

December 3, 2015

Ambassador Michael Froman  
U.S. Trade Representative  
Executive Office of the President  
600 17th Street, NW  
Washington, DC 20508

Dear Ambassador Froman:

In accordance with Section 5(b)(4) of the Bipartisan Trade Priorities and Accountability Act of 2015, and Section 135(e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Trade and Environment Policy Advisory Committee (TEPAC) on the Trans-Pacific Partnership reflecting the various views of TEPAC on the proposed Agreement.

Very truly yours,

A handwritten signature in cursive script that reads "Joseph G. ('Jerry') Block". The signature is written in dark ink and is positioned above the printed name and title.

Joseph. G ("Jerry") Block  
Chair, TEPAC

**The U.S.- Trans-Pacific Partnership  
Free Trade Agreement**

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

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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.-Trans-Pacific Partnership**

**I. Purpose of the Committee Report**

Section 105(b)(4) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 ("Bipartisan Trade Act"), 19 U.S.C. 4204(b)(4), requires that advisory committees provide the President, Congress and the U.S. Trade Representative (USTR), with reports required under Section 135(e)(1) of the Trade Act of 1974, not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135(e) of the Trade Act of 1974, as amended, the report must include an advisory opinion as to whether and to what extent the Agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth by Congress. 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. Unfortunately, for committee members outside of Washington DC, this problem has not improved with the TPP. While USTR provided in-town members the opportunity to review the text several days in advance of its release, it offered no similar access to out-of-town members and, in fact, denied those members telephone access to briefings during the negotiation of the text. In order to provide Congress with the comprehensive assessment and advice it seeks, access by all TEPAC members to the negotiating documents should be improved.

Moreover, as it has for over a decade, TEPAC unanimously recommends that Congress consider increasing this review period to at least 45 days.

In addition to the above concern, TEPAC notes that it is one of the few USTR advisory committees with representatives from different segments of civil society. As a result of this diversity, TEPAC's members have a range of views that the Committee believes assist it, and hopefully USTR and Congress, in analyzing the various public policy tradeoffs associated with the negotiation of free trade agreements. TEPAC recommends that that USTR include on all of its advisory committees members with diverse viewpoints.

### **III. Executive Summary of the Committee's Report**

The TPP substantially achieves Congress's specific environmental negotiating objectives, often incorporating verbatim the congressional mandate. In addition, a majority of the Committee believes that the TPP promotes the interests of the United States, in part by including environmental provisions in the TPP which significantly improve upon those in previous trade pacts. As has been the case with past reports, most of the divergent views from Committee members relate either to places where members believe the TPP should have gone beyond these objectives or to issues that could have an impact on the environment but fall outside of the provisions of the environment chapter itself, such as investor-state dispute settlement (ISDS) and public participation and transparency.

A majority of TEPAC recognizes that the agreement makes great strides toward a number of critical environmental protections for the TPP region. The specific environmental provisions are outlined below. However, a majority of the Committee believes that, to make these provisions work, the United States must commit adequate resources to develop the capacity of the other TPP Parties to comply, as well as to commit their own adequate resources to enforce, and ensure effective implementation. A majority of the Committee believes that the risk and cost of inadequate implementation should be mitigated with the creation of:

- Time frames and performance indicators to assess if TPP countries are meeting the commitments of the agreement;
- Bilateral action plans between the U.S. and each country to address country-specific challenges;
- An interagency monitoring subcommittee within the U.S. government to establish time frames and indicators to implement a plan for enhanced monitoring of implementation within each TPP country for its Article 20.17 commitment.

In some cases, TEPAC has suggestions to strengthen the implementation of certain provisions that relate to environmental protections.

For example, as to marine provisions, TEPAC recognizes that the agreement makes great strides in protecting marine fisheries and eliminating certain fisheries subsidies that distort trade. However, to make these provisions work, the United States must commit adequate resources to develop the capacity of the other TPP Parties to comply as well as commit adequate resources to enforce. At the same time, the agreement does not specifically address subsidies that negatively affect the sustainability of a fish stock that is not yet overfished. A majority of TEPAC is disappointed to see that "port State measures" (described below) remains undefined but notes that, in order "to help deter trade in products from species harvested" from IUU practices,

implementation of the provisions of the Port State Measures Agreement is a minimum necessary to prevent the landing of IUU fish from foreign vessels. Also, since many of the IUU fishing provisions establish only soft commitments, their effectiveness is not assured. Definite, binding commitments would better combat illegal trade and provide more benefit to the environment. The marine wildlife provision in the TPP is laudable, but it neither prohibits shark finning nor commercial whaling nor requires action to deter them. A majority of TEPAC would also have preferred the establishment of binding, enforceable obligation regarding implementation of the multilateral fisheries management instruments that are referenced.

As to the illegal natural resource trade, a majority of TEPAC is pleased to see that the TPP addresses trade in illegal wild flora and fauna, but disappointed that the agreement does not require Parties to prohibit such trade. Illegal trade in natural resources, particularly timber, wildlife and fish, is a prevalent conservation and economic threat throughout the Pacific Rim; throughout the world it is now one of the largest criminal enterprises, causing high social and economic costs. This majority believes that, concurrent with the commitment to promote conservation and combat the the illegal take of, and illegal trade in, wild fauna and floras is the important commitment to "promoting the legal trade of such associated products." Article 20.17(3)(a).

The effectiveness of the TPP provision against the illegal trade in fauna and floras will hinge on its implementation. A majority believes that it is especially critical that Parties are clear that the discretion allowed for in paragraph 20.17.6 does not detract from or diminish the obligations taken in the preceding paragraph (20.17.5). A majority of TEPAC believes that creating effective deterrence is essential and should be broadly implemented. This majority also believes that enforcement discretion should be limited only to decisions about whether to pursue prosecutions given the strength and seriousness of the case. In all cases, enforcement efforts should be undertaken in a manner to provide those affected with appropriate due process so that such cases cannot be criticized as merely a "disguised restriction on trade or investment between Parties." Article 20.2(3).

As to biodiversity, a majority of TEPAC supports the commitment the Parties have made to the conservation of biological diversity and its sustainable use and the recognition of the importance of respecting, preserving and maintaining knowledge and practices of indigenous and local communities that contribute to the conservation of biological diversity. This majority strongly believes that the TPP should have included provisions to build capacity, particularly in provider countries.

