



September 26, 2007

Dear Senator:

The environmental provisions included in the final text of the U.S.-Peru Free Trade Agreement mark a significant step forward, and we commend the Democratic leadership for this important achievement. However, we do not believe that the U.S.-Peru FTA should be seen as a final model for trade agreements generally, and we are therefore regrettably not able to support the agreement.

The significant improvements to the Environment chapter of the agreement include measures in the core text of the agreement aimed at stopping the flow of illegally logged timber from Peru, a major cause of deforestation in the country. This is the first bilateral trade agreement to recognize and seriously address this globally pervasive problem. The agreement also includes requirements for countries to fulfill their obligations under a specific set of Multilateral Environmental Agreements (MEAs), and it provides parity of enforcement between the environmental and commercial provisions of the FTA.

Despite this important progress, we continue to have serious concerns about the following issues that were not addressed in the agreement. The U.S.-Peru FTA contains provisions that allow foreign corporations to circumvent the domestic judicial system and challenge environmental and public health laws before unaccountable international tribunals. Similar investor rights rules in NAFTA and other agreements have been used to undermine common-sense laws designed to protect people and the environment. The investment provisions in the FTA also allow foreign investors to bring suits before tribunals challenging the government's implementation of natural resource contracts or leases, potentially threatening vulnerable resources and areas in both the United States and Peru.

Further, following more than a decade of implementing trade agreements— from NAFTA to the World Trade Organization to CAFTA to other bilateral trade agreements — we believe it is time to take a step back and reflect on the impacts these agreements have had on people and the environment worldwide. While a well-crafted trade policy has the potential to contribute to protecting our natural resources and improving our environment, the current model of trade has failed to fulfill those objectives.

While the U.S.-Peru FTA represents substantial progress, much work still remains to be done to put in place the broad set of trade policies that would truly achieve the goal of environmental sustainability. For the reasons laid out above we can not support the U.S. – Peru FTA, and ask each Senator to weigh the significant gains made in some areas with the serious shortcomings in others. As we face enormous challenges ranging from global warming to biodiversity loss, we look forward to working with you to make environmentally responsible trade a reality.

Sincerely,

Brent Blackwelder,
President, Friends of the Earth

Carl Pope,
Executive Director, Sierra Club



Trade and Environment

Key Recommendations for Free Trade Agreements (FTAs)

I. Environmental Protection and Enforcement

- A. Environmental provisions should be in the core text of FTAs, and dispute resolution provisions should provide for clear parity between environmental provisions and commercial provisions, with respect to both enforcement of obligations and remedies for violations.
- B. All obligations in the Environment chapters of FTAs should be subject to enforceable dispute resolution – including mandatory requirements that countries provide for high levels of environmental protection and not weaken or derogate from their environmental laws.
- C. All the parties to a trade agreement should agree to comply with and fully and effectively implement, including through domestic legislation and domestic mechanisms for citizen enforcement, the obligations under international environmental agreements to which they are a party.
- D. FTAs should include provisions to eliminate trade in illegally sourced natural resources and, in particular, should expressly prohibit trade in illegally sourced timber products, supported by binding chain of custody requirements and certificates of origin.
- E. Each FTA should establish a clearly-defined and independent mechanism, with dedicated and substantial funding, to monitor and facilitate implementation of the Environment chapter and other environmental provisions associated with the FTA. The mechanism should include a meaningful and effective citizen submission process and should provide for capacity building initiatives and comprehensive implementation plans, including explicit timelines.

II. Safeguarding Environmental Laws and Regulations

A. Across-the-Board General Environmental and Public Health Exceptions

It is vital to ensure that the trade and investment rules in FTAs do not undermine environmental laws, regulations and governmental actions. To this end, FTAs should include a clear set of across-the-board general exceptions for environmental and public health protections that are not arbitrarily discriminatory. FTAs recently negotiated by the United States apply such exceptions only to particular provisions and do not include a full set of exceptions for other provisions, such as those addressing investor rights, services and government procurement.

