The U.S.-Singapore Free Trade Agreement

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

February 27, 2003

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Advisory Committee Report to the President, the Congress and the United States Trade Representative on The U.S.-Singapore 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' 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' negotiating objectives as they relate to environmental matters. Moreover, this majority notes with satisfaction that environmental issues are now integrated into the drafting of a free trade agreement. This is a singular achievement which should not go unacknowledged.

A majority of the Committee notes that trade agreements 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 adverse externalities which require enhanced regulatory oversight.

A majority believes that the Agreement's investment protection and dispute resolution provisions are an improvement over those in 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 "a tangible or intangible property right or interest." There is a lack of clarity regarding the definition of this term and there is no comparable U.S. jurisprudential concept.

A similar majority of TEPAC believes significant improvements have also been made in the procedures used to resolve disputes in environmental matters. This majority concluded that the "carve-out" for environmental and labor provisions appears to strike a proper balance between the extensive commitments in the Agreement to cooperate on environmental matters and the need to ensure that both countries commit the requisite resources to enforce domestic environmental laws and regulations.

A majority of TEPAC members believe 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.

As to capacity building, a majority of the Committee notes that, while the Agreement stresses the importance of capacity building (i.e., environmental cooperation), it presents no specific activities to be undertaken, leaving that to a separate memorandum of agreement (MOA) which has yet to be entered into. See Article 18.6. As with the Chile Agreement, but even more so here where no specifics are presented, the Group has concern about the future funding of capacity building projects and the achievement of the Congressional mandate in this area. Taking into account the relative sophistication of Singapore's environmental record, TEPAC does not believe that the undetermined status of the MOA will necessarily lead to a failure to meet Congress' objectives in this area. However, the majority again stresses that, even once the MOA is finalized, the framework alone, without adequate funding, will not allow the achievement of Congress' objectives.

In sum, this majority believes that the Agreement not only specifically recites Congress' 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.

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' 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 and labor 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, and sanitary and phytosanitary measures.

V. The Committee's Advisory Opinion on the Agreement

A majority of TEPAC notes with satisfaction that environmental issues are now integrated into the drafting of a free trade agreement. It was not too many years ago that the issue of including environment and labor sections in a free trade agreement was the subject of great and acrimonious debate. Unlike NAFTA, provisions bearing on the environmental aspects of trade are not placed in a separate side agreement, but rather are to be found in the main text. While a number of TEPAC members believe there remains more progress to be made to take into account the impact of trade on the environment, the path from NAFTA, first with the US-Jordan Free Trade Agreement, the action of Congress in passing the Trade Act of 2002 and including substantial environmental objectives for trade agreements, and now the US-Singapore Free Trade Agreement, have clearly ensured that environmental considerations will be taken into account in trade negotiations. This accomplishment should not go unacknowledged as a singular achievement, for in these important new steps the linkage between trade and the environment is explicitly recognized and the significance of domestic and international environmental protection is underscored. The majority of TEPAC hopes that the momentum gathering in this area continues to build, as it will be in the execution and funding of these provisions, not in their mere inclusion in the Agreement, that their promise will be realized.

A majority of the Committee also notes that trade agreements 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 adverse externalities which require enhanced regulatory oversight.

A. Strict Compliance With Congress' Mandated Objectives

TEPAC recognizes that the Agreement incorporates the eight environmental trade negotiation objectives outlined above. Six of the eight ("A" through "D," "F," and "H," above) are explicitly referenced, almost verbatim, in Chapter 18 of the Agreement, and the remaining objectives are achieved through the Agreement's environmental and tariff reduction provisions, respectively. As these objectives are achieved equitably and in a reciprocal manner, the Committee believes that, initially, the Agreement meets Congress' 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' 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.

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 the North American Free Trade Agreement (NAFTA). 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.

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

Also noteworthy are the concepts which motivate Paragraph 1 of Article 15.3 and Article 15.10 of the chapter on investment, particularly when combined with the other language in the Agreement cited above. Paragraph 1 of Article 15.3 states that in the event of an inconsistency between the Investment Chapter 15 and another chapter (like the chapter on the environment), the other chapter (Chapter 18) trumps Chapter 15. 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 15.10 expressly precludes reading Chapter 15 to prevent environmental protections taken pursuant to the chapter on the environment. Additionally, Article 15.4 of Chapter 15 applies National Treatment and requires Most Favored Nation treatment; and Article 15.5 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 "a tangible or intangible property right or interest." There is a lack of clarity regarding the definition of this term and there is no comparable U.S. jurisprudential concept. This raises the possibility that the resolution of disputes under the Agreement could be inconsistent with U.S. law. To further enlighten the appropriate development of this now more refined concept, we urge the respective national governments to exchange soon, and in an appropriately formal manner, exemplars of what currently constitutes such an "indirect expropriation" in each of their respective legal regimes in order to better inform each national perspective as to the current application of this critical concept in the other's jurisdiction. These exemplars should also be made available to any empanelled arbitral panel for appropriate reference.

