April 6, 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 Morocco 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

Enclosure

The U.S.-Morocco Free Trade Agreement

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

April 6, 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.-Morocco 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. However, as it noted in its report on the Australia FTA, TEPAC does not believe that "one size fits all" with regard to FTAs. This FTA lacks some provisions which have appeared in other agreements and which the Committee believes would have been appropriate to include in this agreement. Not only absent is the extensive public participation framework which appeared in the Central American Free Trade Agreement (CAFTA), but also not included are some more basic provisions which appeared in the Chile and Singapore agreements. TEPAC is unsure if the absence of these provisions simply reflects the result of a more rushed series of negotiations or is indicative of a reduced attention to environmental matters. Either explanation, however, is reason for concern.

A majority of the committee members remains pleased to see environmental issues integrated into the drafting of a free trade agreement. A majority of the committee also 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. However, trade can create and amplify adverse externalities which require enhanced regulatory oversight.

A majority believes that the Agreement's investment protection and dispute resolution provisions are an improvement over those in the North American Free Trade Agreement (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. However, as it has expressed in its four other recent reports, TEPAC is concerned about identifying protected interests with the phrase "a tangible or intangible property right or interest." There is a lack of clarity regarding the definition of this term and there is no comparable U.S. jurisprudential concept.

A majority of TEPAC believes the public participation provisions in the agreement are acceptable. As it has alluded to in previous reports, TEPAC believes that public participation helps ensure that an agreement's provisions operate as intended and greatly increases opportunities to guarantee the effective enforcement of environmental laws and to enhance capacity building and sustainable development efforts. While believing that the public participation provisions of the agreement are acceptable, the majority of TEPAC nevertheless is concerned that they do not go as far as they should. Certain environmental and public participation provisions which exist in other FTAs are not present in the Morocco Agreement. This majority believes that some of these provisions should have been included in this Agreement.

A similar majority of the members believe the dispute resolution procedures will help ensure that the FTA meets Congress's environmental objectives, but thinks that these procedures are not as effective as they could be. The majority is concerned about several issues related to these procedures, including the facts that the public submission process does not reflect a mandatory requirement for acceptance of such submissions and that the language regarding expert technical assistance for panelists is not as strong as it has been in the past. Moreover, instead of including a provision regarding a roster of panelists and panel selection procedures which ensure that panels addressing environmental issues have the requisite expertise, the Agreement places this requirement in a side letter.

The majority believes that the Agreement's monetary penalties of up to $15 million per year for instances of non-compliance with rulings confirming violations of enforcement requirements is an adequate compromise position.

A majority of the Committee believes that the United States-Morocco Joint Statement on Environmental Cooperation (Joint Statement) provides a reasonable basis for the fulfillment of Congress's objectives regarding capacity building and sustainable development. While it would be improved if it were an integral part of the agreement rather than a side agreement and had an available dedicated funding source, the majority believes that the areas listed for environmental cooperation cover a range of issues which they would like to see addressed in this arena. The majority also believes that the capacity building framework would be improved if it focused on

issues related to pollution abatement and control and effective enforcement of environmental laws in addition to the management of, and coordination regarding, natural resources.

The majority believes that the agreement's tariff reductions fulfill Congress's mandate to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services.

The majority believes that in future FTAs, the Parties' understandings regarding the GATT section XX(b) and XX(g) exceptions related to measures necessary for the protection of human, plant and animal health, and the conservation of exhaustible natural resources – namely, that XX(b) includes environmental measures, and that XX(g) includes both living and nonliving natural resources – should continue to be incorporated into the FTA via the main text rather than in a side letter as in this FTA.

The majority also again expresses its position on a procedural issue: As it has expressed in prior reports, a majority of the Committee believes that the 30 days provided by Congress for it to produce reports is an inadequate period. This is particularly so in light of the fact that, in general, these agreements remain classified through much or all of this period. 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, is a significant hindrance. While efforts have been made to respond to these concerns by USTR, as to this FTA, no advance notice was given with regard to the text and it was declassified only three days before the deadline for this report. The majority understands the constraints on USTR of declassifying the text of extensive FTAs. However, it stresses that the failure to declassify the text in a timely manner deprives TEPAC and, to some degree, all of civil society, of the ability to fully comment on the text. As a possible solution, it recommends that for future FTAs that the President contemplate delaying his notification of Congress of the finalization of the FTA (and thus the running of the advisory committees' 30-day clock) in order to provide time for the FTA to be declassified.

Finally, a majority notes that this agreement has been negotiated with a friendly Arab government initiating steps toward democracy and situated near the heart of an extremely complex geopolitical region. This majority believes that this agreement, as well as the Administration's larger Middle East Trade Initiative, might help contribute to economic growth and stability and to positive national security outcomes in the region. On the other hand, if this and similar agreements are not viewed by citizens of these countries as demonstrably fair and beneficial, these Agreements will have the potential to have the contrary effect. A majority of TEPAC believes Congress should focus particular attention on this issue as it examines this and other future Middle East agreements.

