The U.S.- Panama Trade Promotion Agreement

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

April 25, 2007

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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.- Panama Trade Promotion 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. Preliminary Statement

In every report TEPAC has produced since passage of the Trade Act of 2002, it has unanimously stressed that 30 days is an insufficient period of time for it to thoroughly review, analyze, and provide its opinion on free trade agreements. USTR and/or the White House have, on occasion, provided some relief to this very tight timeline by providing TEPAC with a final version of the negotiated text prior to providing official notification to Congress. Given that Congress will soon be debating reissuance of the President's Trade Promotion Authority, TEPAC unanimously recommends that Congress consider increasing this review period to at least 45 days

III. Executive Summary of the Committee's Report

On December 19, 2006, the United States concluded negotiations with Panama on a Free Trade Agreement. For most purposes relevant to this report, the terms of that agreement are the same as those in the Central American Free Trade Agreement ("CAFTA") and in the agreement to integrate the Dominican Republic into CAFTA. However, Panama will not be integrated into

CAFTA, as was the Dominican Republic, but for the purposes of this Report, the terms are essentially the same. As with the CAFTA participants, Panama has negotiated a country-specific schedule for market access in goods and agriculture, services and investment, and government procurement.

On March 19, 2004, TEPAC submitted a copy of its report on CAFTA, a copy of which is attached as Attachment 6. In that report, a majority of the committee members expressed its belief that the Agreement meets Congress's negotiating objectives as they relate to environmental matters. Similarly, here, a majority of the committee members expressed its belief that the Agreement meets Congress's negotiating objectives as they relate to environmental matters.

However, in noting its approval for CAFTA, a majority of the committee stressed that a significant issue regarding CAFTA remained unresolved – the selection of the Secretariat. The majority expressed its belief that the Secretariat chosen must have the resources, both in experienced staff and funding, to accomplish the objectives outlined in the State Department's side agreement on environmental cooperation (ECA) and that the Secretariat had not yet been selected. Since that time, a Secretariat has been selected for CAFTA which a majority of the Committee believes meets these requirements. This Secretariat is a new unit within the Organization for Central American Economic Integration (SIECA). As at the time of the finalization of DR-CAFTA, a Secretariat has not been designated for the Panama TPA. As it outlined in its CAFTA report, a majority of TEPAC believes that the ECA will not be successful without a Secretariat with the resources, both in experienced staff and funding, to accomplish the objectives outlined in the State Department's side agreement on environmental cooperation (ECA). For that reason, this majority urges that Congress require the parties to utilize the SIECA Secretariat as the Secretariat for the Panama TPA.

A majority of the Committee is extremely concerned about the Agreement's limited reductions in the above-quota sugar tariff rates over an extended period. This is of particular concern with regard to sugar; the current US domestic program promotes overproduction of sugar, including in areas that place great stress on delicate and endangered ecosystems like Florida's Everglades.

Of the provisions examined in the March 19, 2004 TEPAC report, the only one changed with regard to Panama relates to tariff schedules. A majority of the Committee believes that the tariff reductions for environmental goods and technologies agreed to by Panama are sufficient to fulfill Congress's mandate to seek market access for United States environmental technologies, goods, and services. As a result, the Committee provides this additional information and otherwise has not updated its March 19, 2004 report.

IV. Brief Description of the Mandate of TEPAC

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

V. Negotiating Objectives and Priorities Relevant to the Report

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

VI. The Committee's Advisory Opinion on the Agreement

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

A. Strict Compliance With Congress's Mandated Objectives

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

B. Actual Achievement of the Mandate

1. Background

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

2. General Conclusion

a. General

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

b. Investment

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

c. Public participation

A majority of the Committee views favorably the Agreement's new public participation provisions and the State Department's ECA. If successfully implemented, these new provisions, will enhance the ability of citizens with reasonable environmental concerns to have those concerns heard, and likely responded to, while simultaneously limiting the possibility that frivolous comments will bog down the process. The majority believes, however, that the public participation provisions could be strengthened by requests for information or an exchange of views regarding implementation of the Chapter by either Party to be made by persons of "any party," rather than submissions "of that party,"

However, this majority stresses that the framework established by the provisions, although strong, is insufficient in and of itself to accomplish these objectives. Without an entity with the requisite knowledge, staffing and resources, the promise inherent in the new provisions will not be realized. At the time this report was prepared, the selection of a Secretariat had not occurred.

A Secretariat has been selected for CAFTA which a majority of the Committee believes meets the necessary requirements. This Secretariat is a new unit within the Organization for Central American Economic Integration (SIECA). This majority does not believe that Congress can fully evaluate the environmental implications of this agreement without knowing what organization will serve in that role and an understanding of its capabilities and funding. Therefore, this majority urges that Congress require the parties to utilize the SIECA Secretariat as the Secretariat for the Panama TPA. Moreover, this majority strongly urges that, in conjunction with review of the TPA, Congress itself either provide for, or ensure the provision of, adequate funding for the Secretariat.

d. Dispute resolution

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

e. Capacity building

As with other agreements, the majority would strongly prefer that Congress provide a dedicated funding source to ensure that the potential inherent in the ECA is realized. Without a funding source, achievement of the goals of the ECA is at best ephemeral. This issue is becoming increasingly significant as more FTAs are executed. Each FTA has contained capacity building provisions, but no funds have been set aside. Soon, these agreements will be competing with each other for scarce funds. A majority believes there is too much competition for funds and too often environmental projects are not afforded appropriate priority. One possible designee of this dedicated funding might be the Office of Environmental Policy in the State Department.

TEPAC understands that, pursuant to an agreement with Congress, in order to ensure approval of CAFTA, the administration agreed to spend $40 million per fiscal year for FY 2006, 2007 and 2008 on the labor and environment provisions of CAFTA. TEPAC further understands from a meeting with USTR and the Department of State that $18.5 million was spent on environmental projects in FY2006. While TEPAC supports these efforts, it does not diminish the need for a dedicated funding source for the environmental provisions of this separate agreement with Panama and of all trade agreements.

A majority of TEPAC believes that this and future FTAs should contain provisions for dedicated funding and technical assistance from governments and international financial institutions as well as funding commitments for public/private sector ventures, This is necessary to both ensure adequate funding of projects to be implemented in the short- and medium-term as well as projects to be developed over the long term. Also, the majority believes that an agreement with the significance of the ECA should be an integral part of the TPA 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 ECA change to any great degree, the majority's opinion regarding its provisions would need to be reexamined.

See also the March 19, 2004 TEPAC report on CAFTA, attached hereto.

f. Market access

In order to determine if the new tariff provisions agreed to by Panama fulfill 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 tariff reductions for such items. USTR provided the following information on tariff reductions:

> For environmental products, nearly 100 percent of U.S. exports will receive duty-free treatment immediately upon implementation of the Agreement. Duties on the remaining products, which include miscellaneous articles of plastic and refractory ceramic goods and account for less than 1 percent of U.S. exports, will be phased out over ten years.

Presuming the accuracy of this information, a majority of the Committee believes that this analysis shows that the TPA will fulfill Congress's mandate to seek market access for United States environmental technologies, goods, and services.

g. Concerns regarding tariff reductions

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

h. Procedural comment

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

i. Biological diversity

A majority of TEPAC was disappointed to see that an article on biological diversity was not included in the TPA's environment chapter despite its inclusion in certain other TPAs. This majority suggests that future TPAs include such a provision.

j. Concerns regarding tariff reductions

A majority expresses concerns over product-specific exceptions to the full or rapid liberalization of tariffs and quotas. This majority believes that a key purpose of free trade agreements is to produce lower prices by lowering barriers to competition.

According to the General Accounting Office, the U.S. sugar program costs consumers almost $2 billion per year. Moreover,, the domestic support program for sugar means unnecessary incentives to grow sugar in what might otherwise be unprofitable geographic areas, such as Florida. Cane sugar farming in Florida and elsewhere puts significant stress on sensitive ecosystems, most significantly the Florida Everglades. Cane fields in the Everglades divert sorely-needed water and increase pollutant loadings through the use of agricultural chemicals. Consequently, this majority believes that the modest increases in the sugar quota were too small and the reductions in the above-quota sugar tariffs, phased in over an extended period, were too

limited. Both significantly reduce U.S. welfare gains from the pact and helps perpetuate the degradation of Florida's wetlands. Additionally, this practice has a significant adverse impact on the developing Panamanian economy that continues to face restrictions on its ability to sell sugar to the United States.

The majority also believes that the continuation of quotas also affects the credibility of the U.S. negotiation positions in the Doha Round regarding the removal of agricultural trade barriers. It is not in the interest of the United States or in the interest of U.S. consumers to continue tariff-rate quotas on sugar.

3. Other Points of View

a. The interaction between CAFTA and GATT is unclear

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

b. Certain terms used in the TPA are ambiguous

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

c. The Investor-State provision are troublesome

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

d. Institutional Jurisdiction

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

e. The Agreement does not adequately protect sanitary and phytosanitary standards

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

f. Customs Administration and Trade Facilitation

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

g. The Agreement excessively relies on trade as a means of advancing environmental objectives.

See Attachment 4 and March 19, 2004 TEPAC report on CAFTA, attached hereto.

h. The investment provisions are too broad

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

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

See Attachment 3 and TEPAC report on CAFTA, attached hereto.

j. The Agreement's intellectual property provisions reduce access to affordable pharmaceuticals

See Attachment 2 and March 19, 2004 TEPAC report on CAFTA, attached hereto.

k. The Agreement does not contain adequate environmental safeguards

See March 19, 2004 TEPAC report on CAFTA, attached hereto.

l. The ECA should not be included in the text of the Agreement

See Attachment 4.

m. No dedicated funding source should be provided for environmental cooperation between the two countries.

A minority believes that dedicated funding source for cooperative activities for environmental improvements and monitoring would mean that other more urgent U.S. budget priorities may receive short shrift or that needed funds for trade capacity-building for Panama would not be available. That would harm both the people of Panama and not allow them to experience the economic growth that trade can bring – and with it – greater wealth to deal with environmental concerns.

m. The Agreement should include a provision to ensure that timber and timber products were legally sourced.

The Interim Environmental Review of the U.S.-Panama TPA noted that the Panamanian authorities consider deforestation and wildlife habitats to be among their most pressing environmental issues. A minority believes that the problem appears to be more significant than the Review indicates and that the Agreement should include a provision to ensure that timber and timber products were legally sourced.

VII. Membership of Committee

Name	Organization
Anne Alonzo	National Foreign Trade Council
Dennis Avery	Hudson Institute
Joseph G. Block (Chair)	Venable LLP
Nancy Zucker Boswell	Transparency International
William A. Butler	Audubon Naturalist Society
Patricia Forkan	Humane Society International
Frank H. Habicht	Global Environment & Technology Foundation
Thomas B. Harding	Agrisystems International
Jennifer Haverkamp	REIL (Renewable Energy & International Law Project)
Rhoda Karpatkin	Consumers Union
Daniel B. Magraw	Center for International Environmental Law
Naotaka Matsukata	Alston & Bird, LLP
Frederick O'Regan	International Fund for Animal Welfare
Peter Robinson	U.S. Council for International Business
Jeffrey J. Schott	Institute for International Economics
Andrew F. Sharpless	Oceana
Frances B. Smith	Competitive Enterprise Institute
William J. Snape, III	Endangered Species Coalition
Alexander F. Watson	Hills & Company
Durwood Zaelke	Institute for Governance & Sustainable Development

ATTACHMENT 1
To Report on U.S.-Panama TPA

Additional Views of Humane Society International
TEPAC Report: U.S.-Panama TPA
April 25, 2007

Humane Society International (HSI) would like to submit the following additional views regarding the U.S. – Panama Trade Promotion Agreement (Panama TPA or Agreement). These comments are intended to be included as an addendum to the Trade and Environment Policy Advisory Committee (TEPAC) report on the Agreement.

HSI joins in the unanimous conclusion of TEPAC Members to stress that 30 days is an insufficient period of time for Members of the Committee to thoroughly review, analyze, and provide opinions on free trade agreements (FTA). In the case of the Panama TPA, the final text negotiated by the Administration has been available for some time. Recent elections, however, caused a shift of power in Congress and the newly-elected majority has indicated through numerous press reports that they are seeking the addition of language that further protects the environment to all FTA texts before they will allow a vote on these agreements. This situation has left TEPAC Members in a precarious situation unable to determine exactly what the final text of the Panama TPA will entail, while at the same time facing a congressionally mandated deadline to submit a report within 30 days of the President's notification to Congress that he intends to sign the Agreement.

For this reason, HSI would like to make clear that the conclusions expressed throughout this submission are based solely on text of the Panama TPA as of the date the TEPAC report is presented to Congress. HSI, therefore, reserves the right to modify opinions presented in this submission if the text of the Agreement were to change due to the Administration's ongoing negotiations with Congress. As a result of the current circumstances, HSI joins the majority of TEPAC Members who are expressing their increasing frustration concerning the limited time frame provided to perform the complex task of creating a report, particularly given the divergent viewpoints of TEPAC Members. The current statutory scheme neither provides an adequate period of time to perform this review, nor is it flexible enough to deal with the current political environment.

Based on the text of the Panama TPA as of this date, HSI agrees with the majority of TEPAC members in supporting the conclusion that the Agreement provides adequate safeguards to ensure that Congress's environmental negotiating objectives will be met. In particular, HSI applauds the inclusion of the requirement

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that both Parties effectively enforce their domestic environmental laws, including those that implement commitments under Multilateral Environmental Agreements (MEA), as well as the trade capacity building provisions and the robust public participation provisions similar to those found in the Dominican Republic – Central America, Colombia and Peru Agreements. HSI strongly believes that the inclusion of an effective enforcement framework supported by robust public participation and trade capacity building provisions will significantly increase the likelihood that the Agreement's environmental provisions will be fully and effectively implemented.

While HSI does not believe that FTAs should be negotiated on a "one size fits all" basis, we are displeased with the fact that the current text of the Panama TPA does not include a biodiversity provision in the Environment Chapter. Such a provision was included in the recently negotiated Colombia and Peru TPAs, and would have been a welcome addition to the Panama TPA. By enshrining both Parties' recognition of the importance of the conservation of biological diversity and its role in sustainable development (specifically that of plants, animals, and habitat), both the Colombia and Peru TPAs represented a substantial achievement in the Environment Chapters of free trade agreements. The failure to include this important provision in the Panama TPA is a substantial step backwards from these agreements and represents a missed opportunity for the United States to further its commitment to environmental protection in one of the most biologically diverse regions in the world.