c. Dispute resolution

In addition, a similar majority of the members believe significant improvements have also been made in the procedures used to resolve disputes in environmental matters. Chief among these is the transparency and participation of civil society during the settlement of disputes in trade cases.[1] Also significant is the inclusion of Article 20.4(4)(c)(i), requiring that members of dispute resolution panel have "expertise or

[1] TEPAC's report on the Chile Agreement, which is submitted simultaneously with this report, noted that there was a choice at some locations in the draft text between the phases "interested persons," "interested parties," or "persons" when referring to civil society. In that situation, TEPAC recommended that the phrases "interested parties" and "persons" both be used. While the same choice does not appear in the Singapore Agreement, the Committee nevertheless believes both terms should be used if possible.

experience relevant to the subject matter that is under dispute." TEPAC reads this provision to be analogous to the special procedures in the Chile Agreement regarding the roster of panelists and panel selection for dispute resolution to ensure that panels addressing environmental issues have the requisite expertise. Nevertheless, TEPAC urges that USTR undertake to obtain a written side agreement with Singapore memorializing the language from the Chilean Free Trade Agreement as to the requisite background in applicable environmental expertise required to serve on an arbitral panel on trade and environment disputes.

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' 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 both countries 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 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.

A majority of the Committee believes 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. Further, the Committee believes that the requirements for the submissions from these parties should not be more stringent than the requirements for investors and states; As drafted, the Agreement requires amicus submissions to be bilingual, while investor and State submissions need not be.

d. Capacity building

As to capacity building, a majority of the Group notes that, while the Agreement stresses the importance of capacity building (i.e., environmental cooperation) – which in part creates a favorable climate for investment and trade – it presents no specific activities to be undertaken, leaving that to a separate memorandum of agreement (MOA) which has yet to be entered into. See Article 18.6. As with the Chile Agreement, but even more so here where no specifics are presented, the Group has concern about the future funding of capacity building projects and the achievement of the Congressional mandate in this area. Taking into account the relative sophistication of Singapore's environmental record, TEPAC does not believe that the undetermined status of the MOA will necessarily lead to a failure to meet Congress' objectives in this area. However, the majority again stresses

that, even once the MOA is finalized, the framework alone, without adequate funding, will not allow the achievement of Congress' objectives. 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 is cautiously optimistic that Singapore and the United States will pursue cooperative projects designed to accomplish these objectives.

In order to insure these activities continue to go forward, TEPAC urges that the MOA be finalized as quickly as possible and that in this agreement and subsequent agreements, Congress direct the relevant United States government departments and agencies to participate and manage these activities and that periodic reports to Congress be required on the status and progress of these activities. Further, TEPAC recommends that Congress funds these activities and align this funding with our foreign policy objectives.

In particular, as TEPAC has noted to USTR in the past, TEPAC urges that these environmental projects include an awareness of Singapore's role as a significant transit corridor for environmentally sensitive trade: wildlife and wildlife products, including endangered species; ozone depleting substances; timber and wood products; and live fish for consumption and aquariums. Projects geared toward increasing detection and enforcement of trade in violation of commitments under relevant international agreements, e.g., CITES and the Montreal Protocol, are especially valuable and should be pursued as soon as possible.

e. Market access

The Agreement provides that upon entry into force of the Agreement, Singapore will eliminate all customs duties. This certainly achieves Congress' mandate to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies and goods. As to environmental services, currently, the only reservations taken are limited ones regarding the distribution and sale of hazardous substances and the provision of sewage and refuse disposal and wastewater treatment services. Consequently, there will be an immediate elimination of tariffs on all other environmental services. TEPAC concludes that the inclusion of these provisions in the Agreement fulfills Congress' mandate to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services. A majority of TEPAC also recommends that Singapore's "negative list" be reviewed on a regular basis, with a view to reducing its coverage.

f. Summary of substantive comments

In sum, these members believe that the Agreement not only specifically recites Congress' mandated objectives in the environmental arena, but contains adequate provisions to meet these objectives. Nevertheless, as stated above, several differing viewpoints exist among a minority of the committee members on specific provisions of the agreement. They are

presented in summary below, with more complete statements provided as attachments hereto. These statements are the opinion of those individual members.

g. Procedural comment

The Committee believes 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 believes that their efforts were unduly restricted by the classified nature of the documents. The inability of members to share the documents with other members of their organizations, others who may have even greater expertise in these matters than the members, also hindered these efforts.

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 Agreements' investment protection provisions are inadequate

As alluded to in Section B.1., in recent years, a vigorous discussion has occurred among interested persons regarding what investment protection provisions are "appropriate" in international trade agreements. TEPAC has not been immune to this controversy, which presents itself here in two competing but intertwined minority viewpoints. One point of view holds that the investment provisions are too broad in that they unfairly discriminate against U.S. investors abroad. The other view is that the investment provisions unfairly open up bona fide environmental regulations to challenges by foreign investors.