Nevertheless, several differing viewpoints exist among committee members. These include the beliefs that 1) the Agreement is inconsistent with the Doha Declaration on the TRIPS Agreement and Public Health 2) the Agreement's investment provisions weaken traditional protections for U.S. investors, 3) the U.S. agriculture phase outs are unnecessarily long, and, conversely, 4) the longer Moroccan agriculture phase outs are necessary, 4) the Environmental Cooperation provisions need not be part of the FTA, 5) the agreement's investment protection provisions are

too extensive, and 6) the dispute resolution provisions should not contain measures specifically addressing environmental issues

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 primary 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.

Finally, the Trade Act also provides for the promotion of certain environment-related priorities and associated reporting requirements, including:

> (I) conducting environmental reviews of future trade and investment agreements consistent with Executive Order 13141 and its relevant guidelines and reporting to the Committees on the results of such reviews; and
>
> (J) continuing to promote consideration of multilateral environmental agreements and consult with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing exceptions under Article XX of the GATT 1994.

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

As expressed in its recent reports on the Australia and Central American Free Trade Agreements, 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.

A. Strict Compliance With Congress's Mandated Objectives

As it has for other reports, in examining the Agreement for consistency with Congress's environmental trade objectives, TEPAC has looked beyond the issue of whether the Agreement

simply recites those objectives to the question of whether those objectives will come to fruition. TEPAC recognizes that the Agreement incorporates the eight environmental trade negotiation objectives outlined above. Six of the nine ("A" through "C," "F," "H," and "J" above) are explicitly referenced, almost verbatim, in Chapter 18 of the Agreement, two more ("D" and "F") are generally referenced in the Agreement's environmental definition and sustainable development provisions, another ("I") has been accomplished through the conduct of an environmental review for the FTA,[1] and the remaining one ("E") is reflected in the Agreement's tariff reduction schedules.

However, the question of whether these objectives will actually be achieved is dependent on the efficacy of the measures used to implement them, 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.

B. Actual Achievement of the Mandate

1. Background

In the last ten years, the most contentious trade agreement provisions relating to the environment 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 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. General Conclusion

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

[1] The majority notes its approval that this environmental review has been conducted but believes that there are issues related to environmental reviews in general which need to be examined more fully. To this end, TEPAC currently has a Working Group examining environmental review issues in an across-the-board fashion.

challenges to attempts to implement more stringent bone 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.

b. Investment

As with the other FTAs finalized in the last year, one improvement 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 a letter declared to be an integral part of the agreement. The concern that regulatory actions will provoke claims by affected investors of indirect expropriation has been lessened by the declaration that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions. . . to protect legitimate public welfare objectives, such as. . . the environment, do not constitute indirect expropriations." The majority of TEPAC believes the "rare circumstances" language should even be strengthened for greater clarification.

Also noteworthy are the concepts which motivate Paragraph 1 of Article 10.2 and Article 10.10 of the chapter on investment, particularly when combined with the other language in the Agreement cited above. Paragraph 1 of Article 10.2 states that in the event of an inconsistency between the Investment Chapter 10 and another chapter (like the chapter on the environment), the other chapter (Chapter 17) trumps Chapter 10. As the majority of TEPAC reads these provisions, any bona fide environmental requirement at odds with an investment-related requirement will trump that latter requirement. Similarly, Article 10.10 expressly precludes reading Chapter 10 to prevent environmental protections taken pursuant to the chapter on the environment. Additionally, Article 10.3 of Chapter 10 applies National Treatment; Article 10.4 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 remains concerned about identifying protected interests with the phrase "a tangible or intangible property right or interest." 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 exchange soon, 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.

c. Public participation and Implementation of the chapter

As it has alluded to in previous reports, TEPAC believes that public participation is an integral aspect of the implementation and ongoing operation of the environmental provisions of FTAs.

In addition to helping to ensure that the provisions operate as drafted, public participation greatly increases opportunities to guarantee the effective enforcement of environmental laws and enhances capacity building and sustainable development efforts. As with the other recent FTAs, the Morocco Agreement includes a significant public participation provision.[2]