The exclusion of a biodiversity provision is disappointing. However, other portions of the Environment Chapter remain strong and should the Panama TPA enter into force it is incumbent on the governments of both the United States and Panama to ensure that the Agreement does more than just put words on paper. Provisions contained in the Environment Chapter and those in the concurrently negotiated Environmental Cooperation Agreement (ECA) require long-term financial backing and support in order to achieve their desired result.

Recognizing the importance of strengthening the capacity in each Party to protect the environment and promote sustainable development, the ECA provides a foundation for long-term cooperation and assistance on environmental issues, programs, and policies. Without a dedicated funding source appropriated by Congress, however, achievement of the goals of the ECA is at best ephemeral. For example, ensuring that the public submission mechanism works as intended – including building the capacity of local organizations to participate effectively in the public submission process, strengthening the ability of Ministries to enforce environmental laws (including the Convention on International Trade in Endangered Species of Wild Fauna and Flora), training of government officials on how to set up a national advisory committee system, and ensuring transparency and openness by communicating issues to civil society – will all require a great deal of funding and technical assistance. Due to current budget constraints, however, all recently concluded FTAs without a dedicated funding source will be competing against each other for a limited and diminishing amount of foreign aid funds. In addition, it is too often the case that environmental projects are placed at the bottom of the priority list for funding.

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

HSI is concerned, however, that at present Panama may not be taking seriously the commitments expressed in the Agreement to effectively enforce domestic environmental laws (including those implementing obligations under MEAs) and to strive to continue to improve those laws and policies. In what could result in violations of both domestic law and its commitments under the Protocol for Specially Protected Areas and Wildlife (SPAW), Panama is considering granting permits to a private company seeking to build a dolphinarium in Panama and stock it with up to 80 locally captured wild bottlenose dolphins. HSI alerted USTR to this issue in a letter on April 5, 2007. USTR has since been in contact and assured HSI that it is investigating the situation. If the Government of Panama were to grant these permits before a scientifically based dolphin population assessment is completed, HSI believes that Panama would be in violation of its own domestic law protecting marine mammals and the SPAW protocol, thus, failing to demonstrate a commitment to effective enforcement of environmental laws.

As noted above, HSI would like to make clear that the views expressed above are based on text of the Panama TPA as of the date of this submission. HSI, therefore, reserves the right to modify our opinion if the text of the Agreement is altered based on the Administration's ongoing negotiations with Congress.

HSI would like to thank the Chairperson of TEPAC for the opportunity to incorporate this submission as an addendum to the official TEPAC report for the Panama TPA.

ATTACHMENT 2
To Report on U.S.-Panama TPA

Separate Statement of TEPAC Member
Rhoda H. Karpatkin, Consumers Union of U.S., Inc.
joined by
William A. Butler, Audubon Naturalist Society
Daniel Magraw, Center for International Environmental Law
Durwood Zaelke, Institute for Governance & Sustainable Development
April 25, 2007

Consumers Union believes that lowering barriers to trade can promote the interests of both the United States and developing countries, and provide significant benefits to consumers. We believe this was the purpose of the Negotiating Objectives contained in the Trade Promotion Authority Act of 2000. The Panama Free Trade Agreement, while it contains some benefits, is flawed in so many significant ways that, on balance, it fails to achieve those ends.

The Agriculture Agreement provisions on sugar and other tariffs are anti-consumer.

The agreement continues to support U.S. protectionism by far too limited reductions in sugar and other tariffs over far too long a period. The U.S. sugar program costs our consumers almost $2 billion per year. It also means that Panama could remain unable to export sugar goods in excess of current quotas. While Article 3.18 of the proposed Agreement allows the U.S. to pay compensation to Panamanian sugar goods exporters if the U.S. decides to continue its current level of tariff-rate quotas on sugar, this mechanism will compensate exporters, but not workers since it provides for compensation *in lieu* of purchased production, and it also allows the continued harm to American consumers imposed by high domestic prices for sugar goods. A critical issue in the Doha negotiations remains the removal of agriculture subsidies and quotas. The continued insistence of the U.S. on perpetuating such barriers will undermine the success of the Doha Development Round.

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."

While a 2005 "Country Strategy" study of the Inter-American Development Bank characterizes Panama as an upper middle income country, it also notes that it's recent economic growth trend has been downward and that recent growth in the Panamanian economy has been in the services

sector, which has few linkages to the rest of the economy and uses very little labor input. Thus, despite the positive overall economic status accorded Panama by the IDB, that institution also notes that there are sharp inequalities of social and economic conditions, especially in rural areas, and that the "most alarming" inequality is among indigenous peoples[1]. These are precisely the conditions in which consumers need affordable access to medicines, but the relevant provisions of this proposed Agreement go in the opposite direction. They *reduce* access.

Panama's poorest and most vulnerable population is the target of the pharmaceutical provisions of this proposed Agreement, despite the Doha Declaration. The terms of these provisions will make it even harder than it is today for poorer Panamanians to afford the medicines they need. The Doha Declaration was intended to protect and clarify whatever access was afforded under TRIPS. This agreement deprives this population of even some of those benefits.

These provisions are written in obscure language about patent rights. Proposed side letters would provide that the obligations of the Intellectual Property Chapter of the proposed Agreement shall not be construed to prevent Parties from "taking necessary measures to protect public health by promoting access to medicines for all," particularly with respect to epidemics, national emergencies and other circumstances of extreme urgency. But the more specific provisions in Article 15.10 of the proposed Agreement nonetheless *appear* to make rules and laws that increase the difficulty of bringing generic drugs to market and, hence, decrease the affordability of medicines for low income consumers, except in circumstances where the governments of the Parties take such emergency actions. Affordability, in practical terms, equates to the availability of generics and to compulsory licensing in some cases. As we read this Agreement:

- It establishes special, monopolistic rights for the patent holder's pharmaceutical registration safety and efficacy data, which is costly to produce; for this reason, generic manufacturers generally do not repeat the underlying tests, but need only show that their products are chemically equivalent and bioequivalent and rely on the drug approval agency's prior approval of the patented drug.

- As a result of these new, monopolistic protections, the introduction of generic drugs will be delayed and limited, extending the *de facto* life of pharmaceuticals patents -- by five years or more beyond the TRIPS-imposed 20-year patent term requirement -- by holding back the market introduction of a generic drug by "at least five years" from the date of its approval. (Chapter 15.10.1(a) and (b);

- It prevents generic manufacturers from exporting generic equivalents of medicines under patent for use as medicine in other countries (including countries not Parties to the Agreement) during the term of the patent, *even if* the patent holder does not make the product available in those countries (Chapter 15.9.5).

The costs of generating original clinical data to prove safety and efficacy are beyond the means

[1] Country Strategy With Panama, Inter-American Development Bank, October 2005, link available at http://www.iadb.org/Publications/search.cfm?language=English&searchLang=E&keywords=&title=Panama&author=&topics=&countries=&resCategory=&fromYear=&toYear=&x=0&y=0.

of most companies that manufacture only generics. And, in any event, if a manufacturer wanted to market a generic based on its own testing, it could not do so during the patent term under the provisions of Chapter 15.9.5. Further, while it appears that a generic could be marketed immediately upon the expiration of the patent term if it were approved at least five years preceding that date, there is little incentive for generic manufacturers to undertake the effort and expense of obtaining such approval so early, as it would not be known at that time whether the drug entity would remain the drug of choice past the expiration date. Proprietary manufacturers often generate new "replacement" products timed to come to market close to the expiration date of their expiring product. Thus, patent holders which received new, draconian powers under CAFTA to delay and prevent the marketing of generic medicines will also enjoy such largesse under the proposed Panama TPA.

At first blush, these considerations may seem to have no significance for American consumers and the Congress. But there are reasons to be concerned. This agreement, and others negotiated under this Administration, including the Australian Free Trade Agreement, will create upward pressure on the price of medicines globally. While it's been suggested that the result will be lower the price of medicines in the United States, that is unrealistic. There is simply no mechanism to translate higher prices for Panamanians or citizens of other foreign countries into lower prices for U.S. consumers. Given the stranglehold monopolist and oligopolist drug companies now have on the market in this country, and the power they have demonstrated in Washington on the issue of prices, it is naïve to believe that they would voluntarily lower prices they can obtain from U.S. consumers.

The Congress has been grappling with the issue of affordability for American consumers. A succession of trade agreements such as these may well have a preemptive effect, intruding on the prerogatives of the Congress to define national policy and to enact new legislation that furthers the consumer interest.

The Congress should also note that provisions such as these 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 view has been a stumbling block in recent trade negotiations. The Doha Development Round is already a difficult challenge for our credibility. 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.

We urge that, for these reasons, among others cited by other NGOs in the U.S. and in Central America, this Agreement should not be approved by the Congress.

ATTACHMENT 3
To Report on U.S.-Panama TPA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

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

Daniel Magraw, President, Center for International Environmental Law
Joined by
Rhoda H. Karpatkin, President Emeritus, Consumers Union of U.S., Inc.
William A. Butler, Audubon Naturalist Society
Durwood Zaelke, Institute for Governance & Sustainable Development

April 25, 2007

The Panama Trade Promotion Authority (TPA) is critically inadequate with respect to 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.

I. General Comments on the Investment Chapter

The approach to international investment rules embodied in the Panama TPA contains some incremental improvements over the North American Free Trade Agreement (NAFTA) and model Bilateral Investment Treaty (BIT) approaches. It is clear that the provisions we have reviewed do not 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 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.

Threat to good governances; public welfare and rule of law. 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

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

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 resolve any legitimate claims by investors. Allowing investors to remove disputes from national legal systems, as is the case in the Panama TPA, stunts the development of those systems.

Greater substantive rights. 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.[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. 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

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

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 concept 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.

Less favorable treatment than is provided to tax measures. In addition, the Panama TPA 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?

Expanding Arbitral Jurisdiction: Investment Authorizations and Investment Agreements. The Investment Chapter subjects investment authorizations and investment agreements to the compulsory jurisdiction of arbitral tribunals. The magnitude and implications of these jurisdictional grants have not been adequately assessed, but it is immediately evident that they will have significant negative effects. This language undermines domestic legal systems by removing an important class of disputes from them, opens whole new areas of potential investor challenges to domestic regulatory programs, and provides foreign investors better treatment than U.S. domestic businesses have.

The investment agreements covered by them are not commercial disputes, but involve important policy questions regarding public assets, including natural resources such as oil, gas, and timber; public services, including water treatment and distribution and power generation and distribution; and infrastructure projects, such as roads, bridges, canals, dams and pipelines.

In particular, we are concerned about the role of the U.S. judiciary and the administration in upholding the rule of law. Whether a party is in breach of investment agreements or authorizations should be determined under applicable U.S. law, and through the statutorily mandated process of administrative courts followed by appeal, if necessary, to U.S. federal courts. That comprehensive body of law defines the competence, rights and obligations of the U.S. government regarding its contracts, including those concerning natural resources, public services, and infrastructure projects. Similarly, that procedural system ensures fairness and consistency in dealing with the multitude of issues involved in U.S. government contracting. It is also critically important that legitimate U.S. regulatory decisions (e.g., regarding health, environmental, communications, energy, and nuclear issues) be tested in the U.S. court system and be subject to U.S. laws, not subject to second-guessing by ad hoc arbitrators.

If it is problematic for foreign investors to take disputes over U.S. contracts and administrative and regulatory measures out of the established domestic processes designed to review them, then it is equally problematic for U.S. investors abroad to bypass the national judicial system of the host country to challenge that country's administrative and regulatory systems, absent a showing of futility. Respect for the rule of law requires that domestic legal processes be given the opportunity and responsibility to work.

The inclusion of a separate jurisdictional grant in the Investment Chapter is also unnecessary, because rights conferred by these investment authorizations and agreements are already protected, to the extent that they are included in the definition of investment by substantive expropriation disciplines. What the new jurisdictional grants do is to make any dispute and all issues arising out of these agreements actionable for damages before unaccountable, ad-hoc arbitral tribunals.

This expansion of the investor-state arbitration is problematic, in part because these disputes can involve the collection of royalties over natural resource extraction, and because they can involve challenges to measures adopted by U.S. agencies to implement and enforce their regulations

governing public services.

III. The Investment Provisions of the Panama TPA 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 Panama TPA 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 Panama TPA 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.[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

[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)

use of the "character of government action" as a factor in expropriation analysis. "Character of government action" is 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 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

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[4] 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.

[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).

"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 Panama agreement thus constitutes a substantial 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 already 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 also granting foreign investors the right to a different legal standard and 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 Panama agreement 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 investor-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, which are considerably more transparent and participatory, and there is no reason to give a private investor a choice of rules in any event.

ATTACHMENT 4
To Report on U.S.-Panama TPA

April 25, 2007

Comments on the U.S. Panama Free Trade Agreement
Submitted by Frances B. Smith

As a member of the USTR's Trade and Environment Policy Advisory Committee (TEPAC), the Competitive Enterprise Institute (CEI) takes seriously its responsibilities to the USTR, the President, and Congress to provide our views on "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." Since TEPAC's responsibility is to focus on trade and environmental issues, the committee has a primary responsibility to ascertain whether the environmental provisions of the Trade Act are met.

The U.S-Panama Free Trade Agreement is likely to advance the economic interests of the U.S. in opening up markets in a broad range of consumer and industrial products. The agreement is not likely to have negative environmental effects in either country since there already is vigorous trade between the countries.

Panama currently exports to the U.S. approximately 50 percent of its total exports of $884.4 million. Those exports consist mainly of the following products: bananas, petroleum products, shrimp, sugar, coffee, and clothing. According to the U.S. State Department, "though Panama has the highest GDP per capita in Central America, about 40% of its population remains mired in poverty."

In that context, CEI would like to emphasize a point made in its comments on CAFTA-DR, as it is very relevant to the situation of Panama and CEI's rationale for dissenting from the Majority Report.

As Peruvian development economist Hernando De Soto has pointed out and demonstrated over the past decade, the rule of law and clearly defined private property rights offer the greatest hope for improving the lot of the world's poor by empowering them to use the capital already available to them to generate wealth and prosperity. These institutions also are essential for sustainable environmental improvements. Once a resource becomes a legally recognized asset, people will tap into its value to both protect and enhance that resource, whether a farm or a forest.