In short, the latter minority view is concerned that the Agreement does not insure that foreign investors are not provided with "greater substantive rights" than domestic investors enjoy under U.S. law. Foreign investors are able to bring claims that will be decided by ad hoc panels that are not trained in or bound by U.S. precedent and that will not be subject to review by U.S. courts to ensure that they do not deviate from U.S. law and grant greater rights to foreign investors. In this view, the Agreement fails to include critical standards established in U.S. jurisprudence that preclude findings of compensable expropriations and leaves unclear some of those that it has chosen to reference. These include the failure to adequately convey the degree to which it is unlikely that a regulatory action would be considered an expropriation under U.S. law and the use of the "fair and equitable" standard which does not exist in U.S. law. Further, the inclusion of claims based on a breach of "an investment authorization" or "an investment agreement" in Article 15.15(1) creates causes of action that transcend the provisions of the agreement and open whole new areas of potential investor challenges to domestic regulatory programs. NAFTA includes no such provisions.

No evidence had been provided to TEPAC that investment rules are necessary in bilateral relations with Chile or Singapore. As far as is known, there is no publicly available information that would suggest that either jurisdiction has mistreated U.S. investors in recent years or that either Chile or Singapore's judicial systems are not capable of resolving complaints of U.S. investors.

Further, the Agreement does not address the fundamental problems with the NAFTA approach. In the non-discrimination provisions, 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 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 summary of the contrary minority view is that, first, the Agreement utilizes the "minimum standard of treatment of aliens" language first adopted in July 2001 as a NAFTA clarification, which is arguably an extremely narrow standard. This is not what Congress sought when it directed the Administration to negotiate protections for fair and equitable treatment consistent with U.S. legal principles and practice. On the issue of regulations for the public welfare, it must be made clear that regulations must be created and applied in a non-discriminatory manner. Finally, the Agreement also inappropriately narrows the protection against expropriation without compensation to "a tangible or intangible property right or interest" rather than to an "investment." (As stated above, the concern with this particular phrase is a majority view). Introducing the term "property" into an international agreement could have adverse implications for U.S. investors as U.S. investors abroad are more likely to face a more restrictive definition of "property" and therefore lower standards of protection than foreign investors enjoy in the U.S.

b. The Agreement should include standards for progress and protection

A minority of the Committee members believe that, on environment, endangered species protection and animal welfare, the Agreement should go beyond the Congressional mandate and require the steady improvement of standards and protection just as it requires the steady reduction of tariffs in a set period of time.

c. Implications for Pharmaceuticals

A minority expressed concern that, at the point where environmental and public health issues converge, the investment provisions creates concerns in the area of pharmaceuticals. There should be no provisions to limit access to pharmaceuticals any more than they now are under TRIPS.

d. Problems with the piecemeal approach to trade agreements

A minority believes that, though not a fault of the Agreement, there is a concern that the current melange of global, regional and bilateral international trade agreements have different, congruent and conflicting substantive, procedural and enforcement provisions. This creates confusion and uncertainty and encourages global forum shopping and multiple proceedings. Congress should look at this patchwork quilt in its entirety, not only one piece at a time and consider the long term impact these agreements will have on American interests over the long term.

e. Agricultural Implications

A minority believes that agriculture's need for land and water drives mankind's largest intrusions on the environment. Thus it is extremely important that the United States take into account the environmental impacts of any trade agreements involving agriculture and, in turn, the ecological impacts of trade-induced agricultural changes.

Singapore, unlike most countries, has already liberalized its farm imports. However, Singapore is surrounded by tropical countries, some of which are clearing species-rich tropical forest to expand farming on poor soils and steep slopes.

Further liberalization of the world's farm trade would help to ensure that the farm imports needed to supply the Singapore's increasing demands, and of other similarly situated countries, will tend to come from higher-quality farmland. This would indirectly protect the world's biodiversity, especially the tropical biodiversity that represents approximately three-fourths of the world's wild species. The world's highest-quality soils not only can sustain the highest yields, but tend to have relatively little biodiversity themselves. (They naturally supported large numbers of a few species, such as the American bison and the Australian kangaroo.)

f. Sanitary and Phytosanitary Implications

A minority recommends that the agreement include a specific reference to the World Trade Organization's Sanitary and Phytosanitary Agreement because of the greater detail and guidance in that agreement than is the case in GATT or GATS.

g. Technical Barriers to Trade

Likewise, a minority states that it is important that the Agreement affirms the existing rights and obligations under the Technical Barriers to Trade Agreements of the WTO.

