Congress of the United States
Washington, DC 20515

July 28, 2015

Ambassador Michael Froman
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Dear Ambassador Froman:

We appreciate the hard work that you and your team have invested in advancing America's interests in trade negotiations and your efforts to create the most progressive Trade Promotion Authority (TPA) in history. The passage of TPA, and its content, reflects that hard work.

Now that TPA is law, we want to emphasize what was said at our last meeting with the President: our support for TPA does not translate into automatic support for the Trans Pacific Partnership (TPP).

Congress drafted TPA to provide the American people with an unprecedented opportunity to review the terms of the agreement. As such, it is important that the agreement avoid any lingering questions that would undermine the administration's credibility and public approval.

A key concern is enforcement of our current, pending and future trade agreements.

Strong and enforceable trade obligations are meaningless unless we have adequate capacity to enforce and implement them. That is why we have supported the enactment of the STRONGER Act, which would establish a trade enforcement and capacity building fund, paid for by trade cheaters. This fund would not only support USTRs efforts on enforcement, but implementation assistance carried out by related agencies to enable our trading partners to more fully and rapidly carry out their obligations, from IP to labor to the environment. We understand the process of enforcing treaty obligations is complex, expensive, and time consuming, which makes it essential that we send a clear signal to our trading partners about enforcement now.

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You have heard from several of us that we are deeply troubled by the level of illegal logging that continues in Peru, despite the many tools available in the U.S.-Peru Trade Promotion Agreement to combat this problem. There is evidence that illegally harvested timber continues to leave the country, even finding its way to the U.S. It is essential that the administration take additional steps and fully leverage our bilateral agreement and its Annex on Forest Sector Governance so that the landmark environmental provisions many of us worked so hard to secure have greater impact. One of the many additional steps that could be taken is leveraging the information obtained in Operation Amazonas, a joint effort carried out by INTERPOL, the World Customs Organization, Peru Customs and others, which resulted in the seizure of illegal timber products worth over $20 million.

We urge you to review the enclosed reports from the Environmental Investigation Agency. In sum, they make a compelling case that the Peruvian government and recently passed legislation could be at odds with their environmental commitments under the U.S.-Peru Trade Promotion Agreement, and that there are areas ripe for additional U.S.-led capacity building to bolster existing reforms. We urge greater action by the administration and would welcome a meeting on USTR's enforcement of these commitments and capacity building in their forest management sector.

As we move forward, we urge you to give careful consideration to these issues. High standards require a high level of commitment to enforcement to be truly transformative. We look forward to working with you to ensure the Transpacific Partnership is as strong as possible, which cannot just withstand public scrutiny, but be worthy of widespread support, including ours.

Sincerely,

Earl Blumenauer
Member of Congress

Ron Kind
Member of Congress

Donald S. Beyer, Jr.
Member of Congress

Suzanne Bonamici
Member of Congress

Jim Cooper
Member of Congress

Susan Davis
Member of Congress

Suzan K. DelBene
Member of Congress

Sam Farr
Member of Congress

James A. Himes
Member of Congress

Eddie Bernice Johnson
Member of Congress

Derek Kilmer
Member of Congress

Rick Larsen
Member of Congress

Beto O'Rourke
Member of Congress

Scott H. Peters
Member of Congress

Jared Polis
Member of Congress

Mike Quigley
Member of Congress

Kathleen M. Rice
Member of Congress

Kurt Schrader
Member of Congress

Implementation and Enforcement Failures in the US-Peru Free Trade Agreement (FTA) Allows Illegal Logging Crisis to Continue

June 2015 Briefing Paper

Overview

Illegal logging in Peru and the associated trade remains a serious and unabated problem. In 2007, in response to the crisis of illegal logging in Peru, the US and Peru agreed to include an Annex on Forest Sector Governance in the U.S.-Peru FTA[1] that lays out a suite of binding obligations on both parties to improve forest governance. While the U.S.-Peru FTA included laudable and innovative new provisions to address environmental impacts in trade agreements, the complete failure to enforce these obligations fundamentally undermines the effectiveness of these measures. Estimates have put illegal logging at 80% of all production[2] in Peru; by many accounts, permits and papers are to date still frequently falsified.[3]

Key Findings:

- Enforcement of the commitments under the U.S.-Peru FTA has not happened and is not currently happening. The volume and frequency with which illegalities occur across the supply chain remains staggering, and yet delays and inaction allow these illegal operators to continue their activities with near impunity.

- OSINFOR[4] has made meaningful progress in addressing forest governance challenges, but the failure of the Peruvian government and USTR to support these nascent reforms by implementing and enforcing the obligations under the FTA is undermining the transformation so greatly needed in Peru.

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[1] This trade agreement is officially called the U.S.-Peru Trade Promotion Agreement (TPA) though is referred to in this briefing paper as the FTA.

[2] World Bank. 2012. Justice for Forests: Improving Criminal Justice Efforts to Combat Illegal Logging.

[3] Acosta, C. 27 February 2015. "Relatos Salvajes." *Revista Poder.* https://revistapoder.lamula.pe/2015/02/27/relatos-salvajes/poder/

[4] OSINFOR (*Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre)* is the Agency for Supervision of Forest Resources and Wildlife

- While there are some positive efforts underway to improve the legal operations of the timber sector in Peru, without political will and essential resources dedicated to enforcement, any improvements to the system will remain largely unimplemented and their impacts will be marginal at best.

Critical Enforcement Gap

Illegal logging is a serious crime that has devastating social and economic impacts. Both Peru and the United States have recognized the severity of this ongoing crisis by enacting criminal penalties for illegal logging and its associated trade. The United States as a consumer of these illicit goods bears a particular responsibility to act. However, actors throughout the supply chain, both in Peru and in the United States, continue to perpetuate this black market trade with impunity. According to publicly available data, no one, in either Peru or the US, has been held accountable for well-documented illegalities. From harvest in the concessions to import into the US, there remains a critical enforcement gap.

In April 2012, EIA issued a report, "The Laundering Machine," detailing a multi-year investigation into illegalities in the Peruvian forest sector. In conjunction with the release of the report, EIA and the Center for International Environmental Law (CIEL) also petitioned USTR to employ the innovative enforcement mechanisms created under the U.Sl- Peru FTA Forest Annex to ensure the requirements of the agreement were being upheld and those involved in illegal logging were held accountable.

Specifically, EIA requested USTR to audit concessions and verify shipments from exporters that were documented in the report for various illegalities. EIA limited the scope of its petition to a sub-set of the concessions (29) and shipments (77) identified in the report as the most egregious among a myriad of significant violations. EIA focused its evidence on illegalities related to the harvest and trade of CITES-listed species, as those are the only ones that are required to present detailed documentation about species and point of harvest, but noted that these were merely examples of much broader corruption and systemic illegal logging that was more difficult to document in non-CITES listed species due to the lack of documentation requirements.

USTR declined to pursue the innovative enforcement mechanisms created in the U.S.-Peru FTA to address the illegal logging crisis in Peru. Upon detailed review of the petition, USTR reported that 22 of the 29 concessions had been suspended or cancelled, and the remaining seven were under active investigation or renewed supervision by OSINFOR or had been investigated and penalized.[5] Instead of using the enforcement mechanisms, they jointly agreed with Peru to a five-point action plan that served to merely further detail the necessary steps to fulfill key requirements that were already contained the Annex on Forest Sector Governance.

[5] USTR's December 6, 2012 response letter to EIA's petition

Since this determination in December 2012, 18 of these 29 concessions that were listed as suspended or cancelled have been under appeal (see annex). This means that they could well have continued operating, even with all the demonstrated illegalities, until their appeal is heard. The body to which the concessionaires appealed, the OSINFOR Tribunal, which USTR told EIA in December 2012 had been established and was close to being composed, has instead been delayed for the past 2.5 years, and has just now begun recruiting the personnel needed to operate. As a result, the appeals have not been heard and many of those concessions may well not have stopped operations.

Neither have any exporters or importers been held accountable for perpetuating this multi-million dollar trade. In its 2012 petition, EIA and CIEL called for USTR, under section 7 of the Forestry Annex, to request that Peru verify all new export shipments from Maderera Bozovich SAC and Maderera Vulcano SAC because of their well documented history of exporting significant volumes of illegal timber to the United States. EIA identified at least 77 shipments arriving to the U.S. between January 2009 and June 2010 that (a) contained timber of either Spanish cedar (*Cedrela odorata*) or Big-leaf Mahogany (*Swietenia macrophylla*) – both CITES-listed species in Peru – directly linked to documents containing fabricated information in concession annual operating plans (POAs), and (b) were exported by Maderera Bozovich SAC or Maderera Vulcano SAC and/or originated in a concession then under temporary suspension. Despite the well-documented evidence of illegality, based on official Peruvian government data, USTR declined to request that these shipments be verified, meaning that there was in fact not even a formal US government evaluation of importers clearly linked to illegal timber trade at the time of the petition. Failures to address well documented instances of illegal timber coming into the US marketplace puts US consumers at risk of unwittingly financing this devastating black market trade and its related human rights violations.

Since the petition in 2012, both Maderera Bozovich SAC and Maderera Vulcano SAC have continued to export large volumes of high value cedar species into the US. Despite a small drop off in 2012, exports of cedar species have continued to date. According to US import data, between 2013 and the first quarter of 2015, Maderera Bozovich exported a minimum of 33 shipments containing cedar or mahogany species.[6] In 2014 and the first quarter of 2015, Maderera Vulcano exported a minimum of 34 shipments of Peruvian timber.

[6] These figures include both *cedrela odorata* which is listed on CITES and other *cedrela* species, namely *cedrela montana*, which are not listed on CITES despite being equally threatened and indistinguishable from CITES listed *cedrela species.* While different species of cedar (*Cedrela*) have been identified in the Peruvian forests, only one (*Cedrela odorata*) requires a CITES permit. According to a 2008 academic study (Evaluación de Existencias Comerciales de Cedro (Cedrela spp.) en el Perú", conducted by the Forestry School of the UNALM and financed by ITTO), Cedrela odorata is the most abundant followed by Cedrela fissili, while Cedrela montana is scarce. It is not possible to differentiate among the different cedars in the form of logs and sawnwood just by visual inspection. It is possible the exporters could be misdeclaring the type of cedar to avoid CITES permitting requirements, therefore all cedar species should be subject to extra scrutiny.

