



March 6, 2009

Acting US Trade Ambassador Peter Allgeier  
600 17th Street, N.W.  
Washington, DC 20508

Dear Acting Ambassador Allgeier,

On January 16<sup>th</sup>, during the final days of the Bush Administration, the Office of the US Trade Representative certified the Trade Promotion Agreement (TPA) between the United States and Peru. While our organizations publicly supported the innovative environmental measures contained within this agreement and have worked together over the past year to support its effective implementation, we and our partners in Peru believe that US government certification of this TPA was premature.

Now that the TPA is certified, however, we would like to support the Administration interagency team and Congress over the next eighteen months to ensure that Peru fully implements the agreement. We are therefore writing to request that both the US and Peruvian governments conduct regularly scheduled consultations with their respective civil society constituencies, in order to assure timely exchanges of information within a constructive process. As a starting point for these discussions, we would like to provide our assessment of Peru's current status with respect to the environmental obligations under the agreement<sup>1</sup> and offer our recommendations for effectively addressing priority forest governance issues during the implementation phase.

We wish to acknowledge the investment of expertise, time and effort that the US interagency group, led by Mara Burr at USTR, has put into working on this process with Peruvian counterparts thus far. We continue to believe that the Annex and related provisions can provide a positive model for ensuring that trade agreements promote legitimate trade without encouraging the illegal and unsustainable exploitation of natural resources. We also believe that in order for Peru to successfully transform its governance of its forest sector, it will need very significant financial support. That support would be most effective if conditioned upon clear political leadership by the Government of Peru in revising and enforcing the legal framework in the spirit in which the FTA was agreed.

This document is divided into the following sections:

- I. Positive changes and obligations met
- II. Recommendations to address on-going concerns regarding laws and regulations
- III. Recommendations to address concerns regarding implementation in practice
- IV. Moving forward in Peru and in Washington D.C.

---

<sup>1</sup>The entry into force of the TPA was predicated on an evaluation that Peru had implemented appropriate and sufficient legislation and measures to be (a) in full compliance with obligations related to eight multilateral environmental agreements and (b) on the path to full compliance with Annex 18.3.4 on Forest Sector Governance within eighteen months.

## **I. Positive changes and obligations met**

- a. *Establishment of Ministry of Environment (MINAM)*: President Garcia’s creation of this new Ministry, a focal point for environmental policy and management at national and regional scales, demonstrated political will and could potentially provide greater cohesion with respect to Peru’s national forest policy. To what degree, however, remains unclear as forestry management now falls to the DGFFS, under the jurisdiction of the Ministry of Agriculture. Additionally, MINAM will need to be better-funded in order to fulfill its central policy role.
- b. *Reform of OSINFOR, the independent forestry agency*: Through Legislative Decree 1085, Peru addressed its obligation under Annex 18.3.4, paragraph 3(h)(iii), to establish OSINFOR as “an independent and separate agency [whose] mandate shall include supervision of verification of all timber concessions and permits.” Peru also expanded OSINFOR’s jurisdiction beyond concessions to native community and private property owners, established a separate budget line for the agency, and defined clear qualifications for the director of OSINFOR to avoid conflict of interest. These steps should strengthen OSINFOR in its effective oversight of commercial forest management, although there remain some concerns (see section III below).
- c. *Reform of Penal Code*: Through revisions to titles 305 through 310 of the Penal Code, Peru addressed its obligations under Annex 18.3.4, paragraph 3(b) and 3(c) to strengthen penalties for a wide suite of environmental crimes including illegal tree harvesting and traffic of plant and animal species. Peru deserves credit for enacting this politically challenging reform. We sincerely hope it will be vigorously enforced against those responsible for trafficking and supporting illegal trade and forest crimes, not against poor and marginalized rural peoples.
- d. *Promotion of forest certification and added-value processing*: Article 30 of the new Forest Law (DL1090, as modified by Law 2958), maintains incentives for companies to seek third-party forest certification and to implement “integrated” projects, i.e. added-value processing on-site. We believe that this will help promote better, more sustainable forest management.