Numerous other studies have made similar findings. In a direct relationship to the environment, Madhusudan Bhattarai (2000) found that civil and political liberties, the rule of law, the quality and corruption levels of government, and the security of property rights were important in

explaining deforestation rates in sixty-six countries across Latin America, Asia, and Africa.

Legal ownership rights and legal barriers to establishing businesses should be a focus of environmental cooperation and capacity-building efforts. Institutions--especially property rights and the rule of law--are key to environmental improvements. In helping to build CAFTA countries' capacity to improve the environment, strengthening these fundamentals should be encouraged.

It is critical that we focus efforts not on detailed bureaucratic and procedural approaches to environmental concerns – as is done in this Agreement -- but on building the underlying institutional framework that can make a real difference.

CEI's other comments on CAFTA-DR are appended to the Majority Report, and we ask that those be made part of these dissenting comments.

In addition, CEI, would like to address several issues that were not addressed in the CAFTA-DR report.

One relates to the issue of sugar. In reviewing the U.S. tariff schedules for the import of various types of sugar from Panama, it appears that sugar is still restricted to a low tariff-rate quota, with high tariffs for the sugar imports above that. CEI would offer that those restrictions not only harm the people in Panama, but lead to increased costs for consumers in the U.S. and to lost jobs in sugar using industries.

CEI dissents from the majority endorsement of including the ECA in the text of the Agreement and establishing a dedicated funding source for environmental cooperation between the two countries. CEI would offer that an ECA is subject to change as priorities shift. Thus, inclusion in the text could be problematic in making such changes.

CEI would also note that a dedicated funding source for cooperative activities for environmental improvements and monitoring would mean that other more urgent U.S. budget priorities may receive short shrift or that needed funds for trade capacity-building for Panama would not be available. That would harm both the people of Panama and not allow them to experience the economic growth that trade can bring – and with it – greater wealth to deal with environmental concerns.

CEI appreciates the opportunity to comment on this TPA.

Sincerely,
Frances B. Smith

ATTACHMENT 5
To Report on U.S.-Panama TPA

Separate Comments on the U.S.-Panama Free Trade Agreement

William J. Snape, III, Endangered Species Coalition
Joined by
Daniel Magraw, President, Center for International Environmental Law
Alexander F. Watson, Hills & Company

Illegal logging is an issue of global importance. It is estimated that developing countries lose $10 billion annually in assets and revenue due to illegal logging and an additional $5 billion in lost taxes and royalties.[1] The forests are not only a source of income for governments, but are an important resource for forest-dependent peoples—estimated by the World Bank to number 350 million.[2] Illegal logging also contributes to loss of biodiversity through destruction of wildlife habitat.

Panama is no exception to this problem. The Interim Environmental Review of the U.S.-Panama TPA noted that the Panamanian authorities consider deforestation and wildlife habitats to be among their most pressing environmental issues.[3] The Review also mentions that the USAID program in Panama includes studies on illegal logging.[4] However, the problem appears to be more significant than the Review indicates. The International Tropical Timber Organization found that "illegal logging is widespread in the moist forest area, even in protected areas."[5] It also found that none of Panama's permanent production forest is managed sustainably.[6] The inability of Panama to manage its forests sustainably is important because it is a range State for two commercially- important timber species: mahogany (*Swietenia macrophylla*), included on Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and cedar (*Cedrela odorata*), which will be considered for inclusion on CITES Appendix II at the next Conference of the Parties in June 2007. Panama's forests are also essential in protecting its biodiversity—home to seven species of mammals, 18 bird species, 52 amphibian species, and four plants that are listed as Critically Endangered, Endangered, or Vulnerable on IUCN's Red List.[7]

The Review found that because tariffs on forest products are already low, the TPA would not

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[1] World Bank, Rep. No. 36638-GLB, Strengthening Forest Law Enforcement And Governance: Addressing A Systemic Constraint To Sustainable Development xi (2006), *available at* http://siteresources.worldbank.org/INTFORESTS/Resources/ForestLawFINAL_HI_RES_9_27_06_FINAL_web.pdf?

[2] *Id*.

[3] OFFICE OF THE U.S. TRADE REPRESENTATIVE, INTERIM ENVIRONMENTAL REVIEW, U.S.-PANAMA FREE TRADE AGREEMENT 7 (2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Panama_FTA/asset_upload_file503_5123.pdf.

[4] *Id*. at 23.

[5] INTERNATIONAL TROPICAL TIMBER ORGANIZATION, STATUS OF TROPICAL FOREST MANAGEMENT 2005, 265 (2006), *available at* http://www.itto.or.jp/live/Live_Server/1255/Panama.e.pdf.

[6] *Id*. at 264.

[7] *Id*. at 263.

significantly alter existing production levels and, thus, not detrimentally impact wildlife habitat.[8] However, there is evidence to suggest that even in the absence of lower tariffs, free trade agreements do increase the volume of bilateral trade in timber and timber products.[9] Consequently, in order to ensure that U.S. imports of timber and timber products do not contribute to loss of biodiversity in Panama, the U.S.-Panama Trade Agreement should include a provision to ensure that those products were legally sourced.

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[8] USTR, *supra* note 3, at 19.

[9] *See* EIA Trade Report, America's Free Trade For Illegal Timber: How Us Trade Pacts Speed The Destruction Of The World's Forests (2006) (Because Singapore acts as a major transshipment port for illegal timber, the U.S.-Singapore Free Trade Agreement increased the volume of illegal ramin from Indonesia entering the United States by 60%). *See also*, International Tropical Timber Organization, *FTA boosts timber exports to the USA*, Tropical Timber Market Rep. Oct. 16-31, 2006, at 10 ("Exports to the US market have risen since the Free Trade Agreement (FTA) between Guatemala and the USA came into effect in July 2006, a trend which is expected to continue. Guatemala's exports of forest products to the USA were only $8.3 million in the first half of 2006 but amounted to $11.6 million just in the third quarter of 2006. Exports of teak sawnwood were only $15,650 in March but had almost doubled to $28,453 in September 2006.").

ATTACHMENT 6
To Report on U.S.-Panama TPA

March 19, 2004 TEPAC report on CAFTA

The U.S.-Central American Free Trade Agreement

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

March 19, 2004

March 19, 2004

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.- Central American 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 believe that the Agreement meets Congress's negotiating objectives as they relate to environmental matters. Moreover, this majority notes with satisfaction that environmental issues in this agreement appear to have obtained a higher profile than in last years' agreements with Chile and Singapore. This positive trend should be acknowledged.

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

A majority of the Committee views favorably the Agreement's new public participation provisions and the State Department's side agreement on environmental cooperation (ECA).

These new provisions, which were not present in the Chile or Singapore Agreements, will enhance the ability of citizens with reasonable environmental concerns to have those concerns heard, and likely responded to, while simultaneously limiting the possibility that frivolous comments will bog down the process. However, this majority believes that the role of the Secretariat (as described in Article 17.7 of the Agreement) is critical to the successful implementation of these provisions. The Secretariat chosen must have the resources, both in experienced staff and funding, to accomplish the objectives outlined in the ECA. Without such a Secretariat, the ECA will not be successful. At the time of this report, the Secretariat has not been chosen and this majority does not believe that Congress can fully evaluate the environmental implications of this agreement without knowing what organization will serve in that role and an understanding of its capabilities and funding. A similar majority of the Committee also recommends that USTR adopt its current tentative position that a local entity be established as the Secretariat. Doing so would be a beneficial means to build the capacity of local nongovernmental organizations.

A majority believes that the Agreement's investment protection and dispute resolution provisions are analogous to those in the Chile and Singapore Agreements and 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 bone fide environmental controls while simultaneously protecting investment. However, TEPAC is concerned about identifying protected interests with the phrase "tangible or intangible movable or immovable property, and related property rights." There is a lack of clarity regarding the definition of this term and there is no comparable U.S. jurisprudential concept. This raises the possibility that the resolution of disputes under the Agreement could be inconsistent with U.S. law. To further enlighten the appropriate development of this now more refined concept, we urge the respective national governments to 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.

A similar majority of TEPAC approves of the procedures used to resolve disputes in environmental matters. The "carve-out" for environmental provisions appears to strike a proper balance between the extensive mechanisms in the Agreement to cooperate on environmental matters and the need to ensure that all parties commit the requisite resources to enforce domestic environmental laws and regulations.

A majority of the Committee is extremely concerned about the Agreement's limited reductions in the above-quota sugar tariff rates over an extended period and the slow phase out in tariffs on chicken leg quarters, rice, and dairy commodities. This is of particular concern with regard to sugar, where the overproduction of sugar caused by domestic subsidies places significant stress on delicate and endangered ecosystems like Florida's Everglades.

In the Chile and Singapore reports, a majority of TEPAC members expressed a belief that that the dispute settlement provisions would be improved if the rules of procedure made clear that

submissions from persons and interested parties (both private sector and NGOs) should be accepted and considered to the extent appropriate as determined by the panel. This majority is pleased to see that such a provision has been incorporated into the CAFTA text.

As to capacity building, a majority of the Committee recognizes that Annex 17.1 and the associated ECA to the environmental provisions of the Agreement presents an impressive framework for reaching the Congressional mandate for this worthy objective. However, this same majority stresses that these efforts are currently unfunded and that, the framework alone, without adequate funding, will not allow the achievement of Congress's objectives.

In sum, this majority believes that the Agreement not only specifically recites Congress's mandated objectives in the environmental arena, but contains adequate provisions to meet these objectives.

Nevertheless, several differing viewpoints exist among committee members, especially with regard to investment protection and dispute resolution issues. These relate to 1) the lack of clarity in the interaction between CAFTA and GATT, 2) the ambiguity of certain terms used in the FTA, 3) the nature of the investor-State provision, 4) questions regarding which institutions have jurisdiction over issues that have environmental implications, 5) a lack of adequate protections for sanitary and phytosanitary standards, 6) questions regarding customs administration and trade facilitation, and concerns that 7) the Agreement excessively relies on trade as a means of advancing environmental objectives, 8) the investment provisions are too broad or, conversely, that they weaken traditional protections for U.S. investors, 9) that the Intellectual Property Article creates new delays in bringing generic pharmaceutical products to market, making medicines less affordable to many consumers, 10) the Agreement does not contain adequate environmental safeguards

III. Brief Description of the Mandate of TEPAC

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

IV. Negotiating Objectives and Priorities Relevant to the Report

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

> (A) to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental. . . laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries;

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

(C) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;

(D) to reduce or eliminate government practices or policies that unduly threaten sustainable development;

(E) to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services; and

(F) to ensure that. . . environmental, health, or safety policies and practices of the parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against United States exports or serve as disguised barriers to trade.

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

(G) to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources; and

(H) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental. . . laws as an encouragement for trade.

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

V. The Committee's Advisory Opinion on the Agreement

A majority of TEPAC notes with satisfaction that not only are environmental issues now integrated into the drafting of a free trade agreement, as they were with the Chile and Singapore Agreements, but, in CAFTA, they are fleshed out to an even greater degree in the FTA's public

participation provisions and the ECA negotiated by the State Department.[1] This majority noted last year the progress that had been made since NAFTA in advancing the awareness of environmental concerns in trade agreements and expressed the hope that the momentum gathering in this area continued to build. It views CAFTA's public participation provisions and the ECA as steps in the right direction. As it noted last year, of course, it will be in the execution and funding of these provisions, not in their mere negotiation and memorialization, that their promise will be realized.

A majority of the Committee also notes 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. Strict Compliance With Congress's Mandated Objectives

TEPAC recognizes that the Agreement incorporates the eight environmental trade negotiation objectives outlined above. Seven of the eight ("A" through "D" and "F" through "H", above) are referenced, almost verbatim, in Chapter 17 of the Agreement, and the remaining objective is achieved through the Agreement's tariff and nontariff reduction provisions. As these objectives are achieved equitably and in a reciprocal manner, the Committee believes that, initially, the Agreement meets Congress's specific environmental objectives.

However, the actual achievement of these objectives is dependent on the efficacy of the measures used to implement these objectives, the enforcement measures necessary to secure them, and the funding provided to them. In the analysis of these factors, the Committee's unanimity breaks down. In examining these issues, some committee members believe that the provisions and mechanisms are adequate, while others believe that they are too weak or, conversely, too strong. Some believe that the provisions will have alternative adverse consequences and some urge that the agreement go beyond Congress's strict mandate. 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, as with investment issues, for example, that separate opinion is summarized and the full opinion attached hereto to give the reader a more detailed explanation.

[1] The ECA was negotiated by the State Department in the context of, but separate from, CAFTA. It has not been finalized and is subject to further revision. As currently drafted, it establishes a framework for environmental cooperation, including public participation therein, and describes broad categories of projects to be contemplated by the parties. However, it does not implement or fund operations, nor does it identify any specific cooperative efforts.

B. Actual Achievement of the Mandate

1. Background

As the reader is probably aware, the most contentious trade agreement provisions relating to the environment, and therefore the source of both the most comment and disagreement, are those relating to investment protection and dispute resolution. The Committee members' analysis of the environmental implications of these provisions is based largely on their's 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 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.

A majority of the Committee also supports the public participation provision of the FTA and the ECA side agreement negotiated by the State Department. These provisions increase the opportunities for public participation, which in turn encourages the effective enforcement of environmental laws.

b. Investment

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

Also noteworthy are the concepts which motivate Paragraph 1 of Article 10.2 and Article 10.11 of the chapter on investment, particularly when combined with the other language in the

Agreement cited above. Paragraph 1 of Article 10.2 states that in the event of an inconsistency between the Investment Chapter 10 and another chapter (like the chapter on the environment), the other chapter (Chapter 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 10.11 expressly precludes reading Chapter 10 to prevent environmental protections taken in conformity with the chapter on the environment. Additionally, Article 10.3 of Chapter 10 applies National Treatment; Article 10.4 (and its footnotes of explanation) require Most Favored Nation treatment; and Article 10.5 requires a minimum standard of treatment that invokes due process in terms that seem expansive, and thus inclusive, of American notions of due process.

