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March 12, 2004

VIA E-MAIL & HAND DELIVERY

The Honorable Robert B. Zoellick
United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ambassador Zoellick:

Pursuant to Section 2104(e) of the Trade Act of 2002 and Section 135(e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Trade and Environment Policy Advisory Committee (TEPAC) on the U.S.-Australia Free Trade Agreement, reflecting majority and minority advisory opinions. In addition, I am attaching to the report the separate views of various individual TEPAC members on the proposed Agreement.

TEPAC believes it is important that this report be made public as soon as possible so that it can inform the debate about the proposed Agreement, particularly among groups and individuals with environmental concerns.

Sincerely,

Joseph G. Block
Chair, TEPAC

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Enclosure a/s

The U.S.-Australia Free Trade Agreement

Report of the
Trade and Environment Policy Advisory Committee (TEPAC)

March 12, 2004

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Trade and Environment Policy Advisory Committee (TEPAC)

Advisory Committee Report to the President, the Congress and the United States Trade Representative on The U.S.- Australia Free Trade Agreement

I. Purpose of the Committee Report

Section 2104(e) of the Trade Act of 2002 requires that advisory committees provide the President, the U.S. Trade Representative, and Congress with reports required under Section 135(e)(1) of the Trade Act of 1974, as amended, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135(e) of the Trade Act of 1974, as amended, the report must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002. The report must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area of the particular committee.

Pursuant to these requirements, the Trade and Environment Policy Advisory Committee ("TEPAC" or "the Committee") hereby submits the following report, which the Committee recommends be included in Congress's record of deliberation on the Agreement, so that, among other things, it might provide guidance to deliberative bodies which will later examine the Agreement's specific provisions on which we comment.

II. Executive Summary of the Committee's Report

A majority of the committee members support the conclusion that the Agreement provides adequate safeguards to ensure that Congress's environmental negotiating objectives will be met. To a fair degree, this is based on the strong, historically positive, record that Australia has with regard to environmental regulation. This majority notes that Australia's record in this regard is not necessarily typical of the other countries with which the United States has negotiated, is negotiating or will negotiate, and therefore stresses that the Agreement's environmental provisions should not serve as a model for future agreements. One size does not fit all in free trade agreements, and the scope and nature of the environmental provisions in this FTA may not be and, probably would not be, adequate in an Agreement with a trading partner with a different environmental history. The FTA neither specifically recites all of Congress's mandated objectives in the environmental arena, nor fully delineates safeguards to ensure that all of the objectives would be met with a partner with a different record or more limited resources.

A similar majority of TEPAC, which last year approved of the procedures used to resolve disputes in environmental matters, has some questions about their adequacy in this particular agreement in light of the comparative wealth of the trading partner. The "carve-out" for environmental and labor provisions still appears to strike a proper balance between the extensive

commitments in the Agreement to cooperate on environmental matters and the need to ensure that both countries commit the requisite resources to enforce domestic environmental laws and regulations. However, the size of the maximum penalty available for enforcing violations of the environmental provisions of the Agreement ($15 million, adjusted for inflation) gives this majority pause. As with the other provisions of the FTA, one size does not fit all. Nevertheless, the maximum penalty available is the same as it was in last year's agreements with Singapore and Chile. Whatever benefit was obtained in those agreements from this dollar amount is lessened in this instance, with a trading partner with an annual gross domestic product five to ten times that of Chile and Singapore.

A majority of the Committee is extremely concerned about the failure of the Agreement to address reductions in sugar, beef and dairy tariffs. This is of particular concern with regard to sugar, where the overproduction of sugar caused by domestic subsidies places significant stress on delicate and endangered ecosystems like Florida's Everglades.

A majority of TEPAC is concerned about potential ambiguity in the scope of Australian environmental laws covered by the FTA and urges USTR to provide Congress with a written explanation of its understanding. A majority also maintains its position, expressed in last year's reports concerning the Chile and Singapore FTAs, that the 30 day, classified period of review of the FTA, is insufficient.

As it did last year in reporting on the Chile and Singapore Agreements, a majority of the Committee believes that trade agreements can create opportunities to enhance environmental protection. Trade opens markets, creates business and employment opportunities, and can increase economic growth. This can lead to increased wealth, which provides opportunities to enhance environmental protection, including the creation of a political will in favor of such protection. However, trade can create and amplify adverse externalities which require enhanced regulatory oversight.

In sum, while believing that Congress's objectives likely will be met given the history of environmental regulation in the member countries, this majority is concerned that the Agreement not be used as a model for future agreements. The FTA neither specifically recites all of Congress's mandated objectives in the environmental arena, nor sufficiently delineates existing safeguards to ensure that all of the objectives would be met with a partner with a different record or more limited resources.

However, several differing viewpoints exist among committee members. These include minority beliefs that 1) the investment protection provisions are too broad (and, conversely, that they are too narrow), 2) the agreement reduces consumers' access to lower cost pharmaceuticals, 3) the public participation provisions should be strengthened, 4) provisions ensuring effective enforcement are lacking, 5) the agreement is not lacking any "core" environmental provisions, and 6) the agreement is one of several that contains disparate investment and dispute resolution procedures.

III. Brief Description of the Mandate of TEPAC

As described in its charter, TEPAC's mandate is to (1) provide the U.S. Trade Representative with policy advice on issues involving trade and the environment and (2) at the conclusion of negotiations for each trade agreement referred to in Section 102 of the Act, provide to the President, to Congress, and to the U.S. Trade Representative a report on such agreement which shall include an advisory opinion on whether and to what extent the agreement promotes the interests of the United States.

IV. Negotiating Objectives and Priorities Relevant to the Report

As is made clear from its mandate, this committee's focus is on issues involving trade and the environment. In the Trade Act of 2002, Congress elucidated the principal trade negotiating objectives related specifically to environmental matters:

> (A) to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental. . . laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries;
>
> (B) to recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other. . . environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources, and no retaliation may be authorized based on the exercise of these rights or the right to establish domestic. . . levels of environmental protection;
>
> (C) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;
>
> (D) to reduce or eliminate government practices or policies that unduly threaten sustainable development;
>
> (E) to seek market access, through the elimination of tariffs and non-tariff barriers, for United States environmental technologies, goods, and services; and
>
> (F) to ensure that. . . environmental, health, or safety policies and practices of the parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against United States exports or serve as disguised barriers to trade.

Moreover, two environmental objectives appear in Congress's overall negotiating objectives:

> (G) to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources; and
>
> (H) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental. . . laws as an encouragement for trade.

In addition to these environmental objectives, which are core objectives relevant to TEPAC's mandate, there are other Congressional trade objectives which affect the achievement of these objectives. These other objectives, which have been the subject of frequent discussion and comment by the members of TEPAC include those related to investment, transparency, dispute resolution, capacity building, technical barriers to trade, intellectual property, agriculture, and sanitary and phytosanitary measures.

V. The Committee's Advisory Opinion on the Agreement

A majority of the Committee continues to believe that trade agreements can create opportunities to enhance environmental protection. Trade opens markets, creates business and employment opportunities, and can increase economic growth. This can lead to increased wealth, which provides opportunities to enhance environmental protection, including the creation of a political will in favor of such protection. It is also noted that trade can create and amplify adverse externalities which require enhanced regulatory oversight. A majority of TEPAC notes with satisfaction that environmental issues continue to be integrated into the drafting of free trade agreements.

This majority takes notice that the parties to the FTA both have highly developed economies and a history of significant, positive, environmental regulation. Due to the limited nature of the assurances found in the FTA, the majority has used this history as a guide to answer the question of whether the goals Congress set forth in the Trade Act of 2002 will be achieved. Thus, while believing that the Trade Act goals will be achieved, the majority's primary concern is that the provisions of this Agreement not be used as a model for future agreements. The Agreement is lacking certain "core" environmental provisions which the majority would want to see in agreements which may be entered into with other nations with less developed environmental histories. These provisions would increase the guarantees that Congress's environmental objectives will be met in an FTA and have appeared in other FTAs and in the United States' negotiating offer on this FTA.[1]

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[1] These provisions include:

- A requirement that the judicial, quasi-judicial or administrative proceedings available for remedying violations of a country's environmental laws be open to the public. This would increase the opportunities for checks and balances on the fairness of such proceedings.

A. Strict Compliance With Congress's Mandated Objectives

As in the Chile and Singapore reports, the Committee has analyzed both the FTA's strict compliance with Congress's mandated environmental objectives (i.e., simple recitations of the objectives) and the likelihood of the actual achievement of those objectives, taking into consideration things such as the efficacy of the measures used to implement these objectives, the enforcement measures necessary to secure them, and the funding provided to them.

The Committee does not believe that the Australia FTA technically is in strict compliance with Congress's mandated environmental objectives. There is no recitation of objectives D and F.

- A requirement that each party "ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and that the competent authorities give such requests due consideration in accordance with its law." This would increase the opportunities for checks and balances on the effective enforcement of environmental laws.

- A requirement that each party "provide persons appropriate and effective rights of access to remedies," which could include suits for damages or injunction or to request competent authorities enforce that party's environmental laws. This would also increase the opportunities for checks and balances on the effective enforcement of environmental laws.

- A requirement that the remedies for violations of environmental laws "take into consideration the nature and gravity of the violation, any economic benefit the violator has derived from the violation, the economic condition of the violator, and other relevant factors." This would increase the assurance that such factors, which a majority of the committee believes are integral to effective enforcement, will be examined at the remedy stage of future proceedings.

