological diversity. Taking these concerns into account, a footnote was added to the final text to clarify this term.

A minority of TEPAC members raised several concerns, including concerns that : (1) intellectual property provisions are contrary to the TRIPS agreement and may reduce access by Peruvians to generic medicines; (2) investment provisions include language that is interpreted as weakening traditional protections for U.S. investors; (3) environmental provisions that were included in CAFTA-DR were not be carried over to the PTPA; and (4) the biological diversity provision failed to recognize the benefits that Peru can derive from efficiency gains and higher yields from its resources through property rights and technological advances.

C. Public Outreach Efforts

In addition to providing opportunities for written comments and testimony in response to notices in the Federal Register, the U.S. Government held a public meeting in Peru with environmental organizations, the private sector and leaders of indigenous groups.¹¹ This meeting provided an opportunity to raise questions and express concerns. More than 200 people participated in the event held in Lima, Peru. Participants represented a wide variety of local, regional and international organizations. The United States worked closely with the Peruvian government to ensure that civil society was actively consulted and engaged during the negotiation of the Environment Chapter of the PTPA and the associated ECA.

¹¹ Similar events were held in Colombia and Ecuador as part of the free trade negotiations with those countries.

V. POTENTIAL ECONOMICALLY-DRIVEN ENVIRONMENTAL IMPACTS

A. Potential Impacts in the United States

Although Peru is an important market for some U.S. producers and exporters, the impact of the PTPA on total U.S. production through changes in U.S. exports appears likely to be very small. Exports to Peru currently account for about 0.2 percent of total U.S. exports (see Table 5, Annex II) and a very small portion of total U.S. production. Increases in U.S. exports of agricultural and industrial goods to Peru are expected as a result of the PTPA's reductions in market access barriers. However, any associated increases in U.S. production will represent a very small change in the aggregate U.S. economy.

Although small changes in production and exports in environmentally-sensitive sectors could provide a basis for concern regarding the PTPA's direct environmental effects in the United States, no instances warranting such concerns were identified and none were raised in public comments on the Interim Review (see Section IV.A). Based on this information and analysis, the Administration has concluded that changes in the pattern and magnitude of trade flows and production attributable to the agreement will not have any significant environmental impacts in the United States. However, the PTPA's provisions on rules of origin and market access may contribute to increased trade in remanufactured products and, as a consequence, provide some environmental benefits through energy and material savings, and the minimization of solid waste.

Liberalization of services can be expected to have an economic impact in the United States although here, too, the effect of the PTPA is likely to be small, and we could not identify any environmentally sensitive sectors in the United States likely to be affected by such impacts. The United States already allows substantial access to foreign service providers, including in environmentally sensitive areas (*e.g.*, tourism and services incidental to energy distribution). Additionally, as noted in Section VI below, the PTPA does not negatively affect the U.S. ability to regulate in these sectors.

B. Transboundary and Global Issues

While the environmental impacts of expected economic changes in the United States attributable to the PTPA are expected to be minimal, the Administration examined a large number and wide variety of environmental issues with potential global and transboundary impacts in determining the scope of this review. These were provisionally identified through public comments in response to a notice in the *Federal Register* (see Section III.A) and through an open-ended scoping process among agencies with environment, trade and economic expertise. We subsequently eliminated topics from further and more detailed analysis when initial findings revealed that there was no identifiable link to the PTPA. The following topics warranted further consideration.

1. Economically-driven Environmental Effects in Peru

As compared to its effects in the United States, the PTPA may have relatively greater impacts on the economy of Peru and, through those impacts, effects on its environment. However, significant trade preferences and market access are already provided by the ATPDEA. Therefore, we do not anticipate that the PTPA will cause a rapid and significant increase in Peru's exports to the United States or in Peru's industrial or agricultural production.

To the extent that the PTPA has significant effects on the Peruvian economy, over time, the environmental effects in Peru may be both positive and negative. The PTPA may further increase investment, trade and production in the country, which may be associated with further pressure on the environment. On the other hand, some new investment may bring environmentally-beneficial technologies and production methods as well as higher standards for corporate environmental performance. In addition, proposed commitments in the PTPA, such as those to effectively enforce environmental laws, may have a positive effect, especially when coupled with capacity-building and environmental cooperation activities. The PTPA also is likely to contribute to increases in per capita income and, through this, to greater demand for environmental regulation within the region over time.

2. Migratory Birds

Migratory and resident species of birds are a critically important global resource. In the United States and in Peru, birds pollinate flowers, remove insect pests and weed seeds from many important commercial food crops and forest product species, and are a critical component of nature-based tourism that generates hundreds of millions of dollars in economic activity. Nevertheless, many bird species face both direct and indirect threats to survival, many of which are human-caused.

In the United States, 836 migratory bird species are currently protected under the Migratory Bird Treaty Act (MBTA), of which some 132 neo-tropical migratory species migrate through or depend on the tropical Andes for wintering habitat. Peruvian ecosystems, within the Central Andean biosphere, hold exceptionally high biological diversity and suffer from acute habitat loss. A decline in the population of many species in the area has been a cause for growing concern. Twenty-nine species that winter in the Andean region are listed by the U.S. Fish and Wildlife Service (2002) as "Birds of Conservation Concern" and according to the 2004 IUCN Red List, five are of global conservation concern: Buff-breasted Sandpiper (*Tryngites subruficollis*), Elegant Tern (*Sterna elegans*), Olive-sided Flycatcher (*Contopus borealis*), Golden-winged Warbler (*Vermivora chrysoptera*), and Cerulean Warbler (*Dendroica cerulea*).