However, the chapter fails to establish an Environmental Affairs Council.[3] As created in some other Agreements, this council is a cabinet-level or equivalent body mandated to discuss the implementation and progress under the environmental chapter. The Council promotes public participation in its work and holds, at a minimum, an annual public session, and, in some instances, seeks public input on cooperative environmental activities. The majority of TEPAC believes this type of organization would be extremely valuable not only in ensuring the achievement of the broader objectives of this chapter (and, in turn, of Congress), but also in promoting public participation and enhancing environmental cooperation and capacity building, all of which lead to more effective and effectively-enforced environmental laws. The majority recognizes, however, that the parties have created an environmental subcommittee of the Joint Committee for this FTA, that governmental resources are limited, and the trade and environment issues in every country may not rise to a level which, given the requisite trade-offs, necessitate the establishment of a cabinet-level council with annual meetings. As a potential solution, in the limited future cases where such a council is not established, this majority believes that a lower-level council or, as more FTAs are negotiated, a regional council, be considered. For instance, in the Middle East, a regional Environmental Affairs Council for Israel, Jordan, Morocco, and Bahrain (with which a trade agreement is currently being negotiated) might be worthwhile. Again, while this majority supports the inclusion of the public participation provisions included in the FTA, it does not believe that they are as effective as either the presence of an established environmental committee or the requirement of public input sessions mandated to occur on a regular basis.

[2] The FTA requires that the parties implement procedures for public dialogue on the implementation of the Chapter and that input received during this process from the public be provided to the other party and other members of the public. It also provides that procedures are to be implemented under which the public will have input into matters to be discussed by the Joint Committee established under Article 19.

[3] TEPAC is pleased to note, however, that in a side letter, the Parties have established an environmental subcommittee of the Joint Committee (the entity established to review the function of the Agreement as a whole).

d. Dispute resolution

A similar majority of the members believes the dispute resolution procedures will help ensure that the FTA meets Congress's environmental objectives, but believe these procedures are not as effective as they should be. The Agreement maintains the positive steps taken in prior Agreements in the transparency and, to some degree, in the participation of civil society during the settlement of disputes in trade cases. However, the majority is concerned that the public submission process does not reflect a mandatory requirement for acceptance of such submissions and the language regarding expert technical assistance for panelists is not as strong as it has been in the past.

As with the other recent FTAs, the transparency and participation of civil society during the settlement of disputes in trade cases are significant improvements over historic practices. Also significant is the inclusion of Article 20.4(4)(c)(i), requiring that members of dispute resolution panel have "expertise or experience relevant to the subject matter that is under dispute." Notably, the special procedures present in some other Agreements providing for a roster of panelists and requirements that panelists selected for dispute resolution have the requisite expertise have been relegated to a side letter with Morocco. While this majority understands the reasons for this change in this FTA, it does not believe this should become a model for future FTAs.

Another notable absence concerns public submissions. In the Chile and Singapore reports, a majority of TEPAC members expressed a belief that that the dispute settlement provisions should make 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 was pleased to see this suggestion incorporated into the Central American and Australia FTAs; it is disappointed to see it absent from the Morocco text.

Also troubling is the absence, in the provision regarding technical assistance to panelists, of any specific reference to "environmental, labor, health, [and] safety" matters. While it appears under the terms of the Agreement that this absence will not affect the ability of the panel to receive technical advice on these matters, its absence is notable amid TEPAC's concerns that this Agreement has deemphasized environmental matters.

Finally, in line with its analysis in the Singapore, Chile, and Central America FTA reports, the majority believes that the Agreement's monetary penalties of up to $15 million per year for instances of non-compliance with rulings confirming violations of enforcement requirements is an adequate compromise position. However, this majority stresses that it continues to examine the efficacy of this provision and notes that its past satisfaction therewith has been and remains based in large part on the finding of a proper balance between the size of the penalty on the one hand and the strength of environmental cooperation (and associated funding commitments) mandated by the Agreements and the need to ensure that parties commit the requisite resources to enforce domestic environmental laws and regulations on the other hand. At some point in the future, if the extent of those environmental commitments decline, this majority may view the size of the monetary penalty as inadequate.

e. Capacity building

A majority of the Committee believes that the Joint Statement provides a reasonable basis for the fulfillment of Congress's objectives regarding capacity building and sustainable development. It establishes a reasonable framework for the development of environmental cooperation projects and sets forth a reasonable range of areas for cooperation. As with other agreements, the majority would prefer that Congress provide a dedicated funding source to ensure that the potential inherent in the Joint Statement is realized. Also, the majority believes that an agreement with the significance of the Joint Statement should be an integral part of the FTA rather than a side agreement. This flaw is magnified by the fact that the side agreement is a draft not yet finalized or signed by the member countries. Should the Joint Statement change to any great degree, the majority's recommendation of its provisions would need to be reexamined. Finally, the majority notes that the capacity building framework focuses almost exclusively on the management of, and coordination regarding, natural resources. It believes that in this FTA (and many other FTAs), it would be beneficial to also address issues related to pollution abatement and control and effective enforcement of environmental laws.

f. Market access

In order to determine if the Agreement fulfills Congress's mandate to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services, TEPAC requested that USTR identify the extent of the Agreement's tariff reductions for such items. USTR's analysis concluded that tariffs on 95% of the environmental goods and technologies in the Agreement will immediately go to zero, with the remaining five percent going to zero after nine years. Presuming the accuracy of these figures, the majority of TEPAC concludes that this reduction fulfills Congress's mandate on this issue.