Not only has no one been held accountable for past violations, but the U.S. is turning a blind eye to ongoing trade in timber that should be considered at high risk of illegality given uncontroverted documentation that past shipments from these companies contained illegally logged timber. The U.S. should be prioritizing its enforcement resources to ensure that high risk shipments from Peru are closely scrutinized to ensure that the timber being imported has been legally harvested and exported.

The accountability gap remains equally acute in Peru. According to publicly available information, there have been no investigations, much less prosecutions, of those engaged in the illegal timber trade. These actors not only have evaded criminal penalties for their actions but they also reap the massive proceeds of the trade. For example, a large volume of illegal timber, enough to fill six Olympic-size swimming pools, was recently seized in an Interpol supported mission, conducted by SUNAT, the Peruvian tax and custom authorities. However, unofficial reports suggest this valuable timber was returned by the Forest Authorities to the very timber companies from which it was taken. Nor have concessionaires or exporters been forced to comply with OSINFOR's sanctions. The fines it levies on illegal operators remains theoretical, with cases tied up in appeals to the aforementioned nonexistent Tribunal. Of the 21.5 million Peruvian soles (US$6.8 million) owed, OSINFOR has received less than 5%.[7]

Forest engineers in Peru play a particularly important role in the systemic fraud that pervades the Peruvian forest sector. The Forest Authority (SERFOR) maintains a list of 309 officially recognized forest engineers who are the only ones authorized to generate the inventories of forest resources available for harvest in timber concessions. These forest inventories are submitted by the concession holders as part of their annual operating plans (POAs), and must be approved by the relevant forest authorities. As of December 2014, nearly half of all of the forest engineers in the official registry, 153 out of around 300, responsible for some 1,146 false annual operating plans, have been found to have falsified forest inventories to facilitate laundering of timber.

After multiple requests by officials and stakeholders, only three of these 153 forest engineers have been sanctioned in any way. Together, these three were responsible for 189 false forest inventories in which well over 65% of the approved volumes for extraction were fabricated. These inflated volumes (meaning they referred to trees that did not exist on the concession) allowed for the creation of official papers that could then be used to launder timber from elsewhere. The total volume of timber in the false inventories signed just by this three forest engineers measured approximately 500,000 cubic meters, with a value of over $60 million dollars. After years of delay, the collective fines they received for enabling this illegal activity amounted to less than $3,000 (see chart on next page). This is functionally a parking

[7] Acosta 2015.

ticket for what amounts to egregious and ongoing fraud, worth millions of dollars. To date, they have not been removed from the official list of approved forest engineers and are still authorized to carry out forest inventories.

Forest Engineer	Number of POAs with at least 50% non-existent trees	Volume approved (m3)	Volume approved (board ft)	Value in soles (1.8 sole/brd ft)	Value in US$	Number of sanctions	Total fine (US$)	Percentage of fine to laundered timber value (%)
#1	126	211,808	46,597,789	83,876,019	26,627,308	3	1,528	0.57
#2	35	187,188	41,181,457	74,126,622	23,532,261	2	917	0.39
#3	28	101,209	22,265,940	40,078,693	12,723,395	1	306	0.24

Sources: SERFOR, Ucayali Regional Government, OSINFOR

OSINFOR: It's Successes and Current Limitations

In the midst of a forest sector still riddled with falsification, laundering, corruption, and violence against forest defenders, Peru has established a legitimately independent agency that not only effectively monitors and attempts to sanction illegal logging but is making its information public for companies, government officials and communities to access: OSINFOR, the Agency for Supervision of Forest Resources and Wildlife (*Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre).*

- The concept of an independent oversight body was embedded in Peruvian law in 2000 but put into action by legislative measures passed in 2009 to comply with the U.S.-Peru FTA Annex on Forest Sector Governance.
- Since 2009, OSINFOR has conducted 3,498 field supervision visits, covering an area of 42,471 square miles and verifying the presence or absence of 321,019 trees. 72% of these supervisions have produced evidence of false information or illegal activity meriting a sanction or cancelation of the logging permit.
- OSINFOR has launched two online databases, SISFOR and SIGO, to provide detailed, geo-referenced information to the public and enforcement agencies regarding the legal status of over 3,700 supervised logging operations in Peru.

Since 2009, OSINFOR has issued some 2,290 final Resolutions indicating an infraction serious enough to assign penalties – 65% of all supervisions it has initiated. However, Final Resolutions may be, and typically are, appealed to a secondary body called the Forestry Tribunal. We understand that OSINFOR has

determined that logging should not be carried out while the case is under appeal, though it is not clear if regional authorities are upholding this interpretation.

This Tribunal was defined by Supreme Decree 1085 in 2008, the same one that created today's OSINFOR. The decree mandates the creation of a secondary body to review and make final decisions regarding appeals by concessionaires or permit holders. However, seven years later, this secondary body – called the Forestry Tribunal – has still not been established. A combination of political resistance and difficult requirements for the three posts in the Tribunal has impeded its formation. As this brief was being written, modified requirements had finally been approved and a new call for candidates was being made. Without the existence of the Tribunal, arguably no one has been held to proper account for illegal activities documented by OSINFOR's fieldwork. This institutional vacuum has hobbled efforts to hold most illegal operators to account.

Over the past few years, OSINFOR has been notably proactive in providing information to other agencies in order to facilitate actions that it alone cannot take. For example, OSINFOR has sent dozens of formal communications to SERFOR[8]and other institutions, such as the Colegio de Ingenieros, which is the professional body that can sanction and revoke professional operating licenses, including lists of private forestry engineers who have signed off on demonstrably falsified documents, as described above, and requested that these individuals be removed from approved lists and sanctioned in some form. Although such action appears as a high priority in the Forest Annex and again in the January 2013 Joint Action Plan under the US-Peru FTA as noted above, none of these individuals have been removed from the approved list or seriously sanctioned.

Operation Amazonas: new official evidence that illegal logging is systemic across all species

OSINFOR has also invested considerable effort in building alliances with Peruvian law enforcement bodies to improve their knowledge of and investigations into the mechanisms of fraud, laundering and illegality in the forest sector. The most visibly successful result of this coordination was 2014's "Operation Amazonas", a three-month operation led by SUNAT (Superintendencia Nacional de Aduanas y de Administración Tributaria), the Peruvian Tax and Customs authority, with cooperation from the World Customs Organization and INTERPOL. The Operation resulted in the seizure of some 6 million board feet of timber worth $120 million or more. According to public information, no one has been prosecuted in connection to the seized timber.

At the core of Operation Amazonas was a 'simple' data analysis: cross-referencing OSINFOR's first-hand data from forest inspections with SUNAT's transport and

[8] El Servicio Nacional Forestal y de Fauna Silvestre (SERFOR, for its acronym in Spanish) is the Peruvian National Forest and Wildlife Service.

export data. For the first time, SUNAT requested exporters to provide information about the source concession of any and all wood (not only mahogany and cedar, for which CITES permits require this information). Peruvian regulations do not currently require the presentation at export of transport documents for non-CITES timber species. This means that for the non-CITES timber species, the exporter does not have to declare the concession of origin, which makes it nearly impossible for the Peruvian government to monitor or verify the legality of these products. The exporter does not even have to declare the scientific name or the common name for the species being traded, regardless of the country of destination. During Operation Amazonas, when exporters were forced to submit to authorities information about the origin of the wood, OSINFOR found evidence of falsified information for at least 68% of the sources provided by exporters.[9] The recently created Office of the High Commissioner to Fight Illegal Logging, as well as the re-activated Multi-Sectoral Commission to Fight Illegal Logging, have reiterated the importance of requiring the inclusion of the timber transport document, which includes reference to the concession of harvest, in the exports documentation for all timber products, regardless of the species or level of transformation of the log to sawnwood or manufactured product.

EIA has continually stated in its 2012 report, petition, and other communications since then that the CITES species it specifically identified as illegal were just the tip of the iceberg and that the illegalities were equally rampant with all commercial species, just much more difficult to definitively track for the reasons outlined above. In fact, the situation of illegal harvest and trade for the rest of the timber species is causing considerably more damage due to the volume involved: over a million cubic meters illegally harvested and traded according to OSINFOR's public data. The decision to focus almost exclusively on the CITES-listed species of cedar and mahogany in response to EIA's 2012 petition significantly diminished the scope of the response needed to address the rampant illegal logging situation in the country.

"Garbage-in, garbage out" Timber Tracking System

The US has profiled the significance of a new timber control system designed to track illegal timber from stump to export, thereby helping to better identify illegal timber exports. This control system, called SNIC for its acronym in Spanish, relies on forest inventories submitted by the owners of the *títulos habilitantes*,[10] which have been widely proven to include false information, such as reporting trees that do not exist within the property boundaries.[11] If the SNIC traceability system relies

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[9] OSINFOR. 2014. "Logros al 2014." Accessed at http://osinfor.gob.pe/portal/logros2014/notalogro.html

[10] *Títulos habilitantes* is the term used to refer to the various modalities for accessing timber, for harvest, for commercial use. This includes concessions on public land, and permits on indigenous land and on private land.

[11] The Laundering Machine provided documentation for plenty of cases, while OSINFOR has continued to provide updated documentation in the same vein. In Operación Amazonas 2014, 68% of the cases showed false information.
http://www.osinfor.gob.pe/portal/data/destacado/adjunto/Presentacion_Plan%20Amazonas%202014-29%20octubre%202014.pdf

on information that reports "fake trees," any additional checkpoints will not be able to detect illegal timber that is being laundered using the volume of those fake trees. The US government has spent considerable sums in supporting the development of a so-called state-of-the-art electronic timber tracking system that attempts to trace logs from stump to port in order to better detect illegal exports. While this system could be immensely valuable in the long term, this entire system is based on fraudulent inventories that are used by concessionaires to launder timber, resulting in a "garbage-in, garbage-out" tracking system. The US government has been repeatedly made aware of these weaknesses and yet the current design of the SNIC fails to address them.