However, TEPAC is concerned about identifying protected interests with the phrase "tangible or intangible movable or immovable property, and related property rights." There is a lack of clarity regarding the definition of this term and there is no comparable U.S. jurisprudential concept. This raises the possibility that the resolution of disputes under the Agreement could be inconsistent with U.S. law. To further enlighten the appropriate development of this now more refined concept, we urge the respective national governments to 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

A majority of the Committee views favorably the Agreement's new public participation provisions and the State Department's ECA. If successfully implemented, these new provisions, which were not present in the Chile or Singapore Agreements, will enhance the ability of citizens with reasonable environmental concerns to have those concerns heard, and likely responded to, while simultaneously limiting the possibility that frivolous comments will bog down the process.

However, this majority stresses that the framework established by the provisions, although strong, is insufficient in and of itself to accomplish these objectives. Successful implementation of the framework is dependent on the selection of a capable and adequately-funded Secretariat (as described in Article 17.7 of the Agreement.) Without an entity with the requisite knowledge, staffing and resources, the promise inherent in the new provisions will not be realized. At the time this report was prepared, the selection of a Secretariat had not occurred. This majority does not believe that Congress can fully evaluate the environmental implications of this agreement without knowing what organization will serve in that role and an understanding of its capabilities and funding. Moreover, this majority strongly urges that, in conjunction with review of the FTA, Congress itself either provide for, or ensure the provision of, adequate funding for the Secretariat. Moreover, this majority recommends that USTR, provided it can identify a local entity with the requisite knowledge, adopt its current tentative position that such an entity be established as the Secretariat. Establishment of a local Secretariat would be a beneficial means to build the capacity of local nongovernmental organizations.

d. Dispute resolution

In addition, a similar majority of the members believe the significant improvements which were made in the Singapore and Chile Agreements in the procedures used to resolve disputes in environmental matters have been retained. Chief among these is the transparency and participation of civil society during the settlement of disputes in trade cases. Also significant is the inclusion of special procedures regarding the roster of panelists and panel selection for dispute resolution to ensure that panels addressing environmental issues have the requisite expertise. Finally, the Agreement utilizes monetary penalties of up to $15 million per year for instances of non-compliance with rulings confirming violations of enforcement requirements. This provision is notable because it applies only to failures to enforce domestic environmental and labor laws. It does not apply to findings of non-compliance regarding other provisions and applies only to the environmental objectives identified in Section IV.A and B above. Despite the fact that this provision strictly meets Congress's mandated negotiating objectives, there was discussion among the committee members regarding the "carve-out" for environmental and labor provisions, the limited enforcement options for environmental violations and the size of the penalty. In the end, this majority concluded that the provision appears to strike a proper balance between the extensive commitments in the Agreement to cooperate on environmental matters and the need to ensure that all parties commit the requisite resources to enforce domestic environmental laws and regulations. As to the size of the penalty, this majority concluded that it was adequate, particularly given the economic positions of the parties and the fact that the high level of visibility and resultant embarrassment associated with such a violation, in conjunction with the transparency of the process, would likely be a sizeable "supplement" to the monetary penalty.

In the Chile and Singapore reports, a majority of TEPAC members expressed a belief that that the dispute settlement provisions would be improved if the rules of procedure made clear that submissions from persons and interested parties (both private sector and NGOs) should be accepted and considered to the extent appropriate as determined by the panel. This majority is pleased to see that such a provision has been incorporated into the CAFTA text. It also strongly supports the new public participation provisions and notes that adequate government funding is essential so that the promise inherent in these provisions can be attained.

e. Capacity building

As to capacity building, a majority of the Committee believes that Annex 17.1 to the environmental provisions of the Agreement, in conjunction with the ECA, presents an impressive framework for reaching the Congressional mandate for this worthy objective, in part creating a favorable climate for investment and trade. However, this same majority stresses that these efforts are currently unfunded and that, the framework alone, without adequate funding, will not allow the achievement of Congress's objectives. Indeed, adequate funding levels should not only be provided, but funding should be better coordinated, both within donor states and with recipient countries (including not only their governments but non-governmental organizations and civil society therein). Specific benchmarks and progress reports should be considered in this regard. In the environmental section of the TPA act, two of the principal negotiating objectives are to (a) strengthen the capacity of United States trading partners to protect the environment

through the promotion of sustainable development and (b) to reduce or eliminate government practices or policies that unduly threaten sustainable development. This majority hopes that, utilizing the framework of the ECA, Central America and the United States pursue cooperative projects designed to accomplish these objectives.

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 and the Department of Commerce identify the extent of the Agreement's tariff reductions for such items. The Department of Commerce provided the following information on tariff reductions: Environmental goods accounted for approximately 5 percent of total U.S. industrial exports to Central America in 2001, totaling almost $360 million. Central American tariffs on these goods range from 0 to 15 percent, with the average varying by country from 0.8 to 1.8 percent. Under the Agreement, 74 percent of these exports will receive duty-free treatment immediately upon implementation. Tariffs on 6 percent will be eliminated over five years, with the remaining 20 percent eliminated over 10 years. Indeed, most products in the last category are miscellaneous plastics and when they are factored out, 97 percent of U.S. environmental goods exports to Central America will receive duty-free treatment immediately upon implementation of the agreement.

As to nontariff barriers, many U.S. exporters currently face complex paperwork requirements that documents be certified in the United States at the embassy or consulate of the Central American country that will receive the goods. These requirements will be eliminated immediately upon implementation of the agreement. Also, in some instances, dealer protection laws have led to severe consequences for U.S. exporters when they terminate a contract with a dealer or distributor in Central America. The agreement requires each Central American country to amend its laws so that U.S. products cannot be denied the right of importation due to contract disputes.

A majority of the Committee believes that this analysis shows that the FTA will fulfill Congress's mandate to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services.

g. Concerns regarding tariff reductions

A majority expresses concerns over product-specific exceptions to the full or rapid liberalization of tariffs and quotas. This majority believes that a key purpose of free trade agreements is to produce lower prices by lowering barriers to competition. The limited reductions in the above-quota sugar tariff rates over an extended period and the slow phase out in tariffs on chicken leg quarters, rice, and dairy commodities reflects the same continuation of U.S. agricultural protectionism that the Committee noted in its recently-submitted report on the U.S. - Australia Free Trade Agreement.

According to the General Accounting Office, the U.S. sugar program costs consumers almost $2

billion per year. Moreover, as expressed in TEPAC's report on the Australia FTA, from an environmental perspective, the domestic support program for sugar means unnecessary incentives to grow sugar in what might otherwise be unprofitable geographic areas, such as Florida. Cane sugar farming in Florida and elsewhere puts significant stress on sensitive ecosystems, most significantly the Florida Everglades. Cane fields in the Everglades divert sorely-needed water and increase pollutant loadings through the use of agricultural chemicals. Consequently, this majority believes that the modest increases in the sugar quota were too small and the reductions in the above-quota sugar tariffs, phased in over an extended period, were too limited. Both significantly reduce U.S. welfare gains from the pact and helps perpetuate the degradation of Florida's wetlands. Additionally, this practice has a significant adverse impact on the developing Central American economies that continue to face restrictions on their ability to sell sugar to the United States.

The majority also believes that the continuation of quotas also affects the credibility of the U.S. negotiation positions in the Doha Round regarding the removal of agricultural trade barriers. It is not in the interest of the United States or in the interest of U.S. consumers to continue tariff-rate quotas on sugar or restrictions on dairy, rice or selected poultry products.

h. Procedural comment

In the Chile and Singapore reports, the Committee expressed its belief that the 30 days provided by Congress for it to produce this report is an inadequate period, given the length and complexity of the Agreement, the diversity of viewpoints among the TEPAC members, the schedules of those members and the fact that, in this instance, reports are required for two Agreements simultaneously. A majority of the Committee also stated its belief that its efforts were unduly restricted by the classified nature of the documents. The Committee would be remiss in failing to recognize that, at least with regard to the CAFTA text, its strongest concerns were addressed. The text of the agreement was provided well in advance of the commencement of the 30 day period and was later provided in declassified form. We encourage the continued use of this procedure, which stands in stark contrast to the conditions under which the Committee prepared its recently-submitted report on the Australia FTA. This majority also notes that the rapid succession with which the President notified Congress of the Australia, CAFTA and Morocco Agreements, required the Committee to undertake the drafting of reports on these three agreements simultaneously. To some degree, this fact decreased the advantage gained by the early and public release of the CAFTA text.[2]

[2] TEPAC notes that on March 15, 2004, five days before this report was due, it was announced that the U.S. had completed negotiations with the Dominican Republic to join CAFTA. As of the time of drafting this report, the Committee had not received any information regarding the implications of that announcement in the review process. While it is not aware of any items particular to the Dominican Republic, TEPAC has not analyzed CAFTA with that country in mind and this report should not be read to include any such analysis.

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.

a. The interaction between CAFTA and GATT is unclear

CAFTA Article 21.1 specifically acknowledges the exceptions in GATT for measures for the protection of human, animal, or plant life or health and for the conservation of living and non-living exhaustible natural resources. A minority of the Committee believes that it is unclear how these general exceptions overlap with or relate to more specific exemptions detailed in other chapters, including the National Treatment and Import and Export Restrictions; Investment Articles regarding protection of human, animal or plant life or health and environmental concerns; and investment exceptions for public welfare.

b. Certain terms used in the FTA are ambiguous

A minority believes that in a number of places legally ambiguous language is used to describe the citizen submission process, including requirements that submissions be from persons with a "legally recognized interest," that they are aimed at "promoting enforcement rather than at harassing industry," and that the Secretariat conclude that the submission is not frivolous and "alleges harm" to the person making the submission. This minority believes that narrow interpretation of these terms could limit the proffering and efficacy of citizens' submissions

This minority also believes the term "environmental law" is ambiguous to the extent it is exempts laws "the primary purpose of which is managing the commercial harvest or exploitation of natural resources." Defining the primary purpose of a statute or provision may be difficult.

This minority also believes that 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. This minority believes 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.

The citizen's submission process extends the procedures contained in NAAEC, particularly in regard to moving forward on a factual record and/or its publication at the request of any one party. A minority believes that this improvement is compromised with regard to rights accorded to those residing in the U.S. Article 17.7(3) exempts submissions from individuals residing or established in territory of the U.S. from this process and requires that they be submitted under the NAAEC.

c. The Investor-State provision are troublesome

A minority believes that the definition of investment, covering both tangible and intangible assets, is too broad. This gives rise to a wide array of potential investor-state claims, which could have far-reaching and unintended environmental implications. This minority stresses that experience with cases being brought under existing agreements (NAFTA and BITs) demonstrates that individual investors are pushing for expansive readings of the substantive obligations in those agreements. This minority believes that 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. A reliance on domestic courts in the first instance, and on state-to-state dispute settlement only if needed, would provide for a more appropriate balancing of the rights of investors against the public interest. In addition, this minority believes that allowing investors to remove disputes from national legal systems, as is the case here in CAFTA, stunts the development of those systems.

Additionally, this minority believes that the provisions for the negotiation of an appellate body to review awards rendered by tribunals are generally vague. Both the initial dispute settlement process as well as any appellate body should provide for transparency and public participation.

d. Institutional Jurisdiction

A minority is concerned that there is no indication of which committee has jurisdiction over the discussion of issues that have environmental implications, such as non-tariff measures, technical measures or SPS regulations.

e. The Agreement does not adequately protect sanitary and phytosanitary standards

A minority believes that the agreement does not ensure that food safety and other sanitary and phytosanitary standards would be adequate to protect public health and safety and the environment in the U.S. and Central America. In addition, this minority believes that the agreement's rules on services could undermine environmental safeguards in such critical sectors as water, forestry, waste transport, mining, and offshore oil development.

f. Customs Administration and Trade Facilitation

A minority believes that "information technology" and "a focus on high-risk goods" as referenced in Articles 5.3(d) and 5.4 should be interpreted to include, and not obviate, efforts to prevent the introduction of invasive alien species through major trade-related pathways or to prevent trade in endangered species and their by-products. This minority also believes that, in cases of imports that may have adverse environmental impacts, the 150 days countries are provided to issue advance rulings on requests for imports of goods may not be sufficient for the conduct of appropriate environmental impact assessments and risk analyses.

g. The Agreement excessively relies on trade as a means of advancing environmental objectives.

A minority believes that the Agreement excessively relies on trade as a direct means to advance various environmental objectives. This minority agrees with the majority in that trade can create wealth, and, in that sense, the most effective means of advancing environmental objectives around the world is to move toward free trade. However, the minority believes that trade agreements should focus on this positive impact, not seek to use trade policy as a tool to force changes that might or might not actually advance some environmental objective.

Moreover, this minority stresses that the people who will bear the burdens of these non-trade related mandates in the Agreement are the poorest people in the CAFTA nations and the most economically disadvantaged consumers here in the United States. Legal ownership rights and legal barriers to establishing businesses should be a focus of environmental cooperation and capacity-building to reach environmental goals. This minority strongly urges Congress not to use this Agreement as a model for future trade agreements with developing countries.

h. The investment provisions are too broad

A minority believes that the definition of "investment" is excessively broad and that, as a result, it may encourage investor-state claims affecting environmental protections and intellectual property. These investor rules would undermine U.S. and Central American environmental standards by allowing foreign investors to challenge legitimate laws and regulations before international tribunals, bypassing domestic courts. This minority believes that, for developing Central American countries, the simple threat of costly investor challenges could freeze adoption of environmental standards.

This minority believes that, despite some incremental changes, CAFTA's investment rules are similar to NAFTA's Chapter 11, which has given foreign investors broad rights that do not exist under U.S. law. The Trade Act of 2002 requires that foreign investors receive "no greater substantive rights" than U.S. citizens have under U.S. law. CAFTA's investment rules fail to meet this congressional mandate: the agreement provides foreign investors with rights and privileges that go significantly beyond U.S. law, and the few U.S. standards the agreement purports to incorporate are left vague and unclear. In addition, this minority believes that 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. An appellate review mechanism is required to curb the excesses of ad hoc arbitration panels and to ensure a stable and consistent body of law.

Further, this minority believes that CAFTA includes language that would allow foreign investors to challenge government decisions about natural resource agreements, such as federal oil, gas, and mineral leases. As a result, foreign companies could challenge royalty payments and other requirements before international tribunals, not U.S. or Central American courts.

