

## **The United States - Peru Trade Promotion Agreement-- Impact on State and Local Governments**

### **I. Introduction**

The United States - Peru Trade Promotion Agreement (PTPA or Agreement) will eliminate tariffs and trade barriers and expand regional opportunities for workers, manufacturers, consumers, farmers, ranchers and service providers in the United States and Peru. The United States exports more than \$2 billion annually to Peru.

Currently, most Peruvian products enter the United States duty-free under unilateral trade preference programs – the Andean Trade Preference Act (ATPA) and the Generalized System of Preferences (GSP) – as well as under existing duty-free treatment provided on a normal trade relations/most-favored-nation (NTR/MFN) basis. The PTPA opens Peru’s markets to manufactured goods, services, and farm products from the United States. Eighty percent of U.S. exports of consumer and industrial goods will become duty-free immediately upon the entry into force of the Agreement, with remaining tariffs phased out over 10 years. Key U.S. export sectors in the states that will benefit from duty elimination include agricultural, industrial and construction equipment, auto parts, information technology equipment, forest products, and medical and scientific equipment.

By value, almost 90 percent of current U.S. farm exports to Peru will receive duty-free treatment immediately, including high quality beef, cotton, wheat, soybeans, soybean meal, and crude soybean oil; key fruits and vegetables including apples, pears, peaches and cherries; almonds; and, many processed food products, including frozen french fries, cookies, and snack foods. Tariffs on most remaining U.S. farm products will be phased out within 15 years, with all tariffs eliminated in 17 years.

Peru will accord substantial market access across its entire services regime, subject to very few exceptions, providing access in sectors such as telecommunications, express delivery, computer and related services, tourism, energy, transport, construction and engineering, financial services, insurance, audiovisual and entertainment, professional, environmental and other sectors.

At the same time, the Agreement will further strengthen democratic and economic reforms, by supporting the rule of law, open and transparent governance, and the protection of private property rights and investments.

One of USTR’s statutory advisory committees, the Intergovernmental Policy Advisory Committee (IGPAC), is comprised of representatives and associations representing executive, legislative, and judicial branches of sub-federal government, as well as states, counties, and cities. The National Governors Association (NGA), Council of State Governments (CSG), the National Conference of State Legislatures (NCSL), the National League of Cities (NLC), the National Association of Counties (NACo), and the National Association of Attorneys General (NAAG) are among the organizations represented on the IGPAC. In 2003 and 2004, USTR

revitalized and significantly expanded membership and geographic representation on the IGPAC to include State Points of Contact designated by the Governors' offices as well as state legislators and attorneys general nominated by NCSL and NAAG, respectively. In February 2004, USTR appointed Kay Wilkie, a public official from the State of New York, as IGPAC Chair.

Pursuant to the Trade Act of 1974, each of the statutory advisory committees including the IGPAC was required to produce a report on the Agreement. The IGPAC report assesses the impact of the Agreement from the perspective of U.S. state and local governments. In its report (available in full at [www.ustr.gov](http://www.ustr.gov)), the IGPAC recognizes that:

“This agreement with Peru, a long-standing ally of the US, could foster trade ties and deepen economic integration throughout Latin America. Negotiations with Peru were concluded in the context of regional negotiations with other nations (Colombia and Ecuador) for an Andean Free Trade Agreement. Expanding global market access and broadening economic opportunity throughout the Andean region, and all of Latin America, are essential goals, and IGPAC members hope that USTR negotiations for the Andean FTA and the Free Trade Agreement of the Americas are successful. The US-Peru TPA should substantially improve the business environment and advance civil society development objectives, while increasing trade capacity and investment opportunities between the US and this critically important world region. US economic interests, entrepreneurs and employees would benefit from improved market access for goods, services, agricultural products, and from better access to government procurement opportunities. IGPAC members note that the US, Peru and the broader Andean region are poised to benefit, both from greater access between markets, and from greater regional integration amongst smaller and larger nations in Latin America.”