- A requirement that the remedies for violations of environmental laws "may include remedies or sanctions such as: compliance agreements, penalties, fines, imprisonment, injunctions, the closure of facilities, and the cost of containing or cleaning up pollution."

- A requirement that the judicial, quasi-judicial or administrative proceedings available for remedying violations of a country's environmental laws comply with the due process of law.

- Enhancing the core environmental cooperation provision. Instead of advocating the pursuit of cooperative environmental activities, under the Australia FTA the Parties simply "agree to negotiate a United States-Australia Joint Statement on Environmental Cooperation under which the Parties will explore ways to support further" ongoing "joint bilateral, regional, and multilateral environmental activities." An agreement to negotiate concerning a statement which would suggest ways to support other agreements is not the same as actual pursuit of cooperation.

- Restoration of a corporate stewardship provision which would encourage third party compliance with environmental laws. While not directly linked to capacity building, increased corporate stewardship theoretically increases private resources available for environmental compliance and reduces violations of environmental laws, thereby reducing the capacity needed for effective enforcement.

However, as noted above, the majority believes that, notwithstanding this failure, based on Australia's positive environmental history, Congress's objectives will actually be met

B. Actual Achievement of the Mandate

Actual achievement is dependent on the efficacy of the measures used to implement the objectives, the enforcement measures necessary to secure them, and the funding provided to them. In the analysis of these factors, the Committee's unanimity breaks down. In examining these issues, some committee members believe that the provisions and mechanisms are adequate, while others believe that they are too weak or, conversely, too strong. As there was no unanimity in these analyses, they have not been presented as such. Instead, the opinion of the majority or minority is presented. Where a lengthy minority opinion was provided, that separate opinion is summarized and the full opinion attached hereto to give the reader a more detailed explanation.

1. Background

As the Committee described in last year's reports, the most contentious trade agreement provisions relating to the environment, and therefore the source of both the most comment and disagreement, have been those relating to investment protection and dispute resolution. The Committee members' analysis of the environmental implications of these provisions is based largely on theirs and others' experience with the North American Free Trade Agreement (NAFTA) , bilateral investment treaties, and the emerging jurisprudence thereunder. Congress, for example, gave specific instruction to U.S. trade negotiators as a result of its concern that NAFTA's investment protection and dispute resolution provisions might hinder a Party's attempts to implement more stringent (but bona fide) environmental controls. By "bona fide," we refer to environmental controls which are not adopted for the purpose of arbitrarily or unjustifiably discriminating against a parties' exports or are simply disguised barriers to trade.

2. Analysis

a. General

With this background, a majority of the Committee believes that the Agreement's investment protection and dispute resolution provisions are an improvement over those in NAFTA. The Committee believes that these provisions reduce the possibility that there will be successful challenges to attempts to implement more stringent bona fide environmental controls while simultaneously protecting investment. The Agreement gives appropriate attention to integrating the achievement of enhanced environmental protection into more traditional notions of bilateral investment and trade, although this attention must be further nurtured. Moreover, many of the concerns historically raised from an environmental perspective regarding investment provisions have been reduced by the absence in this Agreement of an investor-state provision.

b. Investment

As with the Chile and Singapore agreements, among the improvements in the FTA is the fact that the definition of investment is more precise. Most significantly, the issue of "indirect expropriation" or what we in America call regulatory takings has been clarified by changing the terminology from "tantamount" to "equivalent" and elaborating on this term in an annex. The concern that regulatory actions will provoke claims by affected investors of indirect expropriation has been lessened by the declaration that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions. . . to protect legitimate public welfare objectives. . . do not constitute indirect expropriations." The majority of TEPAC believes the "rare circumstances" language should even be strengthened for greater clarification.

Also noteworthy are the concepts which motivate Paragraph 1 of Article 11.3 and Article 11.12 of the chapter on investment, particularly when combined with the other language in the Agreement cited above. Paragraph 1 of Article 11.3 states that in the event of an inconsistency between the Investment Chapter 10 and another chapter (like the chapter on the environment), the other chapter (Chapter 19) trumps Chapter 10. As the majority of TEPAC reads these provisions, any bona fide environmental requirement at odds with an investment-related requirement will trump that latter requirement. Similarly, Article 11.12 expressly precludes reading Chapter 11 to prevent environmental protections taken in conformity with to the chapter on the environment. Additionally, Article 11.4 of Chapter 11 applies National Treatment; Article 11.5 requires Most Favored Nation treatment; and Article 10.5 requires a minimum standard of treatment that invokes due process in terms that seem expansive, and thus inclusive, of American notions of due process.

However, TEPAC is concerned about identifying protected interests with the phrase "tangible or intangible movable or immovable property, and related property rights." There is a lack of clarity regarding the definition of this term and there is no comparable U.S. jurisprudential concept. This raises the possibility that the resolution of disputes under the Agreement could be inconsistent with U.S. law. To further enlighten the appropriate development of this now more refined concept, we urge the respective national governments to speedily exchange, and in an appropriately formal manner, exemplars of what currently constitutes such an "indirect expropriation" in each of their respective legal regimes in order to better inform each national perspective as to the current application of this critical concept in the other's jurisdiction. These exemplars should also be made available to any empanelled arbitral panel for appropriate reference.

The removal of the investor-state provision was seen as favorable by a slightly different majority. The removal of this provision will eliminate third party actions challenging environmental laws as takings and therefore, the majority believes, reduce the number of challenges to *bona fide* environmental regulations and the pressure for overbroad interpretation of these regulations.

c. Effective enforcement

A majority of TEPAC believes that the language of the Agreement, though limited, is sufficient to ensure effective enforcement of Australia's environmental laws. As alluded to above, this is based largely on Australia's strong, positive history of environmental regulation, not on the safeguards built into the Agreement. As there are few countries with such a history, this majority strongly counsels against using the FTA as a model for future agreements.

d. Dispute resolution

A similar majority of the members believe the dispute resolution procedures are not as effective as compared to those in the Chile and Singapore Agreements. The Agreement maintains the positive steps taken in the Chile and Singapore Agreements in the transparency and participation of civil society during the settlement of disputes in trade cases. Similarly, the agreement maintains the positive step of including special procedures regarding the roster of panelists and panel selection for dispute resolution to ensure that panels addressing environmental issues have the requisite expertise.

However, a majority of members believe that the Agreement's specific monetary penalties for instances of non-compliance with rulings confirming violations of enforcement requirements should have been adjusted to reflect the economic wealth of the signatory nations. The provision at issue is notable because it applies only to failures to enforce domestic environmental and labor laws. The majority's concern about this provision in the Australia FTA is the result of the fact that the maximum penalty is the same as in the Chile and Singapore FTAs despite the fact that Australia's economy is more than five to ten times as large as those of Chile or Singapore. As discussed above, the majority does not believe that one size fits all for trade agreements. Whatever benefits were attained by using the $15 million figure in the Chile and Singapore Agreements is lessened in this instance, with a trading partner with an annual gross domestic product five to ten times higher than those countries.

In the Chile and Singapore reports, a majority of TEPAC members expressed a belief that that the dispute settlement provisions would be improved if the rules of procedure made clear that submissions from persons and interested parties (both private sector and NGOs) should be accepted and considered to the extent appropriate as determined by the panel. This majority is pleased to see that such a provision has been incorporated into the Australia text.

e. Capacity building

A majority of the Committee believes that the Agreement does little more than acknowledge the benefits of capacity building. The State Department's side agreement on environmental cooperation provides a good summary of past and current efforts by the two countries to cooperate and work together on global environmental issues and includes promises to continue to work in the capacity building arena. However, no specific undertakings or funding sources are identified. Any future capacity building projects will be the result of the parties' independent initiative, not commitments made in this Agreement.

f. Market access

In order to determine if the Agreement fulfills Congress's mandate to seek market access, through the elimination of tariffs and non-tariff barriers, for United States environmental technologies, goods, and services, TEPAC requested that USTR and the Department of Commerce identify the extent of the Agreement's tariff reductions for such items. While time constraints apparently prevented USTR and Commerce from identifying the specific items, based on the overall tariff reduction schedule, the majority of TEPAC believes that the Agreement achieves Congress's objective in this regard. With limited exceptions for items such as beef, dairy, textiles, apparel, and passenger cars, almost all tariffs are immediately eliminated following entry into force of the agreement. The majority of TEPAC therefore believes that market access for United States environmental technologies, goods, and services is increased by the Agreement.

g. Other concerns

The majority has several other concerns about the environmental language of the Agreement.

i. Definition of Australian environmental laws covered in the FTA

First, given the nature of the Australian Commonwealth system and the correspondingly greater degree of environmental regulation undertaken at the state and territorial level as compared to the United States, language establishing the relevance of the state and territorial laws and regulations and providing a mechanism through which the Commonwealth government would secure the compliance of the States and territories with the terms of the FTA would be of significant benefit. This language does not appear in the final agreement.