g. Other Concerns

i. GATT Exceptions

In other FTAs, the Parties' understandings regarding the GATT section XX(b) and XX(g) exceptions related to measures necessary for the protection of human, plant and animal health, and the conservation of exhaustible natural resources – namely, that XX(b) includes environmental measures, and that XX(g) includes both living and nonliving natural resources –were incorporated into the main text of the agreement. In this FTA, this understanding has been relegated to a side letter. The majority believes these clarifications are significant and therefore welcome their inclusion. However, it believes that in future agreements these clarifications should again be accomplished in the main text.

ii. Background

Finally, a majority notes that this agreement has been negotiated with a friendly Arab government initiating steps toward democracy and situated near the heart of an extremely complex geopolitical region. This majority believes that this agreement, as well as the

Administration's larger Middle East Trade Initiative, might help contribute to economic growth and stability and to positive national security outcomes in the region. On the other hand, if this and similar agreements are not viewed by citizens of these countries as demonstrably fair and beneficial, these Agreements will have the potential to have the contrary effect. A majority of TEPAC believes Congress should focus particular attention on this issue as it examines this and other future Middle East agreements.

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.

Efforts were made to respond to these concerns by USTR and TEPAC appreciates these efforts. With regard to CAFTA, the text was provided to TEPAC well in advance of the 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 or Morocco FTA (although the Australia FTA was declassified during the 30 day period and the Morocco FTA was declassified three days before the deadline for this report). 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 majority understands the constraints on USTR of declassifying the text of extensive FTAs. However, it stresses that the failure to declassify the text in a timely manner deprives TEPAC and, to some degree, all of civil society, of the ability to fully comment on the text. As a possible solution, it recommends that for future FTAs that the President contemplate delaying his notification of Congress of the finalization of the FTA (and thus the running of the advisory committees' 30-day clock) in order to provide time for the FTA to be declassified.

3. <u>Other Points of View</u>

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.

a. The agreement's investment provisions weaken traditional protections for U.S. investors.

A minority disagrees with the majority view that the investment provisions of the agreement are an "improvement" over NAFTA. On the contrary, this minority believes the agreement weakens

the protections traditionally afforded U.S. investors under NAFTA and BITS. Article 10.5 of the 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. This minority believes 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. Annex 10-B 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, this minority also notes that the phrase "in rare circumstances" in paragraph 4(b) of Annex 10-B creates a potential loophole because it gives Parties too much discretion in deciding what constitutes an indirect expropriation without providing any recourse to the foreign investor.

b. The Agreement is inconsistent with the Doha Declaration on The TRIPS Agreement and Public Health

A minority of the Committee believes that, contrary to the Doha Declaration on the TRIPS Agreement and Public Health, the Morocco Agreement's intellectual property provisions do not implement the TRIPS "in a manner supportive of public health and, in particular, to promote access to medicines for all." This minority believes that, instead, that the Morocco Agreement will reduce access. It is also concerned that the Agreement's intellectual property provisions will negatively affect the interests of consumers with respect to seeds, biodiversity and the traditional knowledge of indigenous peoples.

c. The U.S. agriculture tariff phase outs are unnecessarily long

A minority of the committee considers the phase out of some U.S. agricultural commodity tariffs over 15-25 years to be unduly lengthy. This unnecessarily delays the benefits of trade to the consumer and sets a poor precedent for efforts in the Doha Round negotiations to eliminate barriers to agricultural trade.

d. The longer Moroccan agriculture phase outs are necessary

A minority believes that it is in the best interests of the U.S. and Morocco to allow in the FTA for a phased-in opening of certain Moroccan sensitive rural agricultural markets, such as beef and poultry, to provide time for social adjustments. A large percentage of the population in Morocco is still employed in agriculture, so that a disruption of such markets by a large influx of U.S. imports could have broad social implications including environmental degradation. Thus, the fact that some Moroccan tariffs will be phased out slowly for sensitive products may be acceptable to reach better long-term benefits from the FTA.

e. Environmental provisions are adequately incorporated into the FTA

A minority believes that the Environmental Cooperation provisions need not be part of the FTA.

f. The Agreement's investment protection provisions are too extensive

A minority is concerned about the inclusion of extensive investment protection provisions in FTAs.

g. The dispute resolution provisions should not contain measures specifically addressing environmental issues

A minority believes there is no need for a special dispute resolution procedure for environmental disputes in this and other bilateral free trade agreements. Moreover, this minority is concerned about the inclusion of monetary penalties of up to $15 million per year as applied to a developing country.

h. 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 investor-state dispute mechanism included in the FTA will result in individual investors pushing for expansive readings of the substantive obligations in the agreement. The reliance should be on domestic courts in the first instance, and on state-to-state dispute settlement only if needed Moreover, this minority believes that allowing investors to remove disputes from national legal systems, as is the case here in the U.S.-Morocco FTA, stunts the development of those systems.