More broadly, this minority states that it has no evidence that investment rules are necessary in bilateral relations with these countries. To the minority's knowledge, there is no publicly available information that would suggest that these countries have mistreated U.S. investors in

recent years. Equally, there has been no showing their judicial systems are 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. 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. This minority believes that, 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. But the investment rules do not even mention, much less require, minimum standards of corporate conduct on investors acting abroad.

i. 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-C 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-C 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.

j. The Agreement's intellectual property provisions are inadequate

A minority believes that, contrary to the Doha Declaration on the TRIPS Agreement and Public Health, CAFTA'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 CAFTA reduces access. It believes that CAFTA will make it even harder than it is today for the people of Central America to afford the medicines they need. This minority also believes that, in addition to affecting the affordability of medicines, 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.

k. The Agreement does not contain adequate environmental safeguards

A minority believes that CAFTA's environmental provisions would not ensure that environmental protection in Central America is improved in a meaningful way. Moreover, the key aspects of the citizen submission process are unresolved. This minority believes that this deficiency is important enough that Congress should not approve CAFTA until it is resolved.

This minority believes that CAFTA neither clearly requires the maintenance or effective enforcement of a set of basic environmental laws and regulations nor includes an enforceable set of standards for corporate responsibility on environmental (or any other) issues. There is not even parity between enforcement of the existing environmental provisions and CAFTA's commercial provisions.

While CAFTA makes modest progress in some procedural areas regarding the environment, including the establishment of a citizen submission process to allege failures to effectively enforce environmental laws, this minority believes that the proposed process does not provide for any clear outcomes or actions to ensure such enforcement. The lack of enforcement tools in this process stands in stark contrast to the monetary compensation that private investors can demand of governments under CAFTA's investment rules.

This minority believes that, given the environmental challenges facing Central America, CAFTA should include a comprehensive program for environmental cooperation, capacity building, clear goals and benchmarks, and objective monitoring of environmental progress that is backed up by a dedicated source of grant funding and loans. Finally, CAFTA fails to include any independent environmental cooperation institution such as that established under the NAFTA environmental side agreement.

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

Comments of The Humane Society of the United States

The HSUS is the largest and most influential animal protection organization in the United States with over one million active members, eight million constituents and a significant global presence. The HSUS serves as a member of the Trade and Environment Policy Advisory Committee (TEPAC), advising both the United States Trade Representative (USTR) and the Environmental Protection Agency (EPA) on international trade and economic policy.

The HSUS is actively involved in Central America with a long-standing presence in Costa Rica and affiliations with several organizations in all of the Central American countries. The HSUS is participating in the capacity building efforts to provide needed technical assistance and expertise in a number of areas.

Representatives of the HSUS have spent a great deal of time in Central America over the last several months working with governments, non-governmental organizations (NGOs), corporations and other private interests to understand the needs and development priorities of each CAFTA country.

These comments address the preliminary findings of the interim environmental review and other issues that should be considered as the CAFTA is finalized in preparation for Congressional notification and consideration.

Introduction

As set forth in the Interim Environmental Review, the Trade Act of 2002 sets forth certain environmental negotiating objectives: (1) ensuring 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;[1] and (2) seeking 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 and labor laws as an encouragement for trade.[2] The question for the negotiations in the context of CAFTA is how can the parties ensure that trade and environmental policies are mutually supportive?

The Central American countries have enormous potential in a number of areas. However, years of civil war and strife have inflicted serious damage on the countries of Central America. The five CAFTA countries are linked geographically, politically and economically. If difficulties arise in one of the countries, the repercussions are often felt in neighboring countries. As such, any environmental, economic or capacity building program must be fashioned for the region if success is to be sustainable.

[1] Trade Act of 2002 §2102(a)(5).
[2] Id. at §2102(a)(7).

I. Scope of the Environmental Review

As set forth in the Interim Environmental Review the scope of the review discusses the possible direct impacts of the CAFTA on the U.S. environment resulting from prospective changes in the U.S. economy and environmental issues associated with possible transboundary effects of CAFTA.[3] In addition, the environmental review takes account of global and transboundary impacts (where appropriate and prudent), possible effects on the U.S. environment resulting from economic effects in Central America and shared ecosystems and the extent to which the CAFTA might affect U.S. environmental laws, regulations, policies or international commitments.[4]

Although the primary focus of the environmental review is the direct impacts on the United States as a result of the CAFTA, strong consideration must be given to the overall impact CAFTA may have on our shared environment and ecosystems. The transboundary effects of unsustainable practices are well documented – smoke from agricultural fires, animal illnesses and the spreading of diseases, water, soil and air pollution are common problems in Central America with a direct and immediate impact on the United States.

A. Public Comments and Involvement

There are a substantial number of groups, non-governmental organizations (NGOs), private interests, corporations and government agencies involved in environmental issues and international trade and economic relations in Central America. Many of the groups in Central America are attempting to address these difficult issues in imaginative and innovative ways. A common problem in all of the Central American countries experienced by NGOs and others is a lack of adequate resources to address environmental issues and to promote sustainable development.

In Costa Rica for example, ZooAve, a non-profit animal rescue and rehabilitation facility, is working with the Costa Rican government to rescue, rehabilitate and release (where possible) wildlife that have been illegally removed from the wild and/or sold to private individuals in the country. In fact, the illegal trafficking in wildlife is largely within or between Central American countries.

SalvaNatura, an NGO in El Salvador, is responsible for management and oversight of El Salvador's national parks pursuant to a cooperative agreement with the government. This imaginative and innovative partnership helps to further both environmental protection efforts and conservation of natural resources.

In Nicaragua, the National Zoo is working to rescue and rehabilitate wildlife and other animals kept as pets or used as circus animals. The National Zoo is a misnomer because it is a rescue, rehabilitation and education center rather than a zoo. The National Zoo is operating on a very small budget with little or no assistance from the Nicaraguan government. In fact, the National

[3] Interim Environmental Review U.S.-Central America Free Trade Agreement (August 2003) at 14.
[4] Id.

Zoo desperately needs land to expand its facilities and the Nicaraguan government has refused to sell it land that it controls located adjacent to the Zoo.

There are numerous stories such as these that are unlikely to be reported in an environmental review but must be understood to gain a basic understanding of the environmental and conservation situation in Central America. NGOs and other groups are doing their best to preserve and protect the environment but there are not sufficient resources to adequately address all the needs. If the CAFTA is going to be sustainable and promote development in a manner that supports environmentally sound policies, then adequate resources (financial, human and technical assistance) must be invested in Central America.

B. Transboudary and Global Issues

Environmental policies and sustainable development should be a global priority. Environmental problems do not respect continental or national boundaries. Increased trade, investment flows and travel between the United States and Central America as a result of CAFTA, will make the truth of these statements all the more evident.

The United States and the Central American countries need to devise an environmental strategy much like the trade and development strategies being considered as part of the CAFTA. Environmental cooperation is an important and integral aspect of the CAFTA and should be treated as such.

1. Migratory Birds

Deforestation and forest degradation are great threats to birds and their habitat in Central America. Unsustainable agricultural practices and unsustainable timber production must be stopped if Central America is to recover from its present troubled situation.

Educational and outreach programs need to be increased to educate rural farmers and communities about unsustainable practices and how to transition to more sustainable methods of farming. Any educational and outreach program must also provide information and training concerning alternative opportunities for rural communities to benefit from sustainable tourism and other economic activity that supports wildlife and habitats.

2. Wildlife Conservation and Trade

Although deforestation and unsustainable agriculture practices are primary reasons for decreasing numbers of wildlife and habitat in Central America, the illicit trade in animals in Central America (sometimes wholly within a particular country) is also a serious problem. Even in the cases where countries are committed to protecting wildlife and habitat, lack of resources often prevents effective enforcement and protection efforts.

It may be unlikely that the CAFTA would cause an increase in illegal trade of wildlife or endangered species, but, that does not mean the issue does not need to be addressed by the Central Americans. Developmental policies that do not address the protection of wildlife and

habitat as natural resources to be protected will have limited success and questionable sustainability.

Costa Rica, for example, promotes areas where tourists are able to observe native species in their natural habitat. The promotion of such regions illustrates the importance of wildlife and habitat to the domestic economy through sustainable tourism programs.

Despite the potential for economic benefit, Central America remains a region where wild animals, many endangered, are available for purchase – sometimes on the side of the highway. In visits to the region we observed monkeys chained to trees outside restaurants with little or no room to move.[5] In fact, we were told of a restaurant that operates in Nicaragua where wild animals – including endangered species – are kept to be slaughtered for patrons wanting to experience an "exotic meal."

Conservation of wildlife and habitat must be addressed through education as well as other means. The governments of Central America must make the protection and humane treatment of wildlife a priority in their development programs. Most tourists from the United States, Europe or other developed countries would find the often cruel and inhumane treatment of wildlife unconscionable.

The laws concerning animal protection and welfare should be reviewed in each of the countries. Even where there are laws or regulations providing protections for wildlife or other animals, those laws are rarely enforced effectively. The Central American countries need capacity building and technical assistance to address shortcomings in the laws, regulations or other protections for animals and in the enforcement mechanisms and procedures.

The HSUS will provide a detailed analysis to each of the CAFTA countries concerning their participation in and compliance with CITES, and will include specific recommendations on ways in which to improve in both of these areas.

3. Shrimp/Turtle

Sea turtles in the Caribbean and Pacific are threatened with extinction. The interim environmental review addressed this issue "[s]even species of sea turtles are currently included on CITES Appendix I, and all appear in the International Union for the Conservation of Nature (IUCN) Red Data List of threatened species where two species are listed as critically endangered."[6]

The protection of sea turtles is an important issue in the United States as evidenced by the protections enacted by Congress and high profile disputes at the World Trade Organization (WTO).[7] Although sea turtles are in crisis throughout Central America (Atlantic and Pacific),

[5] Photographs of the monkeys are available for inspection.
[6] Interim Environmental Review U.S.-Central America Free Trade Agreement (August 2003) at 21.
[7] For a complete history of the issue, *see Trade and Domestic Protection of Endangered Species:*

there are a number of programs that provide some hope for the survival of these magnificent animals.

In Tortuguero, Costa Rica the Caribbean Conservation Corporation (CCC) runs a turtle station. The turtle station at Tortuguero provides important research and tracking information on sea turtles and records the activities of the turtles laying their eggs on the beach. Scientists, students and tourists all have the opportunity to venture onto the beaches at night to observe sea turtles nesting, laying and camouflaging their eggs. Not only is Tortuguero an important sight for sea turtles, it is an important ecologically minded tourist destination and, as such, an important area for tourism in Costa Rica. The popularity of Tortuguero illustrates that the protection of sea turtles can provide a much better economic existence than poaching or killing the endangered animals for food.

The HSUS and the CCC are partners in an effort to assist the other Central American countries in developing turtle conservation centers and/or stations that can also generate tourism revenue. El Salvador, Honduras and Nicaragua have expressed serious interest in establishing turtle conservation centers similar to Tortuguero, Costa Rica. Sea turtle conservation efforts should have a priority position in the environmental cooperation agreement so that efforts such as these can be developed and sustained.

The HSUS believes that the United States should consolidate and coordinate sea turtle conservation efforts in Central America to boost the capacity building and technical assistance program for CAFTA and the environmental cooperation agreement. One mechanism to provide funding for such an effort would be to support Senator Jefford's bill to promote international sea turtle conservation efforts.[8]

Sea turtle conservation is an area where conservation activities and sustainable economic development efforts can overlap and be mutually supportive. The HSUS recommends that the United States, together with the CAFTA countries, devote time, expertise and resources to this most important endeavor.

4. Transboundary Air Pollution

Air pollution is a major problem in Central America. Unhealthy levels of air pollution and smoke are common features of the large cities. Agricultural fires cause enormous amounts of smoke and unhealthy air in the countryside and in cities. As the interim environmental review provided, " [e]ven so, the potential transport of pollution from fires in Central America could continue or even increase given the following conditions: no change in the widespread practice of burning agricultural wastes; and no change in the use of fire to clear trees and other vegetation."[9]

Peaceful Coexistence or Continued Conflict? The Shrimp-Turtle Dispute and the World Trade Organization, Terence P. Stewart and Mara M. Burr, 23 WM. & MARY ENVTL. L. & POL'Y REV. issue 1, Fall 1998.

[8] *See* Marine Turtle Conservation Act of 2002, S. 2897, Report 107-303, 107th Cong. (2003).

[9] Interim Environmental Review U.S.-Central America Free Trade Agreement (August 2003) at

Unsustainable and environmentally harmful agricultural practices are far too common in Central America. These practices not only harm farmers and their families, but also harm people in cities, farm animals, companion animals, soil, air, water, habitat and wildlife. Agricultural reform with more sustainable, humane and environmentally sustainable practices must be undertaken if Central America is to protect its natural beauty, its biodiversity and its environment.

The HSUS will work with its partners in Central America to assist farmers, ranchers and other agricultural interests to be more humane and environmentally sustainable. In addition, The HSUS will work with its partners to assist them with access to the humane and environmentally conscious consumers and markets in the United States and elsewhere.

5. Marine Pollution

The interim environmental review correctly points out that:

> Increases in land clearing and/or agricultural production in the less-developed eastern watersheds of Central America could accelerate soil erosion and increase polluted run-off (such as sediments, nutrients and persistent organic compounds). This would increase existing pollution stress on coastal ecosystems and could also be expected to have adverse effects on regional ecosystems. The most vulnerable coastal resources include components of coral reef ecosystems (mangroves, sea grasses, back reef areas and coral reefs). Of particular concern are possible system-wide effects on the Meso-American Barrier Reef, the second largest barrier reef system in the world, and other coral reef areas adjacent to Central America.[10]

The interim environmental report goes on to state that "we have been unable to identify specific links between the CAFTA and changes in land clearing or agricultural production in Central America."[11] Recently in Costa Rica, run-off from either a large commercial banana or pineapple polluted the rivers and waterways near Tortuguero, killing several species and harming habitat for others.[12] Although it is not clear that CAFTA will have an immediate or specific impact on such activity, the danger remains quite real that increased production in certain areas could exacerbate such negative effects.

The Central American countries have a unique and wonderful asset in the Meso-American Barrier Reef and the diversity of marine life therein. Activities should be undertaken to ensure that marine pollution is limited and eventually eliminated to the greatest extent possible.

23.

[10] Interim Environmental Review U.S.-Central America Free Trade Agreement (August 2003) at 25.

[11] Id.

[12] For additional information on this incident please contact the Caribbean Conservation Corporation.

Sustainable and environmentally sound agricultural practices must be a priority for Central America so that its marine assets are provided an opportunity for survival.