A majority of TEPAC did identify a significant shortcoming: The majority of TEPAC is disappointed that the TPP environment chapter does little to address a central challenge faced by all TPP countries – the adverse effects of climate change. The section that addresses the actions that TPP members will take to mitigate greenhouse gas emissions – and thus transition to a low emissions economy – contains only the most general and hortatory commitment to cooperate on "matters of joint or common interest" in this area. These are areas where cooperative action could yield big dividends both for the environment and economically for U.S. firms and workers that are world leaders in environmental technologies. Pursuing such activities would undoubtedly result in sharply increased U.S. exports of environmental goods and services to other TPP

countries. However, the TPP language is too limited and ambiguous. Therefore, a majority of TEPAC recommends that significant capacity building efforts by the U.S. be focused on addressing emissions reductions in the TPP region.

Further, many members of TEPAC are pleased with a number of other provisions, or have suggestions to strengthen the implementation of certain provisions, that relate to environmental protections. Those are outlined below.

A majority of TEPAC is pleased to see mention of invasive species in the TPP environment chapter including commitments by the countries to work together in an effort to prevent the introduction of invasive species. Trade can unintentionally accelerate the introduction of non-native species into new habitats, with attendant extensive and often irreversible impacts. The TPP calls for Parties to cooperate with the WTO Committee on Sanitary and Phytosanitary Measures on invasive species management.

A majority of the Committee supports increased capacity building in the form of appropriations and technical support, including but not limited to the creation of a trust fund, as outlined in the STRONGER (Supplemental Trade Review, Oversight, Noncompliance and General Enforcement Resources) Act, that would use some of the penalties paid to the United States to more effectively enforce and implement our trade agreements, with a priority for environmental obligations, including those in the TPP.

While a majority of TEPAC is pleased with the efforts to increase transparency and public participation during the *implementation* of TPP, many members remain concerned about the level of transparency and public participation during the *negotiation* of FTAs. As it has stated in all of its previous reports, a majority of TEPAC believes that transparency and opportunities for public participation are an integral aspect of effective implementation and monitoring and evaluation of the environmental provisions of FTAs. The TPP includes significant provisions for public participation across a number of articles, including but not limited to 20. 7: Procedural Matters, 20.8: Opportunities for Public Participation, 20.9: Public Submissions, and 20.19 Environment Committee and Contact Points.

Improving regulatory coherence was expressly included in the Principal Trade Negotiating Objectives as one means to address concerns regarding the use of government regulation or other practices to reduce market access for U.S. goods, services and investment. A majority of the Committee believes that the provisions included in the regulatory coherence chapter, if implemented by Parties, also have the potential to assist in implementing effective environmental regulatory systems contemplated in the Environmental Chapter. Many of the recommended procedures are only encouraged, not required. Thus, for the most part this Chapter will likely serve primarily to educate Parties about a core set of regulatory processes, provide a forum for sharing best practices and a reporting mechanism for progress achieved.

The Investment Chapter, including Investor State Dispute Settlement (ISDS) was a significant point of disagreement for some members of the Committee. On the one hand, some members believe that legitimate foreign investors need these additional protections against the possibility that host governments might discriminate against those investors. On the other, some members

of TEPAC have concerns that ISDS has been used to challenge legitimate regulations, thereby chilling or overturning legal protections for the environment, consumers, and other public interests (along with other concerns). That being said, the majority of TEPAC acknowledges the efforts made by the U.S. Government and the other Parties in addressing more clearly some of the specific concerns that have arisen regarding use of ISDS procedures in the past. We encourage Congress to review the entirety of the Committee's investment discussion, below, along with each member's separate statement on the issue.

#### **IV. 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.

#### **V. Negotiating Objectives and Priorities Relevant to the Report**

As is made clear from its mandate, this committee's primary focus is on issues involving trade and the environment. In the Bipartisan Trade Act, 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—

- (i) adopts and maintains measures implementing ... its obligations under common multilateral environmental agreements (as defined in section 111(6)),
- (ii) does not waive or otherwise derogate from, or offer to waive or otherwise derogate from—

\* \* \*

- (II) its environmental laws in a manner that weakens or reduces the protections afforded in those laws and in a manner affecting trade or investment between the United States and that party, except as provided in its law and provided not inconsistent with its obligations under common multilateral environmental agreements (as defined in section 111(6)) or other provisions of the trade agreement specifically agreed upon, and
- (iii) does not fail to effectively enforce its environmental. . . laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the United States and that party after entry into force of a trade agreement between those countries;

(B) to recognize that—

- (i) with respect to environment, parties to a trade agreement retain the right to exercise prosecutorial discretion and to make decisions regarding the allocation of enforcement resources with respect to other environmental laws determined to have higher priorities, and a party is effectively enforcing its laws if a course of action or inaction reflects a reasonable, bona fide exercise of such discretion, or results from a reasonable, bona fide decision regarding the allocation of resources;

\* \* \*

- (D) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;
- (E) to reduce or eliminate government practices or policies that unduly threaten sustainable development;
- (F) to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services;
- (G) to ensure that labor, 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;
- (H) to ensure that enforceable labor and environment obligations are subject to the same dispute settlement and remedies as other enforceable obligations under the agreement;
- and
- (I) to ensure that a trade agreement is not construed to empower a party's authorities to undertake labor or environmental law enforcement activities in the territory of the United States.

Congress defined "common multilateral environmental agreement" to mean certain specified agreements as well as additional agreements to which the negotiating parties agree. The specified agreements are: (i) The Convention on International Trade in Endangered Species of Wild Fauna and Flora, (ii) The Montreal Protocol on Substances that Deplete the Ozone Layer, (iii) The Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (iv) The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (known as the Ramsar Convention), (v) The Convention on the Conservation of Antarctic Marine Living Resources, (vi) The International Convention for the Regulation of Whaling, and (vii) The Convention for the Establishment of an Inter-American Tropical Tuna Commission.