The IGPAC further notes that:

“the [US-Peru] TPA's objectives of economic growth, employment creation, sustainable development, and market opportunities should be pursued in a manner consistent with the nation's constitutional and public policy obligations to state and local government and their constituents...and give due consideration to existing state and local regulatory, tax, and economic development policies, and to the social, economic, and environmental values that those policies promote.”

Based on the IGPAC's report and other comments received regarding the potential impact of the Agreement on sub-federal governments, this Report addresses three main areas of interest to states and localities in the Agreement: (i) government procurement; (ii) investment; and (iii) services. Additionally, USTR has also taken into account states' and localities' overall interest in preserving sub-federal regulatory abilities and prerogatives.

## **II. Government Procurement**

During the Uruguay Round negotiations, 37 states agreed to cover some of their procurement under the Agreement on Government Procurement (GPA), an agreement under the

auspices of the World Trade Organization (WTO). These commitments are limited to the procurement of the entities that each state specified in Annex 2 to the GPA and are subject to thresholds, reservations and conditions for such procurement set out in the GPA. These states volunteered to cover some of their procurement because they understood that having states agree to nondiscriminatory procurement significantly improves the United States' ability to persuade our trading partners to open their state or other sub-central procurement markets to U.S. suppliers, thus creating new opportunities for U.S.-based companies and workers.

In September 2003, USTR asked if those 37 states would be willing to extend to new free trade agreement (FTA) partners the same opportunities that they currently extend to WTO members covered by the GPA. USTR also asked the 13 states that are not covered by the GPA whether they would be willing to have their procurement covered under the GPA, as well as under the free trade agreements then under negotiation. States that are already covered by the GPA would not need to change their existing government procurement procedures or practices to implement the government procurement provisions in an FTA. Even a state that has not yet covered any procurement under an FTA would generally not need to change its procedures or practices to comply with GPA or FTA requirements for covered procurements.

In response to inquiries from states, USTR also prepared a Trade Fact Sheet with the following explanation of the parameters for participation under the government procurement chapter of an FTA:

- state commitments to cover government procurement in trade agreements are voluntary;
- a state decides the extent to which it will cover its procurement under the new agreements;
- states may exclude sensitive goods, services, and local development programs;
- the agreements also exclude preference programs for small business, distressed areas, minorities, and women;
- states are explicitly permitted to maintain their own environmental policies for "green" procurement;
- county and city procurement is not covered by any of the agreements; and
- the thresholds for the application of the FTAs at the sub-central (state) level are high: \$526,000 for purchases of goods and services and \$7.4 million for construction contracts.

In early 2005, the USTR wrote to Governors requesting that state governments consider voluntarily covering their procurement under a new "reciprocity" policy for the Andean and Panama negotiations. If a State agrees to allow nondiscriminatory access to its procurement to foreign suppliers from Peru, for example, then businesses and workers from that State will enjoy the same access to sub-central procurement in those countries, opening up new export opportunities. Reciprocal government procurement policies are already used in a number of states, such as New York. More than 30 states have some type of reciprocity in their procurement practices with respect to other U.S. states.

Under the reciprocity policy, eight states and Puerto Rico have agreed to cover some of their procurement under the current Agreement. A list is included as Attachment 1.

Regarding government procurement, the IGPAC report states:

“As a matter of general principle, IGPAC members support the goal of improving transparency and increasing fair market access in government procedures and regulatory decisions related to procurement, while preserving the independent authority of state and local governments to adopt legislation, standards and procedures consistent with their experience and interests.”

Regarding reciprocity, IGPAC states:

“...IGPAC members have indicated that potential benefits to participating states tend to be weakened by the policy’s implementation process, through supplier self-certification, and by the overly broad definition of “principal place of business.”

The IGPAC report notes that coverage of state procurement in the Agreement only pertains to those sub-central entities that have affirmatively consented to include their procurement in the Agreement, subject to any terms and conditions that states may place on this coverage.

