The U.S.-Oman Free Trade Agreement

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

November 15, 2005

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Advisory Committee Report to the President, the Congress and the United States Trade Representative on The U.S.-Oman 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 principal 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 has noted in its reports on other recent TPAs, 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 understands this is the result of the fact that the Agreement is modeled after the United States-Bahrain FTA. Nevertheless, as discussed below, this majority believes that the FTA would have benefited from the incorporation of certain additional provisions.

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 dispute resolution provisions are an improvement over those in the North American Free Trade Agreement (NAFTA).

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. A majority of the Committee is particularly pleased to see these provisions in the Agreement given that full public participation in Oman and the Middle Eastern region is an issue of concern within the Committee and with others.

It is pleased to see that steps are being made to increase public participation in the region and will seek to monitor closely the implementation of these provisions. It recommends that USTR do the same. 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 provisions which exist in other FTAs are not present in the Oman Agreement. This majority believes that some of these provisions should have been included in this Agreement.

A majority of the Committee reiterates the suggestion it made in its report on the Morocco and Bahrain FTAs that USTR consider creating a regional Environmental Affairs Council for Israel, Jordan, Morocco, Bahrain and Oman. The majority believes such an organization would be an effective supplement to the current organizations devoted to environmental matters in those agreements – generally environmental subcommittees of the Joint Committee

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.

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 Memorandum of Understanding on Environmental Cooperation Between The Government of the United States and The Government of the Sultanate of Oman (Memorandum of Understanding) 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 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.

A majority believes that the FTA should include a statement on promoting sound corporate stewardship.

The full Committee also again expresses its position on a procedural issue: As it has expressed in prior reports, the Committee believes that the 30 days provided by Congress for it to produce reports is an inadequate period. It is pleased, however, that the Agreement was declassified relatively early in this process. Declassification enables members to share the documents with other members of their organizations, others who may have even greater expertise in these matters than the members. It also increases the ability for general public input on the text, which the committee believes enhances the deliberative process.

Finally, a majority notes that this Agreement has been negotiated with a friendly Arab government 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's intellectual property provisions are harmful to consumers, 2) public participation in Oman may be prevented, 3) the Agreement's investment provisions weaken traditional protections for U.S. investors, 4), that certain environmental provisions appearing in other trade agreements are not included in the Oman FTA is not a cause of concern, 5) it is inappropriate for FTAs to include investment provisions, 6), the lack of an environmental affairs council is not cause for concern, 7) the dispute settlement procedures should not include special provisions for environmental disputes, 8) the Memorandum of Agreement should not be an integral part of the trade agreement; 9) a "sound corporate stewardship" statement should not appear in the Agreement; 10) the FTA's public participation provisions are inadequate; and 11) the Agreement's investment provisions contain troublesome substantive rules and investor-state dispute settlement procedures and fail to provide an appellate procedure to curb errant arbitral panels.

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;
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> (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;
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> (C) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;
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> (D) to reduce or eliminate government practices or policies that unduly threaten sustainable development;
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> (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 reports on other recent FTAs, 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 addressed in the text 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 ten environmental trade negotiation objectives outlined above. Seven of the ten ("A" through "D," "H," and "J" above) are explicitly referenced, almost verbatim, in Chapter 17 of the Agreement, one more ("F") is generally

referenced in the Agreement's environmental definition provision, another ("I") has been accomplished through the conduct of an environmental review for the FTA, 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 recent 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 foreign investors' 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 dispute resolution provisions are an improvement over those in NAFTA. The Committee believes that this provision reduces the possibility that there will be successful 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. 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 Oman Agreement includes a significant public participation provision. 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. The Committee is also pleased to see that one of the specific areas for potential environmental cooperation in the Memorandum of Understanding relates to promoting public participation in environmental protection efforts and public access to information and access to justice on environmental issues.