This minority believes it is problematic 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. Further, this minority believes that 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 Morocco. To the minority's knowledge, there is no publicly available information that would suggest that Morocco has mistreated U.S. investors in recent years. Equally, there has been no showing that Morocco'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.

VI. 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, U.C. Council for International Business
On the Environmental and Investment Provisions of the
U.S.-Morocco Free Trade Agreement

I agree with the majority of my TEPAC colleagues that the agreement with Morocco provides adequate safeguards to ensure that Congress's environmental negotiating objectives are met. The report also makes reference to the majority view that no "one size fits all" with respect to individual FTAs, a point with which I fully concur. Against that background, I do not therefore understand why the majority insists that the omission of certain environmental provisions from earlier FTAs reflects either a hurried negotiation or reduced attention to environmental matters. While U.S. negotiators obviously work from a model text based on previous agreements, I do not find it surprising or significant that there are slight differences in their environmental chapters, including the agreement with Morocco. Thus, I am not troubled by the lack of a public submission process along lines of the Central American agreement. What might have been appropriate for Central America, may not be so in the case of Morocco. Further, I do not agree with the majority view that the dispute settlement provisions are necessarily less effective than they might have been. In short, I believe the environmental provisions of this agreement meet the objectives of the Bipartisan Trade Promotion Authority Act of 2002.

On the other hand, the investment provisions in the U.S.-Morocco Free Trade Agreement continue the unfortunate trend begun with the Chile and Singapore agreements, and reinforced in the Australian and Central American agreements, of weakening the standards of protection traditionally afforded U.S. investors through NAFTA and existing BITs. While I am pleased with the inclusion of investor-to-state protection, I strongly disagree with the majority view that the investment provisions in this agreement are an "improvement" over NAFTA. I also believe that these provisions are inconsistent with the principal trade negotiating objectives established by Congress in the Bipartisan Trade Promotion Authority Act of 2002. I have spelled out my objections to the investment chapters in previous FTAs, but repeat them below to facilitate the review process of this agreement. My concerns cover four areas:

Minimum Standard of Treatment

Article 10.5 refers to the "minimum standard of treatment of aliens." This language, first adopted in July 2001 as a NAFTA clarification, has been argued by the NAFTA Parties, Canada in particular, as representing an extremely narrow standard akin to a requirement for a showing of something as "shocking the conscience." This is not the appropriate standard, nor what Congress sought when it directed the Administration to negotiate protections for fair and equitable treatment consistent with United States legal practices and principles, including the principle of due process.

Expropriation

1. The language in paragraph 2 of Annex 10-B inappropriately narrows the protection against expropriation without compensation to a "tangible or intangible property right or property interest" rather than to an "investment." Congress directed the Administration to establish standards for expropriation consistent with U.S. legal principles and practice, which includes, but is not limited to, the "takings clause" of the Fifth Amendment. While the Fifth Amendment does define a taking in terms of "property," introducing that term into an international agreement could have adverse implications for U.S. investors and would be inconsistent with Congressionally established negotiating objectives. The U.S. defines "property" more broadly than foreign jurisdictions. Since international law would look to the location of an investment to determine whether it is "property", U.S. investors abroad are likely to face a more restrictive definition of "property" and therefore lower standards of protection than foreign investors enjoy in the U.S. For that reason, I believe the language used in Annex 10-B is against U.S. interests and should be revised.

2. Paragraph 4(a) of Annex 10-B establishes a requirement for a case-by-case inquiry as to whether an action by a Party constitutes indirect expropriation. In my view, in such a case-by-case inquiry, no single factor listed under that paragraph should be read in isolation in making such a determination. The "adverse effect" cited in that paragraph is one of those factors. I interpret this language to encompass, as in U.S. law, those circumstances where less than the entirety of the value of the property has been expropriated. As I have suggested on earlier occasions, the Administration's confirmation of this interpretation would be appreciated.

3. The phrase "in rare circumstances" in paragraph 4(b) of Annex 10-B creates a potential loophole because it gives Parties too much discretion in deciding what constitutes an indirect expropriation without providing any recourse to the foreign investor. Once again, a clearer definition of what this phrase means and how it will be interpreted seems to me necessary.

Attachment 2

Separate Statement of Rhoda H. Karpatkin
President Emeritus
Consumers Union of United States, Inc.

Joined by
William Butler, Audubon Naturalist Society
Daniel B. Magraw, Center for International Environmental Law

I agree with some portions of the TEPAC Report and disagree with other portions. I 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. I am thus submitting these additional comments based on a review of the U.S.- Morocco FTA text.