Failure to Audit Timber Concessions

Although it has been part of the U.S.-Peru FTA from the beginning to conduct detailed audits of each concession at least every five years, the Peruvian government only just approved the "Manual de Auditoría Quinquenal a Concesiones Forestales con fines maderables[12]" (the manual to conduct audits of timber concessions every five years) on April 27th, 2015. Because the manual was just recently approved, none of these types of audits have ever been conducted in Peru by any Peruvian Government institutions.

These audits, referred to in Article 351 in Peru's current Forest Law 27308 regulations as "*supervisiones con mérito de auditoria forestal,*" are very different from the supervisions conducted by OSINFOR. While the OSINFOR field visits and supervisory reports focus solely on one of the *título habilitante's* Annual Operating Plans (known by the Spanish acronym POA), the *auditorías quinquenales* incorporate several additional components for a broader analysis, such as comparative analysis of many annual harvest plans within a concession (rather than just one), a financial audit of the *título habilitante,* an analysis of a concessions investments, a review of the efficiency of its activities, an evaluation of the relevant environmental risks and impacts, etc. These types of audits would provide a more full picture of how concessions are being operated that would complement the information contained in OSINFOR's post harvest field verifications, but they still have yet to be implemented.

Conclusion

The Peruvian and US governments must significantly improve enforcement and actually stop illegal loggers and the related trade from operating with impunity. We have yet to see various commitments and programs of work lead to tangible enforcement results on the ground. The US government also bears a unique responsibility to act. In the past, well-documented instances of illegal timber shipments entering the US market have been provided to USTR. Despite the efforts

[12] To see the Resolución Presidencial 055-2015-OSINFOR that approves the manual and the manual itself, visit: http://www.osinfor.gob.pe/portal/data/recurso/archivos/rp-055-2015-OSINFOR.pdf)

of a few courageous forest officials in Peru, illegal logging remains the status quo in Peru. The efforts of Peruvian officials to clamp down on this illicit trade are unlikely to be successful, if the international marketplace continues to traffic in stolen, illegal wood.

ANNEX: The situation of the 29 concessions included in the Petition to USTR

						USTR response to EIA (December 2012)	
	Concession	Contract Number	OSINFOR's sanction	Under appeal in OSINFOR	At the judiciary	Status at time of petition	Status at time of response to petition
1	Agroindustrial Victoria S.A.C.	17-TAH/C-J-038-02	Archivar I.S.			In operation	In operation/OSINFOR supervision conducted and report pending
2	Agrupación Maderera Anidolly S.A.C.	16-IQU/C-J-226-04	Caducado y multado	1		Suspended	Suspended/results of PAU pending
3	Artemio Becerril Navarro	16-REQ/C-J-021-04	Caducado y multado			Suspended	Suspended/OSINFOR supervision scheduled
4	Aserradero y Carpinteria Don Pepe E.I.R.L.	16-IQU/C-J-030-04	Caducado y multado	1		In operation	Cancelled
5	Eliecio Pereyra Pereyra	25-PUC/C-J-030-03	Caducado y multado			Suspended	Cancelled
6	Empresa Forestal San Juan Bosco S.A.C.	16-IQU/C-J-098-04	Caducado y multado	1		Suspended	Cancelled
7	Forestal El Mana S.A.C.	16-IQU/C-J-194-04	Caducado y multado	1		Suspended	Cancelled
8	Forestal San Pedro de Chambirllo S.A.C.	16-IQU/C-J-225-04	Caducado y multado	1		Suspended	Cancelled
9	Forestal Valera S.A.C.	16-IQU/C-J-090-04	Caducado y multado	1		Suspended	Cancelled
10	Gérman Gómez Vásquez	25-PUC/C-J-004-03	En PAU; Exp. Adm. Judicializado	1	1	Suspended	In operation/court review of OSINFOR decision to initiate PAU and suspend concession pending; court enjoined suspension pending review
11	Hector Murayari Macaya	16-IQU/C-J-022-04	Caducado y multado	1		Suspended	Cancelled
12	Hugo Atilio Sánchez Zegarra	16-IQU/C-J-044-04	Caducado y multado			Suspended	Cancelled
13	Ilter Villacorta Grandez	16-IQU/C-J-089-04	Caducado y multado			In operation	Cancelled
14	Inversiones la Oroza S.R.L.	16-IQU/C-J-050-04	Sancionado	1		In operation	In operation/preliminary investigation underway
15	Jaime Perez Garcia	16-IQU/C-J-047-04	Caducado y multado	1		Suspended	Cancelled
16	Jesús Dionisio Villagaray Gutiérrez	17-TAM/C-J-024-03	Caducado y multado	1		Suspended	Cancelled
17	Jose Zumaeta Ramirez	16-IQU/C-J-072-04	Sancionado	1		In operation	Suspended/results of PAU pending
18	Juan Teobaldo Becerril Navarro	16-REQ/C-J-019-04	Caducado y multado			In operation	Suspended/results of PAU pending

19	Lombardo Villacorta Perez	16-IQU/C-J-204-04	Caducado y multado	1		In operation	Suspended/results of PAU pending
20	Maderera Kalinowski E.I.R.L.	17-TAM/C-J-022-03	Caducado y multado	1		Suspended	Cancelled
21	Maderera Boleo - Madebol	17-TAM/C-J-002-02	Caducado y multado	1		In operation	Cancelled
22	Maderera La Foresta S.R.L.	16-IQU/C-J-007-04	Sancionado			Suspended	In operation, fined
23	Manuel Gatica Grandez	16-IQU/C-J-046-04	Archivar PAU			Suspended	In operation/OSINFOR supervision scheduled
24	María Del Carmen Pariona Coz	25-ATA/C-J-046-03	Caducado y multado	1	1	Suspended	Cancelled
25	Marlon Ibarra Riveiro	16-REQ/C-J-138-04	Sancionado			In operation	In operation/results of PAU pending
26	Operaciones y Exportaciones Amazonicas S.A.C. (OPEXA)	16-REQ/C-J-039-04	Caducado y multado			In operation	In operation/preliminary investigation underway
27	Oroza Wood S.A.C.	16-IQU/C-J-228-04	Caducado y multado			Suspended	Cancelled
28	Productores Forestales Uranias S.A.C.	16-IQU/C-J-192-04	Caducado y multado	1		Suspended	Cancelled
29	Productos Forestales Atacuari S.A.C.	16-IQU/C-J-207-04	Caducado y multado	1		Suspended	Cancelled
			Total	**18**	**2**		

Sources: USTR, OSINFOR

Glossary for chart:

Archivar I.S.: after reviewing the supervisory report, OSINFOR finds that there is no evidence of infractions that could merit starting a PAU.

Caducado y multado: the level of violation of the law and the *título habilitante* conditions endangers the forest resources and therefore the *título habilitante* is cancelled.

En PAU: when the *título habilitante* is still undergoing OSINFOR's administrative investigative process called PAU.

Exp. Adm. Judicializado: when the holder of the *título habilitante* with a PAU (in process or concluded) starts a precautionary measure at the judiciary.

Sancionado: when the holder of a *título habilitante* is sanctioned, after the infractions to the forest and wildlife law have been verified. It can be a fine and/or complementary sanctions.

Archivar PAU: when the initial indications about an infraction to the forest and wildlife law that started a PAU, are found to be inconsistent.

Peru's 2014 Law 30230 Promoting Investment Violates the U.S.-Peru Trade Promotion Agreement

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I. Introduction

The United States-Peru Trade Promotion Agreement (hereinafter, "U.S.-Peru TPA" or "TPA") contains a robust Environmental Chapter, the obligations of which are enforceable under the general dispute settlement process. Among the innovative provisions in this Chapter designed to protect the environment is an article that prohibits either of the parties from weakening their environmental laws so as to encourage investment. Articles in Peru's Law 30230 affecting the environment present precisely the rollbacks the TPA provisions were intended to prevent.

That the Peruvian Government would undermine the TPA's environmental provisions through passage of Law 30230 on July 11, 2014 demands action by the United States Trade Representative (USTR) to ensure these provisions, which were so critical to the passage of the TPA, are upheld and enforced.

The Environmental Provisions as Fundamental to the ratification of the U.S.-Peru TPA

In the negotiations and political discussions leading up to the May 10, 2007 bipartisan agreement on the U.S.-Peru TPA, one of the key concerns of the U.S. Congress and public was the need for U.S. trade agreements to include environmental standards with the same enforcement as that for commercial provisions. As a result, the negotiations of the May 10, 2007 agreement created strong environmental provisions in the TPA.

Among these is Article 18.3.2, which forbids countries from waiving environmental laws in order to attract trade and investment and subjects those commitments to the formal dispute settlement mechanism. Specifically, this article states that a rollback of environmental laws with the aim of promoting investment is "inappropriate" and shall not occur.[1] Peru's new Law 30230, titled "Law Establishing Tax Measures, Simplifying Procedures and Permits for the Promotion and Enhancement of Investment in the Country" (Ley que Establece Medidas Tributarias, Simplificación de Procedimientos y Permisos para la Promoción y Dinamización de la Inversión en el País)[2] hereinafter "Peru's Law Promoting Investment" or "Law 30230," however, does just that.

U.S. support in developing strong Peruvian environmental institutions

[1] The relevant provision of the TPA lies within Article 18.3.2 of the Environment Chapter and states:

> *The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties*.

[2] Ley que Establece Medidas Tributarias, Simplificación de Procedimientos y Permisos para la Promoción y Dinamización de la Inversión en el País), Ley N° 30230, July 11, 2014, http://dataonline.gacetajuridica.com.pe/ZonaAdm-Contadores/Suscriptor/Mod_NormasLegales_CyE/Mod_normaslegales/normas/14072014/Ley-30230.pdf [hereinafter Ley N° 30230].