Deforestation (including clearing for agricultural production and development) and forest degradation (including unsustainable timber production) are among the greatest threats to birds and their habitats. Conversion of coastal wetlands to urban or agricultural use (or contamination from those activities) is a lesser but existing threat. Peru's forest cover has been reduced or degraded and Peru continues to experience a relatively high rate of deforestation (see Table 3,

Annex II). Production for export, including export to the United States, is a factor in deforestation.

The tariff provisions of the proposed PTPA are not likely to have an impact on migratory bird habitat because applied tariffs on most products, including those linked to deforestation and forest degradation, are low or at zero. Although the tariff-related production and trade effects appear likely to be small, it is more difficult to predict the effects of the PTPA on investment in the sector. For example, investment may increase as a consequence of a variety of factors that create a more stable and predictable investment climate. The environmental effects of investment in sectors such as agriculture, whose activities may affect migratory bird habitat, may be either positive or negative.

Recent cooperative activities address a number of concerns related to migratory birds and there are opportunities to continue this work in connection with the PTPA. The ECA signed by the parties will serve as a framework to enhance such cooperation activities (see Section VII).

3. Wildlife Trade and CITES

Peru is an exporter of products of wild flora and fauna, but the majority of this trade is regulated under CITES. CITES is an agreement designed to provide for cooperation to prevent international trade in specimens of wild animals and plants from threatening their survival. CITES is implemented by parties through domestic laws and regulations, and both the United States and Peru are parties to CITES. Trade in CITES-listed species requires the exporting country to certify that the specimen was legally harvested and (in the case of CITES Appendix II) that harvest was not detrimental to the survival of the species.

In the United States, CITES is implemented through the Endangered Species Act of 1973 (ESA). Under some circumstances, the ESA provides protections that go beyond obligations under CITES including, in some cases, for species with ranges outside the United States. In the United States, the ESA prohibits *inter alia* import, export, taking, or selling in interstate commerce of any protected species.

Peru's implementation of CITES is mixed and Peru has acknowledged the need for improvement. As an example, the CITES National Legislation Project evaluates each party's legislation to ensure that it meets the requirements for implementation of the Convention. For some time, Peru has been in Category 2, the designation for countries whose national legislation may not meet all requirements for effective implementation of CITES. At its 50th meeting (in March 2004), the CITES Standing Committee reviewed Peru's legislative progress and adjusted the deadline for Peru's compliance based on evidence of progress in enacting adequate legislation.¹² Peru's progress was reviewed again at Standing Committee meetings in July 2005 and October 2006. At its meeting in June 2007, the Standing Committee was informed that the Secretariat had discussed Peru's legislation with Peru's CITES authorities. At the 14th Conference of the Parties (June 2007), the Secretariat was directed to report at the 57th meeting

¹² Further information is available at: <http://www.cites.org/eng/com/SC/index.shtml>.

of the Standing Committee (scheduled for June 2008) on Parties' progress in enacting adequate legislation and, if necessary, recommend the adoption of appropriate compliance measures, including suspension of commercial trade in CITES-listed species. Pending that report, Peru (along with a number of other countries) remains in Category 2.

The PTPA commits Parties to adopt, maintain and implement laws and all other measures to fulfill obligations under covered multilateral environmental agreements, including CITES. Along with other obligations in the Environment Chapter (see section III.B), this obligation is subject to the PTPA's dispute settlement procedures and enforcement mechanisms.

Public comments drew particular attention to concerns about the effectiveness of Peru's implementation of the listing of big-leaf mahogany (*Swietenia macrophylla*) in CITES Appendix II. Peru is a major producer and exporter of big-leaf mahogany and the United States is the largest single market for big-leaf mahogany. There is concern not only over the extent to which international trade may threaten the species itself, but also the threat that logging for export poses to associated biological communities and forest-dependent species.

The United States supported the decision to use CITES to regulate trade in mahogany. Since the CITES listing (effective as of November 2003), the United States, with other donors, has provided financial and technical support to assist Peru and other range countries in meeting their CITES obligations. The United States supported and participated in meetings of the CITES Mahogany Working Group and has developed and financed capacity building activities through the International Tropical Timber Organization (ITTO). These activities, such as regional capacity-building workshops, have enhanced cooperation among governments, civil society and the private sector and have assisted range countries as well as others in their implementation of the requirements of CITES for mahogany.¹³

Concerns related to CITES-regulated species are generally addressed within the framework of CITES and through cooperation between the U.S. CITES Management Authority (the U.S. Fish and Wildlife Service) and its counterparts in Peru. However, in addition to the obligation for Peru and the United States to adopt, maintain and implement all measures to fulfill their obligations under CITES, the PTPA Environment Chapter includes a groundbreaking Annex on Forest Sector Governance that provides concrete steps that the Parties will take to promote sustainable forest management and legal trade in timber products, including CITES-listed tree species. These steps include a number of actions by Peru to strengthen its forest sector governance as well as the establishment of procedures to audit and verify that exporters of timber products comply with all applicable laws, regulations and other measures of Peru governing the harvest of, and trade in, timber products and the establishment of a Sub-Committee on Forest Sector Governance under both the PTPA's Committee on Trade in Goods and the Environmental Affairs Council. The PTPA also provides opportunities to reinforce these efforts through additional cooperative activities carried out under the framework of the ECA (see Section VIII).

¹³ For additional information on these activities, see annex I of the Interim Environmental Review, available at http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html.

This review did not identify any risk that the PTPA would contribute to an increase in illegal trade of wildlife or endangered species. Instead, the PTPA may help to reduce illegal trade by facilitating exchange of information about patterns of and potential or actual problems with illicit wildlife trade. PTPA's commitments on transparency, rule of law, customs cooperation and rules of origin in addition to the PTPA Environment Chapter's Annex on Forest Sector Governance, should contribute to efforts to combat illegal logging. In addition, the PTPA Environment Chapter obligation to "effectively enforce its environmental laws" includes effective enforcement of Peru's laws related to combating illegal wildlife trade and CITES enforcement.