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 on the TRIPS Agreement and Public Health calls on WTO members to implement the TRIPS "in a manner supportive of public health and, in particular, to promote access to medicines for all." As with prior free trade agreements, the relevant provisions of the Morocco agreement do not go in this direction. Access to medicines –affordability—in practical terms, equates to the availability of generics and to compulsory licensing in some cases. The Morocco Agreement makes rules that delay and increase the difficulty of bringing generic drugs to market and, hence, reduce access to affordable medicines for Moroccan consumers.

Analysis of the complex Intellectual Property provisions of the Agreement requires a high level of expertise. For example, the IFAC-3 Advisory Committee, comprising intellectual property experts from pharmaceutical companies, has provided such an analysis of CAFTA from the viewpoint of those companies. To provide the Congress a parallel level of expertise from the consumer point of view, I would have to consult with civil society experts who are not cleared advisors. This is precluded because the U.S. government has kept the text of the Agreement classified until the virtual end of the short period allowed advisory committees to give the Congress their views on the Agreement. Our committee has many times communicated this concern to the Office of the U.S. Trade Representative, but to no avail in this instance. This serious problem can be resolved simply in the future, if the administration sends trade agreements to the Congress after they have been declassified.

At first blush, concerns about access to medicines may seem to have no significance for American consumers and the Congress. But there are reasons to be concerned. The intellectual property provisions of this agreement, and others negotiated recently,

including the Australian and Central America Free Trade Agreements, will create upward pressure on the price of medicines globally. While it has been suggested that such provisions will lower the price of medicines in the United States, this is unrealistic. There is simply no mechanism to translate higher prices for Moroccans into lower prices for U.S. consumers.

The Congress has been grappling with the issue of affordability of medicines for American consumers. A succession of bilateral trade agreements, expanding patent rights and introducing new limitations on the ways generics can be marketed, may well have a preemptive effect, intruding on the prerogatives of the Congress to define national and global policy.

Provisions such as these also can exacerbate the view, widely held among so many in the world's developing nations, that America's concern for the profits of its drug companies outbalances its interest in global public health. This is of special concern in Morocco, where there are concerns about terrorists, high unemployment among young men, repressive acts against civil society, and where almost half the Moroccans surveyed recently by the Pew Global Attitudes Survey had a favorable view of Osama bin Laden.

In addition, we believe that the Congress should take note of the concerns voiced by reputable Moroccan civil society and global organizations whose views would not ordinarily be part of the advisory committee process. I attach a letter from Human Rights Watch to Ambassador Robert Zoellick voicing concerns over the negotiations of the pharmaceutical provisions in this Agreement, which it says would delay the entrance of affordable generics into the market. This letter calls for maximum flexibility in promoting access to essential medicines. Access to medicines is a critical human rights issue in Africa and elsewhere. The letter also states that the Moroccan government violently dispersed protesters against the Agreement. Other commentators on the negotiations have noted that the intellectual property provisions are more constraining than those between the U.S. and other countries.

National Security Concerns.

The first "Finding" in the Section 2101 of the Trade Promotion Authority Act of 2002 is that "The expansion of international trade is vital to the national security of the United States…Stable trading relationships promote security and prosperity…binding nations together…" This concern about national security continues in the Findings.

The Morocco agreement should be scrutinized by Congress with this concern in mind. While a Middle East Trade Initiative might have positive national security outcomes and help create economic growth and stability in the region, the specific facts of this Agreement should be assessed to help determine whether such outcomes would be realistic. Under conditions of such hostility against the U.S. and other western nations, it is reasonable to be concerned about how this agreement will be perceived within

Morocco To be a positive factor, the agreement should be demonstrably fair and beneficial to this small and troubled country.

In that regard, while there are positive features to this agreement, I have concerns about other provisions, as set forth above. We believe these provisions require special scrutiny in the context we have described.

We urge the Congress to take these considerations into account.

HUMAN RIGHTS WATCH

Access to Essential Medicines in U.S.-Morocco Trade Agreement

Letter to United States Trade Representative Robert B. Zoellick

February 18, 2004

Honorable Robert B. Zoellick
United States Trade Representative
600 17th Street NW
Washington, DC 20508
sent via fax: (202) 395-4549

Dear Ambassador Zoellick:

The negotiations surrounding the United States-Morocco Free Trade Agreement (FTA) provide an opportunity for the United States to live up to its stated commitment to address the immense suffering caused by the global HIV/AIDS pandemic. We urge you not to use these negotiations as an occasion to limit Morocco's ability to use existing global trade rules to expand access to HIV/AIDS medicines.

At the 2001 World Trade Organization (WTO) ministerial meeting in Doha, Qatar, the United States affirmed the right of WTO members to use "to the full" provisions of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) that provide flexibility for the purpose of promoting access to essential medicines. These provisions include the right to grant compulsory licenses for the production of generic medicines, the right to determine what constitutes a national emergency, and the freedom to establish a national regime for the exhaustion of patents (Doha Declaration, article 5). The Declaration is clear that these flexibilities are what enable countries like Morocco, which the national government estimates is home to at least 16,000 people infected with HIV, to address urgent threats to public health.