## **II. Recommendations to address on-going concerns regarding laws and regulations**

- a. *Traceability, chain of custody, and compliance with CITES and Annex 18.3.4*: Paragraph 3(h)(ii) of the Annex obliges Peru to “Develop systems to verify the legal origin and chain of custody of CITES-listed tree species and develop systems, including requirements for management oversight and record keeping, to reliably track specimens from harvest through transport, processing and export.” As Peru’s new forest law does not necessitate a demonstrable chain of custody, and has removed previously stronger language for geo-referencing of harvest trees<sup>2</sup> within the management plan, it is unclear to what extent the origin of wood could be credibly tracked or verified by OSINFOR or other authorities. This is important for Peru’s ability to comply with CITES, among the key provisions of which is the requirement for a finding of legal origin for any listed species.<sup>3</sup> Further, with the dissolution of INRENA, the harvest and trade records on CITES species exported by Peru that INRENA

---

<sup>2</sup> Law 27308, Article 15.1; this provision is weakened in Article 11.1 of Law 2958.

<sup>3</sup> Articles III, IV and V of the Convention state that a specimen listed on Appendices I, II or III (respectively) shall only be exported if certain conditions have been met, among them that “Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora.”

routinely published on-line are no longer available, making external effective monitoring of CITES species management nearly impossible.

Recommendations: (1) Ensure CITES record-keeping is public and transparent, by posting and updating information that lists approved and verified concessions, assigned quotas, and verification reports as well as OSINFOR reports. (2) Request that GoP amend its forest laws and/or regulations as necessary to ensure a meaningful chain of custody system for CITES species.

- b. *Definition of “forest” and “national interest”:* The final changes to the forest law (2958, passed on 14 January 2009) corrected the most egregious problem of Legislative Decree 1090, namely the redefinition of “forest patrimony” to exclude large areas of forest, making it easier to privatize or convert these lands to agricultural plantations or other uses. We are grateful to the USTR for standing strong on this point. However, the new law maintains the ability to approve land-use changes if it is in the “national interest” to do so. While we recognize the government’s sovereign right to develop its own resources, we are concerned that this clause will be invoked by the GoP to justify conversion and development on biologically important and sensitive areas and/or indigenous territories without appropriate transparency or necessary consultation and consent processes as intended by the Forest Annex. Our concern is based on recent actions taken by the GoP. Examples include :
- i. In late 2007, the administration attempted to remove a portion of the Tambopata-Candamo Reserve for oil drilling that was in the ‘national interest’;
  - ii. In early 2008 the planting of bamboo and sugar cane in riparian zones – the protection of whose natural vegetation is important to prevent erosion and protect water quality – was also declared to be in the ‘national interest’ (DS\_004\_2008\_AG).

Recommendation: If Peru is not willing to remove this phrase from the law itself, it will be important for the US to remain vigilant and to take action against unjustifiable declarations of national interest. Under certain circumstances, if this provision were abused, Peru could be in violation of the terms of the agreement.<sup>4</sup>

- c. *Private initiative concessions:* Section 9.1 of 2958 establishes the “Private Initiative Concession” concept, which allows individuals or companies to petition forest authorities for the rights to a concession outside the context of a public auction or bidding process. The law’s corresponding regulations stipulate important limiting conditions as well as a public comment period that includes repeated public advisories at the regional level and via radio and internet. While the language of the law now states that “a competitive and transparent process for granting the concession will be ensured.” as required by Annex paragraph 3(g)(i), we are troubled by the potential for abuse of this provision, as in practice it may facilitate sanctioning of backroom deals and corrupt arrangements.

Recommendations: The effect of this new modality depends on Peru’s ability to control corruption, implement meaningful transparency, and verify that the requirements to apply for private initiative (such as proof that land has no pre-existing title claims) are met. (1) Sufficient information about the potential concessionaire and all of the documentation related to their application should be publicly available to permit an informed assessment by interested observers. (2) The length of time for public comment after publication should be doubled from the current 40 days to allow a realistic time for well-informed response from stakeholders who may have limited access to information and technical and analytical resources.