Since the passage of the TPA, the United States has provided substantial financial and technical support to aid Peru in developing strong environmental institutions and legislation.[3] Given the structural and historical challenges to Peru's environmental institutions subject to influence by strong mining, oil, and other economic interests, the 2008 creation of the Ministry of the Environment (MINAM) was a deliberate effort to ensure Peru would have an institution armed with the tools and power necessary to create and enforce effective environmental legislation in Peru. Law 30230 diminishes the tools and power given to MINAM in order to attract investment. In this way Law 30230 not only directly violates Peru's obligation not to roll back its environmental laws in order to attract investment, it also undermines efforts of both the Peruvian and United States governments to ensure the effectiveness of Peruvian environmental institutions and laws.

USTR must immediately initiate formal consultations with the Peruvian Government

The environmental provisions of the U.S.-Peru TPA can and should be enforced in the same manner that commercial provisions of the TPA are enforced. Therefore, USTR must initiate formal consultations with the Peruvian Government immediately to enforce the U.S.-Peru TPA. As the U.S. government negotiates and hopes to obtain approval from Congress for the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership, enforcing environmental provisions in existing trade agreements is critical to upholding commitments made to Congress and U.S. trading partners.

As provided for in the Chapters on Environment and Dispute Settlement, a Party has a number of options for recourse in the event of a violation of the Agreement by the other party. USTR should first initiate consultations with Peru on Law 30230 under the TPA's Environment Chapter, and, barring resolution under Article 18.12 consultation and optional consideration by the Council, proceed to Article 21 Consultations, Arbitration, and Suspension of trade as appropriate.

USTR cannot delay taking such action. The obligation in Article 18.3.2 is critical, not only to provide recourse when a country weakens environmental policies in order to attract trade and investment, but also to *deter* countries from doing so in the first place. By not taking swift action, Peruvian government will continue to weaken environmental legislation in violation of its TPA obligations, and without being held accountable. In fact, further efforts to weaken Peruvian environmental legislation are already in motion; shortly after the passage of Law 30230 the Peruvian Congress began debating Draft Law 3941, or the "Fourth Paquetazo," which has just been passed by the Peruvian Congress as Law 30327 and seeks to consolidate the process of

[3] In 2013, the United States Trade Representative reported that at least $60 million has been channeled through USAID since 2009 to carry out the Environmental Cooperation Agreement (ECA), a secondary agreement made under the auspices of the US-Peru TPA. UNITED STATES TRADE REPRESENTATIVE, *United States – Peru Trade Promotion Agreement: Strengthening Forest Sector Governance in Peru* at 2, https://ustr.gov/sites/default/files/2013-Progress-under-the-Forest-Annex.pdf (2013) [hereinafter USTR, Strengthening Governance] ("Through these programs, which include technical assistance from a range of U.S. Government agencies such as the Department of Justice and Environmental Protection Agency, significant progress in forestry governance and protection has been made.").

environmental analysis of development projects in several ways.[4] Peruvian organizations fear that Law 30327 could weaken Peru's environmental institutions further by limiting the amount of time that agencies have to review Environmental Impact Assessments (EIAs), taking away several requirements for EIAs to prevent environmental harm and loosening the requirement to consult with local communities in requesting concessions.[5]

Thus, if Law 30230 and subsequent legislation any indication of the future, USTR must act now to stop Peru from further violations of its obligations under Article 18.3.2 of the U.S.-Peru TPA.

II. The articles of Law 30230 weaken Peru's environmental institutions and reduce environmental protection

Peru's Law Promoting Investment weakens Peru's environmental laws and institutions by diminishing key environmental checks on projects that impact the environment, transferring several key powers of Peru's Ministry of the Environment (MINAM) to other government entities, and taking away key tools for enforcing environmental policies.

Thus, Peru's new Law 30230 definitively weakens and reduces "the protections afforded in [Peru's] environmental laws," in provisions outlined in its Articles 19 through 23. The Law's new provisions and its modification of prior law debilitate Peru's environmental norms in the following three ways: Article 21 diminishes key environmental checks on projects that impact the environment; Articles 20, 22, and 23 strip MINAM of its authority to promulgate environmental measures; and Articles 12 and 19 limit OEFA's ability to enforce environmental regulations by taking away key resources and tools used by the agency.

1) Article 21: Harsh deadlines for EIA technical opinions weaken environmental oversight of projects that impact the environment

Article 21 of Law 30230 is a significant departure from the previous environmental impact assessment process, in that it drastically diminishes the input that environmental agencies can have in commenting on Environmental Impact Assessments (EIAs) submitted by companies.

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[4] Comision de Pueblos Andinos, Amazonicos y Afroperuanos, Ambiente y Ecologia, *Predictamen recaido en el proyecto de Ley 3941/2014-PE, que propone Ley de promoción de las inversiones para el crecimiento económico y desarrollo sostenible en las zonas de mayor exclusión social*, Lima, March 2015; DAR, *Opinion al Texto Sustitorio del Proyecto de Ley 394/2014-PE "Ley de promocion de las inversions para el crecimiento economico y desarollo sostenible en las zonas de exclusion social*", March 2015.

[5] Comision de Pueblos Andinos, Amazonicos y Afroperuanos, Ambiente y Ecologia, *Predictamen recaido en el proyecto de Ley 3941/2014-PE, que propone Ley de promoción de las inversiones para el crecimiento económico y desarrollo sostenible en las zonas de mayor exclusión social*, Lima, March 2015; DAR, *Opinion al Texto Sustitorio del Proyecto de Ley 394/2014-PE "Ley de promocion de las inversions para el crecimiento economico y desarollo sostenible en las zonas de exclusion social*", March 2015. See also Derecho, Ambiente y Recursos Naturales, Opinion al Texto Sustitorio del Proyecto de Ley 3941/2014-PE "Ley de Promocion de las inversiones para el crecimiento económico y desarrollo sostenible en las zonas de exclusión social," Marzo 2015.

Under Peruvian law, EIAs serve the purpose of mitigating environmental risks from projects, and approval of a project's EIA is a crucial step towards approval of the project's Environmental Certificate, and consequently of the project itself. Law 30230 harms the environmental protection purpose of the EIA process by setting a strict deadline for agencies to submit their technical opinions with no flexibility for particularly complicated projects, harshly sanctioning officials who do not comply with those deadlines, and permitting projects to proceed in the approval process without considering concerns raised in non-binding technical opinions.[6] While these changes may create more consistency and predictability in the process of approving projects, they also undeniably limit agencies' capacity to prevent environmental harm by evaluating projects' Environmental Impact Assessments. Given the current dearth of resources allotted to these agencies for emitting technical opinions and new constraints imposed by Law 30230, such deadlines will be difficult to meet without additional resources and capacity being dedicated to this important task. Due to the decrease in environmental oversight of EIAs, Article 21 of Law 30230 violates Peru's obligations under its TPA with the United States.

A company or entity seeking approval of a public or private investment project that "implicates activities, construction, or projects that could cause negative environmental impacts" must submit an EIA in order to obtain an Environmental Certificate from the ministry that has jurisdiction over the sector under which its activities fall, or in some cases the relevant regional government, before the project can proceed.[7] The ministry or regional government to which these EIAs are submitted ("the certifying authority") must review the company's EIA and solicit the opinion of other "relevant" public authorities.[8] For Detailed EIAs (those concerning projects that could have "significant" environmental impacts), the certifying authority must solicit opinions from all of the sectors, regions, and localities implicated by the project.[9] For Semi-Detailed EIAs, Peruvian legislation lists several agencies from which the certifying authority must solicit technical opinions if the project falls within their jurisdiction, but otherwise the certifying ministry may choose who it consults.[10] The only "binding" technical opinions from agencies in MINAM are those emitted by SERNANP (the national park service) if the project directly impacts the issues under its jurisdiction;[11] the other opinions requested of MINAM agencies by the certifying authority are not binding in nature. After these opinions are submitted, the company

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[6] The potential shortening of time for other ministries to provide opinions on EIAs is worrisome to groups like the Land and Rights Observatory, which is concerned that these EIAs are already weak instruments and do not adequately take into account all environmental and social impacts of projects. El Observatorio Tierra y Derechos, Preocupan Medidas Para Agilizar Inversiones en el Peru, http://www.observatoriotierras.info/taxonomy/term/114?page=8 ; http://gestion.pe/economia/snmpe-teme-que-cuarto-paquete-retrase-aprobacion-eia-lugar-agilizarlos-2114381; RTM, Proyectos Mineros detenidos en Peru involucran US$ 25 mil millones , 12 October 2014,http://www.revistatecnicosmineros.com/noticias/proyectos-mineros-detenidos-en-peru-involucran-us-25-mil-millones

[7] Ley de SEIA, April 2001, art. 3. Under the Law on the National System for Environmental Impact Assessment (hereinafter, "The EIA System Law"), these projects are classified into three different categories based on their potential environmental effects: Category I: no significant environmental effects, only a Declaration of Environmental Impact is required. Category II: "moderate" environmental effects, a "Semi-Detailed" Environmental Impact Assessment (EIA) must be submitted to the ministry or regional government. Category III: "significant" environmental effects, a "Detailed" EIA is required. Ley de SEIA, April 2001, art. 4; Decreto Supremo 019-2009-MINAM: Reglamento de Ley SEIA (hereinafter "Reglamento de Ley SEIA"), Art 52, Sept 2009.

[8] Ley de SEIA, April 2001, Art 11.1, http://www.minam.gob.pe/wp-content/uploads/2013/10/Ley-y-reglamento-del-SEIA1.pdf

[9] SEIA law, Art. 11.2, April 2001.

[10] The certifying authority is obligated to solicit the technical opinion of several agencies, including the national agency for natural protected areas (SERNANP), the national water authority (ANA), the Vice Minister who handles indigenous and multicultural issues, among other authorities, if the project implicates issues under any of their respective jurisdictions. Reglamento de Ley SEIA, Sept 2009, art 53

[11] Reglamento de Ley SEIA, art 53, Sept 2009. The other agencies that emit binding opinions are SERFOR from MINAGRI on forestry issues, DIGESA from the Ministerio de Salud on topics related to solid waste, and the Viceministerio de Interculturalidad within the Ministerio de Cultura.

is given the opportunity to modify its initial EIA, and the consulted ministries have the chance to reply with their final opinions about the modified EIA. The certifying body subsequently publishes its final decision granting the Environmental Certification,[12] a key requirement for approving a project under Peruvian law.