A majority of the Committee is particularly pleased to see these provisions in the Agreement and Memorandum of Understanding given that full public participation in the Middle Eastern region and elsewhere is an issue of concern within the Committee and with others. As to Oman, the U.S. State Department, in its 2004 Country Report on Human Rights in Oman,[1] states that "the Government restricted freedoms of speech, the press, assembly" as well as academic freedom and that the process for registering an NGO is long and arduous. Associations whose activities are "inimical to the social order" may be prohibited. This majority is pleased to see steps being taken to increase public participation. TEPAC will seek to monitor closely the implementation of these provisions and recommends that USTR do the same.

As with the Bahrain and Morocco FTAs, the chapter fails to establish an Environmental Affairs Council.[2] The majority of TEPAC believes this type of organization is 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 established a mechanism for the creation of a Subcommittee of the Joint Committee for this FTA (a Subcommittee on Environmental Affairs); that, if created, the subcommittee would have a public participation element; 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. The majority recommends that the United States initiate a request under Article 17.5 of the FTA to create an environmental subcommittee with Oman. Among other things, this subcommittee could monitor the implementation of the public participation provisions, as discussed above.

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[1] US Department of State Report on 2004 Human Rights Practices in Oman, Released by the Bureau of Democracy, Human Rights, and Labor, February 28, 2005. Available in full at http://www.state.gov/g/drl/rls/hrrpt/2004/41729.htm

[2] 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 Committee reiterates the suggestion it made in its report on the Morocco and Bahrain FTAs that given the trade-offs described above, a regional Environmental Affairs Council would be worthwhile and is pleased to hear that this idea is being considered by USTR. Membership on such a council could consist of Israel, Jordan, Morocco, Bahrain and Oman.

c. Dispute resolution

A similar majority of the members believes the dispute resolution procedures will help ensure that the FTA meets Congress's environmental objectives. If fully implemented, 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 refers to the discussion of public participation, in Section V.B.2.b.above, with regard to its concerns about the implementation of these provisions. Moreover, 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 20.7(4), requiring that members of panels examining environmental disputes have "expertise or experience relevant to the subject matter that is under dispute."

With regard to public submissions, however, a majority of TEPAC members believe 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 such a provision incorporated into the Central American and Australia FTAs; it is disappointed to see it absent from the Oman text. Similarly, the Memorandum of Understanding is not as strong on the issue of public participation as it could be. It addresses "facilitating linkages among representatives of academia, industry and government to promote the exchange of best practices and environmental information and data. . .", but does not include in this list all civil society, including NGOs. A majority of the Committee believes the inclusion of all civil society in such endeavors would enhance their possibilities for success.

Finally, in line with its analysis in the Singapore, Chile, Central America, Morocco and Bahrain 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.

d. Capacity building

A majority of the Committee believes that the Memorandum of Understanding 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 strongly prefer that Congress provide a dedicated funding source to ensure that the potential inherent in the Memorandum of Agreement is realized. Also, the majority believes that an agreement with the significance of the Memorandum of Understanding 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 Memorandum of Understanding change to any great degree, the majority's recommendation of its provisions would need to be reexamined. The majority is pleased to see that the Memorandum of Understanding highlights specific areas of potential environmental cooperation, rather than vague statements of commitment. Of particular note are the provisions related to the protection of marine resources and sea turtles. This is especially true in light of the information highlighted in the Interim Environmental Review.

e. 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 100% of the environmental goods and technologies in the Agreement will immediately go to zero. Presuming the accuracy of these figures, the majority of TEPAC concludes that this reduction fulfills Congress's mandate on this issue.

f. Other Concerns

i. Corporate Stewardship

Some prior FTAs, including the Singapore FTA (Art 18.9) and the Chile FTA (Art 19.10) include a statement on promoting sound corporate stewardship. No such provision appears in the text of the Oman environment chapter. While there is text (in Art 17.4(1.b)) on incentives (such as market-based incentives and public recognition), a majority of the committee is of the opinion that this language is not a sufficient replacement for a more active provision promoting good corporate behavior. This majority believes a corporate stewardship provision should supplement the incentives provision in future FTAs.

ii. Background

Finally, a majority notes that this Agreement has been negotiated with a friendly Arab government 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. Public participation, as discussed above, is especially important in this regard. A majority of TEPAC believes Congress should focus particular attention on this issue as it examines this and other future Middle East agreements.

g. Procedural comment

In its more recent reports, 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 and the schedules of those members. It also expressed the belief that its efforts were unduly restricted by the classified nature of the documents in that 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, hindered these efforts.