---

<sup>4</sup> The footnote to TPA Article 18.3, paragraph (3) states that with respect to the forest sector, the principle of the right to waive or derogate from an environmental law in a manner that weakens or reduces protections does not apply.

- d. *Absence of prior agreement or consultation requirement for development of extractive activities on indigenous or private lands, and lack of consultation as per ILO Convention 169:* Legislative Decree 1064 appears to have created an “easement” right [*servidumbre*] for petroleum, gas, and mining development on private and indigenous lands, the re-compensation of which will be determined by the state, without any requirement for consultation, much less prior informed consent. Peru’s own Congressional Committee’s Constitutional Review found this provision of the law unconstitutional. Further, indigenous communities were not consulted on this or other important statutory changes to their land rights arrangements within 1064, in contravention of ILO Convention 169 concerning Indigenous and Tribal Peoples.

Recommendation: The US should encourage Peru to initiate a new process with broad stakeholder consultation that is in line with the spirit and letter of the FTA.

- e. *Need for a stronger formal consultative body on forests:* Legislative Decree 1090 eliminated the National Forestry Advisory Council (CONAFOR), previously the only venue for formal stakeholder input on forest policy. While Peru has named a replacement body, thanks to the insistence of USTR, the Forestry Sub-commission of the Agricultural Consultation Commission is a lesser body whose recommendations are likely to be subsumed by agricultural priorities.

Recommendation: While CONAFOR did not function well, the role it was supposed to play remains important. Peru should elevate the status of the new forest consultative body to the same level as that of the Agricultural Commission, or place the forest consultative body within the Ministry of the Environment.

- f. *Establishment of focal point as per Annex 3(h)(iv):* It is unclear whether Peru has yet identified a focal point “with appropriate and sufficient authority and staff to investigate violations of laws and regulations for forest sector governance.” It is important that this focal point not be the same institution responsible for regulating the forest sector, giving out concessions and receiving fees from forest harvesting, etc, e.g. the National Forest and Wildlife Authority or any other entity within the Ministry of Agriculture.

Recommendation: (1) This should be a specialized Office of the Public Prosecutor for Forest Crimes (*Fiscalía Especializada ad hoc*) within the Public Ministry, with both a national office and regional offices in key areas. The Public Prosecutor will need to coordinate with OSINFOR as well as the Finance Intelligence Unit (*Unidad de Inteligencia Financiera*) and SUNAT (tax investigation agency). (2) Peru should also establish a simple, transparent process for the public to report forest crimes to the Public Prosecutor.

### **III. Recommendations to address concerns regarding implementation in practice,**

While fully recognizing that implementation of Annex 18.3.4 is an ongoing process, we must question whether Peru is in compliance with its basic entry-into-force obligations under CITES, or is putting into place the necessary resources and building blocks to get where it needs to be within 18 months. In regards to CITES, the basic information necessary to assess this is lacking.

- a. *Compliance with the Convention on International Trade in Endangered Species (CITES), as per Article 18.2:* Requirements include:
- i. “Starting in 2008, Peru will, as a standing practice, not establish export quotas based on leftovers from harvesting and exports of previous years” (CITES Standing Committee 55 Summary Record p. 3): Peru’s 2009 quota has not been published yet, nor is data available to know the status of its 2008 quota. We have received reports that the 2009 quota may include leftovers.