6. Tourism

The interim environmental review accurately assesses the situation with respect to tourism in Central America, "[t]ourism has the potential to introduce new environmental stresses, as well as to create opportunities for sustainable development."[13] It is also quite true that tourism poses significant threats to the environment in each of the Central American countries – that is if tourism is promoted in a way that is unsustainable.

The HSUS agrees with the interim environmental review in that ". . . Central America's environment is an important factor in attracting tourists to the region and thus justification and motivation for conservation."[14] The interim environmental review lists visits to rain forests, lowland jungles, beaches, and coral reefs as accounting for 25 percent of the visitors to Central America.[15] This is quite true and the numbers and percentages are growing.
The intersection between sustainable economic development, environmental protection and conservation efforts is quite clear when examining the issue and potential of tourism for Central America. Simply put, tourism has the potential to provide enormous economic benefits to the region if it is planned and managed in a sustainable fashion. Such planning and management will require a great deal of thoughtfulness, input from civil society and experts in a number of disciplines. Capacity building efforts and technical assistance is desperately needed on this issue in Central America.

As stated earlier, sound conservation and environmental protection efforts can be successfully combined with tourism and other economic development activities. The HSUS is working with the Central American countries to assess efforts aimed at turtle conservation, wildlife and habitat protections, and how those efforts could be tied to sustainable tourism projects. There are many opportunities for economic growth in the area of tourism but it must be remembered that tourists flock to Central America because of its natural beauty, its wildlife and habitat (jungles, rain forests, mangroves, mountains and beaches).

Cooperation activities should be undertaken to strengthen the ability of the Central American governments and ministries such as environment and natural resources, tourism and other to conduct environmental, wildlife and habitat impact assessments before tourism related activities are undertaken.

II. Environmental Cooperation

Environmental cooperation is important if other aspects of CAFTA (i.e., economic cooperation) are to be successful. There are many reasons for this, but, the most important one being that

[13]Interim Environmental Review U.S.-Central America Free Trade Agreement (August 2003) at 26.
[14] Id.
[15] Id.

successful and sustainable economic development in Central America is dependent upon the level of efforts undertaken to preserve and protect the environment. Environmental protection in Central America and economic development are inextricably linked. For example, if the Central American countries are to develop a strong tourism industry (except for Costa Rica which has already achieved a high level of success) protection of the environment, biodiversity and habitat must be accomplished.

The text of the Environmental Cooperation Agreement is promising and hopefully there will be sufficient funds to adequately provide for the capacity building needs of each country in the area of environment, biodiversity protection and conservation.

III. Country-Specific Comments

At the outset it should be noted that each of the five CAFTA countries recognize the importance of protecting the environment and finding innovative ways to ensure that development is sustainable both environmentally and economically. Each of the countries faces unique challenges and problems and each has a slightly different perspective on how to address those challenges. The HSUS worked closely with each CAFTA country during the negotiating process and developed programs to address both the challenges and development priorities outlined by the countries. The following comments address the current situation in only in Costa Rica and El Salvador due to the progress of our programs in those countries.

A. Costa Rica

Costa Rica, although widely recognized as a "green" country that preserves and protects its environment, nevertheless faces serious challenges in its efforts to promote environmental protection, conservation, biodiversity protection and habitat.

Wildlife Trade

One significant problem is the extraction of animals from the wild for pets in Costa Rica.[16]

> All parrot species, primates and felids documented as pets in Costa Rica are endangered or vulnerable under IUCN (formerly International Union for the Conservation of Nature, now the World Conservation Union) criteria and/or national legislation (Solis et al. 1999). With the exception of white-faced capuchin monkeys, these species are all listed under the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), indicating global concern about the potential harm to their wild populations from international trade. Local trade of these species to satisfy the illegal pet market poses an additional burden on the viability of their wild populations, in addition to other pressures such as habitat destruction. In Costa Rica the yearly extraction rate of parrots from the wild to satisfy the national demand for pets is in the range

[16] *See* Carlos Drews, *The State of Wild Animals in the Minds and Households of a Neotropical Society: The Costa Rica Case Study in The State of the Animals II*, D. Salem and A. Rowan, ed. (Humane Society Press) (2003).

> of 25,000 to 40,000 chicks (Drews 2000b). This figure does not take into account mortality during capture and transport, which would at least double the estimate (Perez and Zuniga 1998). This Costa Rican figure alone exceeds the volumes exported from Central America for the international pet market (Drews in preparation), just as Beissinger (1994) had anticipated.[17]

As the study above indicates, the problem in Costa Rica is mainly animals taken from the wild and kept as pets in Costa Rica rather than trading wild life in the international market. Costa Rica is working to address this problem through greater education and outreach.

The Caribbean Conservation Corporation (CCC) has a turtle station in Tortuguero, Costa Rica. The CCC works to protect and preserve some of the most endangered sea turtles through habitat protection, tagging and research. Not only has the CCC been successful in developing a first-rate turtle conservation facility, it has combined these efforts with economic development in the region through environmentally sustainable tourism. The CCC model could be replicated throughout Central America and is a wonderful example of how conservation efforts and economic development activities can -- if conducted in the right manner – be mutually supportive.

Agriculture

Unsustainable agricultural practices have caused problems for Costa Rican farmers, animals, wildlife and protected areas. Conventional agriculture in Costa Rica is heavily dependent on chemicals and pesticides. These practices are not supportive of the efforts to protect the environment, biodiversity and habitat. In one instance that was well documented, run-off from a plantation contaminated a protected area resulting in the deaths of wild animals, many of which were endangered species.[18] The HSUS spent time with several farmers who left conventional agricultural systems because they and their families became ill due to the overuse of chemicals and pesticides. In fact, many of these farmers banded together to form the organic movement of Costa Rica.

Deforestation

Although the situation in Costa Rica is not as dire as in other Central American countries, deforestation and loss of natural areas (rainforests, cloud forests, dry forests) is a major concern for the country. Costa Rica is working to protect its natural beauty and habitat but these efforts are challenged by unsustainable agricultural practices, clear-cutting and agricultural burning.

Another important challenge is development and its effect on the natural environment, biodiversity and habitat. Costa Rica must find a way to balance its development goals and investment opportunities with its longstanding efforts to protect and promote its environment.

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[17] Id. at 195, column 3.

[18] For a complete explanation of this event visit the Caribbean Conservation Corporation's website or contact the CCC's representatives in San Jose, Costa Rica.

B. El Salvador

El Salvador is still dealing with the consequences of its civil war and the destruction brought about by years of conflict. El Salvador has the highest deforestation rate in Central America with the smallest amount of land. According to a United Nations estimate, El Salvador has lost 95 percent of its natural forests.[19] Despite these bleak facts, El Salvador is working to improve its environment and protect what is left of its natural beauty.

El Imposible national park in Western El Salvador is a shining example of what can be accomplished when a number of groups work together. The park supports native and migratory birds and other wildlife as well as providing economic activity to the surrounding communities.

El Salvador is in the process of enacting laws to protect more of its land and natural habitat.

The HSUS plans to assist El Salvador in its conservation, biodiversity and habitat protection efforts in its national parks and throughout the country.

IV. Trade Capacity Building

Trade capacity building is an important tool to assist the countries of Central America to develop in a sustainable manner. The trade capacity building talks held parallel to the trade negotiations were a progressive and innovative way to address the development needs of developing countries in the context of a trade negotiation. This effort assisted the Central American countries in identifying the development priorities and the development needs prior to the conclusion of the trade agreement.

A better coordinated approach to development both for the recipients and the donors is urgently needed. The CAFTA effort was a great first step but much more needs to be done. Although the idea of having national strategies and priorities identified prior to the start of the trade talks did focus the countries attention on needs, the donors were not as quick to react to the needs expressed by the countries. This was understandable given the fact that trade capacity building was new to all the parties (recipients, donors, governments and non-governmental participants).

The lessons learned in CAFTA need to be digested and the errors made corrected quickly. There needs to be much greater coordination among the donor community and donors need to show greater flexibility in addressing the needs of developing countries.

Non-governmental organizations, both non-profits and private sector representatives, should strive to take a more active and constructive role in capacity building efforts. The CAFTA countries came to the negotiating table with open minds and were open to innovative ideas and initiatives. The private sector and NGOs should to be more open to the idea of offering assistance to developing countries.

V. Conclusion

[19] *See* On Your Own in El Salvador 2nd ed. (2001).

The countries of Central America recognize the urgent need to preserve and protect their environments and to ensure a better future for their people. Sufficient resources both financial and human are needed to provide the necessary tools to accomplish the economic development desired in a sustainable manner. Central Americans have the desire, creativity and incentive to find solutions to the many problems facing the region they simply need assistance to succeed in these efforts.

The CAFTA may not be the answer to all the problems of the region but it will provide some measure of hope, opportunity and stability for both the United States and Central America. The HSUS supports CAFTA and urges others to support this agreement.

ATTACHMENT 2

Comments of Endangered Species Coalition

The following set of comments proceeds according to the different sections of the Central American Free Trade Agreements with specific reference to their varying impacts on environmental concerns.

Exceptions: Article 21.1 specifically acknowledges the exceptions in GATT for measures for the protection of human, animal, or plant life or health (GATT Article XX(b)), as well as for the conservation of living and non-living exhaustible natural resources (GATT Article XX(g)). However, it is unclear how these general exceptions overlap with or relate to more specific exemptions detailed in other chapters, including:

- National Treatment and Import and Export Restrictions – Annex 3.2 (e.g., US – export of logs; Costa Rica – export of logs/boards, coffee; Guatemala – export of round logs, worked logs, sawn timber > 11 cm in thickness and coffee; Honduras – wood from broadleaved forests);

- Investment Articles 10.9(3)(c) and 10.11 regarding protection of human, animal or plant life or health and environmental concerns; and

- Investment Annex 10-C exceptions for public welfare in paragraph 4(b).

In view of this ambiguity, it is presumed that such provisions will be viewed as mutually re-enforcing.

Environment: While the text of the environment chapter builds on a number of the shortcomings found in the North American Agreement on Environmental Cooperation (NAAEC) to NAFTA several concerns still remain on several issues.

More specifically, the citizen's submission process extends the procedures contained in NAAEC, particularly in regard to moving forward on a factual record and/or its publication at the request of any one party. Unfortunately, these improvements are compromised with regard to rights accorded to those residing in the U.S. Article 17.7(3) exempts submissions from individuals residing or established in territory of the U.S. from this process and requires that they be submitted under the NAAEC. This essentially establishes a double standard, which deprives U.S. citizens from availing themselves of the improvements made over NAAEC.

In a number of places the environment chapter also refers to legally ambiguous language regarding the status of persons involved in a citizen's submission, such as:

- persons with a "legally recognized interest" having access to proceedings regarding environmental violations (Article 17.3(3)); and

- Secretariat consideration of whether a claim is not frivolous and "alleges harm" to the person making the submission (Article 17.7(4)(a)).

A narrow interpretation of legal interest, damage, injury or harm could easily limit the ability for citizens' submissions to come forward, particularly if forced to rely on contractual ties or direct evidence of financial damage. Thus a broad interpretation is needed to ensure that groups and

individuals can defend their aesthetic, cultural, ecological and socioeconomic interests with regard to environmental concerns.

Another area of ambiguity is introduced with regard to the Secretariat ensuring that submissions are aimed at "promoting enforcement rather than at harassing industry" (Article 17.7(2)(d)). Such an assessment is highly subjective and a claim of harassment could reasonably be made by any private sector interest under accusation for violating environmental rules. Additionally, unlike the process under NAFTA, the Secretariat is not able to investigate issues on its own initiative, but must instead rely on existing evidence provided by the submitters, governments and other third parties. This will put in place more constraints than the existing NAFTA process, which has engaged in a number of highly valuable investigative records (Article 17.8(4)).

Finally, with regard to the definition of environmental law, Article 17.13(1) exempts statutes or regulations "the primary purpose of which is managing the commercial harvest or exploitation of natural resources." The ensuing paragraph states that "for purposes of the definition of 'environmental law,' the primary purpose of a particular statute or regulatory provision shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part." While the clarification is valuable, some ambiguity may still exist with regard to defining the primary purpose of a statute or provision. We would therefore urge a broad consideration of this exception, particularly in regard to forestry activities, fisheries management and grazing.

Investor-State Dispute Settlement: Building on the other concerns expressed regarding the investor-state dispute provisions, two other concerns have been identified. Despite the exceptions granted for environmental considerations within Articles 10.9 and 10.11, the definition of investment, as included in Section C, is exceedingly broad covering both tangible and intangible assets. This potentially gives rise to a wide array of potential investor-state claims, which could have far-reaching and unintended environmental implications.

Additionally, provisions for the negotiation of an appellate body to review awards rendered by tribunals are generally vague (Annex 10F). Both the initial dispute settlement process as well as any appellate body needs to allow for transparency and public participation, including through the submission of amicus briefs.

Institutional Jurisdiction: To address ongoing issues of relevance to trade policy, the CAFTA text sets out a number of committees and other institutions, including a Committee on Trade in Goods (Article 3.30), a Committee on Sanitary and Phytosanitary Measures (Article 6.3), a Committee on Technical Barriers to Trade (Article 7.8) and an Environmental Affairs Council (Article 17.5). However, there is no indication of who has jurisdiction over the discussion of issues that have environmental implications, e.g., non-tariff measures, technical measures or SPS regulations. Presumably, the committees have a higher standing than the Environmental Affairs Council, which raises concerns if measures potentially impacting the environment (e.g., biosafety import requirements, sustainable forest management activities or prevention of invasive species) are exclusively dealt with by the Committee system and from the perspective of minimizing barriers to trade.

Sanitary and Phytosanitary (SPS) Measures: While the WTO's SPS Agreement implicitly, if ineffectually, addresses the range of issues regarding wildlife and ecosystem health within the context of protecting human, animal and plant life and health, such an understanding should be

extended through CAFTA's SPS requirements. It is now well known that invasive alien species present significant threats to agriculture, public health, wildlife and the environment, as well as the fact that viral diseases are increasingly being found moving from wild species to domesticated animals to humans.

Thus, consideration of SPS issues should be broadened, for example by including relevant work under CAFTA's SPS Committee and engaging in consultation processes beyond Codex, the International Plant Protection Convention and the International Office of Epizootics, to appropriate multilateral and regional environmental, public health and transportation related agreements. Additionally, Annex 6.3 on institutional and agency representation on the SPS Committee should allow for wildlife and public health agencies, such as, in the case of the U.S., the Fish and Wildlife Service and the Centers for Disease Control.