For this FTA, efforts were made to respond to these concerns by USTR. TEPAC appreciates these efforts. The text of the FTA was provided to TEPAC in advance of the President's notification to Congress and it was declassified soon after that notification.

3. 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.

i. The Agreement's intellectual property provisions are harmful to consumers

A minority believes that, contrary to the Doha Declaration on the TRIPS Agreement and Public Health, the U.S.-Oman Free Trade 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." Indeed, this minority believes the Agreement reduces access. It believes that the Agreement will reduce access to affordable generic medicines for Omani consumers.

ii. Public participation in Oman may be prevented

A minority believes that the Omani government's imposed interference with freedom of expression, freedom of assembly and other civil and political rights will make it difficult, if not impossible, for civil society to participate in the implementation and ongoing operation of the environmental provisions of this FTA.

iii. 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. 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. 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, this minority also notes that the phrase "in rare circumstances" in the Annex 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.

iv. That certain environmental provisions appearing in other trade agreements are not included in the Oman FTA is not a cause of concern.

A minority believes it is inappropriate to compare other U.S. bi-lateral trade agreements and offer one or more as the template for the environmental provisions for Oman. Each country is unique, with a unique relationship with the U.S. as well as unique national concerns.

v. It is inappropriate for FTAs to include investment provisions.

A minority believes such provisions are better handled through agreements directly and solely addressing those issues.

vi. The lack of an environmental affairs council is not cause for concern

A minority believes such councils, as outlined in some prior agreements, can focus more on procedural and bureaucratic minutiae that can deflect needed resources from addressing important issues.

vii. The dispute settlement procedures should not include special provisions for environmental disputes.

A minority believes that 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 because of the lack of clear guidelines on how such money would be spent.

vii. The Memorandum of Agreement should not be an integral part of the trade agreement.

A minority believes that the Memorandum of Agreement should not be an integral part of the trade agreement, as espoused by the majority.

viii. A "sound corporate stewardship" statement should not appear in the Agreement.

A minority believes that what is or is not meant by this term is unclear and is not appropriate for inclusion in trade agreements.

ix. The FTA's public participation provisions are inadequate

A minority believes the FTA' public participation provisions do not even include a citizen submission process. Moreover, the references to the UNCITRAL rules in Article 10.15 are also objectionable. These rules are inconsistent with transparency and public participation, both of which are essential because of, inter alia, the fundamental issues of public policy that are the subject of investment and state disputes. There is no reason to include any other dispute settlement possibilities than the International Centre for Settlement of Investment Disputes (ICSID) and the ICSID Additional Facility.

x. The Agreement's investment provisions contain troublesome substantive rules and investor-state dispute settlement procedures and fail to provide an appellate procedure to curb errant arbitral panels.

A minority believes that it is not clear that the investment provisions 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. Nor does the approach address the fundamental problems with the NAFTA/BIT approach. In addition, the failure to include an appellate review process ensures that investor-initiated disputes will continue to threaten to stretch traditional international law concepts in ways that undermine national regulatory powers and frustrate efforts, particularly in developing countries, to achieve sustainable development.

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. 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. 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, there is the continued imbalanced approach to the treatment of investors (most of which are corporate actors) as

opposed to citizens generally in U.S. foreign economic policy. 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.