4. Invasive Species

Public comments and interagency analysis identified invasive species as an environmental concern related to the PTPA.¹⁴ Commodity trade can provide pathways for invasive species, and the introduction of invasive species can result in harmful effects on the environment and economy of the host country. The United States and Peru face and recognize risks associated with invasive species.¹⁵

The trade pathways for invasive species provide varying degrees of risk of environmental harm. Trade-related pathways that involve a risk of invasive introductions include the movement of vehicles used in transporting commodities (e.g., ballast water in ships), or the transport of products that contain potentially invasive organisms (e.g., grains that contains weed seeds). Some invasive species are also introduced on ornamental plants, fruits, aquarium fish, and through other commonly traded products and packaging material such as pallets and crates.

The risk that species from one region will become invasive in another depends in part on the ecological and climactic conditions in each country. Where the territories of trading partners have similar ecological or climactic conditions, and they are separated by geographic barriers, each may be vulnerable to invasions by species native to the other. The United States and Peru are separated by considerable distance and natural barriers.

Although the continental United States and Peru differ in their latitudinal ranges, they contain some similar but previously isolated climatic and vegetation zones, especially associated with altitudinal gradients. Nevertheless, Peru's tropical climates have relatively limited counterparts in the United States. As a result, shared ecological vulnerability associated with invasive species is relatively low, but not insignificant. Similar marine environments along portions of the Pacific Coast of Peru and North America create the possibility for introduction of marine

¹⁴ The term "invasive species" refers to species not native to a particular ecosystem that are intentionally or unintentionally introduced as a result of human activities and cause, or are likely to cause, harm to ecosystems, economic systems or human health.

¹⁵ For the United States, Executive Order 13112 (February 3, 1999) established the National Invasive Species Council and commits federal agencies to conducting research on invasive species issues, taking reasonable actions to discourage the introduction of these species into the United States and elsewhere and to undertake international cooperation aimed at addressing this issue.

organisms through ballast water discharge or other ocean shipping-related activity. Species from Peruvian grasslands, shrub lands, and high elevation forests may find suitable habitats in portions of the United States. In addition, the tropical regions of Hawaii and island territories of the Pacific, as well as south Florida and the Caribbean could be vulnerable to introductions from tropical areas of Peru.

A review of the history of biological invasions between the United States and Peru suggests that the baseline risk of invasive species from the region may be significant. For example, a database on non-indigenous aquatic species maintained by the U.S. Geological Survey catalogues the presence in U.S. territory of numerous species native to South America, including Peru. Ninety-two species native to South America are documented. Of these, the native range of several species specifically includes Peru (origins of many species in the database are described by continent or river basin rather than country). These species have established populations in the Southeastern United States and in warm-water springs of several Western states. Some of these species are ornamental fish (*e.g.* neon tetra); an exception is the peacock bass, which was stocked in Florida to control other exotic fishes previously established.

Similarly, the Global Invasive Species Database maintained by IUCN lists several species that are invasive in the United States and originate in South America. These include the notorious cane toad (*Bufo marinus*), which was deliberately introduced to Hawaii, Puerto Rico, the Pacific island territories and the U.S. Virgin Islands, and is native to South America, including Peru. The fire ant, *Solenopsis invicta*, is an extremely troublesome invader across much of the Southern United States; its South American home range extends into parts of Peru, though it is not clear which country was the source of the invasion.

The risks associated with invasive species are not limited to species native to Peru, as increased travel and trade may also facilitate introduction of species (such as many cosmopolitan weeds) which are native to other parts of the world and invasive in either the United States or Peru, but have not yet been introduced into suitable habitats of the trading partner.

The risk of introduction of invasive species varies across traded commodities. Examples of commodities presenting greater risk of carrying or becoming invasive species include live fish; live plants; seeds and plant parts; cereal grains; and timber products. Peru is a significant exporter of some of these products to the United States, for instance ornamental fish. In addition, associated pests and pathogens may arrive as hitchhikers in shipments of biological materials. Peru is a source of fresh cut flowers, as well as foliage and other plant parts besides flowers.

The PTPA does not alter either country's regulatory framework for managing the introduction of invasive species. The PTPA also does not alter related regulations, such as those prohibiting or regulating agricultural and other trade for the purpose of protecting against the introduction of agricultural pests or diseases. Nor does it require (or, for that matter, prevent) adding any regulations to protect against the introduction of pests or diseases that may threaten wild native forest or grazing lands, protected natural areas or legislatively designated wilderness. The PTPA does establish a Standing Committee on Sanitary and Phytosanitary Matters to discuss how to

share information and build capacity to establish and apply effective SPS measures for regulating imports to protect domestic human, animal and plant health. SPS measures protect against import of plant and animal pests that may in some cases also become invasive species in natural or semi-natural ecosystems.¹⁶ This cooperative mechanism can be a forum for pursuing activities that improve protections against invasive species.¹⁷

This review identified a continuing risk that invasive species may move between Peru and the United States. Experience with species that have already moved between the two regions demonstrates that such a risk is genuine and potentially significant. However, the PTPA's likely effect on this risk appears to be small, especially in the short term. Although the risk of invasive species may increase through increased goods trade, in the near term the PTPA is not expected to lead to a significant increase in Peru's goods exports to the United States (see Section V.B.1 *supra*). The PTPA may decrease the risk of introduction of invasive species through cooperation and consultation.