USTR has informed TEPAC that the absence of such a definition and associated mechanism means that all of Australia's statutory and regulatory authorities are captured under the Agreement's provisions. TEPAC notes that the Agreement reaches all levels of Australian law and therefore achieves the greatest possible impact. However, a majority of TEPAC believes that this language is an important aspect of the agreement and is not certain that USTR's understanding will be reinforced by a third party decision maker should a dispute ever arise concerning the meaning of this term. In light of Australia's strong, positive, history of environmental regulation, the absence of this definition is not significant enough for the majority of TEPAC to suggest the environmental language is inadequate. However, TEPAC asks that USTR provide Congress with a written explanation of its understanding of the term "environmental laws" as it applies to Australia so that it can be included in Congress's deliberations and provide a basis for future dispute settlement panel interpretation of this provision.

ii. Tariff reductions

A majority also expresses concern about the lack of uniformity in the lowering of tariffs. This majority believes that a key purpose of free trade agreements is to produce lower prices by

removing barriers to competition. The absence of an agreement regarding trade in sugar, beef and dairy means higher prices for American consumers of these products. This majority believes that the continuation of quotas also affects the credibility of the United States' negotiating positions in the Doha Round regarding removal of agricultural trade barriers. These very issues caused the breakdown of negotiations at the Cancun Ministerial. It is not in the interest of the United States or the interest of U.S. consumers to continue tariff-rate quotas on sugar or on beef and dairy products.

Of these three commodities, the carve-out for sugar in the agricultural chapter of the FTA is of particular concern to the majority of the Committee because of its adverse effects on consumers and on the environment. The U.S. sugar program involves a system of domestic price supports for sugar producers and import restrictions on how much sugar can be imported at a low tariff rate. In terms of farm trade between the United States and Australia, the U.S.'s sugar subsidies results in an (economically relative) overproduction of sugar. The failure of the FTA to reduce U.S. subsidies to sugar producers is a lost opportunity to increase resource efficiency.[2] The GAO estimates that in 1998, American consumers paid $1.9 billion more for sugar and sugar-containing products because of the sugar tariff program. Low income consumers are affected disproportionately because a larger percentage of their income goes for food.

From an environmental perspective, the domestic support program for sugar means unnecessary incentives to grow sugar in what might otherwise be unprofitable geographic areas, such as Florida. Cane sugar farming in Florida and elsewhere puts significant stress on sensitive ecosystems, most significantly the Florida Everglades. Cane fields in the Everglades divert sorely-needed water and increase pollutant loadings through the use of agricultural chemicals. This majority believes that the exemption of sugar from the free trade obligations causes a significant reduction in U.S. welfare gains from the pact and helps perpetuate the degradation of Florida's wetlands.

h. Procedural comment

In its reports on the Chile and Singapore FTAs, the Committee expressed its belief that the 30 days provided by Congress for it to produce this report was an inadequate period, given the length and complexity of the Agreements, the diversity of viewpoints among the TEPAC members, the schedules of those members and the fact that, at the time, reports were required for two Agreements simultaneously. A majority of the Committee also expressed a belief that their efforts were unduly restricted by the classified nature of the documents. The inability of members to share the documents with other members of their organizations, others who may have even greater expertise in these matters than the members, also hindered these efforts.

Significant efforts were made to respond to these concerns by USTR. TEPAC appreciates these efforts. With regard to CAFTA, the text was provided to TEPAC well in advance of the

[2] Agriculture is the largest intrusion of mankind into the natural environment; about half of the earth's land area not covered with deserts or glaciers is used for food production. In the future, a more affluent world population will demand increased world farm output. Only higher yields and greater resource efficiency can avoid converting millions of additional acres of wildlife habitat into poor-quality cropland. Technology and free trade are the two major ways of raising resource efficiency

President's notification to Congress and it was declassified well in advance of that notification. Unfortunately, no advance notice was given with regard to the text of the Australia FTA (although it was declassified during the 30 day period). Indeed, given the mechanics of the President's notification, the 30 day time period was reduced to 24 days, and it took a further two days for the text of the agreement to be fully released. The hasty nature of the process was further compounded by the rapid succession with which the President notified Congress of the Australia, CAFTA and Morocco Agreements, requiring the Committee to undertake the drafting of reports on these three agreements simultaneously. The Committee would be remiss in failing to recognize that the text was declassified during the review period, but reiterates its concern about the expedited nature of its review.

C. Other Points of View

As stated above, several committee members hold views which run contrary to the majority views presented above. They are summarized below and presented more fully in the memoranda attached hereto.

1. The Agreement's investment protection provisions are too narrow

A minority believed that the investment chapter contains troubling developments. First, the agreement picks up troublesome language from the Chile and Singapore Agreement. This includes the "minimum standard of treatment of aliens" language first adopted in 2001 as a NAFTA clarification. The minority believes this is too narrow a standard and not in keeping with the congressional mandate to negotiate fair and equitable treatment consistent with U.S. legal practice and law. The agreement also narrows the protection to " a tangible or intangible property right or interest" rather than to an investment. This could have adverse implications for U.S. investors abroad, which are more likely to face a more restrictive definition of "property" than foreign investors enjoy in the U.S. Finally, regulations for public welfare should have to be created and applied in a non-discriminatory manner.

Second, the agreement with Australia raises some new, and arguably even more important, concerns about the treatment of U.S. investors and U.S. investment. The most serious problem with the agreement is the failure to include investor-to-state protection. This omission may cause an unfortunate precedent for future FTA negotiations. It could also put U.S. firms at competitive disadvantage vis-à-vis firms from countries with which Australia has concluded a BIT, e.g. Singapore. In situations where a future Australian government might take actions that are discriminatory in nature, a Singapore firm would have the choice of seeking arbitration or using Australian courts, whereas the U.S. firm would have only the latter option

Third, the language of Article 11.17 regarding a possible "change of circumstances" that might allow an investor to submit a claim to arbitration with the other party is too weak. The commitment in this case is only that "…the Parties should consider allowing (emphasis added) an investor of a Party to submit to arbitration …" If, in fact, circumstances do change, the right of an investor to seek arbitration should be spelled out more concretely and less conditionally.

Finally, despite a raising of the threshold for screening acquisitions by U.S. investors, there is a real question why Australia should have a Foreign Investment Promotion Board at all. Australia is not a developing country and should not have such a discriminatory, anti-market structure in place. Moreover, even under the more generous screening ceiling, there are important sectoral exceptions, e.g. telecommunications, the media, and the military supply chain, which will tend to impede market access and make Australia's commitments in this area even less meaningful.

2. The Agreement's investment protection provisions are too broad

A minority believes that the investment provisions may allow foreign investors greater rights than U.S. investors in challenging *bona* fide public health, safety and environmental protection regulations. This minority believes that the "except in rare circumstances" language discussed in Section V.B.2.b. above, without a specific definition or a set of benchmarks to guide courts, is a loophole that should have been closed in the negotiation of the Australia FTA. Further, failure to do so may fail to meet the statutory negotiating objectives.

This minority also believes that the agreement references international law concepts as the guideposts for interpreting the substantive obligations – leaving substantial interpretive room for arbitrators to exploit. The inclusion of terms like "fair and equitable" provide arbitral panels with standards that do not exist in U.S. law. The lack of an appellate process and the lack of any oversight role for U.S. courts inhibit the development of a clear jurisprudence consistent with U.S. investor protections.

More broadly, this minority states that it has no evidence that investment rules are necessary in bilateral relations with Australia. To the minority's knowledge, there is no publicly available information that would suggest that Australia has mistreated U.S. investors in recent years. Equally, there has been no showing that Australia's judicial system is not capable of resolving complaints of U.S. investors.

The minority understands that the U.S. has taken reservations for a considerable number of existing domestic regulatory programs at various levels of government (the text of the reservations was not available for review). Analysis of the proposed reservations would indicate the types of regulatory programs that would (presumably) fail to comply with the proposed rules in the investment chapter. Despite having this information at their disposal, USTR has thus far failed to undertake an adequate attempt to analyze the regulatory impact of investment rules through the environmental assessment process elaborated under Executive Order 14131. The failure to fully understand the impact of the proposed rules on domestic regulation (either domestically or abroad) undermines assertions that these agreements will support sustainable development.

Finally, this minority sees the continuation of an imbalanced approach to the treatment of investors (most of which are corporate actors) as opposed to citizens generally in international economic law. Investors are given explicit rights and enforcement mechanisms to hold governments accountable. On the other hand, there is no citizen enforcement mechanism included in the agreement – not even a process analogous to the NAFTA Commission for Environmental Cooperation citizen submission process. Moreover, the investment rules do not

even mention, much less require, minimum standards of corporate conduct on investors acting abroad.

3. Implications for Pharmaceuticals

A minority expressed the opinion that several provisions in the Agreement are not in accord with Section 2102 (4)(b)(C) of the Negotiating Objectives. that trade agreements respect the Doha Declaration on TRIPS and Public Health. These include the data protection scheme in Chapter 17.10; the independent review structure for the Australian Pharmaceuticals Benefit Scheme, established by Paragraph 2(f) of Annex 2-C; the ban on parallel imports in Article 17.9.4 of the Agreement; and the tasking of both the Medicines Working Group and the Regulatory Cooperation process to focus on drug innovation, with no tasking of the Working Group or the Regulatory Cooperation process on affordability of medicines.

This minority states that drug affordability is both a global issue and a national crisis that has occupied American consumers and their representatives for some time. They believe that major drug companies use our government's extremely powerful bargaining position in trade agreement negotiations to secure advantages not conferred in the multilateral TRIPS agreement, which will eventually result in driving up the price of medicines globally. The mechanisms in this Agreement that will delay the entrance of generics and otherwise raise prices for Australian consumers will do nothing to lower prices for American consumers. On the contrary, they may interfere with or even preempt the prerogatives of Congress and numerous state and local jurisdictions to address these difficult issues and arrive at policies that resolve American and global public health concerns.