Under the Agreement, U.S. suppliers are granted non-discriminatory rights to bid on contracts from Peruvian government ministries, agencies and departments, covering the purchases of most Peruvian central government entities, including key ministries and state-owned enterprises, including Peru’s oil company and its public health insurance agency, as well as all of its first-tier sub-central entities (comparable to U.S. states).

In June 2007, the Agreement was amended to include a clarification that, in addition to promotion of “green” procurement, procuring entities may adopt technical specifications that require suppliers to comply with core labor laws in the place where they make the product or perform the service the entity will purchase.

### **III. Investment**

Chapter Ten of the Agreement contains investment protections that have been included in U.S. bilateral investment treaties and FTAs for decades. Based on a review of earlier expressions of those protections, Chapter Ten of the Agreement includes certain clarifications. In accordance with the objectives set out by Congress in the Trade Act of 2002, the investment provisions of the Agreement are designed to reduce barriers to foreign investment and to secure important protections for U.S. investors in Peru, while ensuring that investors of Peru in the United States do not receive greater substantive rights than U.S. investors in the United States.

As with other FTAs, the investment provisions of the Agreement protect the regulatory authorities of state and local governments. First, while state and local measures generally are subject to the Chapter’s disciplines, the United States is exempt from the most-favored nation treatment, national treatment, performance requirements, and senior management and boards of directors obligations for all state measures existing on the date on which the Agreement enters

into force. In addition, all local measures existing on that date are exempted from the same obligations. State and local measures adopted after the Agreement enters into force are subject to the Agreement's obligations.

Second, the Chapter reflects U.S. legal principles and practices. For example, consistent with U.S. takings and due process protections, the Agreement clarifies that only property rights or property interests in an investment are entitled to protection against unlawful expropriation. The Chapter also incorporates standards that reflect U.S. Supreme Court jurisprudence for determining when a regulatory measure rises to the level of an expropriation. The Agreement's provision pertaining to expropriation (Article 10.7) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

Third, we have taken steps to ensure that investor-state arbitration panels interpret the Agreement in accordance with the intent of the Parties. The Parties have the authority to issue interpretations of the Agreement's investment provisions that are binding on arbitration tribunals. The Parties have committed, within three years after the date of entry into force of the Agreement, to consider whether to establish an appellate body or similar mechanism to review arbitral awards rendered in arbitrations commenced after establishment of such a mechanism.

Fourth, we have refined the investor-state dispute settlement process to help make it more efficient and to help weed out frivolous claims. The Agreement includes expedited procedures to dismiss frivolous claims (based on Rule 12(b)(6) of the Federal Rules of Civil Procedure) and handle jurisdictional objections. To further deter frivolous claims, the Agreement expressly authorizes tribunals to award attorneys' fees and costs after deciding whether a claimant has raised a frivolous claim.

Finally, we have taken steps to enhance transparency and public involvement in the investor-state dispute settlement process. The Agreement provides that hearings will generally be open to the public and that key documents submitted to or issued by an arbitral tribunal will be publicly available, subject to the protection of confidential business information. It also expressly authorizes tribunals to accept and consider *amicus curiae* submissions, whereby interested private parties can present views on issues in dispute.

The IGPAC report states that:

"IGPAC members remain concerned about the inclusion of certain investor-state dispute settlement provisions in this agreement. ... Given the still evolving context of investor-state disputes...IGPAC members maintain significant concerns about overly expansive definitions of investment, and investor-state provisions on dispute settlement claim submission and arbitration and welcome clarifying language in NAFTA interpretive notes and in this TPA."

IGPAC further acknowledges:

"Some suggest that, where agreements are reached with countries with less fully developed legal systems, inclusion of a wholly separate litigation process, applicable only

to foreign commerce and investment, may be viewed as necessary for creating conditions in such countries that are conducive to attracting and retaining international investment....IGPAC members welcome those Chapter 10-Section B provisions in the PTPA that bring about greater transparency, inclusion of non-disputing party and *amicus curiae* submissions, and consideration of whether claims or objections may be frivolous.”