5. Tuna/Dolphin

Public comments raised concerns that the PTPA could weaken efforts to protect dolphin populations in the eastern tropical Pacific Ocean from the adverse affects of commercial fishing. The Inter-American Tropical Tuna Commission (IATTC), established by international convention in 1950, is responsible for the conservation and management of fisheries for tunas and other species taken by tuna-fishing vessels in the eastern Pacific Ocean. The IATTC serves as the Secretariat for the Agreement on the International Dolphin Conservation Program (AIDCP), a legally binding multilateral agreement that entered into force in February 1999. AIDCP aims to: progressively reduce incidental dolphin mortalities in the tuna purse-seine fishery to levels approaching zero through the setting of annual limits; seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins; and ensure the long-term sustainability of tuna stocks in the Agreement Area, as well as that of related marine resources, taking into consideration the interrelationship among species in the ecosystem. The United States and Peru are members of the AIDCP.

The PTPA will not alter or supersede the provisions of the IATTC or the standards of compliance and process of consultation to promote dolphin conservation. The PTPA commits Parties to adopt, maintain and implement laws and all other measures to fulfill obligations under covered multilateral environmental agreements, including the IATTC. Along with other obligations in the Environment Chapter (see section III.B), this obligation is subject to the

¹⁶ For example, international standards for plant protection that traditionally focus on crops now encompass wild as well as domesticated flora and the pests that threaten them, and standards for the pest risk assessments that underlie SPS measures call for consideration of impacts on the environment, including ecosystem stability and biological diversity. *See, e.g.*, International Plant Protection Convention, ISPM (International Standard for Phytosanitary Measures), No. 11: Pest Risk Analysis for Quarantine Pests, Including Analysis of Environmental Risks and Living Modified Organisms (2004), (available at <http://www.ippc.int/IPP/En/ispm.jsp>).

¹⁷ The United States is a participant, and Peru has expressed interest, in the invasive species database (I3N) project of the Inter-American Biodiversity Information Network, a project launched in the framework of the Summit of the Americas process. More information is available at: http://www.iabin-us.org/projects/i3n/i3n_project.html.

PTPA's dispute settlement procedures and enforcement mechanisms. In addition, through implementation of the obligation to effectively enforce environmental laws (including those related to domestic implementation of commitments under the IATTC), the PTPA is expected to complement and reinforce existing fisheries management and dolphin conservation activities.

6. Shrimp/Turtle

Seven species of sea turtles are currently included on CITES Appendix I. All appear in the IUCN Red Data List of threatened species and two species are listed as critically endangered. All sea turtles are protected by the U.S. Endangered Species Act. Sea turtles have been affected by a variety of human activities (exploitation for meat, eggs and shells, as well as being affected by sea pollution), but one of the main threats to their survival is incidental mortality in nets used by shrimp trawlers. In response, the U.S. Government issued voluntary guidelines in 1987 and, subsequently, a mandatory requirement that domestic shrimp trawlers use turtle-excluder devices (TEDs) in their nets. These devices allow larger animals to escape the nets and significantly reduce turtle mortality in shrimp fishing. Starting in 1989, the United States extended turtle conservation efforts to include other shrimp-producing countries in the wider Caribbean/western Atlantic region, with the objective of reducing incidental mortality to rates comparable to those of the U.S. domestic fishery. The Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC) entered into force on May 2, 2001. The United States and Peru are signatories and both have ratified the Convention.

Under Section 609 of Public Law 101-162, the Department of State is required to make annual certifications to the Congress for countries that meet the requirements of Section 609 in terms of sea turtle protection for commercial shrimp trawl fisheries. Any country that is not certified may not export commercially harvested shrimp and shrimp products to the United States (this import restriction does not affect shrimp and shrimp products from aquaculture or artisanal fisheries). The standard for certification is that the sea turtle protection program in that country must be comparable in effectiveness to the program in effect in the United States. Certification decisions are based in part on bi-annual verification visits conducted by Department of State and National Marine Fisheries Service personnel to observe compliance and enforcement. Meeting the standard for certification requires adopting a regulatory program for the mandatory use of TEDs and a credible enforcement program to ensure the use of the devices, or adopting a program governing the incidental taking of sea turtles that is of comparable effectiveness to the TEDs-based program in effect in the United States. On April 28, 2005, the U.S. Department of State certified 38 nations and one economy, including Peru, as meeting the requirements set by Section 609 for continued export of shrimp to the United States.¹⁸

The PTPA does not affect Section 609, or the manner in which the Department of State assesses and makes decisions on the effectiveness of foreign governments in their implementation and enforcement of their domestic laws related to protection of sea turtles. The PTPA provides opportunities to reinforce efforts to protect turtles through obligations to effectively enforce

¹⁸ Additional information is available at: <http://www.state.gov/r/pa/prs/ps/2005/45611.htm>.

environmental laws and through environmental cooperation activities.¹⁹

7. Camisea Natural Gas Pipeline

Public comments raised concerns that the PTPA could intensify the negative environmental effects of foreign investment on the region's biological diversity. In this context, the Camisea Natural Gas Project, constructed in 2004 from gas fields in the Peruvian Amazon across the Andes to the Peruvian coast, was singled out for particular attention. This project will provide access to 11 trillion cubic feet of natural gas and more than 600 million barrels of liquefied petroleum gas (LPG) and includes a 700 kilometer pipeline that connects gas fields in the Camisea and Lower Urubamba watersheds and processing facilities on the Peruvian coast. The debate over the Camisea Project, including the decision to proceed, using investment funds that include loans from the Inter-American Development Bank (IDB), preceded the decision to enter into negotiations for a PTPA. Nevertheless, public comments on the environmental review of the PTPA echoed environmental concerns that were raised from the inception of the Camisea Project. These include the effects on biological diversity from the construction and operation of the pipeline, as well as pollution of the Urubamba River. Construction of a natural gas fractionating and liquefaction plant at the terminus of the pipeline in Paracas Bay, site of a marine reserve, is also a source of concern.²⁰

Peru has developed an action plan, based on a Letter of Commitment that it submitted to the IDB when the loan was approved. This plan contains milestones and completion dates for measures pertaining to both construction and operation phases of the project. In July 2004, the United States reviewed the status of various conditions related to loan closure and the IDB agreed to address the concerns raised by the United States prior to loan disbursement.²¹ With respect to continued monitoring, the IDB and Peruvian civil society are in the process of establishing an independent monitoring mechanism which foresees the participation of several NGOs, government agencies, and independent consultants.