While innovation can serve the consumer interest, the issue of affordability has been the prime concern of consumers and governments around the world. This was the most significant issue before the Doha ministerial meeting. Provisions such as those in this Agreement exacerbate the view that our government's concern for the profits of its drug companies greatly outbalances its commitment to global public health. This may weaken the credibility of the U.S. in its efforts to successfully conclude the already fractious Doha Round.

4. The Agreement's public participation provisions are lacking

A minority believes that the mechanisms established for public participation are too weak. No references are made to best efforts to respond favorably to requests for consultations. The obligations to share information with the public and to take into account public comments are qualified with the "as appropriate" formula, which deprives the obligations from meaningful content. Further, the U.S.-Australia qualifies the loosely worded obligation of disclosure to the public with the "as appropriate" formula, thereby compromising the provision's effectiveness. The absence of a citizens' submission process again highlights the deficiencies in the mechanisms established to ensure compliance with environmental laws.

A similar minority also believes that, while Chapter 14 of the Agreement makes progress in the transparency of dispute settlement proceedings and in the provisions for submissions by members of the public in the dispute panel process, it does not go far enough. This minority believes that there should be a mechanism that accounts for the consideration of such submissions by panels and their role in the outcomes of panel decisions.

5. The FTA is not lacking any "core" environmental provisions.

In the FTA, certain procedural measures for Australia to enforce its environmental laws are not addressed. A minority believes that this is appropriate. It disagrees with the view expressed in the majority report that the FTA include additional provisions that would specify how the public is to be made aware of its environmental laws and compliance with them. To do so would essentially be to impose U.S. procedures instead of recognizing another developed country's own approach. These provisions are not included in the Trade Act of 2002.

The Trade Act of 2002 clearly enunciates the need to recognize that countries must be able to make their own decisions relating to laws and regulations according to their own economic circumstances and assessment of the resources available and their allocation. The FTA appears to be predicated on the fact that Australia has a democratic government with high levels of transparency, accountability and participation. How the government relates to its citizens and how its citizens can participate in ensuring their environmental laws are complied with and enforced would not seem to be the proper purview of a trade agreement. Democracies by their nature are different from one another and use various approaches to procure input from their citizens'. Some countries have national referendums for citizens; others may have series of town meetings; still others (such as France in 1998 in the case of genetically modified organisms) may have a nationwide "Citizens Conference" to reach out to the public. The fundamental issue is that countries and cultures, even if they share the same values and goals, do not necessary adopt the same approaches to reach those goals.

6. Provisions ensuring effective enforcement are lacking.

A minority believes that the Agreement fails to identify with precision the remedies or sanctions that would secure redress in cases of violation of environmental laws. Instead, the chapter uses vague and open-ended language, stating that "[t]he Parties recognize a variety of activities can contribute to enforcement of environmental laws." Such language is clearly deficient as compared with the US-Chile FTA, which outlines clear criteria for sanctions and remedies, and identifies specific legal tools to secure redress. This minority also stresses that the FTA fails to establish a dedicated Environment Affairs Council composed by environmental cabinet-level members.

7. Disparate investment and dispute resolution procedures

A minority of the Committee is concerned about the growing number of FTAs with different investment and dispute resolution procedures. These different provisions are giving rise to a patchwork of jurisprudential precedent which creates unnecessary complexities for those who wish to better understand the nature of the rights and obligations under these agreements. This problem will worsen as the number of agreements grows.

Membership of Committee

Name	Organization
Dennis Avery	The Hudson Institute
Joseph G. Block (Chair)	Venable LLP
Nancy Zucker Boswell	Transparency International
William A. Butler	Audubon Naturalist Society
Roger Lane Carrick	The Carrick Law Group
Patricia Forkan	The Humane Society of the United States
Mary Gade	Sonnenschein, Nath & Rosenthal
Robert E. Grady	The Carlyle Group
F. Henry "Hank" Habicht	Global Environment & Technology Foundation
Thomas B. Harding	Agrisystems International
Jennifer Haverkamp	
Rhoda Karpatkin	Consumers Union
Elizabeth Lowery	General Motors Corporation
Daniel Magraw	Center for International Environmental Law
Naotaka Matsukata	Hunton & Williams
John Mizroch	World Environmental Center
Thomas Niles	Council for International Business
Frederick O'Regan	International Fund for Animal Welfare
Anne Neal Petri	Garden Clubs of America and The Olmstead Society
Paul Portney	Resources for the Future
Jeffrey J. Schott	Institute for International Economics
Andrew F. Sharpless	Oceana, Inc.
Frances B. Smith	Consumer Alert
William J. Snape	Endangered Species Coalition
Irwin Stelzer	Hudson Institute
Alexander F. Watson	Hills & Company
Douglas Wheeler	Hogan & Hartson
Michael K. Young	The George Washington School of Law
Durwood Zaelke	Center for Governance and Sustainable Development

ATTACHMENT 1

Statement of Thomas M.T. Niles
President, United States Council for International Business
On the U.S.-Australia Free Trade Agreement

The United States Council for International Business (USCIB) has welcomed the completion of the U.S.-Australia Free Trade Agreement. As I have stated publicly, this agreement " … is by far the most important bilateral free trade agreement we have undertaken in recent years, and by and large it will be a boon to U.S. exporters." Australia is a major U.S. trading partner with U.S. exports to that country accounting for $17.5 billion in 2002, supporting more than 270,000 jobs. These important economic considerations are central to any decision to sign and approve the agreement.

That said, the TEPAC report correctly notes that the agreement does not meet all the negotiating objectives established by Congress in the Trade Act of 2002. Still, in the give and take of trade negotiations, especially with a sophisticated trading partner such as Australia, not all negotiating objectives, however desirable, are achievable – or they may be too costly in terms of concessions that must be offered to achieve them. Again, this is common to all trade negotiations and should not therefore be a reason for Congress to disapprove the agreement.

Turning more specifically to the environmental provisions of the agreement, I do not believe, as some other TEPAC members do, that the size of the monetary fine for violation of environmental laws ($15 million as was the case with Chile and Singapore) is relevant. The intention of this provision of the TPA bill, as I understand it, was to encourage improved environmental performance with any fines collected used to remedy the problem, not sanction the violator – at least in the first instance. This concern seems misplaced in dealing with an advanced developed country like Australia.

In sum, I believe the environmental provisions in the agreement are adequate and compatible with the TPA legislation.

I do have other concerns about the agreement that are not directly related to the environment, but which I consider vital nonetheless. These involve the investment chapter and agriculture.

Investment (Joined by Robert E. Grady, The Carlyle Group)

First, the investment chapter in this agreement picks up language from the FTAs with Chile and Singapore, which I continue to find troublesome given the long-standing U.S. position on investment matters as set forth in our numerous BITs. Thus, this agreement again uses the "minimum standard of treatment of aliens" language first adopted in 2001 as a NAFTA clarification and subsequently incorporated into the agreements with Chile and Singapore. From my standpoint, this is too narrow a standard, which is not in keeping with the congressional mandate to negotiate fair and equitable treatment consistent with U.S. legal practice and law. The agreement also inappropriately narrows the protection to " a tangible or intangible property right or interest" rather than to an investment. This could have adverse implications for U.S. investors abroad, which are more likely to face a more restrictive definition of "property" than

foreign investors enjoy in the U.S. Finally, on the issue of regulation for public welfare, I continue to believe it important that regulations must be created and applied in a non-discriminatory manner.

Second, the agreement with Australia raises some new, and arguably even more important, concerns about the treatment of U.S. investors and U.S. investment. The most serious problem with the agreement is the failure to include investor-to-state protection, a feature of previously negotiated FTAs and BITs. I recognize that the U.S. negotiating team tried to reach agreement on such a provision, but ultimately was unable to do so because of Australian objections. This omission may cause an unfortunate precedent for future FTA negotiations since our prospective partners will almost certainly look to the Australian example and argue for equal treatment, i.e. no investor-to-state protection.

Third, the lack of an investor to state provision in the Australian agreement could put U.S. firms at competitive disadvantage vis-à-vis firms from countries with which Australia has concluded a BIT, e.g. Singapore. Consider the situation where a future Australian government might take actions that are discriminatory in nature, e.g. the disguised taking of property or blocking the transfer of funds. In such a situation, a Singapore firm would have the choice of seeking arbitration or using Australian courts, whereas the U.S. firm would have only the latter option. The notion that Australia has an advanced legal system is no guarantee of fair treatment. Consider, for example, what some of our own courts have done – and are doing – in various Alien Tort Statute cases in this country involving both U.S. and foreign firms. The investor-to-state provision has been and remains essential to protect U.S. firms from arbitrary and capricious behavior by foreign governments or foreign judiciaries that are corrupt, biased, or simply inadequate.

Fourth, the language of Article 11.17 regarding a possible "change of circumstances" that might allow an investor to submit a claim to arbitration with the other party is woefully weak. The commitment in this case is only that "…the Parties should consider allowing (emphasis added) an investor of a Party to submit to arbitration …" If, in fact, circumstances do change, the right of an investor to seek arbitration should be spelled out more concretely and less conditionally.

Fifth, while I appreciate the fact that Australia has raised the threshold for screening acquisitions by U.S. investors, there is a real question why Australia should have a Foreign Investment Promotion Board in the first place. Australia is not a developing country. How many other OECD countries have such discriminatory, anti-market structures in place? Moreover, even under the more generous screening ceiling, there are important sectoral exceptions, e.g. telecommunications, the media, and the military supply chain, which will tend to impede market access and make Australia's commitments in this area even less meaningful.