Customs Administration and Trade Facilitation: Articles 5.3(d) and 5.4 call upon customs officials to expedite customs procedures by using information technology (e.g., customs/automated systems for risk analysis and targeting) and by focusing on high-risk goods while simplifying clearance and movement of low risk-goods. These activities should be interpreted to include, and not obviate, efforts to prevent the introduction of invasive alien species through major trade-related pathways or to prevent trade in endangered species and their by-products.

The text also provides for a period of 150 days for countries to issue advance rulings on requests for imports of a good (Article 5.10(2)). In cases of imports that may have adverse environmental impacts, this time period may not be sufficient for the conduct of appropriate environmental impact assessments and risk analyses.

Intellectual Property Rights (IPR): Article 15.1(5) requires that Parties ratify or accede to the 1991 version of the International Convention for the Protection of New Varieties of Plants. This version of UPOV is generally recognized to have increased protections for plant breeders, while potentially weakening the control and ownership of local communities and indigenous peoples over their traditional varieties (a highly valuable component of agricultural biodiversity) as well as the ability to save and re-use seed from previous harvests (commonly referred to as farmers' rights). Central American countries should avail themselves of their opportunity to enact legal protections for their local populations to avoid adverse socioeconomic pressures placed on rural communities and their traditional cultivation systems by strengthened IPR regimes.

Similar concerns are involved with Article 15.9(2) which basically requires that Parties allow for patents on plants, obviating that particular exception contained within TRIPS Article 27.3(b). Given numerous incidences of inappropriately granted patents (often referred to as "biopiracy"), resource difficulties for Central American citizens to challenge patent applications in U.S. courts as well as the general level of disparity in development between the U.S. and the Central American countries, due regard should be given to facilitating any claims that may be brought before the U.S. Patent and Trademark Office to recognize and provide appropriate protection for their traditional knowledge.

ATTACHMENT 3

The U.S.-CAFTA Free Trade Agreement

Report Submitted by Frances B. Smith, Consumer Alert, and Dennis Avery, Hudson Institute's Center for Global Food Issues
Members of the Trade and Environment Policy Advisory Committee (TEPAC)

Summary
Under Section 135(e) of the Trade Act of 1974, as amended, the TEPAC 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.

The U.S.-CAFTA Free Trade Agreement is very unlikely to have adverse effects on the U.S., either economically or environmentally. The U.S. is already the most important trading partner of the CAFTA countries in terms of exports, imports, foreign investment, and tourism. As a result of the Caribbean Basin Initiative and other trade preference programs, the majority of these countries' exports to the U.S. are duty-free.

The Agreement could be an important agreement bringing together six Central American countries (with the recent addition of the Dominican Republic) to form a common market with significant reductions in tariffs and non-tariff barriers. Allowing American consumers to benefit from Central American producers would improve consumer welfare and improve economic growth and development in the CAFTA countries. Moreover, the greater wealth created by this expanded trade would make more resources available for environmental protection in the CAFTA countries.

Our reservations on the Agreement and our dissent from the TEPAC report stem from the Agreement's excessive reliance on trade as a direct means to advance various environmental objectives. As noted, trade can create wealth, and, in that sense, the most effective means of advancing environmental objectives around the world is to move toward free trade. Trade agreements should focus on this positive impact, not seek to use trade policy as a tool to force changes that might – or might not – actually advance some environmental objective. To hold hostage economic and technological growth to a regulatory agenda would weaken the forces that have done so much to move the world toward sustainable solutions.

Moreover, the people who will bear the burdens of these non-trade related mandates in the Agreement will be the poorest people in the CAFTA nations and the most economically disadvantaged consumers here in the United States. Environmental goals should be pursued directly – not via restrictions to trade expansion. It is the people who bear the consequences. This is particularly true for the CAFTA countries which often have only very limited resources and economic alternatives.

Legal ownership rights and legal barriers to establishing businesses should be a focus of

environmental cooperation and capacity-building to reach environmental goals. Institutions--especially property rights and the rule of law--are key foundations for environmental improvements. In helping to build CAFTA countries' capacity to improve the environment, strengthening these fundamentals should be encouraged.

It is critical that we focus efforts not on detailed bureaucratic and procedural approaches to environmental concerns – as is done in this Agreement -- but on building the underlying institutional framework that can make a real difference.

These TEPAC members strongly urge Congress not to use this Agreement as a model for future trade agreements with developing countries. To do so would undermine the opportunities for poorer countries to help build their economies and their institutions to address environmental concerns over the long term.

Specific Comments

1. The U.S.- CAFTA Free Trade Agreement goes well beyond the Congressional mandate in relation to environmental provisions and fails to adequately recognize that improved trade can aid in economic growth and the ability of those countries to devote greater resources to environmental improvements. Because of the heavy reliance on environmental provisions with specific requirements as an integral part of the Agreement, the FTA sends negative and incorrect signals that more liberalized trade in the CAFTA countries will likely have adverse effects on the environment.

Trade and open economic systems can lead to improved economic performance, help to reduce poverty, and increase living standards for all participants. Open and competitive markets are an essential part of democratic societies by creating opportunities and wealth that can help the disadvantaged. Economic systems in which people have choices and can make decisions based on their own preferences and values not only can bring better economic opportunities, but also can pave the way to more open and fairer societies. As people achieve 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 with the CAFTA countries. As people achieve more self-determination in economic and political terms, they also are better able to protect their political freedoms.

Concerns and fears that arise in rich and affluent countries such as the U.S. typically pale into insignificance by comparison to problems faced by many people in the CAFTA countries. A trade agreement that ignores this issue could restrict the opportunities and chances of developing countries to escape from the yoke of poverty through economic development. Consumers become exposed to higher quality products and standards. New technologies and new ways of doing business can stimulate change. Trade policy should not be used to pressure less-developed countries to sign on to treaties that would reduce their opportunities to improve living standards. It is also important to recognize that higher environmental standards are best achieved through better economic and institutional conditions.

We would point to Federal Reserve Board Chairman Alan Greenspan's recent cogent remarks about the benefits of economic growth:

> "During the past century, for example, economic growth created resources far in excess of those required to maintain subsistence. That surplus in democratic capitalist societies has been, in large measure, employed to improve the quality of life along many dimensions. To cite a short list: (1) greater longevity, owing first to the widespread development of clean, potable water and later to rapid advances in medical technology; (2) a universal system of education that enabled greatly increased social mobility; (3) vastly improved conditions of work; and (4) the ability to enhance our environment by setting aside natural resources rather than having to employ them to sustain a minimum level of subsistence. At a fundamental level, Americans have used the substantial increases in wealth generated by our market-driven economy to purchase what many would view as greater civility."
> (Remarks by Federal Reserve Board Chairman Alan Greenspan Before the World Affairs Council of Greater Dallas, Dallas, Texas, December 11, 2003)

2. The great degree of specificity in the Agreement concerning exactly what CAFTA countries must do in relation to the environment may drain resources that would lead to increased growth and prosperity for the citizens of those countries, and thus more resources available for improving environmental conditions.

The Agreement's specific mandates for CAFTA countries that would require them to meet standards similar to those in the U.S. could be seen as a form of "export protectionism," as defined by economist Jagdish Bhagwati in other contexts, that is, such requirements will raise the costs of production in those countries and accomplish the same result as high tariffs. Imposing the same standards, according to Bhagwati, "disrupts the trade process, which is a powerful engine for spreading prosperity."

CAFTA includes extensive environmental provisions that go far beyond the requirements specified in the Trade Act of 2002. Some provisions could undermine the "free trade" aspects of the agreement, particularly those setting up environmental tribunals, an Environmental Affairs Council, and an Environmental Cooperation Commission that is responsible for developing, and periodically revising and updating, a program of work that reflects national priorities for cooperative programs, projects, and activities**.**

CAFTA also creates an environmental "secretariat" that listens to all charges from anyone in any of the CAFTA countries that a CAFTA trading partner isn't effectively enforcing its environmental laws. This bureaucratic and procedurally heavy-handed process is done in the name of transparency and public participation. However, it could readily be captured by special interests acting against the public interest.

There is some recognition that the CAFTA countries may not have the resources to address all of the U.S.'s environmental and other concerns; thus, CAFTA includes an Environmental Cooperation Agreement, which sets out what the U.S. really expects these countries to do with appropriate funding in the five Central American countries. A special dispute settlement procedure is set up only for environmental issues, with an Environmental Roster of people appointed to three-year terms to settle these disputes.

What is particularly short-sighted about the extensive environmental provisions in what is supposed to be a trade agreement is the lack of recognition that open trade itself can be one of

the major contributors to environmental improvement. Because trade allows for more efficient use of resources and economic opportunities, it can play a critical role in addressing environmental concerns. CAFTA ignores that fundamental trade lesson: Countries benefit from open trade and foreign investment, through faster economic growth and higher incomes, which can increase the knowledge and demand for higher labor and environmental standards. That can be true for the countries in Central America, if they are not hamstrung by CAFTA's extensive non-trade requirements.

3. The CAFTA Agreement does not seem to recognize that important trade-offs exist, especially for poorer countries, in achieving environmental goals and that countries need a high level of discretion to evaluate those and to make decisions.

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

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

4. The Capacity-Building provisions of the Agreement and the Environmental Cooperation Agreement should recognize that certain fundamentals form the basis for improvements in individuals' economic situations and in the environment – legal systems based on the rule of law and property rights.

As Peruvian development economist Hernando De Soto has pointed out and demonstrated over the past decade, the rule of law and clearly defined private property rights offer the greatest hope for improving the lot of the world's poor by empowering them to use the capital already available to them to generate wealth and prosperity. These institutions also are essential for sustainable environmental improvements. Once a resource becomes a legally recognized asset, people will tap into its value to both protect and enhance that resource, whether a farm or a forest.

Numerous other studies have made similar findings. In a direct relationship to the environment, Madhusudan Bhattarai (2000) found that civil and political liberties, the rule of law, the quality and corruption levels of government, and the security of property rights were important in explaining deforestation rates in sixty-six countries across Latin America, Asia, and Africa.

Legal ownership rights and legal barriers to establishing businesses should be a focus of

environmental cooperation and capacity-building efforts. Institutions--especially property rights and the rule of law--are key to environmental improvements. In helping to build CAFTA countries' capacity to improve the environment, strengthening these fundamentals should be encouraged.

It is critical that we focus efforts not on detailed bureaucratic and procedural approaches to environmental concerns – as is done in this Agreement -- but on building the underlying institutional framework that can make a real difference.

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

Specific Comments – Sugar

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

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

Effects on Consumers

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

Because of domestic price supports and import quotas, the U.S. price for sugar is double or triple the world price. That means higher prices for consumers for everything in the U.S. produced using sugar. A General Accounting Office study estimated a few years ago that consumers paid $1.9 billion a year in additional costs for sugar-containing products is a substantial drain on the U.S. economy. The General Accounting Office looked at the sugar program's impact for 1998 and estimated that it cost domestic users of sweetener some $1.9 billion. The U.S. International Trade Commission has concluded that abolishing the program would result in a net annual welfare gain to the U.S. economy of more than $1 billion.

Effects on the Environment

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

In terms of farm trade between the United States and CAFTA countries, the U.S. is clearly wasting resources on its non-competitive and environmentally harmful sugar industry. The U.S.

is growing most of its cane sugar in Florida, where the cane fields are diverting sorely-needed water from the country's most famous and endangered wetland. They are also seriously polluting the Florida Everglades and the Mississippi Delta wetlands to produce sugar that could be produced with less cost and pollution in a number of other countries. Where the U.S. is growing sugar beets it is accepting ultra-high costs and poor sugar yields per acre on land that could readily be shifted to crops with higher comparative advantage, such as feedstuffs.

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

The U.S. sugar tariff will not be eliminated or reduced under CAFTA. High above-quota tariffs remain. Tariff-rate quotas will barely rise over a 15-year period. Careful protectionist language in the Agreement allows exceptions so that taxpayers and consumers, not producers, will pay the bill. CAFTA includes a special "Sugar Compensation Mechanism" that allows the U.S. to compensate a Central American sugar exporter instead of letting some duty-free sugar goods be imported. That means that the U.S., when it wants to, can pay CAFTA countries *not* to export to the U.S.

Specific Comments – Agriculture

If rich countries demand that poorer countries match their environmental regulations, these are likely to be seen as daunting hurdles for emerging economies. They are likely to discourage freer trade, significantly delaying the income gains which have increasingly become associated with both human well-being and environmental conservation in much of the world. On the other hand, trade agreements which promise income gains can be readily accepted by poorer countries, and will ultimately lead to environmental gains in the poorer countries.

Highly developed countries' demands that poorer countries favor traditional and organic farming systems because of their supposed "sustainability" are likely to be seen by emerging countries as equally daunting impediments to freer trade. The poorer countries have all too much first-hand experience with the low yields and uncertain harvests associated with low-input farming. They have few illusions that the needs of their still-rising populations can be met and their still-unmet dietary aspirations satisfied without risking additional encroachment by their farmers onto fragile wildlands.

The World Conservation Union, in fact, regards low-input farming by the 1 billion people still trying to subsist in the world's biodiversity hotspots as the biggest conservation problem the world faces. Dr. Vaclav Smil of the University of Manitoba estimates the world would need the manure from another 8 billion cattle to replace the chemical nitrogen currently taken from the air which replenishes the soil nitrogen depleted by growing crops. Where would the Central American countries pasture masses of additional cattle without massive eco-damage?

Agriculture is the largest intrusion of mankind into the natural environment; about half of the earth's land area not covered with deserts or glaciers is given over to farming and food production. Moreover, in the next 45 years a larger, a more affluent world population will certainly demand nearly three times the current world farm output. Higher yields and greater

resource efficiency are the only ways in which this prospective demand can be met without converting millions of additional acres of wildlife habitat into poor-quality cropland. (Virtually all of the world's potentially high-quality cropland has already been cleared.). Technology and free trade are the two major ways of raising resource efficiency, and the world is making use of only one of these.

