



HUMANE SOCIETY INTERNATIONAL

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**Before the
United States Senate Committee on Finance
Hearing on the U.S.-Peru Trade Promotion Agreement**

**September 11, 2007
Washington, DC**

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Senate Committee on Finance
Attn. Editorial and Document Section
Room SD-203
Dirksen Senate Office Building
Washington, DC 20510-6200

Chairman Baucus,

On September 11, 2007, the Senate Committee on Finance is to hold a hearing to discuss the U.S.-Peru Trade Promotion Agreement. Pursuant to a letter from Chairman Baucus dated August 17, 2007 regarding hearing participation and submission of written testimony by Humane Society International, please accept the following comments discussing the environmental and public participation provisions of the U.S.-Peru Trade Promotion Agreement.

Humane Society International (HSI) operates as the international arm of The Humane Society of the United States (HSUS). Founded in 1954, HSUS is the largest animal protection organization in the United States and in conjunction with HSI maintains a constituency of over 10 million. As the international arm of HSUS, HSI works to promote the protection of all animals around the world by participating in programmatic activities in developing countries, advocating for the effective enforcement of international environmental treaties, and furthering humane and sustainable international trade policy. HSI actively participates in discussions of international trade policy at the World Trade Organization addressing such issues as equitable development, humane and sustainable agriculture, environmental conservation, and wildlife and habitat protection. Furthermore, as a member of the Trade and Environment Policy Advisory Committee in the United States, HSI advises the United States Trade Representative and the U.S. Environmental Protection Agency on international trade policy.

The following comments are intended to address the provisions of the U.S.-Peru Trade Promotion Agreement affecting the environment, wildlife, habitat protection and biodiversity, as well as public participation, including that of Non-Governmental Organizations such as HSI and HSUS.

I. Introduction

In the Trade Act of 2002, Congress directed the United States Trade Representative (USTR) to achieve several objectives with respect to the environment when negotiating free trade agreements. These objectives include: the requirement that parties to a trade agreement with the United States effectively enforce their environmental laws; strengthening environmental protection through the promotion of sustainable development and efforts to build the capacity of trading partners of the United States; and ensuring that USTR promotes trade and environment policies as mutually supportive and seeks to protect and preserve the environment and enhance the international means of doing so, while at the same time optimizing the world's resources.

About two and a half years ago, I testified before this Committee on the U.S. – Central America – Dominican Republic Free Trade Agreement (DR-CAFTA) and discussed HSI and HSUS's support of the environmental provisions of that agreement. It is the view of HSI and HSUS that each free trade agreement signed by the United States should be judged on its individual provisions and through an objective lens. HSI and HSUS strongly believe that the inclusion of an effective enforcement framework supported by robust public participation and trade capacity building provisions will significantly increase the likelihood that environmental provisions in free trade agreements negotiated by the United States will be fully and effectively implemented. It should be remembered, however, that these efforts can only go so far without the provision of adequate long-term dedicated funding aimed at improving environmental cooperation between the Parties.

In providing testimony to the Committee, I would like to emphasize that the organizations which I represent do not purport to agree that each and every aspect of the U.S.-Peru Trade Promotion Agreement (PTPA) will further the aims most important to HSI and HSUS -- protecting the environment and promoting the protection and humane treatment of all animals. As a member of the Trade and Environment Policy Advisory Committee we participate in the negotiating process of free trade agreements in order to ensure that the protection of animals and preservation of wildlife habitat is thoroughly considered when completing the environment chapters of these agreements. Through this lens, we view the environmental provisions of the PTPA as providing needed opportunities and incentives to enhance environmental protection and enforcement of environmental laws in Peru and the United States.

II. The Bipartisan Trade Deal, Trade Promotion Authority, and Future Trade Agreements

In May of 2007, Congress and the United States Trade Representative (USTR) concluded the Bipartisan Trade Deal (BTD) in an effort to move forward with the consideration of several free trade agreements. HSI and HSUS are generally pleased with the results of the BTD, which increased environmental protections in the trade agreements including the PTPA. HSI and HSUS believe, however, that enhanced environmental protections in future trade agreements are warranted, and that the BTD can be strengthened the next time that Congress considers granting Trade Promotion Authority (TPA) to the President. There are several areas of particular concern to HSI and HSUS.