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

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

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

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



In addition to these environmental objectives, which are core objectives relevant to TEPAC's mandate, there are other Congressional trade objectives which affect the achievement of these objectives. These other objectives, which have been the subject of frequent discussion and comment by the members of TEPAC, include those related to investment, transparency, dispute resolution, capacity building, technical barriers to trade, intellectual property, agriculture, and sanitary and phytosanitary measures. With regard to investment, the Bipartisan Trade Act requires, among other things, that trade agreements "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 committee also notes that the House has proposed amending the Bipartisan Trade Act's negotiating objectives and that the Obama Administration identified negotiating objectives for the Environment Chapter in its December 2011 Green Paper. Neither of these documents directly affect TEPAC's mandate but the Committee has used them to help inform its analysis.

### **(I) The Committee's Advisory Opinion on the Agreement**

The TPP substantially achieves Congress's specific environmental negotiating objectives, often incorporating verbatim the congressional mandate. TEPAC believes that the environmental provisions of the TPP significantly improve upon those in previous trade pacts. As has been the case with past reports, most of the divergent views from Committee members relate either to places where members believe the TPP should have gone beyond these objectives or to issues that indirectly affect the environmental provisions, such as investor-state dispute settlement (ISDS) and public participation and transparency.

#### **A. Compliance with Congress's Mandated Objectives**

##### **1. MEAs**

The TPP provisions relating to multilateral environmental agreements (MEAs) satisfy in letter (if perhaps not completely in spirit) the mandate of the Bipartisan Trade Act that Parties adopt and maintain measures implementing their obligations under common multilateral environmental agreements. At a general level, under Article 20.4.1, the TPP Parties reaffirm their commitment to implement the MEAs to which they are a Party.

At the level of specific MEAs, the Bipartisan Trade Act requires the parties to adopt and maintain measures to implement any of seven identified MEAs to which a Party is a party. While the Chapter does not individually identify each MEA in the text, each is addressed in some way. The TPP uses a broadened approach, addressing the substance of each of the MEAs across multiple articles where relevant. For CITES (20.17.2 footnote 23), MARPOL (20.6 footnote 8) and Montreal Protocol (20.5 footnote 5) a Party must demonstrate that the violation of these commitments affects trade or investment between the Parties

The protection of the ozone layer through the Montreal Protocol on Substances that Deplete the Ozone Layer is specifically noted in Article 20.5. The Montreal Protocol was designed to reduce the production and consumption of ozone depleting substances in order to reduce their

abundance in the atmosphere, and thereby protect the earth's ozone layer. Under that Article titled "Protection of the Ozone Layer," item 1 notes that it should be protected from emissions of ozone-depleting substances, while item 2 encourages the use of environmentally-friendly alternatives to ozone-depleting substances. Article 20.6 requires Parties to take measures to prevent the pollution of the marine environment from ships, further clarifying that this pertains to pollution regulated by MARPOL 1997, which refers to the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships of 2 November 1973, as modified by the Protocol of 17 February 1978.

Article 20.16 on Marine Capture Fisheries notes overfishing and unsustainable use of fisheries resources as an urgent problem. Additionally, it recognizes the importance of international action to address IUU fishing, including actions reflected in instruments established and adopted by RFMOs. Through this Article, TPP goes beyond the species-specific and region-specific scope of IATTC and CCAMLR to more broadly address the long-term conservation and sustainable use of fish stocks by requiring Parties to seek to operate fisheries management systems that regulate marine wild capture fishing and that prevent overfishing and reduce bycatch. The TPP also requires Parties to promote the long-term conservation of sharks, marine turtles, sea birds and marine mammals. Article 20.16.4(a) specifies that measures to conserve sharks should include bycatch mitigation measures, catch limits, and finning prohibitions. The specific obligations of IATTC and CCAMLR on conservation and management measures and catch and trade documentation are referenced in 20.16.149(d) and (e) and apply to all TPP countries, whether or not they are members of those RFMOs. In so doing, this provision extends the scope of the commitment beyond prior trade agreements to non-members of IATTC and CCAMLR who may be significant traders in IUU product. However, the commitment is not binding (it states that the Parties "shall endeavor") and therefore is a weaker obligation as applied to IATTC and CCAMLR members than exists in the Bipartisan Trade Agreement. While IATTC and CCAMLR members are also subject to the general commitment in Article 20.4.1, that commitment is also non-binding.

While the article does not single out the conservation of whales and the management of whaling, or set out specific measures to regulate whaling and conserve whale stocks - as does the IWC - 20.16.4(b) does specify that measures to conserve all marine mammals (as well as marine turtles and seabirds), should include conservation and management measures, bycatch mitigation measures, prohibitions, and other measures in accordance with the relevant international agreements to which each Party is party.

Article 20.17.2 obligates each Party to adopt, maintain and implement laws, regulations and any other measures to fulfill its obligations under CITES. This provides an additional layer of enforcement for CITES listed species and a majority of TEPAC believes that this provision should be implemented complimentary to item 3, that further commits the Parties to combat illegal logging and associated illegal trade. Furthermore, TPP Parties "shall endeavour to implement," as appropriate, CITES resolutions that aim to protect and conserve species whose survival is threatened by international trade

In addition, item 4 addresses the Ramsar Convention by committing Parties to conserve "specially protected natural areas, such as wetlands," as defined by each Party in its legislation,

and to develop and strengthen cooperation to enhance law enforcement cooperation and networks.

## 2. Non-derogation and effective enforcement

Non-derogation and effective enforcement of the environmental laws is specifically required in Article 20.3(4), stating that “[n]o Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement for that Party.”

## 3. Retention of prosecutorial discretion

Article 20.3(5) specifically allows for the retention of prosecutorial discretion, stating that

The Parties recognise that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 4 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws.

## 4. Capacity building

Congress’s goal of strengthening the capacity of United States trading partners to protect the environment through the promotion of sustainable development is addressed in Chapter 21 of the TPP. Chapter 21 contains both hortatory and mandatory language, but much of the mandatory language involves coordination and facilitation. A majority of TEPAC believes that the mechanisms outlined in the chapter should be directed to help the lesser-developed Parties implement the Environment Chapter and generally improve global and local environmental conditions.