Law 30230 does not allow for any flexibility in the deadline for submitting technical opinions on all EIAs and makes the time period for emitting these opinions 45 days "total."[13] Under previous regulations, agencies had a total of 30 days to submit technical opinions for Semi-Detailed EIAs, and 40 days for Detailed EIAs.[14] However, the competent authority could extend the time periods for Semi-Detailed and Detailed EIAs once for up to 30 business days based on technical information from the company if agencies needed more time for evaluation.[15] In contrast, the new law does not set out any possibility of allowing more days depending on the complexity of the project or the number of revisions that need to be made to the submitted EIAs, and does not establish additional time for ministries or agencies to reply to the company's revisions of its EIAs.

Second, Article 21 of Law 30230 sets forth that officials who do not submit their technical opinions within 45 days will be guilty of a "serious infraction" and subject to a personal administrative sanction. Previously, the authority overseeing administrative affairs within each ministry had discretion to determine how serious the infraction was,[16] the personal benefit incurred, as well as other considerations and weigh these factors to determine the type of administrative penalty to be applied.[17] The new law takes away the administrative authority's discretion in determining whether a violation of the 45-day deadline is minor or serious; now, exceeding the deadline by two days may be just as heavily sanctioned as exceeding it by two weeks. This provision creates strong perverse incentives for officials to sacrifice thorough analysis in order to avoid administrative sanctions.

Third, certifying authorities can now approve a project without considering nonbinding technical opinions from agencies if those opinions are not submitted within the 45-day window. Whereas previously the EIA could only be approved after all of these procedures for review of the EIA had terminated,[18] the new law allows the approval process for projects to proceed before

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[12] MINAM's role in the process is fairly limited. It is in charge of promulgating regulations about the national EIA system, and regulates the system of approving detailed EIAs through its agency SENACE. Decreto Legislativo 1078: Modificacion de la Ley de SEIA (hereinafter, "Modificacion de Ley SEIA"), June 2008, Art 17. In December 2012, a new agency was established within MINAM to coordinate the Environmental Certification procedures for projects requiring Detailed EIAs. This new agency is called the National Environmental Certification Service for Sustainable Investment (SENACE). More information about SENACE and its impact on the environmental certification process for these types of projects can be this law firm's website: http://www.munizlaw.com/productos/Lex-Data/Derecho-Ambiental/2012/der-ambiental-9-2012.htm

[13] Ley N° 30230, art. 21.1.

[14] Reglamento de Ley SEIA, Art 52, Sept 2009

[15] Reglamento de Ley SEIA, Art 52, Sept 2009

[16] According to the procedures of sanctions on public officials established by the regulations under Legislative Decree 276, the gravity of a public servant's actions is considered in determining the sanction applied to them for their action. Decreto Supremo No. 005-90-PCM, Reglamento de la Ley de Bases de la Carrera Administrative (Decreto Legislativo No. 276), art. 154. http://www.unmsm.edu.pe/ogp/ARCHIVOS/DS_N_005-90-PCM.htm#cap12 , also see El Servivio Civil Peruano, Capitulo 2: Los Regimenes Laborales en el Peru, p. 35-37. http://files.servir.gob.pe/WWW/files/biblioteca/SERVIR%20-%20El%20servicio%20civil%20peruano%20-%20Cap2.PDF

[17] Administrative sanctions under Article 239 of Supreme Decree No. 27444: Decreto Supremo 27444, art 239 http://www.defensaidl.org.pe/leg_peru/general/45.pdf

[18] Decreto Legislativo 1078, modifying Ley de SEIA, June 2008

non-binding technical opinions have been emitted, if they are not submitted within the 45 day time period. Despite their nonbinding nature, these opinions are vital to addressing the environmental and social risks of projects. Thus the new law undeniably restricts the amount of input that other governmental authorities can have on preventing harm to the Peruvian environment.

Article 21 thus restricts flexibility in time periods for analyzing EIAs by all entities other than the certifying ministry, creates perverse incentives to speed up this analysis, and decreases input from environmental agencies in this process. To make matters worse, these agencies already lack adequate personnel to analyze EIAs in such a short time period. For example, in 2014 the National Office on Agrarian Environmental Issues (Dirección General de Asuntos Ambientales Agrarios - DGAAA) within MINAGRI had only fourteen professionals whose roles included reviewing EIAs under DGAAA's jurisdiction, which includes all projects in the agrarian sector on the national level.[19] Furthermore, analysis of EIAs is no small feat, given the length and complex nature of EIAs' content and the large number of revisions that must be requested given the poor quality of many EIAs. Without a substantial increase in resources and personnel dedicated to analyzing EIAs, such harsh deadlines will lead to reduced environmental protection, thereby violating Peru's obligations under the U.S.-Peru TPA.

2) Articles 20, 22, and 23: Reducing MINAM's authority

Law 30230 substantially reduces the Ministry of the Environment's authority in three areas: establishing Reserved Zones for future consideration as protected areas, setting Environmental Quality Standards and Maximum Permissible Limits, and determining national Land Zoning policy.

In all three of these instances MINAM's independence and decision-making authority is undermined by shifting approval of actions to affected ministries or the full Council of Ministers. When the Council of Ministers emits resolutions through unanimous vote, one dissenting agency can veto a resolution. As discussed above, the history of strong economic and extractive industry interests in the country make it likely that the other Ministries will be able to block MINAM's proposals in the Council of Ministers, thereby returning Peru to its pre-TPA condition of weak environmental institutions for the sake of promoting investment.

Article 20: Establishment of Reserved Zones

Article 20 of Law 30230 rescinded MINAM's power to establish Reserved Zones—the first step for consideration of whether an area should be protected. "Reserved Zones" are zones in which the conditions are present for a Protected Natural Area, but lawmakers are still awaiting the final technical opinions and participatory processes for determining the exact range and

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[19] DGAAA, Cuadro de Asignación de Personal, found at http://www.minagri.gob.pe/portal/download/pdf/marcolegal/normaslegales/resolucionesministeriales/2014/octubre/cap_rm561-2014-minagri.pdf.

categorization of the area.[20] Therefore the status as a Reserved Zone is essentially a temporary first step towards protection under several categories of Peruvian law, whether a simple "protected area," a wildlife sanctuary, protected forest, or a hunting preserve.[21] Therefore this first step of approving the Reserved Zone is crucial to even minimal environmental protection of an area.[22]

Prior to Law 30230, MINAM was the governmental body in charge of this process because it has the technical expertise to determine if the territory being analyzed had the necessary characteristics to merit Natural Protected Area status. After conducting an initial scientific and technical assessment, MINAM granted an area Reserved Zone status[23] if MINAM concluded that the area was likely to reach conservation status as a Natural Protected Area.[24] MINAM's grant of temporary Reserved Zone status would remain valid until MINAM received all of the necessary technical opinions and conducted the required participatory proceedings to determine if the area should be a Natural Protected Area.[25] Only then would the process enter the political phase, when MINAM would present its extensive analysis to the Council of Ministers for a vote on whether to approve a national Natural Protected Area.[26]

As a result of Law 30230, instead of MINAM making a decision based on a technical and scientific assessment of environmental concerns, this first step towards creating a protected area is now infused with political and economic interests because the decision is now made by the full Council of Ministers.[27] As the Peruvian Society for Environmental Law (Sociedad Peruana de Derecho Ambiental - SPDA) has noted, this change lets "the State skip an important step for researching and determining the ecological and cultural value of the place."[28] Many of the Ministries that can now block creation of the Reserved Zone within the Council of Ministers represent interests antithetical to environmental protection, such as investment, agribusiness, and extractive industries.[29] After the passage of Law 30230, MINAM's analysis of the environmental aspects of the proposed zone can easily be overruled by the political and economic concerns of

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[20] CIFOR, Ley 30230: Efectos para la institucionalidad ambiental y la tenencia de la tierra en Peru, infobrief No. 102, Noviembre 2014, p. 3.
[21] CIFOR report November 2014, pg. 3.
[22] According to the Peruvian Society for Environmental Law, protections of the various categories of Natural Protected Areas range from Category II (natural or near natural areas where large-scale ecological processes are preserved and little human impact is allowed) to Category VI (protected area with sustainable use of natural resources) according to the IUCN Protected Areas Categories System. SPDA, Manual Explicativo de la Ley 26834, Ley de Areas Naturales Protegidas, http://intranet.sernanp.gob.pe:9090/xmlui/bitstream/handle/123456789/998/MANUAL%20EXPLICATIVO%20DE%20LA%20LEY%2026834.pdf?sequence=1; IUCN Protected Areas Categories System, http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/ .
23 CIFOR report Nov 2014, pg. 4.
[24] CIFOR report Nov 2014, pg. 4.
[25] CIFOR report Nov 2014, pg. 4; Ivan Lanegra analysis
[26] CIFOR report Nov 2014, pg. 4; Ivan Lanegra analysis
[27] CIFOR report Nov 2014, pg. 4. Additionally, EIA has been informed of a new procedure that is further undermining MINAM's independence in establishing Reserved Zones. MINAM is requiring any companies that have rights within the proposed Reserved Zones to send a "letter of acceptance" before it submits a proposal for a Reserved Zone to the Council of Ministers. According to EIA's source, MINAM is basing this new requirement on its obligations under Law 30230, and is doing so to avoid conflict with other Ministries that are interested in promoting industry.
[28] SPDA, Opinion sobre el Proyecto de Ley No 3627/2013-PE, p. 7, http://www.actualidadambiental.pe/wp-content/uploads/2014/06/opinio_spda_legal.pdf
[29] CIFOR report Nov 2014, pg. 4.

any of the other Ministries, impeding progress towards eventual permanent protection prematurely.[30]

Furthermore, this change in decision-making may prevent protected areas from being created because it will complicate and delay the process for their approval.[31] MINAM will have to present technical and scientific reports to decision-makers who are not familiar with this kind of information, and do not have the technical capacity to swiftly analyze this information. To make the case for the Council of Ministers to approve a Reserved Zone, MINAM will need to present more in-depth information at the outset, rather than conducting a preliminary analysis to establish the Reserved Zone, which was its previous practice.[32] MINAM will have to then present strong evidence for a Protected Area to the Council of Ministers based on more detailed studies done over a longer period of time.[33]

Article 22: Land-Use Planning

Article 22 of Law 30230 takes away most of MINAM's power to determine the National Land-Use Policy (La Política Nacional de Ordenamiento Territorial)[34] and gives this authority to the Council of Ministers, in which MINAM has only one of many votes.[35] The new law also prohibits local and national land use plans from establishing binding land use classifications or prohibitions on use.