First, the BTDA changes the structure for enforcement of environmental violations found by a panel in Party-to-Party disputes. Prior to the BTDA, environmental violations were subject solely to a monetary assessment (capped at \$15 million) that was to be used to improve environmental enforcement in the offending Party. As a result of the BTDA, a monetary assessment is no longer the default remedy. It is still available, but only if requested. Instead, environmental violations are subject to a suspension of benefits, the same penalty ascribed to violations of commercial trading practices. The monies collected under the suspension of benefits scheme, however, are not required to be used to correct the practice or program that led to the violation in the first place. HSI and HSUS strongly believe that whichever remedy is used, the money should not be channeled into the complaining Party's treasury, but must be used to fix the problem in the offending Party. In TPA and future trade agreements, therefore, HSI and HSUS recommend that whether the remedy available is a monetary assessment or a suspension of benefits, or a choice between the two, the existing provisions be strengthened. With regard to monetary assessments, HSI and HSUS believe there should be an elimination of the \$15 million cap, with the fine used to address the violating practice/program. As to suspension of benefits, any monies collected should be required to be used solely to fix the practice/program leading to the violation.

Second, the BTDA obligates Parties to these trade agreements to meet their obligations under seven specific MEAs by passing adequate domestic laws, including several MEAs that are of particular importance to HSI and HSUS (e.g., the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES)). The latter requirement, however, is only applicable when countries have already signed and/or ratified the named MEAs before concluding the trade agreement. In future agreements, HSI and HSUS believe that this provision can be strengthened to *require* Parties to ratify the listed MEAs prior to conclusion of the free trade agreement negotiations to ensure this meaningful new requirement is not invalidated. In addition, HSI and HSUS believe that Congress should investigate whether the list of MEAs should be expanded.

Third, HSI and HSUS believe that TPA and any new free trade agreements must include strong provisions regarding wildlife protection and biodiversity. The PTPA annex on forest sector governance, for example, contains a link between illegal logging and wildlife protection. The inclusion of wildlife in the preamble of the PTPA annex will foster cooperation and increase enforcement of CITES and wildlife protection in Peru. In future agreements, HSI and HSUS believe that wildlife protection should be emphasized throughout any agreement discussing illegal logging and not just in the preamble. In addition, the PTPA includes a provision regarding the commitment to the conservation of biodiversity. It is critical that future free trade agreements contain a similar provision.

Finally, HSI and HSUS urge the Committee to remember that dedicated funding for environmental protection and enforcement initiatives is essential to ensuring that the environmental objectives laid out in the PTPA Environment Chapter are met. At present, neither the Trade Act of 2002 nor the BTDA include a requirement for dedicated funding for capacity building efforts under the Environment Chapters or Environmental Cooperation Agreements negotiated concurrently with trade agreements. HSI and HSUS believe that going forward, TPA must include language requiring funding for trade capacity building.

III. PTPA Chapter on Environment

Protecting the environment, habitat, and animals (wildlife, farm, and companion) and promoting sustainable development requires education, resources, and most importantly, a commitment from the governments of both Parties to the PTPA to follow through on laws, policies, programs and projects once they have started. In particular, the Government of the United States needs to ensure that its trade, economic, environment, and development policies are well coordinated and that various U.S. government agencies involved in these areas communicate effectively and work together to make sure such initiatives are mutually supportive.

It is incumbent upon the U.S. government, therefore, to devote appropriate levels of funding over the long-term for environmental and sustainable development programs and projects. An impressive amount of initial funding was guaranteed for the DR-CAFTA environmental initiatives through the efforts of Senator Bingaman from this very Committee. HSI and HSUS have seen first-hand the ability of dedicated funds to accomplish meaningful and lasting improvements in environmental protection through our work on the ground in Central America. Based on the success of the dedicated funding for DR-CAFTA, HSI and HSUS urge this Committee and the entire Senate to make sure that the environmental initiatives set out in the U.S.-Peru Environmental Cooperation Agreement receive the same attention that was given to Central America.