The PTPA does not alter these arrangements and conditions and provides opportunities to reinforce or extend both monitoring and efforts to mitigate the effects of the Camisea investment. For example, commitments to effectively enforce environmental laws include laws that apply to the environmental effects of the pipeline's operation. In addition, the ECA provides opportunities for environmental cooperation that can be used to enhance and complement efforts already completed or planned.

8. Coastal Habitats and Migratory Marine Species

Peru provides critical habitats for migratory marine species of importance to the United States.

¹⁹ As an example, in 2006 the United States provided training for Peruvian fishermen in use of turtle-friendly fishing hooks.

²⁰ This second phase in the development of the Camisea natural gas fields involves an additional pipeline across the Andes and a plant on the coast north of Paracas Bay. The plant will produce liquefied natural gas (LNG) for export by sea.

²¹ Additional information available at <http://www.iadb.org/exr/pic/camisea/camisea.cfm?language=english>.

Its coastal and marine ecosystems in this region are rich in biological diversity and living marine resources and are habitats for migratory shorebirds and sea turtles.

Peru hosts important nesting, foraging and migrating populations of sea turtles. All species of sea turtles are protected under the U.S. Endangered Species Act and CITES Appendix I (the most protective listing). The inshore and nearshore Pacific waters of Peru provide large areas of important foraging habitat for green turtles, while the nearshore and offshore waters provide important foraging habitat for olive ridleys (*Lepidochelys olivacea*). The coastal waters also are an important migration corridor for the severely depleted east Pacific leatherback (*Dermochelys coriacea*) population.

The effects of shrimp aquaculture on coastal habitats are a source of particular concern. Since the 1980s, shrimp aquaculture has grown rapidly and has contributed to significant alteration of coastal landscapes and ecosystems. By 1991 there were more than one million hectares of shrimp ponds worldwide, and it is estimated that the shrimp aquaculture has destroyed an equivalent area of critical coastal wetlands and mangroves. In Latin America, loss of mangrove habitat is estimated to be as high as 50 percent. The tariff provisions of the PTPA are not expected to have direct, significant effects on products whose production methods currently affect coastal habits because U.S. tariffs on these products are already zero or very low. The longer-term economic and environmental effects of the PTPA, for example through investment, are more difficult to identify and assess.

The PTPA also provides a number of opportunities to enhance ongoing efforts to address concerns related to coastal ecosystems, including mangrove habitats. One such opportunity is the International Wetlands Convention (Ramsar). Ramsar is a covered MEA under the Environment Chapter. Therefore, as part of their PTPA obligations, Peru and the United States must adopt, maintain and implement laws and all other measures to fulfill obligations under Ramsar.

In a recent Ramsar decision, the parties were urged to suspend the creation and promotion of new aquaculture facilities and the expansion of current aquaculture activities that would be harmful to coastal wetlands until the environmental and social impact of such activities are determined, and measures can be enacted to establish a sustainable system of aquaculture.²² The PTPA, through its environmental cooperation activities, will seek to enhance implementation of this Ramsar decision. In addition, the PTPA's commitment to effectively enforce environmental laws can be expected to strengthen enforcement of relevant environmental laws. The PTPA also can be expected to contribute to more effective public participation in enhanced compliance.

VI. POTENTIAL REGULATORY IMPACTS

A. Regulatory Review

²² See Ramsar Resolution VII.21 (available at http://www.ramsar.org/key_res_vii.21e.htm).

Consistent with Executive Order 13141 and its Guidelines, this review included consideration of the extent to which the PTPA might affect U.S. environmental laws, regulations, policies and/or international commitments. Within the range of PTPA obligations, those related to investment, services and TBT could have particular significance for domestic regulatory practices concerning the environment, health and safety. Previous environmental reviews, including the interim and final reviews for the Jordan, Chile, Singapore, Morocco, Australia, Dominican Republic – Central America, Bahrain or Oman free trade agreements, have considered potential impacts on the U.S. regulatory regime with respect to all of these obligations and have found that the respective trade agreements were not anticipated to have a negative impact on U.S. legal or regulatory authority or practices. Further, the reviews noted the potentially positive impact that the agreements could have on the U.S. environmental regulatory regime as a result of agreements' commitments to effectively enforce U.S. environmental laws, strive to not waive U.S. environmental laws to attract trade or investment, and ensure that U.S. environmental laws and policies provide for high levels of environmental protection.

Based on this previous analysis, and given that the core obligations in these areas are similar to those undertaken in the previous free trade agreements, the Administration concluded that the PTPA will not have a negative impact on the ability of U.S. government authorities to enforce or maintain U.S. environmental laws or regulations.

For a more in-depth analysis of general free trade agreement commitments and their potential regulatory impacts in the United States, see the previous reviews at http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html.

B. Investment

Investment provisions in free trade agreements were a matter of intense debate during Congress' consideration of the Trade Act. The central question was the appropriate balance that should be struck between protecting the rights of U.S. investors abroad and preserving the ability of the Federal, state and local governments to regulate with respect to health, safety and the environment.