Previously, the proclaimed goals of the National Land Use Policy development process under Peruvian law were the sustainable use of resources,[36] prevention of environmental conflicts, participation by many actors from each locality, and conservation.[37] This process, established under Peru's 2005 General Environmental Law, was a relatively new approach to land use planning, which sought to conserve nature and meet the needs of national, regional and local community development.[38] The process was guided by MINAM, through its General Directorate of Land Planning (Dirección General de Ordenamiento Territorial – DGOT), which ensured that

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[30] SPDA, Opinion sobre el Proyecto de Ley No 3627/2013-PE, p. 6, http://www.actualidadambiental.pe/wp-content/uploads/2014/06/opinio_spda_legal.pdf
[31] CIFOR report Nov 2014, pg. 4.
[32] CIFOR report Nov 2014, pg. 4.
[33] CIFOR report Nov 2014, pg. 4.
[34] Ley Marco del Sistema Nacional De Gestión Ambiental, Art. 6(h); Reglamento de la Ley Marco del Sistema Nacional de Gestión Ambiental, Art. 23(c); Decreto Legislativo que Aprueba la Ley de Creación, Organización y Funciones del Ministerio del Ambiente, Art. 7(c).
[35] Ley 30230, Art. 22.
[36] DECRETO SUPREMO Nº 008-2005-PCM: Aprueban Reglamento de la Ley Nº 28245, Ley Marco del Sistema Nacional de Gestión Ambiental, art. 54(a), found at http://www.osinerg.gob.pe/newweb/uploads/GFE/Normativa/8%20Normativa%20Medioambiental/DS.008.2005.PCM.pdf .
[37] Ley General del Ambiente, Art. 20; Reglamento de la Ley Marco del Sistema Nacional de Gestión Ambiental, Art. 54; DAR, draft of Impactos de la Ley 3627.
[38] Ley N° 28611 - Ley General del Medio Ambiente en Perú, Art. 17, 19, 20. MINAM's approach to land planning is based on the methodology first proposed by Amazonian soil scientist Wim Sombroek (1994), who recommended complementing the physical and crop production criteria of the ZEE with additional information related to biodiversity, watershed management, endemic diseases, mineral reserves, infrastructure, local human populations, and actual land tenure. A major characteristic of this approach is a consultation component that ensures that stakeholders contribute to the land use planning process from the beginning to end, in contrast with a public comment period, which often typifies environmental impact studies designed to facilitate the implementation of a project, rather than seek substantive input on development options (FAO, 1997). *Hayek, Frank. "Towards Zero Deforestation Oil Palm in Peru: Understanding actors, markets and barriers."*

the process was technical and participative.[39] Regional governments and other social, economic, and technical actors together issued a study called the Economic Ecological Zoning (Zonificación Ecológica Económica - ZEE) that stratified landscapes based on climate, soil type, hydrology, biodiversity, and a range of ecosystem services and economic uses.[40] Using the ZEE as its basis, MINAM would then consult with regional and local stakeholders and regional governments in making a Land Use Plan (Plan de Ordenamiento Territorial - POT), a "technical-political" document to establish a practical land-use plan.[41] Under the law, MINAM had the mandate to eventually stitch these ZEEs and POTs into a National Land Use Policy that covered the whole country.

Law 30230 drastically changes the actors and political interests involved in this process by removing most of MINAM's power to determine the National Land Use Policy. Whereas before Law 30230 the environmental goals of MINAM governed the process of developing the National Land Use Policy, Article 22 now requires all of the other Ministries to support the plan, and requires the final National Land Use Policy to be approved by all of the Ministries through a vote by the Council of Ministers. As a consequence, the National Land Use Policy will be determined by the interests of other Ministries, which conflict with the environmental goals of MINAM. Therefore Article 22 weakens the environmental protection built into the process of developing the National Land Use Policy.

The provisions in Article 22 also state that the Council of Ministers approves the National Land Use Policy, but that land use plans and ZEEs cannot "designate usages or prohibitions on use."[42] Whereas prior legislation stated that the ZEEs and National Land Use Policy could "designate land usage,"[43] this is no longer the case. This means that these instruments' classifications on land use must be of a general nature, and are not binding. Under this literal interpretation of the law, Article 22 would deny regional and national authorities the ability to categorize currently unclassified land as only apt for sustainable uses or prohibit environmentally harmful land uses. It also undermines existing land use plans and ZEEs by allowing them to be changed or contravened at any time. This fundamentally weakens one of the key tools for protecting Peru's environment.[44]

Furthermore, we believe that several words are missing from the article, which leads to a lack of clarity in its current state. It appears that the intent of this article is to make *MINAM's* decisions about the National Land Use Policy and *regional government* decisions regarding land

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[39] Decreto Supremo 007-2008-MINAM: Reglamento de Creacion, Organizacion y Funciones del MINAM; Ley N° 28611 - Ley General del Medio Ambiente en Perú: dictates the development of a decentralized land use planning process intended to support the sustainable development of Peru's renewable natural resources. The task of overseeing and coordinating this process is given to the General Directorate of Land Planning (Dirección General de Ordenamiento Territorial - DGOT), an administrative unit within MINAM charged with coordinating, amongst other functions, the land use zoning process. *Hajek, Frank, "Towards Zero Deforestation Oil Palm in Peru: Understanding actors, markets and barriers."*

[40] Hajek, Frank, "Towards Zero Deforestation Oil Palm in Peru: Understanding actors, markets and barriers."

[41] Hajek, Frank, "Towards Zero Deforestation Oil Palm in Peru: Understanding actors, markets and barriers"; SPDA, Opinion sobre el Proyecto de Ley No 3627/2013-PE, p. 8, found at http://www.actualidadambiental.pe/wp-content/uploads/2014/06/opinio_spda_legal.pdf; Ley Organica de Gobiernos Regionales, Art. 29-A, 53.

[42] Law 30230, Art. 22.

[43] Ley General del Ambiente, Art 19.2.

[44] Ley General del Ambiente, Art 17.2. "Se entiende que constituyen instrumentos de gestión ambiental, los sistemas de gestión ambiental, nacional, sectoriales, regionales o locales; *el ordenamiento territorial ambiental*; la evaluación del impacto ambiental;…"

use policies and ZEEs no longer binding. These will be overturned and replaced by the National Land Use Policy approved by the Council of Ministers, rather than MINAM, at some future date.

Article 22 may have been designed to establish agreement amongst all sectors on land use policy, rather than having conflict arise between ministries over competing land uses after classification. However, limiting MINAM's power to determine land use policy according to its environmental expertise weakens MINAM's previous ability to prioritize environmental protection in developing land use policy and thus violates Peru's obligations under the U.S.-Peru TPA. Admittedly, the development of local and national land use policies has been a slow process in Peru, but the solution is not to reduce MINAM's ability to lead the process. Rather, the Peruvian government should provide MINAM with the funding, capacity, and legal mandate to carry out the necessary ZEEs and POTs leading to MINAM's completion of the National Land Use Policy.

Article 23: Establishment of Environmental Quality Standards and Maximum Permissible Limits

Article 23 of Law 30230 sets forth that any time the Council of Ministers approves ECAs and LMPs, it must do so with the full support of "the sectors to be bound by them." This will limit the independent and objective determination by MINAM when developing these standards. Whereas before MINAM had to solicit opinions from the agencies governing the sectors to be impacted by these environmental standards in order to develop its proposed standards,[45] these standards will now be wholly influenced by, and approval dependent on, those other agencies' endorsement.[46] This greatly diminishes MINAM's ability to set environmental standards that effectively minimize risk to environmental and human health. Additionally, the process instituted by Law 30230 will lead to an even greater delay in creation of effective ECAs and LMPs.

Environmental Quality Standards (estándares de calidad ambiental – ECA), which define the maximum quantity of contaminants allowed in the air, soil, and water sources,[47] and Maximum Permissible Limits (limites maximos permisibles – LMP), which establish the maximum levels of contaminants that can be in waste water, emissions or solid wastes generated by human activities,[48] are key tools in regulating human and industrial effects on the environment in Peru. Much like the United States Environmental Protection Agency determines maximum permissible limits in the United States, prior to Law 30230 MINAM used its technical environmental expertise to determine ECAs and LMPs based on environmental and human health concerns. MINAM was also required to consult the ministries in the sectors that would be impacted by these standards, each of whom would emit an opinion on the standards.[49] After this consultation period the final ECA or LMP was approved by the Council of Ministers.[50]

[45] Legislative Decree No. 1013, Legislative Decree that Approves the Creation, Organization, and Functions of the Ministry of the Environment, Article 7, clause (d).
[46] Original text in Spanish states "se efectuará mediante decreto supremo refrendado por los sectores vinculados."
[47] General Environmental Law, Article 31
[48] General Environmental Law, Article 32
[49] General Environmental Law, article 33
[50] General Environmental Law, article 33

Additionally, Article 23 of Law 30230 declares that these measures must be based in the factors of "an analysis of the regulatory and economic impact" that the new ECAs and LMPs will have on companies. The law does not specify how much weight these factors will have in comparison with environmental and human health considerations, but incorporation of the impact that such standards will have on commercial activities, along with the new requirement of approval by affected Ministries, will undermine the ability of MINAM to set sufficiently protective ECAs and LMPs.

3) Articles 12 and 19: Limiting OEFA's resources and tools for enforcing environmental laws and regulations

Articles 12 and 19 of Law 30230 weaken the ability of Peru's Agency for Environmental Assessment and Enforcement (Organismo de Evaluación y Fiscalización Ambiental – OEFA) to enforce environmental law. Article 12 eliminates a current key source of funding for the agency, and Article 19 weakens OEFA's ability to deter and fine companies committing environmental infractions.