Specifically, a majority of TEPAC members urge that the cooperation and capacity building resources be directed to the issues with the most opportunity for global and/or local environmental benefit. These should be strategically determined based on an assessment of the existing and potential future environmental impacts from the TPP Parties, and comparing those to the gaps that are not being addressed (or fully addressed) by governments or private sector. A majority of TEPAC members believe that such an analysis will likely find that climate change, water usage and wastewater, fisheries, timber legality and timber trade, wildlife trade and agricultural production are among the greatest environmental impacts that cooperation and capacity building should address. Further, these TEPAC members believe that cooperation and capacity building should not only target government-to-government action, but also provide capacity building and technical assistance to the specific private industries and entities that have

environmental impacts. Factories that produce goods for export and the agricultural industries are two examples of private sector industries that require capacity building and technical assistance in order for the objectives of the Environment Chapter (and others like the Labour Chapter) to be fully recognized.

As with prior trade agreements, a majority of TEPAC urges Congress to provide a dedicated funding source to cooperation and capacity building to ensure that the potential inherent in this Chapter is realized. With a funding source, this critical investment in the TPP region will support continuous progress in achieving the goals of this Chapter. When funds are allocated to support an FTA's capacity building provisions, these efforts have generated long-lasting returns. Existing agreements are competing with each other for scarce funds, and this has the potential to be significantly exacerbated considering the magnitude of TPP. Congressional members have prioritized the objectives of the Environment Chapter and it is important that the Administration and Congress provide such environmental programs appropriate priority.

#### 5. Reduction in government practices threatening sustainable development

The TPP Environmental Chapter contains several provisions directed at increasing sustainable development, including 20.12(1) (regarding sustainable development, generally); 20.13(1), (2), and (5) (biodiversity); 20.15 (transport and urban infrastructure development); 20.16(1) and (3.c) (fisheries) and 20.17(4.b) (forests).

#### 6. Market access for environmental goods and services

Under the TPP, tariffs on all environmental goods will be eliminated, so this Congressional objective is met.

#### 7. Absence of discrimination / disguised barriers to trade

Article 20.2(3) specifically states that "The Parties further recognise that it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties."

#### 8. Dispute resolution

As per Congress's objectives, Chapter 28, regarding Dispute Settlement, applies the same dispute settlement and remedies to the Environmental obligations as to other enforceable obligations under the agreement.

#### 9. No foreign government enforcement in U.S. territory

Article 20.3(7) specifically states that "Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party."

## B. Additional Environment Chapter Obligations

In addition to meeting Congress' negotiation objectives, as described above, the TPP contains a number of other provisions directly and indirectly affecting environmental issues and TEPAC members' interests, as described below.

### 1. Marine provisions beyond the listed MEAs

TEPAC recognizes that the agreement makes great strides in protecting marine fisheries and eliminating some of the fisheries subsidies that distort trade. TEPAC further recognizes that including, for the first time ever in an international trade agreement, binding obligations concerning marine fisheries, is an important precedent that can lead to further accomplishments in future agreements, such as in the Transatlantic Trade and Investment Partnership talks with Europe and negotiations at the World Trade Organization.

To make these provisions work, a majority of the Committee believes that the United States must commit adequate resources to develop the capacity of the other TPP Parties to comply as well as commit adequate resources to enforce. These provisions offer significant benefits to the environment and the TPP countries through promoting sustainable fisheries, but only if the United States actively assists the less developed TPP partners in developing their fisheries management capacity.

TEPAC has the following specific comments concerning the three subject areas, which were also discussed by the Green Paper in relation to marine fisheries.

#### *Disciplines on subsidies that contribute to overcapacity and overfishing*

TEPAC recognizes the significant accomplishment in the TPP's commitment to four provisions related to subsidies, while also recognizing that there is further work to do in future agreements. The TPP Parties acknowledge that fisheries subsidies contribute to overfishing and overcapacity and accordingly state that they seek to operate a fisheries management system designed to prevent overfishing and overcapacity. In fact, subsidies have helped produce a global fishing fleet up to 175% larger than sustainable levels.<sup>1</sup> Accordingly, TEPAC stresses the importance of reducing or limiting capacity in conjunction with eliminating subsidies.

The TPP Parties agree to

- Prohibit subsidies that negatively affect overfished stocks
- Prohibit subsidies for IUU-listed fishing vessels

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<sup>1</sup>[http://www.researchgate.net/profile/Yimin\\_Ye/publication/263154870\\_Rebuilding\\_global\\_fishe-ries\\_the\\_World\\_Summit\\_Goal\\_costs\\_and\\_benefits/links/543b7bdf0cf204cab1db00a6.pdf](http://www.researchgate.net/profile/Yimin_Ye/publication/263154870_Rebuilding_global_fishe-ries_the_World_Summit_Goal_costs_and_benefits/links/543b7bdf0cf204cab1db00a6.pdf)

- Make their best efforts to refrain from introducing new fisheries subsidy programs or expanding existing ones
- Report fisheries subsidies every two years to the Environmental Affairs Committee

The prohibitions on specific subsidies address one of the most significant threats to the marine environment outside of global climate change. Their terms are broad enough to encompass a wide range of harmful subsidies, but definite enough to allow for enforcement. Nevertheless, the United States must provide assistance to its TPP partners that need to develop capacity to assess their fish stocks and determine whether they are overfished.

At the same time, the agreement does not specifically address subsidies that negatively affect the sustainability of a fish stock that is not yet overfished. The agreement also, of course, is limited to the 12 TPP Parties. In the future, the United States should strive to expand both the breadth of the prohibition on harmful subsidies and the number of nations that agree to prohibit such subsidies. The United States should aggressively pursue these objectives in TTIP and WTO negotiations.

The best-efforts commitment to refrain from introducing new fisheries subsidy programs or expanding existing ones is also very important for the sustainability of marine fisheries. The commitment would be more effective if it were binding. As with the prohibitions, the United States should seek to incorporate such a (binding) commitment in future agreements.

The requirement to report fisheries subsidies is central to making these provisions work and another important precedent.