ATTACHMENT 4

Separate Statement of TEPAC Member

Separate Statement of TEPAC Member
Rhoda H. Karpatkin, Consumers Union of U.S., Inc.
joined by
William A. Butler, Audubon Naturalist Society
Daniel Magraw, Center for International Environmental Law
Durwood Zaelke, Center for Governance and Sustainable Development
March 19, 2004

Consumers Union believes that lowering barriers to trade can promote the interests of both the United States and developing countries, and provide significant benefits to consumers. We believe this was the purpose of the Negotiating Objectives contained in the Trade Promotion Authority Act of 2000. The Central American Free Trade Agreement, while it contains some benefits, is flawed in so many significant ways that, on balance, it fails to achieve those ends. Congress should return it to the U.S. Trade Representative for substantial revisions.

Other members of TEPAC will more fully address those flaws in this agreement that I do not address at length. These include:

- **Agriculture**: The agreement continues to support U.S. protectionism by far too limited reductions in sugar and other tariffs over far too long a period. The U.S. sugar program costs our consumers almost $2 billion per year. This also harms the Central American countries that are poor and need development. It means they are unable to export sugar that might be worth $1.5 billion at current prices. U.S. protectionism is also continued in the slow phase-out of tariffs on chicken leg quarters, rice and dairy commodities, helping U.S business but not the largely agrarian countries of Central America or American consumers. The critical issue in the Doha negotiations was the removal of agriculture subsidies and quotas. The continued insistence of the U.S. on perpetuating such barriers will undermine the success of the Doha Development Round.

- **Investment** The definition of "investment" is excessively broad in many ways. It can encourage a large variety of investor-state claims, affecting environmental protections and intellectual property. Foreign investors could challenge sound laws in international tribunals, rather than in domestic courts. Such costly proceedings, which would likely be brought by large corporate law firms, could chill the willingness of developing Central American countries to adopt sound regulations, due to the threat of costly litigation they could not afford.

- **Lack of regulatory framework and infrastructure**. There is a huge disparity between the strong legal and regulatory frameworks of the U.S. and the weak, underfunded ones in the CAFTA countries. These countries will be virtually unable to enforce the legitimate consumer, labor and environmental protections their economies require against the powerful exporting and investor interests.

- **Intellectual property.** In addition to affecting the affordability of medicines, the intellectual property provisions will negatively affect the interests of consumers with respect to seeds, biodiversity and the traditional knowledge of indigenous peoples.

- **An unbalanced agreement.** It's not surprising that the world's greatest superpower has been able to wrest such a flawed agreement from our poor, weak Central American neighbors. Rather than endorse this victory, however, we urge the Congress to consider its long term consequences for American and Central American consumers, for U.S. - Central American relations, for U.S. credibility in the Doha Development Round, and for our nation's standing among the peoples of the world.

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, specified in this Objective, unlike the CAFTA Agreement 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."

CAFTA's relevant provisions go in the opposite direction. They *reduce* access.

Central America's unique character must be taken into account. It is not Australia.

- It is a very poor region. The Economist Magazine described the Central American countries in 2001 as "small, mostly poor, and vulnerable to economic change and natural disasters,"with a combined GDP smaller than that of Mississippi. It noted that "health and education systems, and political institutions are…generally weak", except for Costa Rica. "Poverty and inequality are deep-rooted. Only one Guatemalan in five goes to secondary school" and "Honduras has been condemned to poverty by difficult geography and poor soil." (*The Economist*, August 9, 2001. In 2003, The Economist reported U.S. government estimates that about 83% of the population and 90% of the indigenous people live in poverty in Guatemala. (*The Economist*, May 15, 2003). The region has been racked, in the last part of the twentieth century, by raging civil and guerilla wars, and the scars still remain.

- It has weak governmental institutions. This impedes its ability to regulate and oversee the activities of large transnational corporations with respect to health, investments, labor and the environment.

These largely poor and vulnerable populations, and their weak governments, are the targets of the pharmaceutical provisions of CAFTA. The terms of these provisions will make it even harder than it is today for the people of Central America to afford the medicines they need. The Doha Declaration was intended to protect and clarify whatever access was afforded under TRIPS. This agreement deprives these populations of even some of those benefits.

These provisions are written in obscure language about patent rights. Chapter15.1.7 provides that "nothing in Chapter 15 shall be construed to derogate from the obligations and rights of one Party with respect to the other by virtue of the TRIPS Agreement… ." But these more specific provisions nonetheless *appear* to make rules and laws that increase the difficulty of bringing generic drugs to market and, hence, decrease the affordability of medicines for low income consumers. Affordability, in practical terms, equates to the availability of generics and to compulsory licensing in some cases. As we read this Agreement:

- It establishes special, monopolistic rights for the patent holder's pharmaceutical registration safety and efficacy data, which is costly to produce; for this reason, generic manufacturers generally do not repeat the underlying tests, but need only show that their products are chemically equivalent and bioequivalent and rely on the drug approval agency's prior approval of the patented drug.

- As a result of these new, monopolistic protections, the introduction of generic drugs will be delayed and limited, extending the *de facto* life of pharmaceuticals patents -- by five years or more beyond the TRIPS-imposed 20-year patent term requirement -- by holding back the market introduction of a generic drug by "at least five years" from the date of its approval. (Chapter 15.10.1(a) and (b);

- It strips away the compulsory licensing rights, specifically authorized under the WTO TRIPS Agreement, of each Party to the Agreement *including those of the United States*, so that in a national emergency none of the countries could license generic equivalents of an essential medicine in order to increase the supply or the affordability of the medicine (Chapter 15.9.5 and 15.10.3(a);

- It prevents generic manufacturers from exporting generic equivalents of medicines under patent for use as medicine in other countries (including countries not Parties to the Agreement) during the term of the patent, even if the patent holder does not make the product available in those countries (Chapter 15.9.5).

The costs of generating original clinical data to prove safety and efficacy are beyond the means of most companies that manufacture only generics. And, in any event, if a manufacturer wanted to market a generic based on its own testing, it could not do so during the patent term under the provisions of Chapter 15.9.5. Further, while it appears that a generic could be marketed immediately upon the expiration of the patent term if it were approved at least five years preceding that date. There is little incentive for generic manufacturers to undertake the effort and expense of obtaining such approval so early, as it would not be known at that time whether the drug entity would remain the drug of choice past the expiration date -- proprietary manufacturers often generate new "replacement" products timed to come to market close to the

expiration date of their expiring product. Thus, patent holders have received new, draconian powers under CAFTA to delay and prevent the marketing of generic medicines

At first blush, these considerations may seem to have no significance for American consumers and the Congress. But there are reasons to be concerned. This agreement, and others negotiated recently, including the Australian Free Trade Agreement, will create upward pressure on the price of medicines globally. While it's been suggested that this will lower the price of medicines in the United States, this is unrealistic. There is simply no mechanism to translate higher prices for poor Central Americans into lower prices for U.S. consumers. Given the stranglehold monopolist and oligopolist drug companies now have on the market in this country, and the power they have demonstrated in Washington on the issue of prices, it is naïve to believe that they would voluntarily lower prices they can obtain from U.S. consumers.

The Congress has been grappling with the issue of affordability for American consumers. A succession of trade agreements such as these may well have a preemptive effect, intruding on the prerogatives of the Congress to define national policy.

The Congress should also note that provisions such as these 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 view has been a stumbling block in recent trade negotiations. The Doha Development Round is already a difficult challenge for our credibility. 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.

We urge that, for these reasons, among others cited by other NGOs in the U.S. and in Central America, this Agreement should not be approved by the Congress.

ATTACHMENT 5

Statement of Thomas M. T. Niles
President, U.C. Council for International Business
On the Investment Provisions of the
U.S.-Central America Free Trade Agreement

The investment provisions in the U.S.-Central American Free Trade Agreement continue the unfortunate trend begun with the Chile and Singapore agreements of weakening the standards of protection traditionally afforded U.S. investors through NAFTA and existing BITs. As such, I strongly disagree with the majority view that those 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. 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-C 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-C is against U.S. interests and should be revised.

2. Paragraph 4(a) of Annex 10-C 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. The Administration's confirmation of this interpretation would be appreciated.

3. The phrase “in rare circumstances” in paragraph 4(b) of Annex 10-C 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. Some clearer definition of what this phrase means and how it will be interpreted is necessary.

ATTACHMENT 6

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

Separate Comments of TEPAC Members on the U.S.-Central American Free Trade Agreement (CAFTA)

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

March 18, 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 CAFTA text. We are also including, as an attachment to this memorandum, a letter that was sent to Congress in February 2004 regarding the shortcomings of the environmental provisions in CAFTA.

The body of TEPAC's report references the fact that the agreement is incomplete in two key aspects – that the investment arbitration mechanism that is created does not include an appellate mechanism and that key aspects of the citizen submission process (Article 17.7) are left unresolved. We feel that these deficiencies are important enough in themselves that Congress should not approve CAFTA until they are resolved. In our view, an appellate review mechanism is required to curb the excesses of ad hoc arbitration panels and to ensure a stable and consistent body of law. Congress articulated a similar view in the Trade Act of 2002. Moreover, while we applaud the inclusion of a citizen submission process in CAFTA, the facts that the choice of an institutional home for the citizen submission secretariat is unresolved and that no secure and adequate source of funding is identified for the process leave the ultimate value of the mechanism very much an open question. We cannot accept on faith that these deficiencies will be adequately resolved in the future, and neither should the Congress.

I. General Comments on the Investment Chapter

The approach to international investment rules embodied in the CAFTA 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[1]. Nor does the approach address the fundamental problems environmental

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

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 CAFTA 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, 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 CAFTA, 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 Central American countries. To our knowledge, there is no publicly available information that would suggest that these countries have mistreated U.S. investors in recent years. Equally, there has been no showing that the various national judicial systems are not capable of resolving complaints of U.S. investors. One must thus question the need for investment rules in the first place.

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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.[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 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

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

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 10.11 of CAFTA 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 CAFTA 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 CAFTA 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 CAFTA 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 CAFTA 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.

[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)

precedent.[4] 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.[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]

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[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, 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).

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.

- 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.

ATTACHMENT 6A

Center for International Environmental Law · Defenders of Wildlife
Earthjustice · Friends of the Earth · League of Conservation Voters
National Environmental Trust · Natural Resources Defense Council
National Wildlife Federation · Sierra Club · U.S. PIRG

February 17, 2004

RE: Oppose the Central American Free Trade Agreement (CAFTA) – Recently Released Text Falls Short on Environment

Dear Member of Congress:

On behalf of our millions of members, we are writing to express our opposition to the recently released text of the U.S.-Central American Free Trade Agreement (CAFTA). The agreement would allow foreign investors to challenge hard-won environmental laws and regulations, and fails to include adequate measures to ensure environmental improvement throughout Central America and the United States.

Harmful Anti-Environmental Suits. CAFTA's investor rules would undermine U.S. and Central American environmental standards by allowing foreign investors to challenge legitimate laws and regulations before international tribunals, bypassing domestic courts. In bringing these cases, foreign investors could demand monetary compensation for the implementation of legitimate environmental protections. For developing Central American countries, the simple threat of costly investor challenges could freeze adoption of environmental standards.

Despite some incremental changes, CAFTA's investment rules are similar to NAFTA's Chapter 11, which has given foreign investors broad rights that do not exist under U.S. law. Both Mexico and Canada have lost Chapter 11 challenges to environmental protections, and the U.S. faces suits totaling more than $1 billion.

The Trade Act of 2002 requires that foreign investors receive "no greater substantive rights" than U.S. citizens have under U.S. law. CAFTA's investment rules fail to meet this congressional mandate: the agreement provides foreign investors with rights and privileges that go significantly beyond U.S. law, and the few U.S. standards the agreement purports to incorporate are left vague and unclear. Further, CAFTA includes language that would allow foreign investors to challenge government decisions about natural resource agreements, such as federal oil, gas, and mineral leases. As a result, foreign companies could challenge royalty payments and other requirements before international tribunals, not U.S. or Central American courts.

In addition, CAFTA language with respect to creating an appeals process for investor suits is wholly inadequate without substantial modification to the underlying investor rights and privileges. Moreover, the agreement does not provide specific rules for an appellate mechanism and would allow foreign investor suits against environmental laws to proceed before the appeals process is established or its basic parameters known.

Inadequate Environmental Safeguards. Central America faces daunting environmental challenges that jeopardize the region's capacity for sustainable development. Unfortunately, CAFTA's environmental rules are inadequate and would not ensure that environmental

protection in Central America is improved in a meaningful way.

Although environmental standards in Central America vary widely, CAFTA does not clearly require any country to maintain and effectively enforce a set of basic environmental laws and regulations. The agreement also does not include an enforceable set of standards for corporate responsibility on environmental (or any other) issues. Further, there is not even parity between enforcement of the existing environmental provisions and CAFTA's commercial provisions.

While the CAFTA text appears to make modest progress in some procedural areas regarding the environment, including the establishment of a citizen submission process to allege failures to effectively enforce environmental laws, the proposed process does not provide for any clear outcomes or actions to ensure environmental enforcement. In particular, the lack of enforcement tools in the citizen submission process stands in stark contrast to the monetary compensation that private investors can demand of governments under CAFTA's investment rules.

Given the numerous environmental challenges facing Central America, we believe that CAFTA should include a comprehensive program for environmental cooperation, capacity building, clear goals and benchmarks, and objective monitoring of environmental progress that is backed up by a dedicated source of grant funding and loans. Unfortunately, the agreement includes no such funding even though CAFTA would significantly reduce the resources Central American countries have for environmental protection by diminishing their tariff revenue. Finally, the CAFTA text fails to include any independent environmental cooperation institution such as that established under the NAFTA environmental side agreement.

Threats to food safety and other standards. CAFTA does not ensure that food safety and other "sanitary and phytosanitary" standards would be adequate to protect public health and safety and the environment in the U.S. and Central America. These are critical issues to address in an agreement that will increase the volume of trade, particularly in produce and other agricultural goods, between the countries. In addition, the agreement's rules on services could undermine environmental safeguards in such critical sectors as water, forestry, waste transport, mining, and offshore oil development.

Trade agreements should support, not undermine, environmental protection, human rights and labor standards. Regrettably, CAFTA could seriously undermine efforts to strengthen environmental protections in the U.S. and Central America. We urge you to oppose this agreement if it comes before Congress for approval.

Sincerely,

Dan Magraw
Executive Director
Center for International Environmental Law

Martin Wagner
Director of International Programs
Earthjustice

Carroll Muffett
Director of International Programs
Defenders of Wildlife

David Waskow
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