HSI and HSUS believe the provisions included in the environment chapter of the PTPA, together with the recently concluded BTDA, build upon environment chapters in prior free trade agreements. As explained, HSI and HSUS believe these provisions can be further strengthened in future agreements. While HSI and HSUS do not support the use of “boilerplate” language for the environment chapter of all free trade agreements, the text of the PTPA does provide for the creation of further opportunities to enhance environmental protection in Peru. Most importantly, the PTPA environment chapter includes important provisions that HSI and HSUS believe will help to promote improved governance and stewardship in Peru, and permit citizens and Non-Governmental Organizations (NGOs) to have their voices heard on important environmental issues.

A. *Environmental Disputes*

Most important to HSI and HSUS under the PTPA environment chapter is the obligation agreed upon by both Parties to effectively enforce their domestic environmental laws, while at the same time striving to improve upon current environmental laws and policies. HSI and HSUS strongly support this commitment by both Parties. Under the current U.S. trade regime with Peru governed by the Andean Trade Preferences Act, there are no similar requirements placed on either government to effectively enforce domestic environmental laws. Following implementation of the PTPA, however, if either Party intentionally disregards its laws intended to protect the environment they will be subject to possible dispute settlement. The current Andean Trade Preferences permit the Parties to turn a blind eye to such inaction without fear of repercussions.

In addition to the requirement to effectively enforce environmental laws, the Parties have also agreed under the PTPA to establish an Environmental Affairs Council (“the Council”) made up of senior level officials with expertise in the environment. Pursuant to the Agreement, the Council is required to attempt to resolve disputes referred to it by the PTPA secretariat when one Party requests consultations alleging a failure to effectively enforce environmental laws.

With respect to Party-to-Party disputes, the PTPA provides each Party with the right to request consultations regarding any matter arising under the environment chapter, including where one Party is failing to effectively enforce its own environmental laws in sustained or recurring course of action or inaction in a manner that affects trade. HSI and HSUS are pleased to note that the dispute settlement chapter allows for the selection of panelists with experience in environmental matters when forming dispute settlement panels.

As explained above, however, the BTM resulted in certain changes to dispute settlement enforcement mechanisms under the environment chapter. Under the previous incarnation of the PTPA, a panel finding that a Party failed to effectively enforce an environmental law could result in a monetary assessment of up to \$15 million annually to be paid by the offending Party into a fund to be used to improve enforcement. The BTM changed this remedy and now requires that environmental disputes be treated on equal footing as commercial disputes, thus, eliminating the use of a fund to improve enforcement and help correct the environmental problem in the offending country.

Where a panel finds that a Party has failed to effectively enforce an environmental law causing trade effects, the PTPA dispute settlement chapter now permits the complaining Party to request the suspension of benefits if a level of monetary compensation cannot be agreed upon between the Parties. Under the BTM, therefore, the imposition of trade sanctions in an environmental dispute will result in money being sent to the treasury of the complaining Party rather than going towards fixing the problem. The PTPA dispute settlement chapter still allows for the creation of a fund, but only after the offending Party requests a monetary assessment in lieu of suspended benefits *and* the Free Trade Commission (not the Environmental Council) determines that the creation of a fund is warranted. HSI and HSUS believe the possibility of eliminating the \$15 million cap could have been discussed and adopted as a reasonable mechanism for dispute settlement enforcement. We are not convinced that replacing a fund dedicated to improving enforcement with a system that serves to send money into the treasury of the complaining Party will help to meet the overall objectives of the environment chapter.

B. Obligations under Multilateral Environmental Agreements

Included in domestic environmental laws covered by the effective enforcement provision in the PTPA generally are multilateral environmental agreements (MEAs) ratified by a Party because those agreements become part of domestic law when ratified or implemented through legislation. The BTM went a step further by obligating both Parties to meet the requirements laid out in seven specific MEAs *if* countries are *already* a party to those MEAs. Several of these MEAs are very important to HSI and HSUS including the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), the International Convention for the Regulation of Whaling (IWC), and the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC). It is, therefore, disappointing that the BTM did not require

all countries who wish to enter into a trade agreement with the U.S. to sign and/or ratify each of the seven MEAs. By mentioning these MEAs without requiring countries to sign them, the BTDA can be seen to provide a disincentive to joining an MEA if a country is not already a member because of the additional obligations that would result under the trade agreement.