The concept of requiring an equivalent protection level for consumers for all products and services whether imported or produced domestically is a sound one. However, the same standards can often be achieved through different methods and safety measures and therefore exporting countries should have a fair chance to demonstrate their inspection systems are equivalent to the importing country's own standards in relation to health and safety risks.

h. Reservations and Regulatory Analysis

A minority expressed concern that they were unable to review the reservations that the U.S. has taken for a considerable number of existing domestic regulatory programs at various levels of government. Particularly in light of the failure of the environmental assessment process to fully consider the regulatory impact of the proposed investment rules, the impact of the proposed investment rules on existing and future domestic regulatory programs is not fully understood.

VI. Membership of Committee

Name	Organization
Dennis Avery	Center for Global Food Issues
Joseph G. Block (Acting Chair)	Venable, Baetjer, Howard & Civiletti
Roger Carrick	Carrick Law Group
Patricia Forkan	The Humane Society of the Unites States and WorldWIDE
Mary Gade	Sonnenschein, Nath & Rosenthal
Robert E. Grady	The Carlyle Group
Hank Habicht	Global Environment & Technology Foundation
Thomas B. Harding	Agrisystems International
Rhoda Karpatkin	Consumers Union
Elizabeth Lowery	General Motors Corporation
Naotaka Matsukata	Hunton & Williams
John Mizroch	World Environmental Center
Thomas Niles	U.S. Council for International Business
Frederick O'Regan	International Fund for Animal Welfare
Anne Neal Petri	Attorney
Paul Portney	Resources for the Future
Jeffrey J. Schott	Institute for International Economics
Frances B. Smith	Consumer Alert
Irwin M. Stelzer	Hudson Institute
Alexander F. Watson	Hills & Company
Douglas Wheeler	Hogan & Hartson
Durwood Zaelke	Center for International Environmental Law

Attachment 1

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

I believe that the investment provisions in the U.S.-Singapore FTA weaken existing standards of protection for U.S. investors and, therefore, are inconsistent with the principal trade negotiating objectives approved by Congress in the Bipartisan Trade Promotion Authority Act of 2002. My concerns cover four areas:

Minimum Standard of Treatment: Article 15.5.2 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 principles and practice, including the principle of due process.

Expropriation:

1. The language in paragraph 2 of the exchange of letters on expropriation, which was added to the FTA, 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 presumably 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 <u>location</u> 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 the exchange of letters is inappropriate and against U.S. interests and should also be revised.

2. Article 4 (a) of the exchange of letters on expropriation 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 Paragraph 4(a) 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. In such circumstances, compensation may still be due depending on the analysis of these factors. The Administration's confirmation of this interpretation would be appreciated.

3. On the issue of regulations for the public welfare [Paragraph 4(b) of the exchange of letters on expropriation], I consider it essential to clarify that regulations must be created and applied in a non-discriminatory manner. There are certainly cases where a regulation can be developed for a legitimate public welfare purpose, but applied in a discriminatory manner (e.g. the WTO's findings in the Reformulated Gasoline case). Again, the Administration's confirmation that this provision applies to the application of a regulation as well as its development would be welcome.

Attachment 2

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

Separate Comments of TEPAC Members
Durwood Zaelke, Center for International Environmental Law
Fred O'Reagan, International Fund for Animal Welfare
Rhoda H. Karpatkin, Consumers Union

February 27, 2003

We agree with some portions of the TEPAC Report and disagree with other portions. We also have additional views on some issues that are either not touched upon or referenced only briefly in the Report, but which we believe the Congress should consider. We are thus submitting these additional comments based on our review of the U.S.-Chile and U.S.-Singapore FTA texts on the USTR secure web-site. The comments apply equally to both agreements, but references to particular provisions are to the Chile agreement unless otherwise noted. In addition, CIEL and IFAW also join in the separate comments submitted by Rhoda H. Karpatkin, Consumers Union.

I. General Concerns

The approach to international investment rules embodied in the Chile and Singapore Agreements 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 groups and others have identified with the NAFTA/BIT approach.

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

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

However, in both cases, the agreement references international law concepts as the guideposts for interpreting the substantive obligations – leaving substantial interpretive room for arbitrators to exploit. The inclusion of terms like "fair and equitable" provide arbitral panels with standards that do not exist in U.S. law. The lack of an appellate process and the lack of any oversight role for U.S. courts inhibit the development of a clear jurisprudence consistent with U.S. investor protections. There can thus be no assurance that either expropriation or minimum standard of treatment will be applied in a manner consistent with the U.S. legal norms as required by the last year's fast track bill. 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 Chile or Singapore. To our knowledge, there is no publicly available information that would suggest that either jurisdiction has mistreated U.S. investors in recent years. Equally, there has been no showing that either Chile or Singapore's judicial systems are not capable of resolving complaints of U.S. investors. One must thus question the need for investment rules and the investor-state mechanism in the first place.