Measures to weaken OEFA are of particular concern, given the United States government's role in facilitating the creation of this important Peruvian environmental institution. After the United States and Peru signed the TPA, the United States lent substantial aid to the Peruvian government in the creation of MINAM and agencies under its purview, including OEFA, due to the need for strong and independent environmental institutions. Therefore, Articles 12 and 19, coupled with industry efforts to undermine OEFA outlined in Section IV, represent a substantial step back in Peru's environmental governance and enforcement.

Article 12: Limiting OEFA's financial resources

OEFA was created in 2008 under the Ministry of the Environment (MINAM), and performs the vital function of supervising and sanctioning entities that violate Peruvian environmental law. [51] OEFA can impose fines or other administrative measures for any infraction of the General Environmental Law and all other environmental laws and regulations, as well as any administrative decisions under OEFA's competency, such as supervision of companies' compliance with their Environmental Impact Assessments (EIAs).[52]

[51] OEFA's role in the supervision and enforcement of environmental norms begins at the first stage of environmental assessment for a project that may negatively impact the environment. At this stage, the decision-making ministry makes a "strategic environmental assessment", which determines the category in which the project falls according to its probable environmental impacts. After the environmental certificate is granted, OEFA monitors the company's adherence to environmental law as part of its general power to enforce environmental law. Afterwards, the agency is responsible for sanctioning those actors that do not comply with Peruvian environmental law. Modification of Ley del SEIA, Art 15.2: El MINAM, a través del Organismo de Evaluación y Fiscalización Ambiental OEFA, es responsable del seguimiento y supervisión de la implementación de las medidas establecidas en la evaluación ambiental estratégica.

[52] The sanctions include: "aplicables a toda persona natural o jurídica, patrimonio autónomo, sociedad irregular, forma asociativa de empresa u otro tipo de sujeto de derecho que desarrolla actividades económicas sujetas al ámbito de fiscalización ambiental de competencia del OEFA, por el incumplimiento de: (i) Obligaciones contenidas en la normative ambiental; (ii) Compromisos asumidos en los instrumentos de gestión ambiental; (iii) Medidas cautelares o correctivas, o disposiciones o mandatos emitidos por los órganos competentes del OEFA; u, (iv) Otras obligaciones ambientales fiscalizables a cargo del OEFA por normativa posterior o en función de los procesos de transferencia de competencias al OEFA. (Resolucion de Consejo Directivo No. 012-2012-OEFA/CD, Article 2, http://www.oefa.gob.pe/wp-content/uploads/2013/04/Reglamento-procedimiento-administrativo-sancionador.pdf)

Article 12 of Law 30230, while not in the environmental chapter of the law, has the potential to significantly limit the resources at OEFA's disposal for enforcing environmental law. Article 12 states that those resources that are procured by executive branch agencies in charge of enforcement of law through administrative fines in execution of their functions are to be considered resources of the Public Treasury, and not of the agency itself.[53] This means that agencies such as OEFA, which has the function of enforcing environmental law, will not be able to use the money it receives from imposing fines; rather, this money will go to the general Public Treasury. Since OEFA's budget currently includes money from fines it has imposed upon violators of environmental law,[54] this article takes away one source of funding for OEFA's budget and may harm OEFA's ability to perform its enforcement functions.

Article 19: Weakening OEFA's tools for enforcement of environmental law

Article 19 of Law 30230 severely undermines several key tools used by OEFA to enforce environmental laws.[55] Law 30230 cuts in half the fines that OEFA is able to impose on companies for violating environmental law for a period of three years, and only allows OEFA to fine a company if it does not comply with "corrective measures" dictated by OEFA, aside from those exceptions outlined below. Although this preserves OEFA's ability to demand remediation from environmental violations, it drastically weakens the second crucial prong of OEFA's environmental law enforcement: deterrence through punishment of entities that violate environmental law.

Law 30230 now cuts in half the amounts of each of the fines that OEFA can impose, for a period of three years, except for the following three types of infractions: those that have caused "serious harm" to humans or the environment, projects done without any environmental authorization, and repeated commission of the exact same violation within six months.[56]

Serious offenses are defined under Peruvian law by two resolutions of OEFA's Advisory Council ("Consejo Directivo") regarding Environmental Management Instruments and activities within prohibited zones[57] and regarding fisheries and aquaculture activities,[58] but these laws are

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[53] Law 30230, Article 12.

[54] OEFA Budget 2014; Resolucion de Consejo Directivo No. 012-2012-OEFA/CD, Article 2, http://www.oefa.gob.pe/wp-content/uploads/2013/04/Reglamento-procedimiento-administrativo-sancionador.pdf

[55] OEFA embodies the General Environmental Law's mandate for an environmental enforcement agency that has the discretion to define and enforce environmental infractions. Ley General del Ambiente, Ley No. 28611,October 2005, Art. 135

[56] Ley No. 30230, Art 19. What "serious harm to humans or the environment" entails is not defined in Law 30230. The relevant provision states: "Infracciones muy graves, que generen un daño real y muy grave a la vida y la salud de las personas. Dicha afectación deberá ser objetiva, individualizada y debidamente acreditada."

[57] Resolución de Consejo Directivo No. 049-2013-OEFA/CD, *Aprueban la Tipificación de Infracciones y Escala de Sanciones relacionadas con los instrumentos de gestión ambiental y el desarrollo de actividades en zonas prohibidas*, Dec. 20, 2013, *available at* http://www.oefa.gob.pe/?wpfb_dl=7822.

In Resolution 049-2013-OEFA/CD, OEFA's Advisory Council defines serious offenses regarding Environmental Management Instruments and activities in prohibited zones. In Article 4, the Resolution clarifies a number of administrative infractions that constitute serious crimes, such as non-compliance with previously agreed to agreements falling under the Tools for Environmental Management (Instrumentos de Gestión Ambiental), specifically those agreements addressing activities only indirectly implicating potential or real harm. Several additional instances of noncompliance with Tools for Environmental Management constitute serious offenses under Article 19, including failure to comply with any provision of the Tools that causes serious potential

vague and could be subject to less stringent interpretation depending on the strength of the environmental administration. Law 30230 also vastly restricts the definition of what is classified as a "repeat offense," defining repeat offenses as within six months instead of four years; OEFA had previously defined repeat offenses as similar offenses within four years.[59]

OEFA has also provided further details in regulations related to Article 19 of Law 30230 since the passage of the law.[60] OEFA has specified that "fixed" or "typified" fines (fines that are defined and listed with a corresponding sanction in OEFA regulations) will not be impacted by the three-year 50 percent reduction in fine amount.[61] Additionally, "multas coercitivas," or penalty fines, will not be impacted.[62] OEFA states that the fines to be impacted are those calculated using OEFA's "Methodology,"[63] which takes into account several factors including the actual or potential cost of environmental harm caused, the probability of the violation being detected by officials, and the illegal benefit obtained, as well as other aggravating or attenuating factors.[64] However, despite the various ways that prior and subsequent regulations have carved out exceptions to the Law 30230 reduction in sanctions, these regulations can easily be changed by future administrations and thus cannot be relied upon to counter the weakening of OEFA's sanctioning power.

Furthermore, under Law 30230 a company found in violation of Peruvian environmental law cannot be immediately sanctioned, and can avoid paying a fine altogether. Law 30230 states that OEFA must first help the violator company implement "correct measures" in order to

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or actual harm to the environment, and human life or health. Moreover, the activity constituting a violation of the Tools does not have to correspond specifically to the provisions of the Tools to find a violation of the same. Instead the resolution grants OEFA the authority to impose sanctions even where the activity in question constitutes an obvious manifestation of the articulated violations or sanctioned activities and the circumstances favor environmental protection.

In Article 5, the Resolution further affirms that noncompliance with previously approved Tools for Environmental Management, such as agreements concerning specific mining projects, constitutes a serious violation if the activity imposes the threat of potential or actual environmental or human harm. Article 6 declares that it is a serious crime to develop projects and activities in the mining and forestry sector in prohibited zones, regardless of the potential or actual harm realized in the course of these activities. Resolución de Consejo Directivo No. 049-2013-OEFA/CD, *Aprueban la Tipificación de Infracciones y Escala de Sanciones relacionadas con los instrumentos de gestión ambiental y el desarrollo de actividades en zonas prohibidas*, Dec. 20, 2013, *available at* http://www.oefa.gob.pe/?wpfb_dl=7822.

[58] Resolución No. 015-2015-OEFA/DC, Mar. 21, 2015, *available at* http://www.elperuano.com.pe/NormasElperuano/2015/03/21/1214597-1.html.

The Advisory Council provided clarification of activities constituting serious offenses in Resolution 015-2015-OEFA/DC. Under this Resolution, it is a serious offense to operate processing plants for flour, fish oil, or hydrobiological products for human consumption that do not have proper effluent reducing systems or whose effluent reducing technology is inoperative or otherwise expired. Likewise, it is a serious violation to not have installed or operational certain submarine effluent or dumping reducing measures by the deadline set in regulations for fisheries. Article 8 of the resolution states that it is a serious offense to breach the obligations in the updated Environmental Management Plan (Plan de Manejo Ambiental) for compliance with the maximum permissible limits within *and* outside the coastal zone environmental protection. Resolución No. 015-2015-OEFA/DC, Mar. 21, 2015, *available at* http://www.elperuano.com.pe/NormasElperuano/2015/03/21/1214597-1.html.

[59] "Recidivism, defined as the commission of the same offense within a period six (6) months since the final resolution for the first offense." Email from Peruvian Embassy to the United States to the Environmental Investigation Agency. *Also see* CIFOR, Ley 30230: Efectos para la institucionalidad ambiental y la tenencia de la tierra en Peru, infobrief No. 102, Noviembre 2014, p. 3. While not provided for in law previously, OEFA based this four-year period on Article 233 of the General Administrative Procedure Law and calculated from the resolution resulting from the first sanction. Ley del Procedimiento Administrativo General, LEY Nº 27444, Art. 233.

[60] Resolucion de Consejo Directivo No. 026-2014-OEFA/CD, Lima, July 22nd, 2014.

[61] Resolucion de Consejo Directivo No. 026-2014-OEFA/CD, Lima, July 22nd, 2014., article 4.