Agriculture

Given the enormous importance of agricultural trade issues in both the WTO's Doha Round negotiations and the FTAA, USCIB is troubled by the agricultural trade provisions in the agreement, concerns that are echoed to a large extent in the majority report. While USCIB is a business organization, we do recognize the importance of agricultural trade liberalization in

bilateral, regional, and multilateral negotiations. Clearly, the agreement with Australia provides important benefits to American farmers and food producers, but the unwillingness of the U.S. to liberalize imports of certain "sensitive" agricultural products may prove costly on at least two counts. First, by taking these items off the negotiating table, Australia undoubtedly made a choice to hold back meaningful concessions to the U.S. in such key areas as investment and pharmaceuticals. Second, the U.S. stance on "sensitive" products will almost certainly send a signal to our trading partners that the U.S. call for major liberalization in agricultural trade may be qualified and not as forthcoming as U.S. public statements might lead them to believe.

ATTACHMENT 2

The U.S.-Australia Free Trade Agreement

Submitted by TEPAC members Frances B. Smith, Consumer Alert and Dennis Avery, Hudson Institute's Center for Global Food Issues

Summary

The U.S. – Australia Free Trade Agreement does appear to promote the interests of the U.S. and to meet Congress' negotiating objectives relating to environmental issues as mandated by the Trade Act of 2002, with a notable exception discussed under (4) below.

General Comments – Environmental Provisions

1. **The agreement relating to environmental issues is appropriate in establishing those objectives yet not detailing how those objectives are to be attained.**

The Trade Act's environmental objectives recognize clearly that sovereign nations must have flexibility to make their own decisions in this regard: "to recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement. . . "

Because of that clear enunciation of a country's ability to "exercise discretion" re areas including compliance and enforcement, the FTA rightly does not stipulate specific procedures whereby Australia would ensure compliance and enforcement of its environmental laws.

The Commonwealth of Australia and its states and territories are in the best position to determine what is needed to meet its diverse environmental goals and the trade-offs that are involved in exercising discretion.

For the U.S. to do otherwise -- to insist that Australia ensure compliance and enforcement of its domestic laws through detailed procedures specified by the U.S. -- would violate sovereignty of that nation. It also would fail to recognize the different political structure of the Commonwealth.

2. **The FTA does not use a prior trade agreement as a template for the environmental provisions. That approach is both logical and flexible as well as recognizing the unique relationship between the U.S. and Australia on a range of issues, including those relating to the environment.**

It would be inappropriate to compare other U.S. bi-lateral trade agreements and offer one or more as the template for the environmental provisions for Australia. Each country is unique, with a unique relationship with the U.S.

Trade agreements are not made in a vacuum. In negotiating and reaching agreements, the Parties' representatives must have knowledge of the other country's economic, political, and legal systems. The history of the countries' bi-lateral relationship in many dimensions is also

important in providing the context for a trade agreement. In writing any "contract," those drafting the document include more bells and whistles when there is no prior experience with the other entity. In the case of the U.S.-Australia relationship, the two countries' multi-layered ties are historic and extensive.

Australia is a highly developed, wealthy country with a GDP of $477 billion, and a per capita GDP of about $20,317. According to the U.S. State Department's "Background Note: Australia" (November 2003), the U.S.-Australia relationship is very close: "The World War II experience, similarities in culture and historical background, and shared democratic values have made U.S. relations with Australia exceptionally strong and close. Ties linking the two nations cover the entire spectrum of international relations--from commercial, cultural, and environmental contacts to political and defense cooperation."

In reviewing the FTA in relation to environmental goals and objectives and their enforcement, one needs to note that the Commonwealth of Australia has a very high level of environmental protection at the state, territorial and national levels. Indeed, the FTA between the U.S. and Australia should recognize the fact that Australia has a robust environmental protection regime that involves the national government, states and territories. Especially in relation to promoting sustainable development – an environmental objective of the Trade Act -- the Australians have adopted a "National Strategy" ("National Strategy for Ecologically Sustainable Development," which was endorsed by the Council of Australian Governments, December, 1992) that includes clearly defined goals and principles, monitoring and assessment, involvement of the public, etc.

The "Interim Environmental Review of the U.S. – Australia Free Trade Agreement (December 2003)" clearly recognizes the commonality of the two countries' approach to environmental protection on a range of issues:

> "The United States and Australia share common concerns and similar responsibilities for protecting and conserving the environment in their respective nations. The two governments have a common interest in promoting global environmental improvement and protection and in using science and technology to address environmental challenges. Australia and the United States have a long and productive history of bilateral cooperation, for example through the U.S.-Australia Climate Action Partnership and in areas such as botanic gardens, endangered species, meteorological and oceanographic research and management, whaling and ozone protection.
>
> "The United States and Australia also have contributed to regional environmental cooperation in the South Pacific region in an effort to build capacity in the region to protect the environment. Both governments are members of the South Pacific Regional Environmental Program, the Asia-Pacific Economic Cooperation Forum and the Secretariat of the Pacific Community. The United States and Australia also recognize the importance of multilateral environmental activities and the benefits of close cooperation between the two countries in preparing for and participating in international environmental meetings and conferences. Subjects of recent cooperation include endangered species, Antarctica, ocean affairs, chemicals and hazardous wastes, and biological diversity. Meetings of the Commission on Sustainable Development and the WTO Committee Trade and Environment provided further opportunities for close cooperation between the two countries.

> "Through a Joint Statement on Environmental Cooperation, the United States and Australia expect to express their recognition of the importance of these bilateral, regional and multilateral efforts and their intent to consult regularly both on the direction of ongoing cooperative activities and on areas for future cooperative efforts. (pages 12-13)

Consistent with the high-level of environmental protection evidenced by Australia, coupled with the fact that Australia has a highly developed legal system, the Australia FTA carries out the mandate of the Trade Act of 2002 in relation to the environment by encompassing the Act's objectives in the text (with the exception of (4) discussed below).

3. The FTA correctly does not have the U.S. specifying *how* some of those mandates will be carried out, as Australia has its own body of laws and regulations to ensure the accomplishment of the objectives and enforcement of those objectives.

In the FTA, procedural measures for Australia to enforce its environmental laws are not addressed. That is appropriate. To do otherwise would essentially be imposing U.S. procedures instead of recognizing another developed country's own approach.

We would refer to the Trade Act of 2002's clear enunciation of the need to recognize that countries must be able to make their own decisions relating to laws and regulations according to their own economic circumstances and assessment of the resources available and their allocation.

> "(B) to recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor or environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources, and no retaliation may be authorized based on the exercise of these rights or the right to establish domestic labor standards and levels of environmental protection;"

The fundamental issue is that countries and cultures, even if they share the same values and goals, do not necessary adopt the same approaches to reach those goals.

Thus, we dissent from the majority report of the Committee in its assertion that the "The Agreement is lacking certain 'core' environmental provisions. . . . " The majority report indicates a desire for the FTA to include additional provisions – provisions NOT included in the Trade Act of 2002 -- that would specify how the public is to be made aware of its environmental laws and compliance with them. The report calls this needed "checks and balances."

However, the FTA agreement seems to be predicated on the fact that Australia has a democratic government with high levels of transparency, accountability and participation. *How* the government relates to its citizens and *how* its citizens can participate in ensuring their environmental laws are complied with and enforced would not seem to be the proper purview of a trade agreement. Democracies by their nature are different from one another and use various approaches to procure input from their citizens' – some countries have national referendums for citizens; others may have series of town meetings; still others (such as France in 1998 in the case

of genetically modified organisms) may have a nationwide "Citizens Conference" to reach out to the public.

Specific Comments -- Sugar

4. **There is a major element of the U.S.-Australia Free Trade Agreement that does not live up to the Congressional mandate: "to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources;"**

The fact that there was a carve-out for sugar in the agricultural chapter of the FTA is of concern because of its adverse effects on consumers and on the environment. It also is a striking example of U.S. protectionist policy – one that is at odds with our international posture in promoting the Doha Agenda for more trade liberalization in the World Trade Organization. It also sends negative signals to developing countries that desperately need greater access to developed countries' markets.

Effects on Consumers

The U.S. sugar program involves a system of domestic price supports for sugar producers and import restrictions on how much sugar can be imported a a low tariff rate. The artificially high prices harm U.S. consumers by increasing the costs of many processed foods.

"The program relies on a system of price supports and import restrictions to keep prices paid to U.S. producers above the world market. Unfortunately, much of this increased income to growers is passed on to consumers as an added cost by those who buy sugar from producers—that is, food processors and retailers.

"Consumers pay this hidden subsidy when they buy food products containing sugar at the grocery store. It amounts to a hidden food tax that hits poor Americans the hardest, since they spend a larger percentage of their income on food than other families." Statement of Arthur S. Jaeger, Associate Director, Consumer Federation of America, on the federal sugar program and its impact on consumers, before USDA's Agricultural Outlook Forum 2002, Feb. 22, 2002

Effects on the Environment

The domestic support program for sugar also means that there are adverse environmental consequences, particularly in certain sugar producing areas, such as in Florida, where perverse incentives to increase sugar production put stress on sensitive ecosystems, such as the Everglades.

Agriculture is the largest intrusion of mankind into the natural environment; about half of the earth's land area not covered with deserts of glaciers is given over to farming and food production. Moreover, in the next 45 years a larger, a more affluent world population will certainly demand nearly three times the current world farm output. Higher yields and greater resource efficiency are the only ways in which this prospective demand can be met without converting millions of additional acres of wildlife habitat into poor-quality cropland. (Virtually all of the world's potentially high-quality cropland has already been cleared.). Technology and

free trade are the two major ways of raising resource efficiency, and the world is making use of only one of these.