VI. Membership of Committee

Name	Organization
Mr. Dennis Avery	Hudson Institute
Mr. Jerry Block (Chair)	Venable LLP
Ms. Nancy Zucker Boswell	Transparency International
Mr. William A. Butler	Audubon Naturalist Society
Mr. Roger Carrick	Carrick Law Group, P.C.
Ms. Patricia Forkan	Humane Society International
Ms. Mary Gade	Sonnenschein, Nath & Rosenthal
Mr. Robert E. Grady	The Carlyle Group
Mr. Frank H. Habicht	Global Environment & Technology Foundation
Mr. Thomas B. Harding,Jr.	Agrisystems International
Ms. Jennifer Haverkamp	Independent Consultant
Ms. Rhoda Karpatkin	Consumers Union
Mr. Daniel B. Magraw	Center for International Environmental Law
Dr. Naotaka Matsukata	Hunton & Williams
Mr. John Mizroch	World Environmental Center
Mr. Thomas Niles	U.S. Council for International Business
Mr. Frederick O'Regan	International Fund for Animal Welfare
Ms. Anne Neal Petri	Garden Clubs of America
Mr. Jeffrey J. Schott	Institute for International Economics
Mr. Andrew F. Sharpless	Oceana
Ms. Frances B. Smith	Competitive Enterprise Institute
Mr. William J. Snape, III	Endangered Species Coalition
Mr. Irwin M. Stelzer	Hudson Institute
Mr. Alexander F. Watson	Hills & Company
Mr. Douglas Wheeler	Hogan & Hartson
Mr. Michael K. Young	University of Utah
Mr. Durwood Zaelke	Institute for Governance and Sustainable Development

Attachment 1

**Separate Statement of TEPAC Members Rhoda H. Karpatkin,
President Emeritus, Consumers Union of United States, Inc.,
William A. Butler, Audubon Naturalist Society;
Daniel B. Macgraw, Center for International Environmental Law; and
Durwood Zaelke, Institute for Governance and Sustainable Development
November 15, 2005**

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

Intellectual Property Protections for Pharmaceuticals
Section 2102(4)(b)(C) of the Trade Act of 2002 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, specified in this objective, recognizes the tension between the contribution of intellectual property to the development of new medicines and "the concerns about its effects on prices." It 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 we have noted in separate statements in TEPAC reports on several other bilateral free trade agreements, the relevant provisions of the Oman Agreement instead create roadblocks to such access. Access to medicines – affordability – in practical terms, equates to the availability of generics and to compulsory licensing in some cases. The Oman Agreement contains provisions that delay and increase the difficulty of bringing generic drugs to market and, hence, reduce access to affordable medicines for Omani consumers.

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 those in other recently negotiated agreements, will create upward pressure on the prices of medicines globally. These agreements create a danger for millions of people suffering from life-threatening diseases who may be denied access to essential medicines. This is of particular concern for the increasing number of people suffering from HIV/AIDS. It is of great concern at this moment, as well, as the world faces an avian flu pandemic. Fighting a contagious disease in one country can help prevent or mitigate its spread to other countries.

Despite medical advances over the last several years, the HIV/AIDS crisis continues. However, because of competition from generic drugs, the price of medicines has dropped dramatically. For instance, triple combination antiretrovirals that once cost between $10,000 and $15,000 per patient per year in developing countries can now cost as little as $140 per patient per year. This makes lifesaving treatment available to millions who would otherwise go without. Continued competition of this type will not be possible without flexibility to promote generics, including through the granting of compulsory licenses.

But these recently negotiated free trade agreements – including the Oman Agreement – would impede generic competition by creating intricate market authorization and medicine registration procedures, and by limiting the grounds on which compulsory licenses can be issued. The Oman Agreement and, indeed, the entire recent series of FTAs, demonstrates just how dangerous these provisions can be to public health. Under its intellectual property provisions, special five year monopoly protections would be created for pharmaceutical test data required to demonstrate safety and efficacy, and to authorize a drug's use (see Article 15.9.1). This would greatly delay and limit generic competition, even if no patent barriers exist. In addition, pharmaceutical patents would be extended beyond the 20 years required by the WTO (see Articles 15.8.6), further slowing the introduction of affordable generic drugs.

Unfortunately, this is not just a fault in the Oman Agreement – similar provisions are included in free trade agreements negotiated with Australia, Bahrain, the Central American states, Chile, Morocco and Singapore. It is clear by now that a pattern has been established that will impose these or similar provisions in most if not all future free trade agreements. Public health on a global scale will suffer as a result, as these provisions create upward pressures on prices and reduce access to affordable drugs.