In the Trade Act, Congress recognized that securing a stable investment climate and a level playing field for U.S. investment abroad is an important objective of U.S. trade policy. By fostering economic growth and job creation, investment can bring important benefits, including potential benefits to the environment: as wealth grows and poverty decreases, more resources become available for environmental protection, with potential benefits for developing countries, particularly as they develop constituencies in favor of increased environmental protection. Congress, however, also gave weight to concerns that arbitral claims brought by investors against governments (through "investor-State" arbitration) could be used inappropriately to challenge U.S. domestic laws and regulations, including those concerning the environment. As the Conference Report accompanying the Trade Act states: "[I]t is a priority for negotiators to seek agreements protecting the rights of U.S. investors abroad and ensuring the existence of a neutral investor-State dispute settlement mechanism. At the same time, these protections must be balanced so that they do not come at the expense of making U.S. Federal, State, and local

laws and regulations more vulnerable to successful challenges by foreign investors than by similarly situated U.S. investors.”²³

The Trade Act strikes a balance between these two goals by recommending U.S. trade negotiating objectives that clarify several substantive investment obligations of particular concern (notably, provisions on expropriation and “fair and equitable treatment”). The objectives seek to ensure that foreign investors in the United States are not accorded greater substantive rights than U.S. investors in the United States, while also securing for U.S. investors abroad core protections that are comparable to those that would be available to them under U.S. law. The Trade Act also includes objectives that provide for a number of innovations in the investor-State procedures to help ensure that arbitral tribunals interpret substantive obligations in a consistent and coherent manner. After enactment of the Trade Act, the Administration consulted extensively with Congress and with the business community and environmental non-governmental organizations (NGOs) to clarify provisions and develop new procedures and to ensure that those provisions fully satisfied the Act’s objectives. These provisions were ultimately incorporated into each of the free trade agreements we have negotiated pursuant to Trade Act authority.

The environmental reviews of the Singapore, Chile, Morocco and Dominican Republic – Central America free trade agreements examined the investment provisions in detail, particularly those clarifications and improvements as compared with provisions in free trade agreements negotiated prior to the Trade Act, such as those of NAFTA Chapter 11. We concluded that the investment provisions should not significantly affect the U.S. ability to regulate in the environmental area.²⁴ In this review, we have re-examined that conclusion in light of public and advisory committee comments and our most recent experience.

Relevant FTA Investment Provisions

As relevant to the environment, the PTPA Investment Chapter includes the following substantive clarifications and procedural innovations, as developed based on careful consideration of Trade Act guidance and consultations with interested constituencies:

- *Expropriation.* The expropriation provisions have been clarified in an annex to ensure that they are consistent with U.S. legal principles and practice, including a clarification that non-discriminatory regulatory actions designed and applied to protect the public welfare (including environmental protection) do not constitute indirect expropriation “except in rare circumstances.” To determine whether an indirect expropriation has occurred, the annex directs tribunals to examine several factors, which derive from the analysis of the U.S. Supreme Court in *Penn Central Transportation Co. v. New York*

²³ See H.R. Rep. No. 107-624, at 155 (2002).

²⁴ Full text of the investment chapters for the concluded agreements is available at http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html. Additional information can also be found in the interim and final environmental reviews available at: http://www.ustr.gov/Trade_Sectors/Environment/Environmental_Reviews/Section_Index.html

City, 438 U.S. 104 (1978), the seminal case on regulatory expropriation. The annex also clarifies that only tangible or intangible property rights or interests in an investment are subject to the PTPA's obligations with respect to expropriation.

- *Minimum standard of treatment/“fair and equitable treatment.”* The minimum standard of treatment obligation, including the obligation to provide “fair and equitable treatment” and “full protection and security,” is clarified to provide that these concepts do not require treatment in addition to or beyond that contained in customary international law, and do not create additional rights. Specifically, “fair and equitable treatment” is defined to include the obligation not to “deny justice” in criminal, civil or administrative adjudicatory proceedings, in accordance with “due process” protections provided in the principal legal systems of the world, including that of the United States. An annex gives further guidance concerning the Parties’ understanding of the term “customary international law.”
- *Increased transparency in the investor-State mechanism.* The PTPA provides that all documents submitted to or issued by an arbitral tribunal shall promptly be made public and that hearings are open to the public, subject to provisions ensuring the protection of classified and business confidential information. It also expressly authorizes *amicus curiae* submissions, allowing the public to present views on issues in dispute.
- *Elimination and deterrence of frivolous claims.* The PTPA includes an expedited procedure to allow for the dismissal of frivolous claims (based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, *i.e.*, the claimant has failed to state a claim upon which relief may be granted) and for the dismissal of claims based on jurisdictional objections. It also expressly authorizes awards of attorneys’ fees and costs after a tribunal decides, as a preliminary question, whether to dismiss a claim for lack of jurisdiction or for failure to state a claim on which relief may be granted.
- *Promoting consistency and coherence of arbitral decisions.* The PTPA allows interim review of draft tribunal decisions by litigants and by the non-litigating Party. The litigants may comment on the draft decision. In addition, the Investment Chapter contemplates the establishment of an appellate mechanism to review arbitral awards. Within three years after the date of the entry in force of the PTPA, the Parties may seek to develop a bilateral appellate mechanism. In addition, the Parties may agree that awards rendered in investor-State arbitration under the PTPA will be subject to review by an eventual multilateral appellate mechanism.

In addition to these improvements developed specifically in response to the Trade Act, the PTPA includes several provisions, similar to those in previous agreements, that recognize the flexibility that environmental regulators need to do their job and demonstrate the Parties’ intent that the investment obligations should be interpreted in a manner consistent with each Party’s right to regulate in the environmental area:

- *National treatment and MFN treatment for investors and their investments “in like*

circumstances.” The provisions for national treatment and MFN treatment, similar to provisions in earlier U.S. bilateral investment treaties (BITs) and NAFTA Chapter 11, make clear that these obligations apply to investors “in like circumstances.” This means that domestic regulation (including environmental regulation) may, in furtherance of non-discriminatory policy objectives, distinguish between domestic and foreign investors and their investments, as well as among investors of different countries and their investments, without necessarily violating the national treatment and MFN obligations. For example, regulators in appropriate circumstances may apply more stringent operating conditions to an investment located in a wetland, or in a more heavily polluted area, than to an investment located in a less environmentally sensitive area.