In terms of farm trade between the United States and Australia, the U.S. is clearly wasting resources on its non-competitive and environmentally harmful sugar industry. The U.S. is growing most of its cane sugar in Florida, where the cane fields are diverting sorely-needed water from the country's most famous and endangered wetland. They are also seriously polluting the Florida Everglades and the Mississippi Delta wetlands to produce sugar that could be produced with less cost and pollution in Australia, Brazil, or a number of other countries. Where the U.S. is growing sugar beets it is accepting ultra-high costs and poor sugar yields per acre on land that could readily be shifted to crops with higher comparative advantage, such as feedstuffs.

It seems likely that under a free farm trade scenario, the U.S. would import cane sugar from Australia, while Australia would import more U.S. feedstuffs to supplement its rainfall-limited production of wheat and forage. Corn and soymeal from the U.S. would help fatten and add value to Australia's grass-fed cattle and sheep for ultimate export to expanding markets in Asia. All the countries involved would be better off.

The only visible loss would be to the cane sugar industries in Florida and Louisiana, which have only modest profit due to their high costs, and which represent one of the most serious pollution problems that can legitimately be attributed to modern U.S. farming.

Specific Comments – Other Agricultural Issues

5. **It is disappointing that the U.S. did not take the lead in this Agreement to significantly reduce the tariff programs and domestic support systems for other agricultural commodities. Rather, the Agreement continues to protect agricultural producers at the expense of consumers and the environment.**

As a measure of farm trade reform failure, the USTR itself notes that the average tariff in non-farm manufactures has been lowered from about 40 percent at the signing of the GATT in 1948 to about 4 percent today. Meanwhile, the USTR says, the average tariff on farm products has probably remained above 65 percent. We are not even sure that USTR can cite a realistic farm tariff figure since so much farm trade is simply banned by national policies against importing farm products at all (as in China and India, to cite two huge examples).

The U.S. is far from alone in its failure to frontally attack the agriculture problem, but it is certainly failing to exert the leadership in liberalizing farm trade that will be needed to achieve the congressional hopes and the broadly agreed environmental goals in the near term; and, equally important, to avoid an ugly collapse of its farm policy.

The Agreement raises only slightly the quota for Australian beef imports to amount to about 0.17 percent of U.S. beef production. The quota increases will take effect when US beef exports return to their 2003 (pre-BSE) levels, or three years after effective date of the agreement, whichever comes first. To give enough time for U.S. beef producers to transition, duties on

Australian beef imports above that quota will be phased out over 18 years. The agreement also has a permanent safeguard measure that kicks in to protect U.S. producers.

In relation to dairy issues, the tariffs on dairy imports above the quota are maintained. As with beef, the quota was raised to amount to 0.17 percent of the annual value of dairy production.

Looking more broadly, the economic and environmental ideal for the year 2050 would certainly involve freer farm trade, with the high-yield and low-cost farmers of North America and Europe helping to meet the increasing food requirements of rising populations and rising dietary aspirations in such densely populated emerging economies as China, India, Indonesia, and Bangladesh.

Failure to liberalize farm trade is likely to lead to more such environmental disasters as the heavy floods in China within the last decade, after too-steep hillsides in some of its river valleys were cleared for crops, creating massive runoff and erosion problems. Millions of acres of those steep hillsides have since had to be reforested, while China searches for other ways to meet its rising demand for farm products.

India searches today for ways to feed what its president says are at least 300 million malnourished citizens, while protecting the wildlife preserves of the Bengal tiger and the barking deer. Its grain price supports remain too high to permit most of its people to eat high-quality diets including poultry and fish, while potential feedstuffs lie unused as “surplus” in government warehouses.

These are just a few of the problems created by the current network of farm subsidies and farm trade barriers left over from the era before GATT and rapid economic growth. Today, there is no need for those subsidies, trade distortions and environmental negatives. The farm “surpluses” from such countries as France, the United States, Argentina, and parts of Africa could be usefully absorbed by the growing demand for food and feed in densely populated countries and more affluent countries short of good farmland.

A larger proportion of the “environmental problems” charged against high-yield farming in recent years can actually be attributed to the over-intensification and poor incentive structures associated with the farm subsidies and trade barriers.

In short, freer farm trade is a winning policy—economically, environmentally, and politically—for Europe, North America, South America, Asia, and Africa.

Farm subsidies and trade barriers are an ugly vestige of a bygone era.

Moreover, the day will shortly arrive when both the U.S. and Western Europe must admit that these costly and failing policies can no longer be supported. Western Europe will be unable to afford the extension of its current farm subsidies to the ten new member countries it is accepting. (Several of them will be major farm exporters as they accumulate better technology and more capital.)

The U.S. will be unable to maintain its farm subsidy commitments in the face of the War on Terror, and the urgently impending reform of Social Security and Medicare.

The members signing this statement recommend that the USTR and the U.S. government make another, more urgent effort to reach a free trade agreement that lives up to its name in the agricultural sector as well as in non-farm goods and services.

ATTACHMENT 3

Separate Statement of TEPAC Members

Rhoda H. Karpatkin, Consumers Union of United States, Inc.
joined by
William A. Butler, Audubon Naturalist Society
Daniel Magraw, Center for International Environmental Law
Durwood Zaelke, Center for Governance and Sustainable Development

March 12, 2004

I agree with some portions of the TEPAC Report and I disagree with others. There are three policy issues addressed by the agreement about which I hold separate views.

While the US – Australia Free Trade Agreement includes some positive actions to reduce trade barriers and improves in procedural ways over earlier trade agreements, in other ways it fails to meet some negotiating objectives of the Trade Promotion Authority Act of 2000.

Investor-State Disputes.

Section 2102(b)(3) establishes the objectives of "ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States", and securing "for investors important rights comparable to those that would be available under United States legal principles and practice, by… "(*D)* seeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice."

The absence of an investor-state dispute settlement mechanism obviates some of the concerns raised by the U.S. - Chile and NAFTA agreements. This eliminates the opportunity for commercial interests to challenge legitimate changes in regulations that protect health, safety and the environment before a tribunal that has no long-term accountability to either Party or its citizens.

At the same time, Chapter 11 Annex 11-B Section (4)(b) includes the same language as the Chile FTA to which I objected last year. It may allow foreign investors greater rights than U.S. investors in challenging *bona* fide public health, safety and environmental protection regulations. The agreement provides that "…[e]xcept in rare circumstances" changes in regulations that protect health, safety and the environment shall not be deemed to constitute an expropriation. I believe that the term "rare circumstances," without a specific definition or a set of benchmarks to guide courts, is a loophole that should have been closed in the negotiation of the Australia FTA. I believe that the failure to do so may fail to meet the statutory negotiating objectives.

Tariff Reductions.

Section 2102(a)(1) of the Act establishes a principal negotiating objective of obtaining "more open, equitable, and reciprocal market access". Section 2102(a)(2) establishes the further principal objective that agreements "obtain the reduction or elimination of barriers and distortions that are directly related to trade and that decrease market opportunities for United States exports or otherwise distort United States trade". Further, Section 2102(b)(1)(B) establishes the objective of obtaining "reciprocal tariff and non tariff barrier elimination agreements… ." And, Section 2101(b)(1)(v) establishes the objective of "developing disciplines for domestic support programs, so that production that is in excess of domestic food security needs is sold at world prices".

These objectives are for the benefit of U.S. consumers as well as of U.S. producers. Trade agreements are meant to benefit consumers by lowering prices. Therefore, an agreement that fails to create *reciprocal* market access and *reciprocal* trade barrier reductions, to the injury of U.S. consumers, is contrary to the objectives of the Act.

The continuation of U.S. protectionism with respect to domestic sugar, beef and dairy products is contrary to these negotiating objectives. According to the General Accounting Office, the sugar program alone costs U.S. consumers almost $2 billion annually with respect to sugar protectionism alone because domestically-grown sugar is sold to them at well above world prices. The carve-outs for beef and dairy add to this total. The carve-out for sugar is particularly egregious because it allows continued harm to our environment as well as to consumers' pocketbooks. The Congress should set aside the concerns of special producer interests and address this issue in light of the objectives of the Trade Promotion Act of 2000.

Intellectual Property Protections for Pharmaceuticals.

Section 2102(4)(b)(C) establishes the objective that trade agreements respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001.

The Doha Declaration, recited in this objective, calls on WTO members to seek ways to increase consumer access to essential medicines. It reflects the strong relationship between trade issues and the global crisis in the affordability of medicines for most of the world's peoples, a connection that nearly derailed the Doha Ministerial meeting. Drug affordability is a crisis that has occupied American consumers and their representatives for some time.

Provisions in the Australia FTA that run counter to this Negotiating Objective include:

- the data protection scheme in Chapter 17.10, which would extend by 5 years the delay in marketing of generic substitutes that rely on the propriety date of the patent holder to establish safety and efficacy. This delays the introduction of lower priced generics, a major factor in the affordability of drugs,
- the independent review structure for the Australian Pharmaceutical Benefits Scheme, established in Par. 2(f) of Annex 2-C, which could further delay the marketing of generic

substitutes by tying marketing approval up in a lengthy review process, in which pharmaceutical companies are given new rights to intervene,

- the ban on parallel imports in Chapter 17.9.4, which will eliminate a major source of price competition, and
- the establishment of a Medicines Working Group in Annex C-2 (3), of government officials with direction to focus on research and development. There is no consumer representation here, and no inclusion of consumer concerns about affordability.