- Recommendation: USG should ask Peru to (1) publish on-line all 2008 exports of CITES listed species and (2) establish and make public the 2009 quota immediately. The volume of mahogany to be exported in 2009 should not include leftovers; should be based on the advice of the Scientific Authority; and should only come from concessions that have been approved and verified in the field.
- ii. “Verified and approved mahogany” (SC55 Summary Record p. 3): Informed sources in Peru have indicated to us that concession inspections for the 2009 mahogany quota have not been systematically done and that some of those which have been completed show mahogany coming from areas where trees have not been verified and approved in the field. It is unclear whether these concessions have been allowed to export the mahogany. Recommendation: We are working to provide you with more details on this matter, which is delicate given the nature of our sources. To clarify concerns, and as a matter of transparency moving forward, USG should request that Peru publish on-line the verification reports for the 2009 and future quotas.
- iii. “Peru should provide a ‘baseline’ report on the remaining volume [of mahogany] that can be authorized for export, and subsequent reports, on a quarterly basis, regarding the disposition of the remainder of the volume authorized for harvest in 2007. Information on the authorized and verified concessions and other forest management areas where the timber was harvested should be included on the CITES permit in box 5 (‘special conditions’) and annexes.” (SC57 Com.3, adopted in plenary): It is unknown whether the changes to the permit form have even been made; it is not publicly available. Recommendation: Given substantial questions over legal origin of this Appendix III species, USG should request that Peru conduct verifications of all specimens of *Cedrela odorata* (not just a statistical sampling) and follow the same procedure for this species as for mahogany in providing harvest origin information on CITES permits.
- iv. Parties are urged “to explicitly and transparently address, in future non-detriment findings, the identified need for application of conversion factors and/or other methodologies that link harvested wood volumes to export shipment volumes” (PC17 WG10 15-19 April 2008). Peru’s CITES Management Authority had already established scientifically sound conversion factors for mahogany and cedar in January 2008 through Resolutions 002-2008 and 017-2008. However, under pressure from the timber industry, the new administration withdrew these factors on March 23, 2008 in Resolution 075-2008-INRENA, and committed to conclude an additional transparent multi-stakeholder process to determine volumetric conversion factors. Although the commission had 180 days to provide its conclusions, no results appear to have been made public. Without an appropriate conversion factor, timber laundering will remain a real problem. Recommendation: USG should request that Peru clearly define and publish a realistic conversion factor for 2009 based on the commission’s findings.
- b. *Clarity regarding how responsibilities will be transferred and shared between the regional and central government (including concession allocation, data collection, and OSINFOR duties):* In terms of on-the-ground implementation this may be the single biggest current gap in need of attention by Peruvian authorities and US assistance. Recommendation: The US should support Peru in creating, funding and implementing a clear transition plan for all key timber producing regions, with a priority on Ucayali and Madre de Dios. We strongly recommend that OSINFOR’s responsibilities be maintained at the central level in order to keep in place appropriate checks and balances.

- c. *Lack of functional electronic information system:* In Report 001-2006 INRENA-OI,<sup>5</sup> Peru's own IT agency found systematic problems with its National Forestry Information System, including evidence that the system was illegally accessed and doctored. Further, as of mid-2008, a number of INRENA field posts had no regular internet access and continued to resort to inputting hand-written data to files that were then irregularly transmitted to headquarters from public internet cafes. To our knowledge, this system has not yet been upgraded. Without a functional information system, there is no way to guarantee timber legality or traceability. Recommendation: The US should ensure that Peru has a realistic timeline and resources to develop an electronic information system that will meet its security and data management needs. The "SNIC" (Sistema Nacional de Información y Control) is the current system.
- d. *Release of enforcement personnel:* Although Annex paragraph 3(a) requires an increase in enforcement personnel, we have received reports that the opposite is occurring. Plans to reduce employees in the Forestry Directorate (DGFFS) at the national level exist, but the resulting increase at the regional level for either Forestry or Protected Areas (under the Ministry of the Environment) remains unclear. Recommendation: As part of the transition plan recommended under III(b), an assessment of personnel needs for protected area patrols and commercial forestry law enforcement should be conducted in all regions. Peru should agree to abide by the results within the 18 months.
- e. *Lack of budget for OSINFOR:* According to our best available current knowledge, OSINFOR currently lacks dedicated funding for 2009. It is therefore completely unable, in practice, to carry out its oversight functions. We hope this is not the case but recommend that, if so, Peru move immediately to make significant funds available for OSINFOR.
- f. *Completion of national cadastre:* The national mapping exercise is critical for legal and transparent land-use decision making as well as appropriate identification and delineation of protected areas, concessions and community boundaries, as per Annex paragraph 3(j). Yet as former INRENA head José Luis Camino acknowledged publicly to *El Comercio* in December, "it will take at least five years, and COFOPRI [the agency responsible] just got a massive budget cut." It is critical to reconstitute funding to this process. Recommendation: The US should request a timeline and associated budget from Peru on completion of the national cadastre and regularly check on progress. In the meantime, USG should work with Peru to put precautions into place to assure that concession allocations do not violate the legal or customary rights of indigenous or *campesino* communities, nor are granted in contravention of environmental laws or special land-use designations.