The United States made an international commitment in Doha. We should not systematically chip away at that commitment through regional and bilateral agreements with countries that are realistically left with no choice other than to agree to such provisions in order to reach valuable trade agreements with the United States. The United States government should honor the commitment it made in Doha and, through that Declaration, should commit to protecting the lives of millions of seriously ill people in countries around the world who desperately need access to affordable, life-saving medicines.

In addition, these provisions in the Oman Agreement do not benefit American consumers. 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 Omanis and the developing countries with whom we have FTAs into lower prices for U.S. consumers.

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 Congress to define national and global policy. Questions have already been raised about the interference of such provisions with the authority of Congress to enact drug re-importation legislation.

Congress should also note that provisions such as these exacerbate the view, widely held among so many of the world's consumers, that America wants to advance the profits of its drug companies at the expense of global public health. This view has been a stumbling block in recent trade negotiations. The Doha Development Round is already a difficult challenge. The drug provisions of this Agreement fly in the face of the Doha Declaration on the TRIPS Agreement and Public Health and will only increase that challenge that the United States faces in the negotiations at the upcoming WTO Ministerial meeting in Hong Kong.

Public Participation

Public participation is indeed key to the implementation and ongoing operation of the environmental provisions of FTAs.

However, the reality is that implementation is highly unlikely in Oman, an absolute hereditary monarchy with only an advisory legislature. Public participation does not actually exist and is not permitted to exist. The U.S. Department of State's 2004 Country Report on Human Rights Practices in Oman raises formidable doubts about the ability of groups and individuals in Oman to freely participate and to express themselves publicly. The Report states that "The Government [of Oman] restricted freedoms of speech, the press, [and] assembly… ." The Report details practices that restrict freedom of expression and freedom of the right to assemble, as well as specific restrictions on NGO's.

We agree with the majority of the Committee, which expresses concern whether these public participation provisions can or will be meaningfully implemented. The committee cites the U.S. State Department, in its 2004 Country Report on Human Rights in Oman. However, a reading of that report shows that the committee has not gone far enough in its advice to the Congress. The report reveals that Oman has no open doors for civil society participation but, instead, operates to foreclose such participation. The report states:

- "The Government restricted freedoms of speech, the press, assembly."
- "The law and government practice generally restricted freedom of speech and of the press. The law prohibits criticism of the Sultan in any form or medium and prohibits the publishing of 'material that leads to public discord. . .'"
- "Censors enforced the Press and Publication Law, which authorizes the Government to censor all domestic and imported publications. Ministry of Information censors may act against any material regarded as politically. . . offensive."
- "The Government discouraged in-depth reporting on controversial domestic issues."
- "The government owned four radio stations and two television stations, which generally did not air politically controversial material. In August, the Government promulgated a new law allowing private radio and television companies. No companies have been created since the initial decree."
- "The Government restricted academic freedom, particularly regarding publication or discussion of controversial matters, such as domestic politics."
- "The Government limited [freedom of association] by the ability to prohibit associations whose activities are "inimical to the social order'."
- "[I]t did not license groups regarded as a threat to the predominant social and political views or the interests of the country."
- "The law does not provide for political parties. . ."
- "Citizens [during 2004] had indirect access to senior officials through the traditional practice of petitioning their patrons, usually the appointed local governor, for redress of grievances. Successful redress depended on the effectiveness of a patron's access to appropriate decision makers."

The Report also details other restrictive practices affecting speech, press, assembly, association and petitions to government.

The State Department report provides valid reasons to believe that the public participation that TEPAC believes to be so important will, in practice, not be permitted by the Omani government. If it is, it is likely that Omani NGOs will be unwilling or unable to participate given the intimidation factors specified in the State Department report. While we join the majority in lauding the public participation

aspects of the Oman FTA, it is not enough to merely write about procedures for public dialogue in the agreement when the expectation of freedom to participate is so unrealistic. Implementation of the public participation measures must be ensured. These concerns should be addressed in this FTA if we are to fully accomplish the agreement's goals regarding public participation.