Human Rights Watch is very concerned that the U.S.-Morocco FTA will make it impossible for Morocco to use the flexibilities contained in TRIPS "to the full." There are credible reports that the United States is seeking an extension to the twenty-year patent term required by the TRIPS, as well as exclusive rights for drug companies to pharmaceutical test data. Each of these provisions would diminish Morocco's ability to hasten market entry of affordable generic medicines. It is hypocritical for the United States as a member of the WTO to pursue bilateral trade policies that undercut precisely those flexibilities whose full use the Doha Declaration encourages.

We are also concerned about the exclusion of civil society organizations from negotiations surrounding the U.S.-Morocco FTA. The text of the agreement has not been made publicly

available, unlike the text of other agreements such as the Free Trade Area of the Americas (FTAA). When representatives of Moroccan civil society organizations protested the agreement in Rabat on January 28, 2004, they were forcibly dispersed by Moroccan police using batons, resulting in the injury of filmmaker Nabil Ayush and the president of the Moroccan Association for Human Rights, Abd al-Hamid Amine. Given the United States' clear recognition in the Doha Declaration of the potential impact of trade agreements on public health, we urge you to make clear to the Moroccan government U.S. dismay regarding the violent dispersal of Moroccans protesting the U.S.-Morocco FTA. We also urge you to release the draft text of the agreement without delay.

The Doha Declaration has been affirmed by a broad global consensus, including by the United Nations Commission on Human Rights, the World Health Organization, and the United States 2002 Trade Promotion Authority Act. As evidenced by negotiations surrounding the Free Trade Area of the Americas, the Central America Free Trade Agreement and other agreements, however, the United States appears to be alone in using its trade authority to undermine the achievements made at Doha. We urge that you refrain from negotiating anti-Doha, TRIPS-plus provisions in the U.S.-Morocco Free Trade Agreement, and instead promote maximum flexibility for promoting access to essential medicines in national patent regimes.

Sincerely,

Joe Stork
Acting Executive Director
Middle East and North Africa Division

Joanne Csete
Executive Director
HIV/AIDS Program

Cc: Mr. Taieb El Fassi El Fihri, Delegate for Foreign Affairs and Cooperation, Min. Of Foreign Affairs, the Kingdom of Morocco
Cc: Mr. Biadi Ellah, Min. of Health, the Kingdom of Morocco

Attachment 3

Dissenting Comments on the TEPAC Report on Environmental Provisions of the U.S. – Morocco Free Trade Agreement
by Frances B. Smith, Consumer Alert

General Statement

The U.S.- Morocco Free Trade Agreement should provide adequate safeguards to ensure that the environmental objectives set forth in the Trade Act of 2002 are met. In accordance with the majority report, Consumer Alert shares the view that FTAs are to be adjusted to individual countries and should not follow a "one size fits all" approach. Therefore, Consumer Alert does not share the general concern of the Committee that the mere lack of certain provisions that were included in other FTAs represents a disregard of environmental issues related to this trade agreement.

Consumer Alert is in agreement about the overall benefits of more open trade for consumers and businesses in both countries, which through an increase in living standards and economic opportunities can help achieve better protection of the environment and natural resources.

Morocco is an important developing country that has strong political and economic ties with the United States and Europe, as well as many developing countries in the Middle East. The Moroccan economy and its people could significantly benefit from a trade agreement that would provide better access to highly developed markets, and U.S. consumers would gain from more choices in Moroccan products.

Due to its geographical location in Northern Africa, Morocco is a gateway to other parts of the Arabic speaking world. While the overall amount of trade between the U.S. and Morocco is comparatively small, a new trade agreement can help to develop new markets for Morocco and the U.S. and can also bring closer social and cultural ties between the two peoples.

Specific provisions
Consumer Alert dissents from the majority on the following issues:

<u>Investment protection</u>
Consumer Alert's view regarding investment protection in FTAs has not significantly changed since the TEPAC report on the FTAs with Chile and Singapore. Since the investment provisions are similar to those in the two agreements, Consumer Alert restates concerns about the inclusion of extensive investment protection provisions in FTAs.

Public participation
While Consumer Alert strongly supports public participation as an integral part of the democratic political process that should be encouraged, Consumer Alert does not regard the provisions in the Morocco FTA as lacking in ambition. The participation of the public takes different forms in different countries; therefore provisions in some FTAs

might not apply in others. Domestic economic and other constraints might limit public inputs more than the lack of specific provisions in the bilateral trade agreement.

Dispute settlement procedure

There is a general disagreement with the majority view that environmental disputes regarding this and other bilateral free trade agreements need a special dispute settlement procedure. Including a special procedure that only applies to environmental disputes provides a more prominent role to environmental issues in what is primarily a trade agreement and could undermine important trade-related issues.