At first blush, it may seem that these provisions have no significance for American consumers, and that the Congress would have no reason to be concerned. They do, in several respects. These transparent steps to achieve higher drug prices from Australians, for the benefit of a very powerful and profitable industry, are not balanced by any mechanism that would translate those increases into lower prices for Americans. The provisions do not recognize that public health cannot be achieved by innovation alone, but requires that medicines be affordable as well. And trade agreement provisions such as these run counter to an evolving and sorely needed national and global public policy that seeks to increase the affordability of medicines.

Such agreements will eventually result in upward pressures on the prices of medicines globally, and greater powers that those provided in the TRIPS agreement for pharmaceutical companies to achieve higher prices.

Congress has been grappling with this highly publicized public policy crisis in the US, as have numerous state and local jurisdictions. A succession of trade agreement provisions such as these may have a preemptive effect, and intrude upon the prerogatives of the Congress to define that policy. Our country has a continuing national security concern. We should take note that negotiations such as these exacerbate the view held among so many of the world's peoples, especially in the developing countries, that American's concern for the profits of its drug companies greatly outbalances its interest in global public health. This will weaken our credibility abroad, and our efforts to successfully conclude the WTO Doha Development round.

I urge the Congress to take these considerations into account in deciding whether to approve the US-Australian Free Trade Agreement.

ATTACHMENT 4

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

Separate Comments of TEPAC Members on the Environment Chapter of the U.S.-Australia Free Trade Agreement

William Butler, Board Member, Audubon Naturalist Society
Rhoda H. Karpatkin, President Emeritus, Consumers Union of United States
Daniel Magraw, President, Center for International Environmental Law
Durwood Zaelke, President, Institute for Governance and Sustainable Development
William J. Snape, President, Endangered Species Coalition

March 9, 2004

Regarding the environment chapter of the U.S.-Australia FTA, we note that it departs in a significant way from other FTAs recently negotiated by USTR, in particular the recent Chile, Singapore, and CAFTA agreements. The changes are not to enhance or refine the terms of the environment chapter, however, but to delete or weaken important elements in regards to opportunities for public participation, for cooperation, or for securing remedies in cases of environmental harm. These negative developments do not meet the negotiating objectives defined by Congress in TPA.

1. Regarding the Opportunities for Public Participation, the mechanisms established in the Australia-U.S. FTA are weaker than those included in the FTA concluded with Chile. In particular, no references are made to best efforts to respond favorably to requests for consultations. The obligations to share information with the public (19.6.2.) and to take into account public comments (19.6.3) are qualified with the "as appropriate" formula, which deprives the obligations from meaningful content. Further, unlike the Chile-U.S. FTA which requires each Party to promptly make available to its public all communications it receives, and to review and respond to them, the U.S.-Australia qualifies the loosely worded obligation of disclosure to the public with the "as appropriate" formula, thereby compromising the provision's effectiveness.

2. The absence of a citizens' submission process again highlights the deficiencies in the mechanisms established to ensure compliance with environmental laws.

3. The FTA fails to establish a dedicated Environment Affairs Council composed by environmental cabinet-level members. Rather the FTA grants the general Joint Committee created under the Institutional Arrangements and Dispute Settlement Chapter the discretionary power to establish a subcommittee (19.5.1). This subcommittee would

also be created in case one of the Parties requests consultations regarding matters arising under the environment chapter. (19.7.3)

4. The Procedural Guarantees and Public Awareness provisions of the Environment Chapter suffer from severe deficiencies. Significantly, the chapter fails to identify with precision the remedies or sanctions that would lead secure redress in cases of violation of environmental laws. Instead, the chapter uses vague and open-ended language, stating that, "The Parties recognize a variety of activities can contribute to enforcement of environmental laws" (19.3.3). Such language is clearly deficient as compared with the US-Chile FTA, which outlines clear criteria for sanctions and remedies, and identifies specific legal tools to secure redress.

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

Separate Comments of TEPAC Members on the Investment Chapter of the U.S.-Australia Free Trade Agreement

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We agree with some portions of the TEPAC Report and disagree with other portions. We also have additional views on some issues that are either not touched upon or referenced only briefly in the Report, but which we believe the Congress should consider. We are thus submitting these additional comments based on our review of the U.S.-Australia FTA text.

I. General Comments

We note with approval that the U.S.-Australia FTA investment chapter does not contain an investor-state dispute mechanism. This is positive for several reasons. Experience with cases being brought under existing agreements (chiefly NAFTA and numerous bilateral investment treaties or BITs) demonstrates that individual investors are pushing for expansive readings of the substantive obligations in those agreements. Further tilting international investment rules in favor of investors at the expense of the ability of governments to regulate in the public interest is a threat to good governance and public welfare. The reliance on domestic courts in the first instance, and on state-to-state dispute settlement only if needed, provides more appropriate fora for the balancing the rights of investors against the public interest. In addition, requiring investors to rely in the first instance on domestic legal remedies helps build the rule of law by allowing national legal regimes to resolve any legitimate claims by investors. Allowing investors to remove disputes from national legal systems, as is the case in most recent U.S. investment treaties, stunts the development of those systems.

Notwithstanding, the lack of the investor state dispute mechanism, the underlying provisions of the investment provisions of the U.S.-Australia FTA are largely unchanged from those negotiated in recent U.S. FTAs, and thus remain highly problematic. We do not believe that the provisions we have reviewed comply with the direction from Congress that new international investment rules not provide foreign investors with

"greater substantive rights" than domestic investors enjoy under U.S. law[1]. Nor does the approach address the fundamental problems environmental groups and others have identified with the NAFTA/BIT approach.

The explicit limitation of the minimum standard of treatment provision to "customary international law" corrects one serious flaw with the NAFTA approach, which referenced only "international law." Of course, the content of customary international law with respect to the treatment of aliens is not crystal clear and it remains to be seen how arbitral panels will apply this standard. In addition, the removal of "tantamount to" language in the expropriation text and the inclusion of a "shared understanding" in an annex to the text provide greater guidance to future arbitral panels that could limit the more expansive readings of NAFTA's expropriation provision.

However, the agreement references international law concepts as the guideposts for interpreting the substantive obligations – leaving substantial interpretive room for arbitrators to exploit. The inclusion of terms like "fair and equitable" provide arbitral panels with standards that do not exist in U.S. law. The lack of an appellate process and the lack of any oversight role for U.S. courts inhibit the development of a clear jurisprudence consistent with U.S. investor protections. There can thus be no assurance that either expropriation or minimum standard of treatment will be applied in a manner consistent with the U.S. legal norms as required by the Trade Act of 2002. Part III below details a number of specific ways in which the expropriation and minimum standard of treatment provisions fail to meet the "no greater substantive rights" standard.

Need not demonstrated. More broadly, there has been no evidence provided to TEPAC that investment rules are necessary in bilateral relations with Australia. To our knowledge, there is no publicly available information that would suggest that Australia has mistreated U.S. investors in recent years. Equally, there has been no showing that Australia's judicial system is not capable of resolving complaints of U.S. investors. One must thus question the need for investment rules in the first place.

Regulatory effects not adequately understood. The bulk of the concerns expressed by environmental groups and others involve the regulatory effects of the investment rules. In other words, the rules and the investor-state process have been used to challenge domestic regulations designed to protect the environment and public health or advance other important social objectives. We understand that the U.S. has taken reservations for a considerable number of existing domestic regulatory programs at various levels of government (the text of the reservations was not available for review via the secure web-site). Analysis of the proposed reservations would indicate the types of regulatory programs that would (presumably) fail to comply with the proposed rules in the investment chapter. Despite having this information at their disposal, USTR has thus far failed to undertake an adequate attempt to analyze the regulatory impact of investment rules through the environmental assessment process elaborated under Executive Order 14131. The failure to fully understand the impact of the proposed rules on domestic

[1] Part III below addresses in more detail the failure of the agreements to meet the "no greater substantive rights" standard.

regulation (either domestically or abroad) undermines assertions that these agreements will support sustainable development.

Failure to correct imbalance. Finally, we see the continuation of an imbalanced approach to the treatment of investors (most of which are corporate actors) as opposed to citizens generally in international economic law. Investors are given explicit rights and enforcement mechanisms to hold governments accountable. On the other hand, there is no citizen enforcement mechanism included in the agreement – not even a process analogous to the NAFTA Commission for Environmental Cooperation citizen submission process. Moreover, the investment rules do not even mention, much less require, minimum standards of corporate conduct on investors acting abroad.

In a separate minority statement on investment issues, one of our colleagues refers to the Alien Tort Claims Act and the efforts in U.S. courts to use this statute to hold U.S. corporations accountable for their actions abroad as an example of actionable mistreatment of investors. We could not disagree more strongly. Home country efforts to hold their corporations responsible for their actions abroad are a critical element in building better international governance and the Alien Tort Claims Act is an important tool in that respect.

II. Specific Concerns

Definitions. The definition of investment differs markedly from that in NAFTA and appears to be even broader in scope. The effect of this definition is not clear, but at a minimum it raises questions as to the types of property interests the agreement seeks to protect and whether those notions are consistent with the limited notion of protected property interests under the U.S. Constitution and case law. The reference in the expropriation annex to "a tangible or intangible property right or property interest" does little to elucidate the precise scope of property interests protected by the agreement for purposes of ensuring consistency with the "no greater substantive rights standard."