#### **IV. Cross-Border Trade in Services**

Chapter Eleven of the Agreement covers the supply of services on a cross-border basis. This includes services supplied from the United States into Peru or vice versa, including by electronic means; services supplied by a national of a Party in the territory of the other Party; and services supplied in the United States to a consumer in the other Party. Services supplied through investment are covered by the Investment Chapter, but also enjoy the protection of certain provisions in the Cross-Border Trade in Services Chapter. Although state and local governments are subject to the obligations of this Chapter, they will not be required to make any changes to existing laws or regulations which may be inconsistent with core obligations in the Chapter such as local presence, market access, national treatment, and most-favored-nation treatment. The United States scheduled an exemption from the obligations in the Chapter pertaining to most-favored nation treatment, national treatment, local presence, and market access for all existing state measures. Likewise, existing local level measures are exempted without having to be listed.

Nothing in Chapter Eleven or any other provision of the Agreement requires the privatization or deregulation of any government services, including water supply or distribution services, education services, or health services. The Chapter expressly excludes services supplied in the exercise of governmental authority.

The implementation of this Chapter should not require an additional commitment of resources by state and local governments.

The IGPAC report comments that:

“State and local governments generally support objectives to liberalize trade in services industries as a means of increasing market access for U.S. firms and for reaching trade development objectives. IGPAC members equally assert that the independent exercise of state and local legislative and regulatory power is critical to protecting citizens’ interests and safeguarding the federal system.”

The IGPAC further notes that a general exemption for existing state and local measures could leave open the possibility of disputes about future changes, highlighting the need for USTR to educate and consult with state and local entities so that they are aware of such constraints on future actions.

## **V. Financial Services**

Chapter Twelve of the Agreement covers measures relating to investment in regulated financial institutions in the United States and Peru, and certain cross-border trade in financial services from the territory of a Party into the territory of the other Party (including via electronic means), financial services supplied in a Party to a person of the other Party, and financial services supplied by a national of a Party in the territory of the other Party. The Chapter does not apply to measures relating to public retirement plans or social security systems. Although state and local governments are subject to the obligations of this Chapter, they will not be required to make any changes to existing laws or regulations that may be inconsistent with core obligations in the Chapter such as national treatment and most-favored-nation treatment. The United States scheduled an exemption from the obligations of the Chapter pertaining to national treatment, most-favored-nation treatment, market access for financial services, and senior management and board of directors for existing state level measures. Existing local level measures are exempted without having to be listed.

## **VI. Regulatory Interests**

The Agreement does not prevent the United States or state and local governments from enacting, modifying, or fully enforcing domestic laws protecting consumers, health, safety, or the environment.

## **VII. Conclusion**

States and localities are poised to benefit greatly under the Agreement. The United States is the single largest foreign supplier of goods and services to Peru: Almost twenty percent of total goods imported into Peru come from the United States. Moreover, as previously noted, nearly 97 percent of products imported into the United States from Peru already enter the United States duty-free under the ATPA and GSP preference programs and existing NTR/MFN duty-free treatment. A free trade agreement would provide reciprocal access for U.S. goods in Peru, thereby leveling the playing field for U.S. products. It also would provide increased access for U.S. firms to services sectors in Peru, including opportunities in telecommunications, express delivery, computer and related services, tourism, energy, transport, construction and engineering, financial services, insurance, audiovisual and entertainment, professional, environmental and other sectors.

Additionally, the Agreement will foster transparency, openness, and the rule of law in Peru, as well as supporting, in coordination with U.S. development assistance programs, that country's efforts on environmental protection and labor. The Agreement will also provide an impetus toward the goal of free trade in the Western Hemisphere.

We do not believe that state and local governments will need additional resources to deal with the effects of increased trade under the Agreement.

## Attachment 1

State Coverage of Procurement under the Agreement:

### **Covered (8 states + Puerto Rico)**

Arkansas  
Colorado  
Florida  
Illinois  
Mississippi  
New York  
Texas  
Utah  
  
Puerto Rico