We believe it is essential that this issue be addressed firmly in the FTA or in a side letter prior to Congressional approval of this agreement. Additional language should detail how the freedoms to make public participation meaningful will be legalized, authorized and facilitated by the Omani government, and how they will be monitored by the United States and interested parties. Only then, we believe, will the public participation provisions be meaningful.

American policy today is to foster democracy in Middle Eastern countries, and to make trade policy a partner in that process. This agreement can be seen as a way to advance that policy, or it can be seen as a tacit acquiescence in the very undemocratic practices we seek to have changed.
We urge the Congress to insist on an additional understanding with the Omani government that makes public participation a reality in this agreement.

We urge Congress to take these considerations into account.

Attachment 2

November 15, 2005
Comments of the
Competitive Enterprise Institute and the
Hudson Institute's Center for Global Food Issues
on the Free Trade Agreement with Oman

Submitted by Frances B. Smith, Competitive Enterprise Institute, and Dennis T. Avery, Hudson Institute's Center for Global Food Issues

General comments

Trade and Environmental Goals

In relation to the U.S.-Oman Free Trade Agreement and environmental goals, the Competitive Enterprise Institute (CEI) and the Hudson Institute's Center for Global Food Issues (CGFI) would emphasize the importance of recognizing that higher environmental standards are best achieved through better economic and institutional conditions, and that trade and open economic systems can lead to improved economic performance, help to reduce poverty, and increase living standards for all participants. As people achieve greater wealth and more economic independence, more resources can be freed up to protect the environment. Besides the exchange of products and services, economic and social ideas can also flourish through increased trade. As people achieve more self-determination in economic and political terms, they also are better able to protect their political freedoms.

To facilitate these critical goals, trade agreements should focus on their main purpose and not be overloaded with a range of issues that cannot (and should not) be solved by trade negotiators. Many of those issues might have an economic background, such as investment rules and intellectual property rights, while others might relate to other concerns.

Those issues should be discussed and negotiated in their appropriate venues, and international and bilateral agreements relating to those issues are better forged through expert negotiations focusing on those issues.

Environmental objectives

CEI and CGFI agree with the majority report that the U.S.- Oman Free Trade Agreement provides adequate safeguards to ensure that the environmental objectives set forth in the Trade Act of 2002 are met.

CEI and CGFI also share the view of the majority that FTAs are to be adjusted to individual countries and should not follow a "one size fits all" approach. However, CEI and CGFI express concern with the Majority Report's seemingly contradictory point that certain environmental provisions appearing in other trade agreements do not appear in the Oman FTA.

It is both logical and appropriate that the FTA does not use a prior trade agreement as a template for the environmental provisions. Each country is unique, with a unique relationship with the U.S., as well as unique national concerns, including those relating to environmental issues..

In contrast to the majority view and its endorsement of the need for more regulatory oversight, CEI and CGFI would point to the role of institutions--especially property rights and the rule of law—that are key foundations for environmental improvements. In helping to build countries' capacity to improve the environment, strengthening these fundamentals should be encouraged. Environmental goals should not be pursued via restrictions to trade expansion.

Investment Provisions

This dissenting view disagrees with certain portions of the TEPAC report on investment provisions in the U.S. – Oman Free Trade Agreement. This dissent would point out that concerns about investments are better dealt with in an investment agreement--if countries wish to do so--but should not necessarily be part of a bilateral trade agreement.

Investment rules and challenges to domestic regulations should be considered, as far as possible, in the domestic legal systems of those countries. Countries that fail to adequately address the concerns of investors will likely face economic consequences in lower levels of foreign investments. While closer cooperation and facilitation between the Parties might help to bridge different concepts of investment and its protection, enforcement outside of the domestic legal system can pose significant problems and concerns relating to public acceptance, the rule of law, and national sovereignty.

The provisions in the U.S.-Oman Trade Agreement regarding the definition of investment and what would constitute an "expropriation" might or might not be an improvement from the approach in the North American Free Trade Agreement (NAFTA); however, the effort to clarify the meaning is a positive one. Nevertheless, a better understanding of the effects on domestic regulatory regimes would also help to achieve better public acceptance of such agreements.

