

November 17th, 2008

Ambassador Susan Schwab, United States Trade Representative
Honorable Nancy Pelosi, Speaker of the House
Honorable Charles Rangel, Chairman of the House Ways and Means Committee
Honorable Jim McCrery, Ranking Member of the House Ways and Means Committee
Honorable Sander Levin, Chairman of the Trade Subcommittee
Honorable Wally Herger, Ranking Member of the Trade Subcommittee

Dear Ambassador Schwab, Madam Speaker, Chairmen Rangel and Levin, and Ranking Members McCrery and Herger:

On May 10, 2007, House leadership and the White House reached agreement on revisions to free trade agreements (FTA) negotiated, which included important new provisions to protect the environment, promote worker rights and ensure access to affordable medicines. The U.S.-Peru FTA is the first trade agreement passed by U.S. Congress that includes these new provisions. We believe that it is particularly important for Congress to work closely with the White House, as well as with stakeholders in Peru, to ensure that all of these important provisions are implemented in both law and practice according to the letter and spirit of the May 10th agreement.

As U.S.-based labor and non-profit organizations, together with our Peruvian civil society counterparts, we have been monitoring Peru's process of implementing its obligations under the FTA. In particular, we believe it is crucial that Peru effectively implement those obligations derived from the May 10th agreement, which include: the requirement that Peru adopt and maintain in its statutes and regulations the rights as stated in the ILO Declaration on Fundamental Principles and Rights at Work and to effectively enforce those laws; mandatory adherence to Multilateral Environmental Agreements to which each country is party; parity of enforcement for worker and environmental provisions with those of commercial interests; strengthening of Peru's forestry laws and institutions, with emphasis on ensuring legal trade in mahogany and other timber species; and greater flexibility in applying new intellectual property protections in order to preserve access to affordable medicines.

Such measures mark a significant step towards a more just and equitable trade system, provided they are implemented in a manner that honors both the letter and spirit of the provisions.

Under U.S. implementing legislation, an FTA cannot enter into force until the President has certified that the other party has brought its domestic laws and regulations into conformity with the agreement. During 2008, the government of Peru enacted nearly 100 legislative decrees on a wide range of issues using extraordinary powers delegated by the Peruvian Congress to the Executive Branch for the purpose of legislating changes necessary to implement its obligations under the U.S.-Peru FTA. While some of these decrees are well-founded and enact reforms required by the FTA, others present substantial new problems. Still others have little if anything

to do with the trade agreement, and have been interpreted as being in possible violation of the extraordinary powers granted to the Executive.

In view of mounting pressures to certify and implement the FTA as soon as possible, we would like to call attention to the following developments in Peru over the past nine months:

Reforms affecting forests and the environment

Several of the Peruvian government's Legislative Decrees are reforms to forest sector laws and institutions. While some positive changes have been made in keeping with the FTA's groundbreaking Annex on Forest Governance, there is broad concern among Peruvian civil society, professional associations and academic experts that key provisions in the decrees will undermine forest governance rather than strengthen it. Furthermore, Peru's regulatory process will not be sufficient to resolve all these concerns; modification of the Decrees themselves are needed.

- Legislative Decree 1090, Peru's new Forestry Law, redefines "Forest Resources" to technically exclude over 60% of Peru's forest lands from the regulatory regime and protections afforded to those forests. This change could potentially work in conjunction with L.D. 1064 to allow large-scale changes in use and conversion of Peru's forest lands. It is difficult to overestimate the possible implications of this change for Peru's indigenous communities, forest cover and wildlife. While the U.S. administration has already requested that Peru address this concern, their response is still unclear.
- Legislative Decree 1090 also eliminates the existing formal mechanism for public consultation about forests, and contains a provision (Article 41) that can be interpreted to create loopholes for ongoing trade and export of illegal wood.
- These decrees also contradict existing statutes that are gradually decentralizing forest management to regional authorities. This situation has already created conflict and will debilitate law enforcement and forest governance if not resolved through dialogue between the central and regional governments.