B. Investor Rights Provisions

We believe that the investment provisions of FTAs need to be reformed in a number of respects, including the following:

- Investment disputes should be addressed on a government-to-government basis, as is the case with other chapters of FTAs. However, if a direct private investor-to-government dispute mechanism is instituted, investors should be required to exhaust all reasonably available domestic legal remedies before being able to bring a case to an international tribunal.
- In addition, if an investor-to-government mechanism is included, the Environment chapter should provide private citizens the same rights for enforcement and remedies as those rights provided to private entities in the Investment chapter.
- Investment rules should clearly and unambiguously provide foreign investors “no greater substantive rights” than U.S. citizens receive under U.S. law (see appendix for specific U.S. legal standards).
- Foreign investors should not be permitted to bring investor-to-government suits before international tribunals challenging government decisions regarding natural resource contracts, leases, or concessions (such as oil and gas leases).



Investment and Environment

Key Recommendations for Free Trade Agreements (FTAs)

We believe that the investment provisions of FTAs need to be reformed in a number of respects, including the following:

A. No Investor-to-State Arbitration

- Investment disputes should be addressed on a government-to-government basis, as is the case with other chapters of FTAs.
 - However, should a direct private investor-to-government dispute mechanism be instituted, the investor's home State should decide whether to allow any investor claim relating to environmental measures, in parity with the treatment afforded to tax measures.
 - If a direct private investor-to-government dispute mechanism is instituted, investors should be required to exhaust all reasonably available domestic legal remedies before being able to bring a case to an international tribunal. This requirement would strengthen the rule of law by strengthening the judiciary of the host State, and it would ensure that: only the most serious cases would proceed to international adjudication; domestic courts would have the opportunity to provide a remedy to the investor; and, domestic courts can interpret issues of domestic law that lie at the heart of the dispute.
 - The requirement to exhaust domestic remedies would be sufficiently flexible to allow exceptions in cases where no remedy is available, there has been undue delay or where it would be futile to pursue domestic remedies.
 - In addition, if an investor-to-government mechanism is included, the Environment chapter should provide private citizens the same rights for enforcement and remedies as those rights provided to private entities in the Investment chapter. (The May 2007 Bipartisan Trade Deal already endorses making all trade related dispute settlement procedures available for environmental disputes.)
- In no event should FTAs grant jurisdiction to arbitral tribunals to hear disputes regarding natural resource contracts, leases, or concessions (such as oil and gas leases).

B. Across-the-Board General Environmental and Public Health Exceptions

- It is vital to ensure that the trade and investment rules in FTAs do not undermine environmental, health and safety laws, regulations and governmental actions. To this end, FTAs should include a clear set of across-the-board general exceptions for environmental, health and safety protections that are not arbitrarily discriminatory. FTAs recently negotiated by the United States apply such exceptions only to particular provisions and do not include a full set of exceptions for other provisions, such as those addressing investor rights, services and government procurement.

C. No Greater Rights to Foreign Investors

- Investment rules should clearly and unambiguously provide foreign investors "no greater substantive rights" than U.S. citizens receive under U.S. law (see appendix for specific U.S. legal standards). This language should be included in the preamble of any FTA containing investment rules.
- The definition of investment should require compliance with domestic law. This would ensure that the investor cannot invoke the protections of the FTA if it has engaged in fraudulent or otherwise illegal behavior.
- The preamble of any FTA containing investment rules should clearly state that investment is a tool to achieving sustainable development, which is the ultimate objective pursued by the parties to the FTA.
- The clarifications and limitations on the scope of provisions on "indirect expropriation" and especially on "minimum treatment under international law" should be included in the provisions of the FTA, and not just in interpretative annexes. One such limitation would clarify that the adoption or application of any bona fide and non-discriminatory law or regulation intended to serve a public purpose shall not constitute a violation of the FTA (*i.e. expand and apply, with improvements, the rule in Methanex v. United States*).