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

National security concern. We are also concerned that aggressive use by U.S. corporations of the investor-state mechanism to seek damages from governments (and therefore taxpayers), particularly developing country governments, could adversely affect our national security. Recent testimony by the head of the CIA, as well as by the Director of the Pentagon's Defense Intelligence Agency before the Senate indicate the danger that economic globalization can create for the United States. (See Edward Alden, Financial Times, February 12, 2003, "Globalization cited as threat to US security", London Edition, p.8.) For example, attempts like that by a Bechtel Corporation subsidiary to recover lost profits from failed water privatization efforts in Bolivia, the poorest country in South America, through an investment arbitration challenge can create

the anti-American conditions that Vice-Admiral Lowell Jacoby and CIA Director Tenet warned could increase security risks.

Undermining the rule of law. In addition, we are concerned that the inclusion of the investor-state process without a requirement that investors exhaust local administrative and judicial remedies (unless to do so would be fruitless) will undermine the rule of law in both Singapore and Chile. By removing disputes from national legal systems, the investor-state process actually stunts the further development of stable and consistent national legal systems. Under the proposed rules, national systems are not even given the opportunity to correct a problem before investors can have recourse to international dispute mechanisms. This process also undermines the legitimacy of the U.S. regulatory and legal system, for the same reason: investors will be able to bypass it altogether or begin using it and then exit it whenever that best serves their overall litigation strategy.

Failure to correct imbalance. Finally, we see the continuation of an imbalanced approach to the treatment of investors (most of which are corporate actors) as opposed to citizens generally in international economic law. Investors are given explicit rights and enforcement mechanisms to hold governments accountable. On the other hand, there is no citizen enforcement mechanism included in either agreement – not even a process analogous to the NAFTA Commission for Environmental Cooperation citizen submission process. The only reference to any possible obligation for good corporate conduct is the reference to voluntary codes in the environment chapter of the Chile agreement. This is simply not sufficient.

II. Specific Concerns

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

Distinguishing investors based on environmental criteria. In the non-discrimination provisions (national treatment and most favored nation treatment) there is no clarity regarding the extent to which environmental criteria can be used as the basis to fairly distinguish between investors. In particular, there is no explanatory note that would ensure that future panels are guided by a notion of "like circumstances" that would accept environmental criteria as an important part of the like circumstances analysis. The classic example is in regulating point source pollution of a river. The absorptive capacity of the river system could, for example, allow five sources of pollution without significant harm, but a sixth could create too heavy a load and result in significant environmental harm. Would national treatment require the sixth facility (identical in every way 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. We are of the view that 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 Chile agreement does so in Article 2 of the Exceptions Chapter for other portions of the agreement, but not for investment. The approach in Article XX of the GATT (incorporated in Article 2), 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 Chile text includes a carve-out from the expropriation provision for tax laws. (Article 4 of Exceptions Chapter.) 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 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 (Article 10.6(3)(c)) 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?

New causes of action. The inclusion of claims based on a breach of "an investment authorization" or "an investment agreement" in Article 10.16 create causes of action that transcend the provisions of the agreement and open whole new areas of potential investor challenges to domestic regulatory programs. NAFTA includes no such provisions.

Amicus submissions. Finally, the inclusion of provision for amicus briefs in investor-state disputes is welcome although there are troublesome limitations imposed in the Chile agreement. For example, the requirement to file briefs in both English and

Spanish, where no such obligation exists for a claimant, appears designed solely to discourage participation. Similarly, the requirement that any outside financial or other assistance be disclosed also appears designed to deter potential submitters, particularly those from the non-corporate part of civil society, which is dependent on contributions from individuals, foundations, etc. We have not found these same limitations in the Singapore agreement, raising the additional problem of a confused, ad-hoc treatment of public participation in investment disputes.

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

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

While the two agreements clearly reflect a departure from the investment provisions in previous agreements to which the U.S. is a party, including NAFTA Chapter 11, those changes fail to meet the standard articulated by Congress last year. 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.

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

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

Expropriation

The removal of the "tantamount to" language and the inclusion of the annex setting out a shared understanding of the expropriation provision provide incremental improvements. However, in attempting to define a standard, the agreements first references customary international law on expropriation and then focuses on a limited, and imbalanced, set of the critical factors used by the Supreme Court in determining takings cases. The agreements fail to include critical standards established in U.S. jurisprudence that preclude findings of compensable expropriations, and leaves unclear in a problematic manner some of those that it has chosen to reference. For example, they do

not include the critical Supreme Court principle that a governmental action must permanently interfere with a property in its entirety in order to meet a threshold requirement to constitute a taking.[2] Simply listing some of the factors the Supreme Court discussed in *Penn Central*, but without the essential explanations and limitations that were set forth in that case and in subsequent rulings, provides no assurance that foreign investors will not in fact be granted greater rights than U.S. investors. This failure to provide explanations and limitations for critical standards includes the use of the "character of government action" as a factor in expropriation analysis. "Character of government action" is extraordinarily ambiguous and could easily be misapplied by tribunals that are neither trained in nor bound by U.S. precedent.[3] In addition, the language concerning the analysis of an investor's expectations is too vague, leaves too much to the discretion of the arbitrators, and does not indicate the deference to governmental regulatory authority that is found in U.S. jurisprudence.[4] Property rights are not defined in the agreement, nor is there any reference to the fact that under Supreme Court cases takings claims must be based upon compensable property interests, which are defined by background principles of property and nuisance law. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Furthermore, the agreements fail to include the fundamental distinction between land and "personal property."[5]