### *IUU fishing*

TEPAC recognizes the importance of agreeing to provisions to combat IUU fishing, including agreeing to implement port state measures. A majority of TEPAC is disappointed to see that "Port State measures" remains undefined but notes that, in order "to help deter trade in products from species harvested" from IUU practices, implementation of the provisions of the Port State Measures Agreement is a minimum necessary to prevent the landing of IUU fish from foreign vessels. As noted in the discussion of MEAs above, Article 20.16.14 includes provisions to reinforce and extend the application of the provisions of all RFMOs, whether or not the country is a member. Further provisions require the adoption of measures to deter IUU fishing activity by nationals and by vessels flying the country's flag, as well as to address the problem of transshipment at sea. TEPAC is of the view that these provisions will provide additional support for ongoing international efforts to combat IUU fishing if there is commitment to implementation by all countries and oversight of such commitments. However, since many of the IUU fishing provisions establish only soft commitments to "cooperate," "support," "strive," or "endeavor," their effectiveness is not assured. Definite, binding commitments would better combat illegal trade and provide more benefit to the environment. Accordingly, a majority of TEPAC stresses each TPP party should adopt, implement and effectively enforce the Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing.

### *Shark conservation*

The marine wildlife provision in the TPP is notable in part because it

- (1) encompasses additional important marine species including marine turtles, seabirds, and marine mammals, and
- (2) requires TPP Parties to consider multiple important conservation measures, such as, for sharks, collecting species-specific data, bycatch mitigation, catch limits, and prohibiting shark finning.

However, it neither prohibits shark finning or commercial whaling nor requires action to deter shark finning. The United States should work cooperatively with its TPP partners to develop adequate conservation measures for all these species, including to prohibit shark finning and commercial whaling.

### *Promoting sustainable fisheries management*

The marine fisheries article sets forth an overall commitment from the Parties to seek to operate sustainable fisheries, including preventing overfishing and overcapacity, reducing bycatch, and recovering overfished stocks. This commitment is to be addressed based on the best scientific information available and consistent with international best practices. TEPAC recognizes that this provision is an important policy statement in favor of sustainable fisheries management and sets an important precedent for future trade agreements. Nevertheless, the provision is weaker than it could be, because it does not establish any binding, enforceable obligation regarding implementation of the multilateral fisheries management instruments that are referenced. It is important for the United States to take full advantage of this provision by providing the necessary assistance to its TPP partners that need to develop capacity to sustainably manage their fisheries relying on the best available science and consistent with international best practices.

## 2. Illegal natural resource trade

Article 20.17 of the Environment Chapter requires TPP countries to take measures to combat trade in illegal wild flora and fauna. The types of measures deemed appropriate include, but are not limited to, laws, regulations, policies, sanctions, penalties, and “other effective measures” that can act as a deterrent. The trigger for what makes something illegal is that it was taken or traded in violation of a country’s own law or another applicable law, where the law’s purpose is to conserve, protect or manage wild fauna and flora .

The negotiating objectives outlined in TPA call on U.S. trade agreements to ensure that trade and environmental policies are mutually supportive and “seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of world’s resources.” Illegal trade in natural resources, particularly timber, wildlife and fish, is a prevalent conservation and economic threat throughout the Pacific Rim. Illegal trade undermines legitimate trade, creating a black market of cheaper goods that not only frustrates efforts at sustainable management of these resources, but, among other things, also causes losses in profit

and insecurity in supply for those acting within the law. For example, the availability of illegal timber depresses global timber prices by as much as 16%, costing the U.S. wood industry up to \$1 billion annually.<sup>2</sup>

In the case of illegal wildlife trade, it is now one of the largest criminal enterprises in the world, with an annual value estimated at \$8 billion - \$10 billion,<sup>3</sup> more than twice that of illegal commerce in small arms, diamonds, gemstones, and gold combined. Wildlife crime comes with high social and economic costs in the form of soaring costs for park protection, lost opportunities for legitimate livelihood options in rural communities through activities such as eco-tourism, and increased armed conflict and corruption driven by soaring black market prices for high-value wildlife products, such as ivory and rhino horn.

Seafood is one of the most highly traded commodities and, with high levels of global illegal fishing and a largely opaque supply chain. Illegally caught seafood is traded among TPP Parties, with a recent estimate that 20-31% of U.S. imports of wild caught seafood may be illegally caught or unreported.<sup>4</sup>

A majority of TEPAC believes that the effectiveness of Article 20.17 will hinge on its implementation. The measures required to effectively deter this illegal trade will vary from country to country. For most TPP countries, new laws and/or regulations will be required, as well as sufficient resources.

The majority of TEPAC recommends that the assortment of measures, each unique to the political and regulatory environment for each country, should be identified and assessed for their effectiveness in reducing both trade in and take of illegal wildlife, timber and seafood. There is no question that such measures, if implemented properly, can be useful deterrents. For example, in 2008, the U.S. amended the Lacey Act to include a prohibition on trade in illegal timber products. A November 2014 statistical analysis by the United States Forest Service Forestry Sciences Laboratory found a double-digit percentage decrease in the amount of illegally sourced wood products entering the U.S. market, matched by similar increases in the value of legally sourced wood products.<sup>5</sup> This study also cautioned that such trade measures may have other, indirect effects that still need to be further studied. Not yet understood is to what extent illegal producers have diverted their illegally sourced fiber exports away from the United States and toward third countries without such trade measures or diverted the illegally sourced production toward domestic consumers. Thus, effective implementation of TPP can serve to normalize and support the legal trade among nations to reduce these potential diversions.

The risk and cost of inadequate implementation should be mitigated with the creation of:

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<sup>2</sup> [http://www.unece.lsu.edu/responsible\\_trade/documents/2003-2006/rt03\\_036.pdf](http://www.unece.lsu.edu/responsible_trade/documents/2003-2006/rt03_036.pdf)

<sup>3</sup> <https://www.unodc.org/unodc/en/frontpage/2014/May/wildlife-crime-worth-8-10-billion-annually.html>

<sup>4</sup> <https://www.unodc.org/unodc/en/frontpage/2014/May/wildlife-crime-worth-8-10-billion-annually.html>

<sup>5</sup> [http://www.srs.fs.usda.gov/pubs/ja/2014/ja\\_2014\\_prestemon\\_002.pdf](http://www.srs.fs.usda.gov/pubs/ja/2014/ja_2014_prestemon_002.pdf)



- Time frames and performance indicators to assess if TPP countries are meeting the commitments of the agreement;
- Bilateral action plans between the U.S. and each country to address country-specific challenges;
- An interagency monitoring subcommittee within the U.S. government to establish time frames and indicators to implement a plan for enhanced monitoring of implementation within each TPP country for its Article 20.17 commitment.