[62] Resolucion de Consejo Directivo No. 026-2014-OEFA/CD, Lima, July 22nd, 2014, article 6.

[63] Resolucion de Consejo Directivo No. 026-2014-OEFA/CD, Lima, July 22nd, 2014, article 4.

[64] Explanatory Manual for the Methodology for Calculating Base Fines and the Application of Aggravating and Attenuating Factors to be Utilized in the Gradual Application of Sanctions, found at http://www.oefa.gob.pe/wp-content/uploads/2013/03/anexo3.pdf

remediate the harm done. Only if the company refuses to implement or inadequately implements these corrective measures can OEFA impose a fine for violation of environmental law.

Moreover, OEFA already had procedures for precautionary measures, which commenced alongside the sanctioning procedures.[65] These two processes could occur simultaneously because they each serve a different function: while the fine provides financial incentive not to violate the law, the corrective measures help companies adjust their operations so as to avoid violating the environmental law again.[66] OEFA's inability to sanction outright, coupled with the reduced fine amounts, reduces companies' cost for violating laws and generates perverse incentives.[67]

III. Law 30230 affects trade "between the parties": U.S. Companies Benefitting from Peruvian Environmental Rollback

Law 30230 not only weakens and reduces the protections of Peru's environmental laws, it further violates article 18.3.2 of the TPA by specifically doing so "in a manner affecting trade or investment between the [United States and Peru]."[68]

While provisions in a number of the articles of Law 30230 discussed above will have long-term consequences for Peru's environment and create more permissive conditions for business while limiting environmental protection, the near-term effects on U.S. investment are most clearly implicated by the provisions under Article 19 limiting OEFA's ability to sanction companies for violating environmental laws. Under Law 30230, companies may be able to avoid sanctions for violating environmental law if they implement "corrective measures," or if their actions fall into one of the exceptions established under Law 30230 or by OEFA regulations (see above).

Of the more than 100 companies that have been fined more than once since the creation of OEFA in 2008,[69] several United States companies make the list and may be able to avoid future fines.[70] For example, Newmont Mining, an international mining giant incorporated in Colorado,[71] was the subject of a heated controversy over its Yanacocha mine in Peru.[72] Newmont was also fined for noncompliance with Environmental Impact Assessments procedures in

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[65] Reglamento y procedimiento administrative sancionador, Art 20-23, http://www.oefa.gob.pe/wp-content/uploads/2013/04/Reglamento-procedimiento-administrativo-sancionador.pdf
[66] CIFOR, Ley 30230: Efectos para la institucionalidad ambiental y la tenencia de la tierra en Peru, infobrief No. 102, Noviembre 2014, p. 3.
[67] CIFOR, Ley 30230: Efectos para la institucionalidad ambiental y la tenencia de la tierra en Peru, infobrief No. 102, Noviembre 2014, p. 3.
[68] United States-Peru Trade Promotion Agreement, Art. 18.2.3.
[69] Dánae Rivadeneyra, *Exclusivo: Las Mineras Más Multadas por Contaminar Son las Que Quieren Debilitar al OEFA*, UTERO, Jan. 30, 2015, http://utero.pe/2015/01/30/exclusivo-las-mineras-mas-multadas-por-contaminar-son-las-que-quieren-debilitar-al-oefa/.
[70] These companies include Nyrstar Ancash S.A. (seven sanctions); Doe Run Company; Newmont; Xstrata; Pluspetrol International, Inc.; Peru LNG; and Talisman Energy, Inc.
[71] Newmont Mining Corporation Stock Report, NASDAQ, Mar. 26, 2015, http://www.nasdaq.com/symbol/nem/stock-report.
[72] Philip Mattera, *Newmont: Corporate Rap Sheet*, CORPORATE RESEARCH PROJECT, Feb. 13, 2015, http://www.corp-research.org/Newmont.

conjunction with the company's Tunsulla exploration project.[73] Xstrata, a multinational commodity company with assets and offices in nine U.S. cities,[74] was sanctioned $84,000 by OEFA for contaminating 1,000 m^2 of land around the company's Tintaya mine with highly contaminated levels of copper and not notifying OEFA of the incident.[75]

It is likely that, if these companies continue to violate Peruvian environmental law, the fines for those infractions will be subject to reduced enforcement provisions under Law 30230. Despite the exceptions carved out by OEFA and within Law 30230, many fines will be halved and only applied to companies that continue to violate the law by not following the required corrective measures. As such, Law 30230 drastically diminishes the deterrent and punishment effect of Peru's environmental law enforcement.

In addition, at least one U.S. company is directly involved in efforts to further diminish OEFA's resources. Yanacocha Mine SRL, a company majority owned by Colorado-based Newmont Mining,[76] is one of 16 mining companies that have filed a constitutional *amparo* complaint seeking to prohibit OEFA from charging concessionaires a fee (*aporte*) that goes toward funding OEFA's functions.[77] This fee currently composes 80 percent of OEFA's budget, and if taken away would drastically inhibit OEFA's ability to perform its functions.[78] Newmont Mining has been sanctioned eight times by OEFA.[79]

IV. These environmental rollbacks are for the purpose of "encouraging investment"

It is important to note that, much like the TPA was set in a context of increasing interest in ensuring environmental protections in free trade agreements, Law 30230 is part of a broader context in Peru of attracting investment through reduction of laws and requirements for companies. Furthermore, the title of Law 30230 explicitly states that its purpose is to promote and encourage investment.

For many years, Peru has been a safe haven for mining companies interested in avoiding oversight by environmental groups and benefitting from various internal concessions.[80] Companies such as Baron Oil used to see Peru as a prime country for investment, given its

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[73] Table (on file with Author).
[74] GLENCORE, *Global Operations*, http://www.glencore.com/global-operations/.
[75] *Xstrata Tintaya fined for pollution around mine*, PERU SUPPORT GROUP, Jan. 14, 2014, http://www.perusupportgroup.org.uk/news-article-702.html.
[76] Newmont Mining Corp/DE/, United States Securities and Exchange Commission Form 10-K (Annual Report), filed 02/20/15 for the period ending 12/31/14, found at http://www.newmont.com/files/doc_financials/quarterly/2014/NEM10K.pdf. (latest annual report available on company's website)
[77] Henry Carhuatacto Sandoval, *La defensa del aporte por regulacion minaera del OEFA y la fescalizacion ambiental en el Peru*. IDL Justicia Viva. Found at http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=1594
[78] *Id*.
[79] http://convoca.pe/node/172
[80] *See* Alfredo Gurmendi, *The Mining Industry in Peru*, reprinted in 2006 MINERALS YEARBOOK, United States Geological Survey (2009), *available at* http://minerals.usgs.gov/minerals/pubs/country/2006/myb3-2006-pe.pdf; Miguel Enriquez, *Mining investment projects in Peru to reach USD 60 billion over the next 10 years*, APEXWISE, May 18, 2014, http://www.apexwise.com/mining-investement-proyects-in-peru/.

"attractive" fiscal regime, and the way in which "Peruvian authorities have welcomed new oil companies without placing too rigorous criteria on them, with the intent of stimulating further investment."[81]

The U.S.-Peru TPA sought to strengthen environmental protection and avoid the proverbial "race to the bottom," sparking reforms in an effort to have effective environmental regulations in Peru. Now, historical interests are undermining these important reforms. This is not the first time the Peruvian government has sought to restrict the timeline of the EIA evaluation process in order to encourage investment; in May 2013 the EIA process was expedited for EIAs under the jurisdiction of the Ministry of Energy and Mining (MINEM), which regulates all hydroelectric, mining, and hydrocarbon investment activities. Under this law agencies from which MINEM solicits opinions had to submit their opinions within 30 days, or they were deemed to have committed an administrative infraction.[82]

The long term impacts of Law 30230 will be to attract companies to expand operations in Peru as a result of OEFA's decreased enforcement capabilities; a more difficult process of studying the environmental impacts of potentially harmful projects; and likely fewer Reserved Zones; a land-use policy more advantageous to industry interests; and less stringent ECA and LMP regulations due to MINAM's reduced power in these areas of law.[83] In passing such a law, Peru has opened itself up to legal action from the United States under the TPA. It is essential that the United States begin consultations with Peru to correct these violations, and ensure that Peru does not create any additional laws or regulations that also violate the TPA.

The entities that will benefit from weakened environmental legislation in Peru have also begun several legal actions against OEFA in the courts which would take away OEFA's ability to charge a fee (*aporte*) to concessionaires for its supervisory functions.[84] The National Society of Mining, Petroleum and Energy and other companies have submitted petitions against OEFA to the National Institute for the Defense of Competence and Protection of Intellectual Property (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual–INDECOPI), while other mining companies have placed 16 complaints constitutional complaints to overturn OEFA's ability to charge this fee.[85]

V. Conclusion

Law 30230 is a violation of Peru's obligations under Article 18.3.2 of the U.S.-Peru Trade Promotion Agreement. Its provisions weaken Peruvian environmental law in order to promote investment, particularly in a way that impacts trade with the United States.

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[81] BARON OIL PLC, http://www.baronoilplc.com/explorerperu.php (company website).
[82] DS 060-2013-PCM, 25 May 2013, Art 3.3, http://www.minem.gob.pe/minem/archivos/file/Mineria/LEGISLACION/2013/mayo/DS%20060-2013-PCM.pdf
[83] *See Impactos, Intereses y Beneficiarios de la Ley No 30230*, report by DAR and other Peruvian nonprofits, found at http://dar.org.pe/archivos/publicacion/154_analisis_Ley30230.pdf.
[84] Henry Carhuatacto Sandoval, *La defensa del aporte por regulacion minaera del OEFA y la fescalizacion ambiental en el Peru*. IDL Justicia Viva. Found at http://www.justiciaviva.org.pe/notihome/notihome01.php?noti=1594
[85] *Id*.

Given the violation of the TPA by Law 30320, it is imperative that USTR initiate consultations with Peru on Law 30230 under the TPA, and, barring resolution under Article 18.12 consultation and optional consideration by the Council, proceed to Consultations, Arbitration, and Suspension of trade benefits under Article 21.