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

[3] The Supreme Court's reference to that factor in *Penn Central* reflects a clear limitation on takings claims under U.S. law that is not evident in an unexplained reference to the "character of government action." In *Penn Central*, the Court explained that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the public good." The Supreme Court thus referred to the character of government action to distinguish between a permanent invasion of land, which is more likely to give rise to a right to compensation, and normal regulatory action, for which compensation is only required in extreme circumstances that are equivalent to a permanent, compelled, physical occupation. Without a clear explanation of how the character of government action affects the analysis of a takings claim, a tribunal applying this factor would be free to interpret it so as to afford foreign investors far greater rights than the U.S. Constitution provides.

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

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

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

Minimum Standard of Treatment

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

- <u>There is no right corresponding to "fair and equitable treatment" under U.S. law.</u> 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.

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

- 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 3

The U.S.-Singapore Free Trade Agreement

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

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

II. Executive Summary of the Committee's Report

This dissent from the Committee Report first takes issue with the unnecessary use of rhetorical rather than factual language in the summary's first paragraph. The agreement does appear to meet Congress' negotiating objectives relating to environmental issues. Whether those objectives were wise and whether they will indeed advance environmental goals is a separate issue and one open to debate.

As clearly stated in TEPAC's charter, TEPAC's focus is on "trade and environment issues" and whether trade agreements further U.S. interests. As such, it would appear that viewing trade agreements from the trade perspective AND from the environmental perspective is TEPAC's charge. As well, it appears incumbent on the committee to view trade agreements from the standpoint of whether trade provisions undermine environment goals, promote those goals, or would appear to have little net effect.

It would also appear that environmental provisions included in the trade agreement should be viewed from the same perspective – do those environmental provisions undermine the principal trade goals of the agreement, promote those, or have little effect?

This is not a trivial issue, especially at this point in time. The Chile and Singapore Free Trade Agreements are the first to be negotiated under the Trade Act of 2002. Thus, these agreements are likely to set the precedent for how the new trade law is to be carried out in specific agreements.

Almost overlooked in the TEPAC report is that the agreement is a TRADE agreement, that is, its principal purpose is to promote open trade between the two parties, while mutually supporting environmental improvement. However, the agreement is not an environmental agreement with some trade provisions. The draft report thus skews the trade and environment relationship.

This issue also represents a split in the majority and minority viewpoints throughout the report. One viewpoint seems to believe enactment of more laws is the way to improve the environment; the other views trade as the most important avenue to increase environmental benefits.

V. The Committee's Advisory Opinion on the Agreement

This dissent provides an alternative advisory opinion on the Agreement. The dissenters do not question that environmental issues are important. A majority of the Committee noted that "trade agreements 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." That acknowledgment of the importance of trade in advancing environmental goals is a critical linkage that is undermined by the lack of emphasis in the Committee Report, except for one paragraph.

The dissenters note with approval that the U.S.-Singapore Agreement in Article 18.6 (3) includes a requirement that the Parties share information or experiences – positive or negative – on the environmental effects of the trade agreement.

Also unacknowledged in the TEPAC majority report is the problem of using trade agreements as the principal vehicles to specifically address problems in the environmental area. If a government or special interests want to address specific environmental problems, it or they has to find solutions that directly affect the issue and not use trade as a more convenient or politically more opportune subterfuge. Using trade as a stratagem for dealing with other issues is not only not the most effective way to tackle the problem, but also as a consequence often destroys the economic basis to find sustainable solutions. People are the ones who bear the consequences. This is particularly true for developing countries which often have only very limited resources and economic alternatives.

c. Dispute resolution

The dissenting parties fully support transparency. It is laudable that the U.S.-Singapore FTA is making efforts towards more openness through making materials and information flowing from the agreement more accessible to the public. However, the Committee Report's usage of the term "civil society" is not appropriate. The use of that term, especially in the context of dispute resolution, is of concern. Civil society is a term that has taken on new connotations, and is now used in a much narrower sense than is represented by the broad panoply of what constitutes civil society. Civil society includes a diverse range of opinions and groups, not limited to business, trade unions, consumer, or environmental interest groups. Civil society includes farmers, parents, teachers, entrepreneurs, scholars, and people in every walk of non-governmental life, whether joined together by special interests or not.