A majority believes that it is especially critical that Parties are clear that the discretion allowed for in paragraph 20.17.6 does not detract from or diminish the obligations taken in the preceding paragraph (20.17.5). A majority of TEPAC believes that creating effective deterrence is essential and should be broadly implemented. This majority also believes that enforcement discretion should be limited only to decisions about whether to pursue prosecutions given the strength and seriousness of the case. In all cases, enforcement efforts should be undertaken in a manner to provide those affected with appropriate due process so that such cases cannot be criticized as merely a “disguised restriction on trade or investment between Parties.” Article 20.2(3).

Article 20.17 binds each country to “endeavor to take measures to combat illegally taken or traded wild flora and fauna that is transshipped.” Concurrent with the commitment to promote conservation and combat the the illegal take of, and illegal trade in, wild fauna and flora is the important commitment to “promoting the legal trade of such associated products.” Article 20.17 (3)(a).

The Agreement also outlines a bilateral side agreement with Peru recognizing Peru’s new Forest and Wildlife Law to include provisions requiring proof of legal origin for wild flora and fauna. The details of that obligation within Peru’s legislation is currently not clear within the implementing regulations. The Committee’s understanding is that this side agreement is merely a recognition of current law rather than a certification that Peru is in compliance with Article 20.17.

### 3. Transition to low emission economy/Climate change

The majority of TEPAC is disappointed that the TPP environment chapter does little to address a central challenge faced by all TPP countries – the adverse effects of climate change. The section that addresses the actions that TPP members will take to mitigate greenhouse gas emissions – and thus transition to a low emissions economy – contains only the most general and hortatory commitment to cooperate on “matters of joint or common interest” in this area. In the 2009 G20 Leaders’ Statement, President Obama committed to phase out and rationalize inefficient fossil fuel subsidies over the medium term. Instead of addressing subsidies that exacerbate the emissions problems or constrain progress toward a low emissions economy, or other trade and investment policies that discourage the deployment of pollution abatement technologies, the TPP only provides an illustrative list of areas of possible cooperation. The list includes development of renewable energy sources, sustainable urban infrastructure, and emissions monitoring among others. These are areas where cooperative action could yield big dividends both for the environment and economically for U.S. firms and workers that are world leaders in

environmental technologies. Pursuing such activities would undoubtedly result in increased U.S. exports of environmental goods and services to other TPP countries. However, a majority of TEPAC believes that the TPP language is too limited and ambiguous; the Parties only agree to pursue, as appropriate, cooperative and capacity-building activities. Moreover, a majority of TEPAC does not believe that such initiatives are likely to advance sufficiently unless adequate resources are devoted to these activities.

#### 4. Biodiversity

Species extinction is taking place at least 100 times the natural background rate of extinction (Global Environmental Outlook 4). With trade having the potential to accelerate biodiversity loss, it is important that sustainability principles be fundamental to trade agreements. A majority of TEPAC supports the commitment the Parties have made to the conservation of biological diversity and its sustainable use and the recognition of the importance of respecting, preserving and maintaining knowledge and practices of indigenous and local communities that contribute to the conservation of biological diversity. This majority believes that this section could have been strengthened with more specific and binding cooperative measures to support biodiversity conservation.

This majority believes that the TPP should have included provisions to build capacity, particularly in provider countries. This is an important way to value biodiversity conservation and to ensure all stakeholders, including private operators and local peoples, can effectively contribute to sustainable development and conservation of the natural resources. This majority is pleased to see recognition of the need for informed consent to access genetic resources and the establishment of mutually agreed terms between users and providers for the sharing of benefits from the use of genetic resources.

#### 5. Invasive alien species

Trade can unintentionally accelerate the introduction of non-native species into new habitats, with attendant extensive and often irreversible impacts. Invasive species may be as damaging to native species and ecosystems on a global scale as the loss and degradation of habitats. The economic and ecosystem costs from the introduction of even one invasive species can be huge and include loss of biodiversity, remediation costs, lower property values and lost production.

The TPP calls for Parties to cooperate with the WTO Committee on Sanitary and Phytosanitary Measures on invasive species management. A majority of TEPAC is pleased to see mention of invasive species in the TPP environment chapter including commitments by the countries to work together in an effort to prevent the introduction of invasive species.

TEPAC looks forward to studying the final Environmental Review for further analysis of the risks from invasive species among the TPP countries, and particularly the assessment of whether cooperation and consultation is sufficient to offset the increased risk through expanded trade. TEPAC notes that observers have called for the development of coherent trade rules for dealing with invasive alien species and the strengthening of SPS capacity through the joint work of the

WTO SPS Committee, relevant international standards-setting bodies and the Convention on Biological Diversity.

### **C. The Need for Effective Implementation; including funding**

In examining the Agreement for consistency with Congress's environmental trade objectives, TEPAC has looked beyond the issue of whether the Agreement simply recites those objectives to the question of whether those objectives will come to fruition.

However, the key to whether those objectives will actually be achieved is effective implementation. This in turn, requires not only adequate and efficient implementation measures, but also adequate funding and enforcement measures.

As trade agreements have evolved to more accurately reflect international commerce, they've become more complex. This complexity limits U.S. ability to simultaneously oversee, implement and enforce these agreements. A majority of the Committee supports increased capacity building in the form of appropriations and technical support, including but not limited to the creation of a trust fund, as outlined in the STRONGER (Supplemental Trade Review, Oversight, Noncompliance and General Enforcement Resources) Act, that would use some of the penalties paid to the United States to more effectively enforce and implement our trade agreements, with a priority for environmental obligations, including those in the TPP.

In addition, as outlined in GAO-15-161, *Free Trade Agreements: Office of the U.S. Trade Representative Should Continue to Improve Its Monitoring of Environmental Commitments*, published November 2014, USTR should mitigate the risk and cost of ineffective implementation with the creation of:

- Time frames and performance indicators to assess if TPP countries are meeting the commitments of the agreement;
- Bilateral action plans between the United States and each country to address country-specific challenges;
- An interagency monitoring subcommittee within the U.S. government to establish time frames and indicators to implement a plan for enhanced monitoring of implementation within each TPP country for its environment and conservation obligations.