#### **IV. Moving forward in Peru and in Washington D.C.**

We do recognize the considerable efforts that USTR and the interagency team have invested in the TPA, and are optimistic regarding the long-term effects of some of the resulting changes to Peruvian forest governance and institutions. We would like to work constructively with the US team over the next 18 months to assure that the Annex on Forest Sector Governance is implemented effectively. To that end, we request the following:

- a. *Regular stakeholder dialogues and formal public review at 9 months, in US:* We request that we meet on a monthly schedule for mutual updates on developments within Peru with respect to the Environmental Chapter and Annex, with special attention to the concerns raised above. We ask that provision be made for those with operational expertise, particularly those

---

<sup>5</sup> Available on-line at:


[www.peruforests.org/Main%20References/Peruvian%20Authorities/Evaluation%20of%20forestry%20information%20system.pdf](http://www.peruforests.org/Main%20References/Peruvian%20Authorities/Evaluation%20of%20forestry%20information%20system.pdf)

working in Peru on forestry issues, to speak with the interagency team directly in order to provide first-hand information. At the 9 month midway point, we request a formal process to review concerns that have not yet been addressed related to the environmental provisions.

- b. *Regular stakeholder dialogues and formal public review at 9 months, in Peru:* It is clear that the lack of a clear stakeholder dialogue in Peru has engendered miscommunication and misinformation. We request that the US strongly encourage Peru to hold dialogues and a 9 month review also, and establish a more functional relationship with civil society and indigenous organizations around the issues the TPA addresses. An open civil society dialogue during the first meeting of the subcommittee on Annex 18.3.4 would be an important step.
- c. *Outreach on new laws, regulations, TPA provisions and enforcement/dispute mechanisms:* Given the significant recent changes to Peruvian forest governance institutions, we ask that you keep us informed of further new laws and regulations so that we can assure that our partners in Peru are tracking and responding to them in a timely fashion. We recommend that the TPA provisions, including dispute mechanisms, be publicized both in the US and in the forest regions of Peru such that civil society understands their function and can provide input and take action where and when needed.
- d. *Ongoing compilation and communication of new information and articles, in both languages:* We recommend that an independent institution such as OSINFOR, the Defensoria del Pueblo or a third party be provided the resources to compile, translate and disseminate news articles, updates or changes to regulations, new relevant decrees or other public notifications, on a regular basis (perhaps bi-weekly), to maintain government decision-makers and stakeholders in both countries informed, and minimize misunderstandings and miscommunications.

Thank you for your attention to our analysis and recommendations. We look forward to your response and to working with you over the coming 18 months.

Respectfully,



Andrea Johnson, Director of Forest Campaigns, Environmental Investigation Agency



Ani Youatt, Director, Peru BioGems Project, Natural Resources Defense Council



Jessica McGlyn, Senior Program Officer, WWF-US Government Relations

Cc:

Mark Linscott, Assistant US Trade Representative, Environment & Natural Resources  
Mara Burr, Deputy Assistant US Trade Representative, Environment & Natural Resources  
Rep. Charles Rangel, Chair, Ways & Means Committee, House of Representatives  
Rep. Sander Levin, Chair, Subcommittee on Trade, Ways & Means Committee, House of Representatives  
Senator Max Baucus, Chair, Senate Finance Committee