Reforms affecting worker rights

To date, the government of Peru has yet to enact all of the laws necessary to bring the labor laws into compliance with the commitments made to the House Committee on Ways and Means, outlined in a September 18, 2007 Dear Colleague Letter, let alone its obligation to adopt and maintain in its statutes and regulations the rights stated in ILO Declaration on Fundamental Principles and Rights at Work.

- Legal obstacles with regard to the right to strike still remain unaddressed.
- The government issued two directives to monitor and rein in the abuse of short-term contracts and subcontracting; however, it does not appear that these directives have been fully implemented in the year since their issuance. In fact, both short-term contracts and subcontracting continue to be subject to routine abuse. It also remains unclear whether a third directive instructing labor judges to catalogue backlogged cases concerning the

dismissal of workers for union activity and to expedite the resolution of those cases has been fully implemented.

- The government issued several new laws and decrees in 2007 and 2008. Although they address some of the identified problems with the labor laws, some problems remain unresolved and new problems have been created. For example, Legislative Decree 1086, which is meant to “promote” small and medium enterprises, actually reduces the payment owed to workers for unjust termination (such as for union activity) in the majority of Peruvian enterprises. Legislative Decree 1057 created a new class of public sector employee that is excluded from the scope of the generally applicable public or private sector labor laws. Further, while the new law governing subcontracting is an improvement, qualifications to that law introduced through subsequent decrees may limit its overall efficacy.

Reforms affecting access to medicines

Legislative Decree 1072 establishes protection for test and other undisclosed data for pharmaceutical products, while Decree 1075 revises the country’s intellectual property regime that is defined by the Community of Andean Nation decree 486. Both of these new laws are consistent with the May 10th agreement and the FTA text. However, the regulations determining how these laws will be put into effect have not been finalized and the process of drafting them has lacked transparency.

- There is concern that these regulations could be drafted so as to effectively eliminate flexibilities available in Peru’s new intellectual property protection obligations that help preserve access to affordable medicines. For example, we are concerned that regulations could introduce ‘patent linkage’ into the intellectual property code, even though such a measure would exceed the country’s obligations under the FTA and could effectively limit the timely introduction of affordable, generic medicines to the market.
- Furthermore, it has come to our attention that the U.S. pharmaceutical industry has been exerting its influence to push Peru, either through regulatory means or further legislative reform, to disallow the flexibilities and safeguards made available thanks to the May 10th agreement. It is important that Peru’s intellectual property regime allow for full use these flexibilities in order to avoid eroding access to affordable medicines.

The modifications to Peruvian law by these Decrees have generated significant political and social upheaval in Peru already. There is concern that the special authority granted by the Peruvian Congress to facilitate passage of the FTA has been utilized to pass measures which are not in adherence to or in some cases undermine the spirit and letter of the agreement. We believe that these serious deficiencies must be rectified before the United States proceeds with full implementation of this FTA.

Additionally, while some funding had been designated in the 2008 appropriations Continuing Resolution, it has not been sufficient to assist with capacity building in Peru as specified within the Annex on Forest Sector Governance contained in the FTA. It is essential that additional funds be earmarked for this purpose in the FY 2010 State and Foreign Operations appropriations bills.

We bring these issues to your attention in recognition of Peruvian officials' stated desire to both certify the U.S.-Peru FTA and to finalize a trade agreement with China by the APEC meetings in Lima, Peru next week. While we recognize the efforts of the Peruvian government to achieve compliance with the FTA, a rushed approach is not the way to proceed, particularly amidst outstanding concerns raised by Peruvian civil society. It is critical that sufficient attention and resources are devoted to ensuring that Peru's laws and institutions are fully prepared to meet the obligations included within the improved U.S.-Peru Free Trade Agreement.

Sincerely,

AFL-CIO

Change to Win

Defenders of Wildlife

Environmental Defense

Environmental Investigation Agency

Natural Resources Defense Council

Oxfam America

Sierra Club

Washington Office on Latin America

Cc:

Senator Max Baucus, Chair of the Senate Finance Committee

Senator Charles Grassley, Ranking Member of the Senate Finance Committee

Members of the House Committee on Ways and Means

Ambassador Felipe Ortiz de Zevallos, Embassy of Peru