### **D. Encouraging Public Participation and Transparency**

As it has stated in all of its previous reports, TEPAC believes that transparency and opportunities for public participation are an integral aspect of the implementation and monitoring and evaluation of the environmental provisions of FTAs. The TPP includes significant provisions for public participation across a number of articles, including but not limited to 20.7: Procedural Matters, 20.8: Opportunities for Public Participation, 20.9: Public Submissions, and 20.19: Environment Committee and Contact Points.

A majority of TEPAC welcomes the efforts to encourage transparency throughout the implementation of the Agreement. For example, this majority welcomes the establishment of an Environment Committee (which shall be responsible for implementation of the Environment

Chapter) and Articles 20.19.6 and 20.19.8, (which require that decisions and reports of the Environment Committee must be made public and that the Environment Committee shall provide for public input and hold a public session at each of their mandated meetings). The majority also welcomes the requirement for the Parties to promote public awareness of their environmental laws, regulations, and policies by ensuring that relevant information is made available to the public, per Article 20.7.1. In addition Article 20.7.2 ensures that interested persons of a Party may request that Party to investigate alleged violations of environmental laws, and that the appropriate authority of the Party give such a request due consideration. Article 20.7.3 also increases transparency and opportunities for public engagement by requiring that, for the enforcement of environmental laws, each Party ensure that judicial, quasi-judicial, or administrative proceedings are available, fair, and that hearings in such proceedings are open to the public.

Lastly, this majority welcomes the inclusion of detailed procedures for public submissions in Article 20.9. Specifically the requirement that each Party provide for receipt and consideration of written submissions from persons of that Party regarding its implementation of the Chapter, and the requirement to respond, in writing, in a timely manner and to make the submission and the response available to the public, for example on a public website.

While a majority of TEPAC is pleased with these efforts to increase transparency and public participation during the *implementation* of TPP, many members remain concerned about the level of transparency and public participation during the *negotiation* of FTAs. TEPAC's role in the trade advisory committee system contributes some advice on environmental matters, but these members believe that the environmental, consumer, and public interest voices within that system need to be strengthened to address effectively the broad array of issues in trade negotiations. The trade advisory committee system does not provide a way for all citizens affected by trade negotiations to have an effective voice during the negotiations.

While there are a large number of sectoral advisory committees (ITACs), the committee structure as established provides access to specific business interests in each sector to the negotiating process and to be physically present at the venue where the negotiations are taking place. TEPAC's membership contains a healthy diversity of viewpoints, but the same is not true for other trade advisory committees. For example, there are only a handful of public interest representatives among the more than 600 trade advisory committee members. Several of these serve on TEPAC.

These members note that the GAO criticized the imbalance in the advisory committee system in 2002 and again in 2007. In February 2014, the USTR published a Federal Register notice announcing plans to establish a new Public Interest Trade Advisory Committee ("PITAC") for obtaining the perspective of those concerned with public interest issues. The deadline for comments and initial nominations was March 25, 2014, but the new committee has not been established. These members of TEPAC urge USTR to expand the diversity of views on the various ITACs and to establish the PITAC.

## **E. Other chapters within the TPP with potential environmental impact**

### **1. Regulatory Coherence**

Improving regulatory coherence was expressly included in the Principal Trade Negotiating Objectives as one means to address concerns regarding the use of government regulation or other practices to reduce market access for U.S. goods, services and investment. A majority of the Committee believes that the provisions included in the regulatory coherence chapter, if implemented by Parties, also have the potential to assist in implementing effective environmental regulatory systems contemplated in the Environmental Chapter. However, some members of the Committee are concerned that the Chapter does not explicitly call out the need for environmental impact analysis. Moreover, many of the recommended procedures are only encouraged - not required. Thus, for the most part this Chapter will likely serve primarily to educate Parties about a core set of regulatory processes, provide a forum for sharing best practices and a reporting mechanism for progress achieved.

As a general matter, Chapter 25 includes many of the core components of the U.S. regulatory system. This Chapter applies only to regulations of a general application issued by regulatory agencies for mandatory actions. Thus, this chapter does not apply to voluntary guidance documents or to regulatory matters that are not of general application (such as the issuance of specific licenses or permits). The exact scope of the affected regulations are to be determined by each Party within a year of the entry into force.

While many of the themes identified by Congress in the Principal Trade Negotiating Objectives have been included in Chapter 25 some are necessarily included in other chapters.

#### *Coordination and Review*

The agreement encourages the development of a process and office to ensure effective interagency coordination and review of proposed covered regulatory measures. The agreement identifies a number of functions of this office including strengthening consultation and coordination among domestic agencies and preventing overlap, duplication and inconsistent requirements across agencies.

#### *Core Good Regulatory Practices*

Chapter 25 of the TPP has a set of core regulatory practices that Parties are encouraged to put into place. Parties to the agreement are generally encouraged to urge their relevant regulatory agencies to conduct regulatory impact assessments. In addition, Parties' regulatory processes should include assessing the need for a proposed regulation, examining feasible alternatives, costs and benefits, risks as well as distributive impacts – with a recognition that some costs and benefits are difficult to quantify and monetize. Unfortunately, the Chapter did not explicitly include the fundamental regulatory requirement of environment impact analysis. Regulations are encouraged to be written in plain language and regulatory agencies should provide public access to information on new covered regulatory measures and where practicable make this information publicly available online.

Parties may take into consideration the potential impact of the proposed regulation on small to medium enterprises (SMEs). This is a departure from the U.S. system, which requires regulatory agencies to consider the impact on small businesses in most regulatory actions.

Parties are encouraged to establish an annual publically available regulatory plan and to consider regulatory measures in other Parties as well as relevant developments in international, regional and other fora when planning regulatory measures.

### *Cooperation*

A Committee on Regulatory Coherence will establish a process to cooperate on regulatory matters and to make recommendations on improving this Chapter. Cooperative activities are also contemplated including training, and information exchanges, dialogues or meetings with interested persons, including SMEs, of other Parties.