It remains our sincere hope, however, that the inclusion of these MEAs will encourage the Government of Peru to quickly bring its domestic legislation into full compliance with the obligations under these agreements. For example, Peru has been identified as one of ten countries by the CITES Secretariat as requiring priority attention for bringing its national legislation into compliance with the Convention. While the previous example is applicable to Peru, it is incumbent upon both Parties to effectively enforce domestic legislation implementing obligations under all MEAs that they have ratified.

C. Effective Enforcement and Public Participation

Another important aspect of the PTPA chapter on environment is the inclusion of several provisions which permit the public and NGOs to participate in bringing environmental issues to the attention of the competent authorities in each of the Parties. HSI and HSUS strongly believe that public participation provisions in free trade agreements are integral to the implementation and formation of ongoing operations of the environmental provisions of these agreements.

The PTPA chapter on environment includes several provisions that HSI and HSUS agree will enhance the ability of the public to participate in the implementation of the obligations included in the chapter. For instance, the chapter specifically requires the Parties to create procedures by which interested persons can request competent authorities to investigate alleged violations of their environmental laws. In addition, each Party is directed to establish a national consultative or advisory committee, comprised of persons with knowledge of environmental issues, to provide views on the implementation of the chapter as well as on issues raised by interested persons in submissions to a Party. Interested persons are also guaranteed access to the competent authorities of each Party to investigate alleged violations of domestic environmental laws.

The environment chapter, furthermore, requires the creation of an Environmental Affairs Council which must establish mechanisms to exchange information with the public, consider public submissions at Council meetings, and request public input on matters relevant to the Council's work. The willingness of the Parties to establish this Council further demonstrates their commitment to ensure effective enforcement of domestic environmental laws and to make sure that persons knowledgeable in environmental issues are intimately involved in the resolution of such disputes.

Most important to HSI and HSUS, however, is the requirement that both Parties cooperate in the creation of an independent secretariat designed to receive submissions from private citizens and NGOs alleging that a Party is failing to effectively enforce an environmental law. This independent mechanism empowers civil society, NGOs, and the private sector to have a voice in their country's environmental policies, programs, and enforcement regimes without fear of governmental intervention in the process. To ensure that this independent mechanism operates in a meaningful manner, it is essential that the Secretariat understand the objectives of

the environmental chapter and be guided by the chapter's working procedures, and that both Parties be vigilant in ensuring that the Secretariat properly carries out the obligations of the Chapter.

Failure to follow these procedures can lead to unpredictable and in some cases erroneous results that undermine the effectiveness of these provisions of the environment chapter. For example, in the first case to come before the DR-CAFTA Secretariat, the Secretariat rejected a submission by HSI in a matter involving the Dominican Republic's alleged failure to enforce its domestic laws designed to protect endangered sea turtles. The Secretariat determined that HSI's submission did not meet the factual requirement under Article 17.7.2(c) of the DR-CAFTA environment chapter that the submitting Party provide sufficient documentary evidence to permit review. However, the reason the Secretariat determined that Article 17.7.2(c) was not met did not relate to the factual and evidentiary information and accompanying exhibits provided by HSI with respect to the laws at issue or the failure to effectively enforce these laws. Rather, the Secretariat explained the submission was deficient because HSI failed to provide sufficient evidence that private remedies were pursued under Article 17.7.4. However, Article 17.7.4 only applies after the Secretariat evaluates whether the submitting Party has met the criteria of Article 17.7.2 (a) – (f). Moreover, Article 17.7.4 merely provides a list of factors that guide the Secretariat in determining whether to request a response from a Party. There is no requirement that private remedies be pursued or exhausted by the submitting party under Article 17.7.4. Thus, it appears there is confusion as to the factors the Secretariat must consider in the submission process, and which factors are actually requirements needing to be fulfilled before the submission process moves forward.