- *Relationship to other provisions.* The PTPA incorporates provisions making clear that in the event of any inconsistency between the Investment Chapter and any other Chapter (such as the Environment Chapter), the other Chapter will prevail to the extent of the inconsistency. While the United States does not believe there to be any inconsistencies between the Investment Chapter and any other Chapter, the latter provision reinforces the Parties’ understanding about the relationship between different chapters. The PTPA also provides, similar to the NAFTA, that nothing in it shall be construed to prevent a Party from taking measures otherwise consistent with the Investment Chapter to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. Further, in the Environment Chapter each Party recognizes that it is inappropriate to weaken its environmental laws as a means of attracting investment.

Potential Environmental Regulatory Impacts

We have been unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the PTPA’s substantive investment obligations, and none have been called to our attention by commenters. No claims have ever been brought against the United States under the almost 40 BITs that are currently in effect or under any of our free trade agreements other than the NAFTA. In the ten years since the NAFTA has been in effect, only eleven cases have been brought against the United States by Canadian or Mexican investors. The United States has prevailed in all of the cases that have been decided to date.

We also considered the views of the TEPAC and other commenters on investment issues (see Section IV). The TEPAC majority concluded that the clarifications to the PTPA’s investment provisions were an improvement over those in NAFTA Chapter 11 (particularly the clarification of the meaning of “indirect expropriation”), although the majority noted that some concepts could be further clarified. The majority also found that these clarifications reduced the possibility of a successful claim relating to a U.S. environmental measure. In addition, the majority noted other provisions that provide important protections for environmental regulation: the provision that another Chapter (such as the Environment Chapter) would prevail over the Investment Chapter in the event of an inconsistency; the provision that nothing in the Investment Chapter should be construed to prevent a Party from taking measures otherwise consistent with the Chapter to regulate investment in an environmentally sensitive manner; clarifications of the minimum standard of treatment obligation; and the national treatment and MFN treatment

obligations. Some members in a minority found that the PTPA provisions did not provide sufficient protection for U.S. environmental regulation, while other members in the minority expressed concerns that investment protections had been inappropriately weakened.

Based on the above considerations, and given that U.S. environmental measures can be challenged in U.S. courts under current law, we do not expect the PTPA to result in a significantly increased potential for a successful claim relating to such measures under the PTPA's investor-State mechanism. The PTPA's innovations as compared with NAFTA Chapter 11 should further reduce the risk that arbitral tribunals will misapply the investment provisions of the PTPA.²⁵ We will, however, continue to review the potential impact of investment provisions on environmental measures as we implement this agreement and free trade agreements with similar provisions.

VII. ENVIRONMENTAL COOPERATION

As discussed in Section I.A, the Trade Act establishes that a principal U.S. negotiating objective is to strengthen the capacity of our trading partners to protect the environment through the promotion of sustainable development. In addition, the Trade Act instructs negotiators to seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science.

The United States and Peru share common concerns and similar responsibilities for protecting and conserving the environment and have a long history of cooperation to address environmental challenges. The United States and Peru also have a common interest in promoting global environmental improvement and protection and in using science and technology to address environmental challenges.

The negotiation of the PTPA presented opportunities to encourage and foster development of private sector initiatives to promote the goals of the agreement, including innovative partnerships among governments, NGOs, international financial institutions and commercial interests. All of these activities support implementation of the provisions of the PTPA by building capacity within governments, at all levels, to protect the environment in concert with the strengthening of trade and investment.

In conjunction with the negotiation of the PTPA, the United States and Peru negotiated an environmental cooperation agreement (ECA) similar to those negotiated in parallel with the Chile and the Dominican Republic – Central America FTAs.²⁶ As previously noted, the ECA provides for a Commission to oversee the implementation of cooperative activities under the

²⁵ A recent paper that reviews experience under NAFTA Chapter 11 can be found at http://www.cec.org/pubs_docs/documents/index.cfm?varlan=english&ID=1825.

²⁶ Additional information is available at <http://www.state.gov/g/oes/env/tr/>.

ECA. The Commission will consist of high-level officials with environmental responsibilities from the Parties (the Commission member for the United States will be a high-level official from the U.S. Department of State), as well as any other Andean country, such as Colombia, for which an environmental cooperation agreement providing for Commission participation is in force. Through the development of a Work Program, the Commission will guide and identify goals and objectives, as well as specific areas for cooperation that are consistent with national priorities. The Commission will meet within one year after its establishment and as appropriate thereafter.

The ECA makes specific provision for the development of performance measures to assist the Commission in examining and evaluating the progress of specific cooperative programs, projects and activities in meeting their intended goals. The ECA also outlines the Commission's role in seeking and considering input from relevant local, regional and international organizations to assist it in monitoring the progress of cooperative activities.

The ECA identifies short-, medium- and long-term cooperation activities that include: strengthening national and local environmental governance and management, as well as the capacity to develop, implement, monitor and enforce environmental and natural resource laws, regulations and policies; strengthening the conservation and sustainable use of natural resources; promoting mechanisms to support the conservation and sustainable use of biological diversity such as the control of invasive alien species; developing and promoting incentives, including economic incentives and instruments, and other flexible and voluntary mechanisms; promoting the development, transfer, use, proper operation and maintenance of cleaner, more efficient production processes and technologies, including those that reduce toxic chemical emissions; strengthening the capacity to implement multilateral environmental agreements to which both Parties are party; promoting the development and implementation of domestic initiatives on environmental goods and services; building capacity to promote public participation in environmental and natural resources decision-making and enforcement, including public access to information; strengthening capacity to review and evaluate the environmental effects of trade agreements; and increasing access to cleaner energy, including renewable energy sources.