Geographic representation as well as representation of diverse viewpoints would be important. Groups that proclaim themselves as such are often considered representatives of "civil society." However, they can only represent certain parts of civil society. The vast majority of citizens would not be represented. Giving certain groups a privileged position in trade negotiations because of claims to represent civil society seems problematic. Democratic societies already have significant processes for interested parties to become involved. In a democratic society with elected representatives, especially, there are risks in delegating to the unelected. In the case of dispute settlement relating to environmental disputes, there is a risk to the democratic process when special-interest groups are given special-interest access to special panels.

d. Capacity building.
The agreement fulfills the TPA Act's principal negotiating objectives of capacity building. However, the Committee Report recommends that Congress fund the capacity-building activities by linking those with our foreign policy objectives.

We dissent from that recommendation, which would be another effort to bypass the representative political process. The funding would be paid for by taxpayers.

3. Other Points of View:

b. The recommendation that on the environment, endangered species protection and animal welfare, the Agreement should go beyond congressional mandate and require the steady improvement of standards and protection just as it requires the steady reduction of tariffs in a set period of time.

We would refer to the TPA'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;

The fundamental issue is that countries and cultures do not always share the same values and do not necessary believe in the same solutions. This is not a new phenomenon, but as old as mankind itself, and an essential dilemma for reaching international agreements. The U.S.- Singapore Free Trade Agreement is certainly not the only agreement confronted with the problem; nor will it solve it.

The trade agreement cannot decide what those societal rules and political standards should be for another country. Each society has to arrive at a consensus on rules by which it wants to live.
This right would seem to be a basic one – the right of a national government to make its own laws according to its situation, competing needs, its values, its culture.

d. Problems with the piecemeal approach to trade agreements. Frances B. Smith, Consumer Alert, agrees that there are problems with often conflicting substantive and procedural provisions in a panoply of trade agreements and agrees that it should be recommended that Congress look at these issues.

In addition, these issues create questions and potentially serious concerns relating to national sovereignty – issues that Congress should also address.

Attachment 4

U.S. – Singapore Free Trade Agreement

Dissenting comments by Frances B. Smith, Consumer Alert

Provisions concerning international investment rules

This dissenting view disagrees with certain portions of the TEPAC report on investment provisions in the U.S.-Singapore Free Trade Agreement.

This dissent would point out that concerns about investments are better dealt with in an investment agreement--if countries wish to do so--but should not necessarily be part of a bilateral trade agreement. Investment rules and challenges to domestic regulations should be considered, as far as possible, in the domestic legal systems of those countries. Countries that fail to adequately address the concerns of investors will possibly face economic consequences in lower levels of foreign investments. While closer corporation and facilitation between the Parties might help to bridge different concepts of investment and its protection, enforcement outside of the domestic legal system can pose significant problems and concerns relating to public acceptance, the rule of law, and national sovereignty.

However, Consumer Alert recognizes that the U.S. Congress included certain investment-related provisions in the Trade Promotion Authority Act.

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

Note: In these concerns, this dissent agrees with some of the views expressed in the general concerns provided in separate comments by TEPAC members representing CIEL, IFAW, and CU.

3. Other Points of View
d. Problems with the piecemeal approach to trade agreements.
The dissenter agrees that there are problems with often conflicting substantive and procedural provisions in a panoply of trade agreements and agrees that it should be recommended that Congress look at these issues.

In addition, these issues create questions and potentially serious concerns relating to national sovereignty – issues that Congress should also address.

Attachment 5

Separate Statement of TEPAC Member

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

February 25, 2003

The following separate statement was drafted for the TEPAC report on the Chile Agreement and therefore contains specific references to it. However, the opinions presented in the statement apply equally to the Singapore Agreement and are therefore attached to this report as well.

I agree with some portions of the TEPAC Report and I disagree with other portions. I also have additional views on some issues that are not touched upon in the Report, but which I believe the Congress should consider. Therefore I am filing this separate statement, which also reflects agreement with and incorporates views that some other members of the TEPAC have expressed.

While the U.S. - Chile Free Trade Agreement contains some incremental improvements over the North American Free Trade Agreement (NAFTA), it fails to meet some negotiating objectives of the Trade Promotion Authority Act of 2000.

Investment Article

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

The U.S. – Chile Free Trade Agreement cannot ultimately comport with the "no greater rights" Congressional goal because foreign investors are able to bring claims that would be decided by *ad hoc* panels not trained in or bound by U.S. Supreme Court precedent and 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 taking legitimate regulatory and other actions is extremely troubling.

The change of the "tantamount to" language found in the NAFTA to "equivalent" and the inclusion of the Annex setting out a shared understanding of the expropriation provision, provide incremental improvements. However, in attempting to define a standard for "expropriation", the agreement first references customary international law on expropriation. The Agreement then focuses on a limited and imbalanced set of the critical factors used by the U.S. Supreme Court in deciding takings cases. The Agreement fails to include critical standards established in U.S. jurisprudence that

preclude findings of compensable expropriations, and it leaves unclear in a problematic manner some of those that it does reference.