Accordingly, HSI and HSUS believe it is essential that the working procedures for PTPA and future agreements are clear and well-defined to enable independent secretariats to operate effectively and in a manner consistent with the environment chapter's objectives of encouraging high levels of environmental protection and public participation. In addition, the Parties should seek to ensure that the Secretariat properly carries out the obligations of the chapter.

As a member of the Trade and Environment Policy Advisory Committee here in the U.S., HSI and HSUS recognize the importance of public participation in the development of trade and environmental policy. HSI and HSUS, therefore, believe that it is crucial for both Parties, civil society, NGOs, and the private sector to remain engaged in environmental and economic development issues. While HSI and HSUS support the public participation provisions included in the environment chapter of the PTPA, it should not escape the Committee's attention that both USTR and the Congress share responsibility for closely monitoring the implementation of these provisions.

D. Biodiversity

For the first time in a free trade agreement, the United States included in the PTPA a commitment to protect and conserve biodiversity. Under Article 18.10 of the PTPA environment chapter both Parties declare their commitment to the promotion and encouragement of biodiversity, including plants, animals, and habitat. In addition, both Parties explicitly acknowledge their commitment under the Agreement to strive to continue the improvement of their individual levels of environmental protection. Finally, the Parties agree to enhance their

cooperative efforts on issues affecting biodiversity through the Environmental Cooperation Agreement.

Peru is one of the most biologically diverse countries in the world. It is home to unique species such as alpacas, vicuñas and Andean river dolphins as well as a number of endangered species including the yellow-tailed woolly monkey, yellow-eared parrot, Andean mountain cat, and the Andean tapir. We are perhaps most excited about this biodiversity provision which underscores the commitment of both the United States and Peru to the environment and conservation of precious biodiversity, including endangered species and other animals.

The recognition of the important role biodiversity plays in the diverse ecosystems found in Peru and the United States is a historic event. Both Parties should be commended on this accomplishment. Should the PTPA enter into force, however, it is incumbent on the governments of both the United States and Peru to ensure that the Agreement does more than just put words on paper for the first time. Provisions such as the biodiversity Article need long-term financial backing and support in order to achieve their desired results. Through innovative programs and efforts, including the Environmental Cooperation Agreement, such protections may be increased and enhanced.

While HSI and HSUS applaud the inclusion of a biodiversity provision in both the Peru and Colombia trade agreements, we note that this provision was not included in the Panama or Korea agreements. Upon questioning regarding this omission, we did not receive a satisfactory answer as to why this provision was left out of these agreements. When considering TPA renewal, HSI and HSUS urge Congress to incorporate a requirement to include a biodiversity provision in the environment chapter of all future trade agreements where appropriate.

E. Illegal Logging and Wildlife

With regard to the changes effectuated under the BTDA, HSI and HSUS are most pleased with the addition of an annex on forest sector governance to the environment chapter that recognizes the detrimental effect illegal logging has on wildlife. The global timber trade poses one of the greatest threats to the survival of the world's wildlife and the conservation of forest habitat. Throughout South America, including Peru, illegal logging of mahogany degrades rivers and streams that are home to the giant river otters and other species. In addition, unsustainable logging practices result in the creation of roads into the vast forests that are used by poachers to hunt monkeys and other wildlife that end up on the illegal black market for endangered species.

In our experience, wherever nefarious conduct, such as the illegal trade in drugs, guns or timber, occurs throughout the world, trade in endangered or exotic species will also be found. According to Interpol, for example, the value of illegal wildlife trafficking is estimated to be as high as \$20 billion per year, second only to arms and drug smuggling. Thus, it is no surprise that trade in endangered species from Peru and poaching are often linked to the illegal trade in mahogany and other timber products from that country. The inclusion of wildlife in the annex on forest sector governance, we believe, provides an opportunity for further cooperation between the Parties to increase enforcement of CITES and wildlife protection. For this reason, HSI and HSUS are happy to see that both Congress and the USTR recognized the linkage of these issues

and included reference to wildlife in the preamble to the annex. However, HSI and HSUS believe that because of the strong link between habitat loss and its negative effects on animals, wildlife should have been mentioned more prominently in the annex. It is our hope that this link will be enhanced in future trade agreements.