The inclusion of monetary penalties of up to $15 million per year is a matter of concern in its application to a developing country. Besides the amount, which for a developing country is a significant fiscal commitment, the lack of clear guidelines how such money would be spent is also of concern.

Joint Statement on Environmental Cooperation

The actions described in the Joint Statement should be able to achieve the objectives set forth by Congress. However, Consumer Alert does not regard the need for making the provisions part of the agreement. The FTA with Morocco is a trade agreement that includes environmental provisions mandated by the Trade Act of 2002, including some regarding capacity building. Additional provisions relating to environmental capacity building is a complicated process that extends the reach of a trade agreement and would be better placed in environmental cooperation agreements; otherwise, the purpose of the free trade agreement may be diluted.

Agricultural Issues

a. The U.S. agricultural tariff phase-outs are unnecessarily long

A minority of the committee considers the phase out of some U.S. agricultural commodity tariffs over 15-25 years to be unduly lengthy. This unnecessarily delays the benefits of trade to the consumer and sets a poor precedent for efforts in the Doha Round negotiations to eliminate barriers to agricultural trade.

b. The longer Moroccan agriculture phase-outs are necessary

However, a minority believes that it is in the best interests of the U.S. and Morocco to allow in the FTA for a phased-in opening of certain Moroccan sensitive rural agricultural markets, such as beef and poultry, to provide time for social adjustments. A large percentage of the population in Morocco is still employed in agriculture, so that a disruption of such markets by a large influx of U.S. imports could have broad social implications including environmental degradation. Thus, the fact that some Moroccan tariffs will be phased out slowly for sensitive products may be acceptable to reach better long-term benefits from the FTA.

Attachment 4

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

Separate Comments on the U.S.-Morocco Free Trade Agreement
Daniel Magraw, President, Center for International Environmental Law
Rhoda H. Karpatkin, President Emeritus, Consumers Union of U.S., Inc.

April 6, 2004

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 that Congress should consider. We are thus submitting these additional comments based on our review of the U.S.-Morocco text.

I. General Comments on the Investment Chapter

The approach to international investment rules embodied in the U.S.-Morocco FTA contains some incremental improvements over the North American Free Trade Agreement (NAFTA) and model Bilateral Investment Treaty (BIT) approaches. As with other recent agreements reviewed by TEPAC, it is not clear 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. In addition, the failure to include an appellate review process ensures that investor-initiated disputes will continue to stretch traditional international law concepts in ways that undermine national regulatory powers and frustrate efforts, particularly in developing countries, to achieve sustainable development.

Unlike the recently concluded U.S.-Australia FTA investment chapter, the U.S.-Morocco investment chapter includes the investor-state dispute mechanism. Experience with cases being brought under existing agreements (chiefly NAFTA and numerous 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,

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

provides more appropriate fora for 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 here in the U.S.-Morocco FTA, stunts the development of those systems.

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 provisions 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 Morocco. To our knowledge, there is no publicly available information that would suggest that Morocco has mistreated U.S. investors in recent years. Equally, there has been no showing that Morocco's national 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.

Constitutional issues. Some have raised the question of whether or not the investor-state dispute mechanism is consistent with the U.S. Constitution given that it can decide cases otherwise subject to the Constitution's provisions on the judiciary.[2] Given that the need for this mechanism is not clearly established, why should the U.S. enter into agreements that might embody an unconstitutional delegation of judicial power?

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

[2] See, John Echeverria, "Who will Decide for Us?" LEGAL TIMES, March 8, 2004.

reservations for a considerable number of existing domestic regulatory programs at various levels of government. 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.

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. But the investment rules do not even mention, much less require, minimum standards of corporate conduct on investors acting abroad.

II. Specific Concerns with the Investment Chapter

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. The so-called exception in Article 10.10 of the U.S.-Morocco FTA is merely an exercise in circular logic and fails to provide a meaningful safe harbor for legitimate environmental and public health measures. 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.

In addition, we note that like NAFTA, the U.S.-Morocco text includes a carve-out from the expropriation provision for tax laws (Article 21.3). This includes a mechanism by which the home and host countries can agree to disallow a claim for expropriation based on a tax measure. In our view, environmental and public health regulations serve societal objectives every bit as important as tax structures. The willingness to create a mechanism for governments to preclude an expropriation challenge for tax laws but not environmental laws again raises a question of whether the agreements strike the proper balance among the economic and non-economic objectives of government.

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?

III. The Investment Provisions of the U.S.- Morocco FTA 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.-Morocco 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.-Morocco agreement 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 constitute 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 agreement fails 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.[3] 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.[4] In addition, the language concerning the

[3] 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)

[4] 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, for which compensation is only required in extreme circumstances that are equivalent to a permanent,

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.[5] 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."[6]

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.[7]

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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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.

[5] 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).

[6] "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).

[7] 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.