Distinguishing investors based on environmental criteria. In the non-discrimination provisions (national treatment and most favored nation treatment) there is no clarity regarding the extent to which environmental criteria can be used as the basis to fairly distinguish between investors. In particular, there is no explanatory note that would ensure that future panels are guided by a notion of "like circumstances" that would accept environmental criteria as an important part of the like circumstances analysis. The classic example is in regulating point source pollution of a river. The absorptive capacity of the river system could, for example, allow five sources of pollution without significant harm, but a sixth could create too heavy a load and result in significant environmental harm. Would national treatment require the sixth facility (identical in everyway to the first five, but for foreign ownership) to be compensated if it is not allowed to operate? The negotiators have demonstrated at numerous points in the text a willingness to try to provide panels with guidance, and the failure to do so here is puzzling – particularly, as

noted below, when there is no general environmental exception for the investment chapter.

Lack of environmental exception. The failure to include a general environmental exception to the investment chapter is a further indication that international investment rules remain a significant threat to environmental and other policies enacted by governments to further the public interest. If, as the supporters of strong investment protections argue, such rules pose no threat to legitimate environmental regulations or actions of government, then why not ensure that result by clearly carving out such regulations from the ambit of the rules? The approach in Article XX of the GATT, if applied to investment, would ensure that governments are not required to compensate investors for the consequences of entirely legitimate and reasonable environmental regulation. As noted above, the failure to explicitly include environmental factors in the like circumstances analysis heightens the need for an effective environmental exception.

Performance requirements. The performance requirements section includes a puzzling environmental exception for some but not all of its provisions. The exception singles out some paragraphs and not others and directs that they not be construed in a way to prevent a Party from adopting or maintaining legitimate environmental measures. Does this mean that the paragraphs not mentioned may be construed to prevent a Party from adopting or maintaining legitimate environmental measures? If not, then why not apply the exception more broadly?

Investor-State Consultations: sneaking in the back door? Article 11.16 appears to offer the possibility that investor will be able to bring direct arbitration claims against one or the other Party. The provision refers to a "change of circumstances" as providing a potential basis for such a claim going forward. This ambiguous reference creates unnecessary confusion over whether or not investor-state disputes are indeed off the table in this agreement. While we read the provision as allowing either Party to effectively prevent such claims moving forward, we see no benefit to including this provision.

III. The Investment Provisions of the U.S.-Chile and U.S.-Singapore FTAs Fail to Meet the "No Greater Substantive Rights" requirement of the Trade Act of 2002

The Trade Act of 2002 requires that investment provisions "ensur[e] that foreign investors are not accorded greater substantive rights with respect to investment protections than United States investors in the United States…." Section 2102(b)(3).

Like the Chile and Singapore FTAs, the U.S.-Australia FTA clearly reflects a departure from the investment provisions in previous agreements to which the U.S. is a party, including NAFTA Chapter 11, however, those changes fail to meet the standard articulated by Congress. While there are potentially helpful elements in the proposals, they fail to adequately reflect U.S. law, or even international law, in many respects – including the particular Supreme Court decision, *Penn Central*, on which USTR intended to base much of the standard for expropriation.

The U.S.-Australia FTA cannot ultimately comport with the "no greater rights" congressional mandate if foreign investors are able to bring claims that would be decided by ad hoc panels that are not trained in or bound by U.S. Supreme Court precedent and that would not be subject to review by U.S. courts to ensure that they do not in fact deviate from U.S. law and grant greater rights to foreign investors. The prospects of such panels engaging in subjective balancing tests, and on the basis of those, imposing financial liability on the U.S. for legitimate regulatory and other actions is extremely troubling.

The agreements are also flawed, however, in failing to do what they purport to do – that is, reflect U.S law. A number of particular concerns regarding the standards for expropriation and minimum treatment are addressed below.

Expropriation

The removal of the "tantamount to" language and the inclusion of the annex setting out a shared understanding of the expropriation provision provide incremental improvements. However, in attempting to define a standard, the agreement first references customary international law on expropriation and then focuses on a limited, and imbalanced, set of the critical factors used by the Supreme Court in determining takings cases. The agreements fail to include critical standards established in U.S. jurisprudence that preclude findings of compensable expropriations, and leaves unclear in a problematic manner some of those that it has chosen to reference. For example, they do not include the critical Supreme Court principle that a governmental action must permanently interfere with a property in its entirety in order to meet a threshold requirement to constitute a taking.[2] Simply listing some of the factors the Supreme Court discussed in *Penn Central*, but without the essential explanations and limitations that were set forth in that case and in subsequent rulings, provides no assurance that foreign investors will not in fact be granted greater rights than U.S. investors. This failure to provide explanations and limitations for critical standards includes the use of the "character of government action" as a factor in expropriation analysis. "Character of government action" is extraordinarily ambiguous and could easily be misapplied by tribunals that are neither trained in nor bound by U.S. precedent.[3] In addition, the

[2] The Supreme Court has clearly stated that takings analysis must be based on the effect of the government action on the parcel as a whole, not its segments. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-31 (1978). This standard prevents segmenting a property, whether measured in terms of area or time, as clearly articulated in the Supreme Court's *Tahoe-Sierra* case, which rejected a taking claim arising out of a temporary moratorium on development. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002)

[3] The Supreme Court's reference to that factor in *Penn Central* reflects a clear limitation on takings claims under U.S. law that is not evident in an unexplained reference to the "character of government action." In *Penn Central*, the Court explained that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the public good." The Supreme Court thus referred to the character of government action to distinguish between a permanent invasion of land, which is more likely to give rise to a right to compensation, and normal regulatory action,

language concerning the analysis of an investor's expectations is too vague, leaves too much to the discretion of the arbitrators, and does not indicate the deference to governmental regulatory authority that is found in U.S. jurisprudence.[4] Property rights are not defined in the agreement, nor is there any reference to the fact that under Supreme Court cases takings claims must be based upon compensable property interests, which are defined by background principles of property and nuisance law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Furthermore, the agreement fails to include the fundamental distinction between land and "personal property."[5]

While the "rare circumstances" language in the agreements provides some direction for arbitral panels, it fails to adequately convey the degree to which it is unlikely that a regulatory action would be considered an expropriation under U.S. law. It would take an extreme circumstance for any of the thousands of our country's laws and regulations to be found to constitute an expropriation. It would be more accurate to state that regulatory actions designed to protect health, environment, or the public welfare do not constitute an expropriation, except in instances equivalent to a permanent, compelled, physical occupation.[6]

Minimum Standard of Treatment

In regard to minimum, or general, treatment, we are deeply concerned that the term "fair and equitable treatment" has been included as an essential element of the standard. "Fair and equitable treatment" opens the door to outcomes in investment cases that go far beyond U.S. law. While we welcome the clarification that "fair and equitable" includes procedural due process, inclusion of one principle in a standard does not eliminate the significant potential of a broader, unbounded interpretation of the standard. The terms "fair" and "equitable", after all, are inherently subjective and incapable of precise definition.

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for which compensation is only required in extreme circumstances that are equivalent to a permanent, compelled, physical occupation. Without a clear explanation of how the character of government action affects the analysis of a takings claim, a tribunal applying this factor would be free to interpret it so as to afford foreign investors far greater rights than the U.S. Constitution provides.

[4] The expropriation annex does not include critical limitations stating that an investor's expectations are a necessary, but not sufficient, condition for liability, that an investor's expectations must be evaluated as of the time of the investment or that an investor must expect that health, safety, and environmental regulations often change and become more strict over time. For example, it fails to include the *Concrete Pipe* Court's reiteration of the principle that those who do business in an already regulated field "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993).

[5] "In the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulations might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992).

[6] As the Supreme Court unanimously stated in the *Riverside Bayview* case, land-use regulations may constitute a taking in "extreme circumstances." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

- There is no right corresponding to "fair and equitable treatment" under U.S. law. The closest thing in U.S. law is the Administrative Procedure Act (APA), which allows a court to review federal regulations to determine whether they are "arbitrary or capricious." First and foremost, the APA does not apply to many governmental actions (e.g., legislation, court decisions, actions by state, local and tribal governments, and exercises of prosecutorial discretion) that are covered under investment agreements. The two proposed agreements thus constitute a massive enlargement of foreign investors' rights. Secondly, the APA does not provide for monetary damages (as these investment provisions would allow); only injunctive relief is allowed.

  Foreign investors have the same rights as U.S. investors under the APA to seek injunctive relief. Enshrining this equal access in a trade agreement is one thing, but granting foreign investors the right to be paid the costs of complying with a requirement that may violate the APA but does not constitute a compensable taking under the Constitution as interpreted by the Supreme Court would clearly violate the Congress' "no greater substantive rights" mandate. In other words, giving foreign investors the right to monetary damages under investment rules, where an identically situated U.S. investor would be limited to injunctive relief, would violate the "no greater substantive rights" mandate. Finally, U.S. courts are bound by deference doctrines in applying the APA; there is no equivalent doctrine in the Chile and Singapore agreements or other international law, to our knowledge.

- In addition, the "fair and equitable" language, if viewed as an independent standard, is extremely dangerous to good governance. It would invite an arbitral tribunal to apply its own view of what is "fair" or "equitable" unbounded by any limits in U.S. law. Those terms have no definable meaning, and they are inherently subjective. Indeed, we wonder how they can have any principled meaning when applied to countries with such different histories, cultures, and value systems as are involved in free trade agreements. The kind of second-guessing of governmental action—e.g., legislation, prosecutorial discretion, police action, court decisions, regulatory actions, zoning decisions, etc., at all levels of government—invited by this type of standard is antithetical to democracy.