Further, the Article on Investment fails to close off the threat, already made real by Chapter 11 of the NAFTA, that foreign investors will use the investor claims process to challenge valid, nondiscriminatory public health, safety, consumer protection and environmental protection regulations. The Annex to the Chile Agreement does state that nondiscriminatory regulations are not "indirect expropriations" subject to investor claims "except in rare instances." But the exception in the first clause of this *proviso* constitutes an enormous loophole. While the "rare circumstances" language in the agreement provides some direction for arbitral panels, in that there is no such provision in NAFTA Chapter 11, 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. There is neither any established meaning to the quoted phrase nor any definitions or guidelines in the Agreement or its Annex to guide its application.

Under this Agreement, foreign investors and their lawyers, by alleging rare circumstances, remain free to litigate for compensation based on the adoption, amendment or repeal of valid, nondiscriminatory regulations and valid jury verdicts, and to be compensated at the expense of the public fisc.

Indeed, it appears that foreign investors may make claims for monetary compensation even in the same proceeding where U.S. investors are limited to the remedies of judicial review of a regulatory action. Hence, the investor claims provision fails to meet the Congressional goal of assuring that foreign investors have no greater substantive rights than is afforded U.S. investors.

Investments, as defined in the Agreement, include intellectual property. The negotiating objective in Trade Promotion Authority Act Section 2101(b)(4)(C) calls for respect for the Declaration on the TRIPS Agreement adopted at the WTO Ministerial held in Doha on November 14, 2001.

However, Article 10(2)(c) of the Chapter on Intellectual Property Rights in the Chile agreement fails to do this. It imposes limitations on the use of compulsory licensing that are more severe than those in the TRIPS agreement, and may be inconsistent with compulsory licensing. This is contrary to the Declaration referred to in the negotiating objective. This is proposed at the very moment when the US is embroiled in a high profile, global dispute over the interpretation of the Doha Declaration involving the WTO's TRIPS compulsory licensing provisions, a dispute that involves access to affordable pharmaceuticals by poor consumers. The US position has put the US at loggerheads with the developing nations and other nations as well.

Provisions that impose more onerous limitations on compulsory licensing than are now provided in TRIPS do not meet the negotiating objective cited above.

Dispute Settlement

The Dispute Settlement Article includes welcome provisions for public panel hearings, prompt public access to pleadings and panel decisions, and for panelists with environmental expertise in hearings involving environmental issues.

While there is a clear provision for the filing of comments (in dispute settlement) or briefs *amicus curiae* (in investor claims proceedings) by interested non-parties, there is no policy statement in either the Dispute Settlement Article or the investor claims provisions of the Investment Article generally favoring panel consideration of such filings. **Therefore, the Agreement does not constitute in any meaningful way a "mechanism for acceptance of amicus curiae submissions…", as called for in Section 2102(b)(3)(H) of the Trade Promotion Authority Act.**

Further, interested persons (that is, non-govermental, non-disputant parties) are required to file *amicus* briefs in investor claims proceedings in both English and Spanish, while neither investor claimants nor governmental participants are required to do so. This imposes a discriminatory and unreasonable cost on those seeking to become *amici curiae*. This fails to meet the negotiating objective of Trade Promotion Authority Act provision regarding amicus briefs.

Investor claims procedures also call for public disclosure of proceedings minutes "if available", but do not require that minutes be maintained in order to be made available. A proceeding that may contest a valid regulation or other government action, or affect those stakeholders protected by such regulations or actions, and require compensation to come from the public fisc, must be a proceeding on a written record**. This provision of the Agreement falls short of the Trade Promotion Authority Act Section 2102(b)(5) goal of increasing transparency.**

Finally, the Investment, Intellectual Property Rights and Dispute Settlement Articles of this agreement, which are interrelated, would add an additional layer to the already complex patchwork of global, regional and bilateral dispute resolution procedures that address the same matters. The various GATT agreements in the WTO, the NAFTA, the upcoming FTAA agreement, the upcoming CAFTA agreement, and previous bilateral trade agreements all contain related substantive, procedural and enforcement provisions, some congruent and some divergent or conflicting. This can create confusion and uncertainty about law, regulations, standards, procedures and dispute venues. It can create serious barriers to consumer protection, and to public participation and understanding. It can encourage global forum shopping, multiple proceedings, and vast new opportunities for international trial lawyers. It does this in areas of law that are often unsettled, and before dispute resolution bodies that are outside the US legal system and have no accountability. These bodies will be authorized and energized to make decisions that can penalize the actions of American legislative, executive and judicial branch entities, both federal and state, as well as those of corporations and citizens. The Congress should consider the impact that these new substantive rights and adjudicatory proceedings will have on American interests and jurisprudence over the long term, and

should assess whether multiple outsourcing of dispute resolution proceedings in these ways can comply with Congress' negotiating objectives.

I would urge the Congress to take these considerations into account in deciding whether to approve the U.S. Chile Free Trade Agreement.