The ECA is an important mechanism for the United States and Peru to achieve shared goals and objectives and comply with the obligations undertaken in the PTPA Environment Chapter. The Administration is working closely with Congress to identify adequate and stable funding sources for potential cooperative activities under the ECA.

ANNEX I – Organizations Providing Comments²⁷

Received in response to 69 *Fed. Reg.* 19261 (April 12, 2004)

- Natural Resources Defense Council, Center for International Environmental Law, Defenders of Wildlife, Friends of the Earth, Oxfam (joint submission)
- American Sugar Alliance

Received in response to 70 *Fed. Reg.* 10463 (March 3, 2005)

- American Bird Conservancy
- American Sugar Alliance
- Government of Colombia
- Humane Society International
- Defenders of Wildlife, Friends of the Earth, Sierra Club, Center for International Environmental Law, Earthjustice (joint submission)

²⁷ See Section IV for additional information.

ANNEX II – Data Tables

Table 1 – Population, economic and trade data for Peru and the United States in 2006

	Population <i>Millions</i>	Gross National Income			Exports of goods and services	
		Total, nominal <i>Billion US\$</i>	Per capita <i>US\$/capita</i>		Total <i>Billion US\$</i>	As a share of GDP <i>Percent</i>
			Nominal	PPP ^a		
Peru	28	74.0	2,650	5,830	19.4	24.4
United States	296.4	12,913	43,560	41,950	1,275.2	10.3%

^a Purchasing Power Parity.

Sources: World Bank.

Data available at: <http://www.worldbank.org/data>

Table 2 – Selected development indicators for Peru and the United States in 2005

	Population density <i>People per square km</i>	Urban Population <i>Percent</i>	Access to		Under-5 mortality <i>Number per 1,000</i>	Life expectancy at birth <i>Years</i>
			Improved water source ^a <i>Percent</i>	Improved sanitation facilities ^b <i>Percent</i>		
Peru	22	74	82	61	34	70
United States	31.5	78	100	100	7	77

^a Data for the year 2002.

^b Data for the year 2001

Source: World Bank, World Development Indicators.

Data available at: <http://devdata.worldbank.org/wdi2005/Cover.htm>, last accessed April 14, 2006.

Access to an improved water source: Refers to the percentage of the population with reasonable access to an adequate amount of water from an improved source, such as a household connection, public standpipe, borehole, protected well or spring, and rainwater collection. Unimproved sources include vendors, tanker trucks and unprotected wells and springs. Reasonable access is defined as the availability of at least 20 liters a person a day from a source within one kilometer of the dwelling. (2005 World Development Indicators, World Bank).

Access to improved sanitation facilities: Refers to the percentage of the population with at least adequate excreta disposal facilities (private or shared, but not public) that can effectively prevent human, animal and insect contact with excreta. Improved facilities range from simple but protected pit latrines to flush toilets with a sewerage connection. To be effective, facilities must be correctly constructed and properly maintained. (2005 World Development Indicators, World Bank).

Table 3 – Land area, land use, and forest cover change for Peru and the United States

	Land area <i>Million square kilometers</i>	Land use <i>Percent total land</i>		Annual change in forest cover, 1990-2000 <i>Percent</i>	Share of land in protected status ^a <i>Percent</i>
		Forest	Agriculture		
Peru	1.3	51	2.4	-0.4	6
United States	9.2	25	14	.2	26

^a Nationally protected areas.

Sources: United Nations Food and Agriculture Organization; World Bank 2004 World Development Indicators.

Land area and forest data available at <http://www.worldbank.org/data> (last accessed April 14, 2006).

Potential agriculture land use data available at: <http://faostat.fao.org/> (last accessed April 14, 2006).

Table 4 – Biological diversity indicators for Peru and the United States

	Number of protected areas <i>Number</i>	Area of biosphere reserves <i>Thousand hectares</i>	Species threatened <i>Threatened/Total (Percent)</i>		
			Mammals	Birds	Plants ^a
Peru	36	3,268	49/460 (11)	76/695 (11)	269/17,144 (1.6)
United States	3,481	31,570	37/428 (8.6)	55/508 (10.8)	169/19,473 (0.1)

^a Flowering plants only.

Sources: United Nations Environment Program; World Bank; and World Resources Institute Earth Trends Country Profiles. Data available at: www.worldbank.org and www.earthtrends.wri.org.

Protected areas: Refers to management categories I through V of the International Union for the Conservation of Nature and Natural resources (IUCN). (See <http://www.iucn.org> for additional information.)

Biosphere reserves: Refers to areas representative of terrestrial and coastal/marine environments that have been internationally recognized under the United Nations Educational, Scientific and Cultural Organization (UNESCO) Man and the Biosphere Programme. (See <http://www.unesco.org> for additional information.)

Table 5 – United States goods trade with Peru, 2004-2006

Billion dollars

Trading partner	United States exports			United States imports		
	2004	2005	2006	2004	2005	2006
Peru	2.1	2.3	2.9	3.7	5.1	5.9
All trading partners	818.8	906	1,037.1	1,469.7	1,673.5	1,855.1
Peru country share (percent)	0.26	0.25	0.28	0.25	0.30	0.32

Source: U.S. Department of Commerce
Data available at: <http://tse.export.gov/>,
<http://www.ustr.gov/reports/2003atpa.pdf> and <http://dataweb.usitc.gov>.