F. Investor State Provisions

While investor state provisions have not been an area of major concentration for HSI and HSUS in the past, we recognize that this is a controversial issue with respect to the environment and agree with the position taken by the majority of Trade and Environment Policy Advisory Committee members in our report to Congress regarding the PTPA. We continue to stand behind the following findings made by TEPAC:

As with the other recent FTAs, one improvement [in the PTPA investment chapter] is the fact that the definition of investment is more precise. Most significantly, the issue of “indirect expropriation” or what we in the United States call regulatory takings has been clarified by changing the terminology from “tantamount” to “equivalent” and elaborating on this term in a letter declared to be an integral part of the agreement. The concern that regulatory actions will provoke claims by affected investors of indirect expropriation has been lessened by the declaration that “[e]xcept in rare circumstances, nondiscriminatory regulatory actions . . . to protect legitimate public welfare objectives, such as . . . the environment, do not constitute indirect expropriations.” The majority of TEPAC believes the “rare circumstances” language should even be strengthened for greater clarification.

Also noteworthy are the concepts which motivate Paragraph 1 of Article 10.2 and Article 10.11 of the chapter on investment, particularly when combined with the other language in the Agreement cited above. Paragraph 1 of Article 10.2 states that in the event of an inconsistency between the Investment Chapter 10 and another chapter (like the chapter on the environment), the other chapter (Chapter 18) trumps Chapter 10. As the majority of TEPAC reads these provisions, any bona fide environmental requirement at odds with an investment-related requirement will trump that latter requirement. Similarly, Article 10.11 expressly precludes reading Chapter 10 to prevent environmental protections taken pursuant to the chapter on the environment.

IV. Funding for Environmental Cooperation

Concurrently with the PTPA negotiations, the Parties negotiated an Environmental Cooperation Agreement (ECA). Recognizing the importance of strengthening the capacity in each Party to protect the environment and promote sustainable development, the ECA provides a critical foundation for long-term cooperation and assistance on environmental issues, programs, and policies. Pursuant to the ECA, each Party is required to take into account the public comments and recommendations regarding cooperative environmental activities.

Although HSI and HSUS support the efforts of the United States to promote enhanced environmental cooperation in Peru, we are concerned about the level of financial commitment to these efforts. For example, ensuring that the public submission mechanism works as intended – including building the capacity of local organizations to participate effectively in the public submission process, strengthening the ability of Ministries to enforce environmental laws (including CITES), training government officials on how to set up a national advisory committee system, and ensuring transparency and openness by communicating issues to civil society – will all require a great deal of funding and technical assistance.

As with all previous free trade agreements that include ECAs, the PTPA does not set forth an essential dedicated funding source to achieve the intended results of the capacity building provisions. Due to current budget constraints, all recently concluded free trade agreements without a dedicated funding source will be competing against each other – and all other programs - for a limited and diminishing amount of foreign aid funds. In addition, it is too often the case that environmental projects are placed at the bottom of the priority list of initiatives to receive funding. For these reasons it is critical that Congress include a dedicated funding source for the Peru ECA.

HSI and HSUS are hopeful that the ECA will provide a strong basis for ongoing environmental cooperation with Peru and, therefore, strongly urge Congress to ensure that the ECA is adequately funded. While we are aware of the need to be fiscally responsible, environmental cooperation is an area where we can achieve a great deal of good and improve the life and health of people and animals in addition to increasing economic opportunities. HSI and HSUS, therefore, recommend that Congress set aside a specific amount of funding for environmental cooperation with Peru as it did in the case of the DR-CAFTA.

V. Conclusion

HSI and HSUS support the efforts of the United States and Peru in including the effective enforcement, public participation, and biodiversity provisions in the environment chapter of the PTPA. In addition, the Environmental Cooperation Agreement illustrates the strong commitment by both Parties to work together to protect the environment and conserve precious natural resources including biodiversity. For all of these reasons, HSI and HSUS are strongly encouraged that the PTPA will support increased environmental protection in both countries.

Thank you very much for the opportunity to testify before the Committee. We would be happy to answer any questions the Committee may have with regard to our comments.

Respectfully submitted,



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