Public participation

CEI and CGFI strongly support public participation as an integral part of the democratic political process. It is encouraging that Oman, while not a democracy, has committed to provisions that call for greater civic involvement and transparency in relation to environmental issues.

Trade is generally regarded to be an important tool for economic development. And while economic development is not the exclusive road to a more open and democratic society, lessons from history show that the creation and preserving of an open society without stable and satisfying economic conditions is a very difficult task.

Lack of an Environmental Affairs Council. The fact that the agreement does not establish an Environmental Affairs Council is not a cause of concern, as was expressed in the majority report. Such councils, as outlined in some prior agreements, can focus more on procedural and bureaucratic minutiae that can deflect needed resources from addressing important issues.

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 because of the lack of clear guidelines on how such money would be spent.

Memorandum of Agreement. The actions described in the Memorandum of Agreement should be able to achieve the objectives set forth by Congress. However, CEI and CGFI do not regard the need for making the provisions part of the trade agreement. The FTA with Oman is a trade agreement that includes environmental provisions mandated by the Trade Act of 2002, including some regarding capacity building. Environmental capacity building is a complicated process that requires flexibility and adjustments to deal with emerging concerns that are better handled in a separate agreement; otherwise, the trade agreement itself may become diluted.

Sound corporate stewardship. CEI and CGFI do not support inclusion of a "sound corporate stewardship" statement in the agreement, as the term is vague, subject to various interpretations, and thus is not appropriate for inclusion in trade agreements.

Attachment 3

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

Separate Comments of TEPAC Members on the U.S.-Oman Free Trade Agreement

Daniel Magraw, President, Center for International Environmental Law
William Butler, Board Member, Audubon Naturalist Society
Rhoda H. Karpatkin, President Emeritus, Consumers Union of U.S., Inc.
Durwood Zaelke, President, Institute for Governance and Sustainable Development
November 15, 2005

The Oman Free Trade Agreement (FTA) is critically inadequate in at least two respects: its public participation provisions, which do not even include a citizen submission process; and its investment provisions, which contain troublesome substantive rules and investor-state dispute settlement procedures and fail to provide an appellate procedure to curb errant arbitral panels. The public participation deficiencies are dealt elsewhere in another statement.

I. General Comments on the Investment Chapter

The approach to international investment rules embodied in the Oman FTA contains some incremental improvements over the North American Free Trade Agreement (NAFTA) and model Bilateral Investment Treaty (BIT) approaches. It is not clear, however, 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[3]. 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 threaten to stretch traditional international law concepts in ways that undermine national regulatory powers and frustrate efforts, particularly in developing countries, to achieve sustainable development.

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, provides more appropriate fora for protecting the rights of investors. 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

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

resolve any legitimate claims by investors. Allowing investors to remove disputes from national legal systems, as is the case in the Oman 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 arbitral panels have applied this standard in idiosyncratic fashion, e.g. Occidental v. Ecuador and CMS Gas v. Argentina.

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.

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.[4] 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. 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 U.S. foreign economic policy. 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

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

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.

In addition, the Oman 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 Oman 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 Oman 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 Oman 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

In attempting to define a standard for expropriation, the agreement (Annex 10-B) 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.[5] 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

[5] 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)

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.[6] In addition, the 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.[7] 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."[8]

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.[9]

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.

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[6] The Supreme Court's reference to that factor in *Penn Central* as 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." See also Lingle v. Chevron (USSC May 23, 2005). 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, 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.

[7] 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).

[8] "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).

[9] 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).

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.

- 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.

Dispute Settlement

We also object to the references to the UNCITRAL rules in Article 10.15. These rules are inconsistent with transparency and public participation, both of which are essential because of, inter alia, the fundamental issues of public policy that are the subject of investment and state disputes. There is no reason to include any other dispute settlement possibilities than the International Centre for Settlement of Investment Disputes (ICSID) and the ICSID Additional Facility.