The Regulatory Coherence Chapter and Core Good Regulatory Practices, if adopted by Parties, will help promote coordination and transparency of regulatory actions and allow for the participation of interested parties; all of which will assist in implementing effective environmental regulatory systems contemplated in the TPP.

## 2. Investment Chapter

Beginning with the North American Free Trade Agreement, investment provisions have been included in all of the trade agreements to which the United States is a party and almost all provide for Investor State Dispute Settlement (ISDS).

Some members of TEPAC continue to have concerns about including ISDS provisions in the TPP. That being said, a majority of TEPAC acknowledges the efforts made by the U.S. Government and the other Parties in addressing more clearly some of the specific concerns that have arisen regarding use of ISDS procedures in the past

Those members of TEPAC in support of ISDS believe that experience has shown that a strong ISDS system can play a key role in promoting and protecting investments, rule-of-law, and transparency and in resolving knotty disputes, either through the arbitration process or through negotiations against the backdrop of a possible arbitration. ISDS simply assures access to a neutral arbitral forum for the resolution of a dispute between a state and an investor that is a national of another state. ISDS takes disputes out of the political arena and lets them be resolved by recognized independent and impartial arbitrators. Importantly, and contrary to allegations of some critics, ISDS provisions do not undermine host government regulation. U.S. BITs and FTA Investment chapters actually enhance, rather than undermine, the rule of law as they 'export' core U.S. legal practices. There are, furthermore, safeguards in place to deter the filing of frivolous cases.

TPP takes several of these important provisions to a new, more explicit level. The process under TPP emphasizes and enhances transparency and public participation: for Investor-State cases

filed against the United States under TPP, all submissions, hearing transcripts and other key documents will be available on the Department of State website. Interested stakeholders, including labor organizations, civil society and business can submit “amicus curiae” or friend-of-the-court” briefs as they would in a U.S. appellate court. TPP provisions ensure that an investor’s “home” government and other TPP Parties will be able to make a submission to panels on interpretation of the Agreement. The TPP governments have added carefully-crafted new language detailing the conditions ensuring that governments have (as they have long had under U.S. investment agreements) the right to regulate for a public purpose in a responsible, non-discriminatory manner. TPP provides explicit reference to appropriate government regulation only being subject to ISDS litigation in rare circumstances. TPP countries will establish a code of conduct for ISDS arbitrators that will provide additional guidance on issues of arbitrator independence and impartiality. TPP strikes the right balance of strong, enforceable protections for eligible investments with clarified rights and responsibilities for member governments, and enhanced transparency for the Parties, for investors and for other stakeholders.

The members of the Committee who oppose including ISDS in the TPP are concerned that, despite the efforts and assurances, there remains too much potential for ISDS to be misused to attack legitimate environmental, health, and safety regulations, thereby chilling or impeding important legal protections. They are concerned that ISDS gives investors, including large multinational corporations, a special private avenue for legal challenge, outside the accountability of the host government’s established administrative and judicial procedures -- employing a system of private arbitration, where the arbitrators are drawn from the ranks of the international business community and their legal advisors, who may have less familiarity with, or less affinity for, the public policy interests that the host government is responsible for promoting and protecting, and who know they may represent investors in future cases.

These members are further concerned that, despite assurances, the most favored nation provision could be interpreted to nullify the efforts made by the U.S. Government to address some of the concerns that have arisen regarding use of ISDS procedures in the past – that under the most favored nation provision investors could take advantage of older agreements that the parties have entered into that do not contain the clarifications resulting from those efforts that are now in the TPP.

TEPAC notes that under the TPP, a Party may elect to deny arbitration under ISDS provisions to claims relating to tobacco control measures. Some members who support the ISDS provisions believe the tobacco exclusion sets the precedent of politicizing the investment protection regime, and raises the concern that the U.S. or other Parties could extend this approach to other politically sensitive investments. Some members who support this exclusion of tobacco from ISDS believe this is the outcome of a long and widespread public health effort to discourage smoking and the sale of cigarettes, in the public interest.

#### 1. Intellectual Property

Certain members of TEPAC have concerns about the Intellectual Property Chapter of the TPP, particularly as it relates to generic medicines, ISDS and government reimbursements and address

those concerns in their separate statements, below.

## 2. Sanitary and Phytosanitary Standards

As trade barriers such as tariffs have been significantly reduced, non-tariff trade barriers have become more prominent. Some members believe those protectionist policies can take many forms, from food safety standards that are not based on science to customs and border procedures that put obstacles in the path of free trade to complex regulatory schemes primarily intended to increase costs to suppliers and consumers .

Indeed, the World Trade Organization is quite cognizant of countries' use of health and safety concerns to disguise their protectionism. In its discussion of the Sanitary and Phytosanitary Agreement, the WTO warns against such use and notes how they can result in trade restrictions:

SPS measures, by their very nature, may result in restrictions on trade.

All governments accept the fact that trade restrictions may be necessary to ensure food safety and animal and plant health protection. However, governments are sometimes pressured to go beyond what is necessary for health protection and to use SPS measures to shield domestic producers from economic competition.

Such pressure is likely to increase as other trade barriers are reduced as a result of the Uruguay Round agreements.

An SPS measure which is not actually required for health reasons can be a very effective protectionist device, and because of its technical complexity, a particularly deceptive and difficult barrier to challenge.<sup>6</sup>

The negotiating objectives in the Trade Promotion Authority Act of 2015 include significant goals dealing with SPS issues in relation to trade in agriculture:

“(3) TRADE IN AGRICULTURE.—The principal negotiating objective of the United States with respect to agriculture is to obtain competitive opportunities for United States exports of agricultural commodities in foreign markets substantially equivalent to the competitive opportunities afforded foreign exports in United States markets and to achieve fairer and more open conditions of trade in bulk, specialty crop, and value added commodities by—

“(A) securing more open and equitable market access through robust rules on sanitary and phytosanitary measures that—

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<sup>6</sup> World Trade Organization, “Introduction to the SPS Agreement,”  
[http://www.wto.org/english/tratop\\_e/spse/spse\\_agreement\\_cbt\\_e/cls2p1\\_e.htm](http://www.wto.org/english/tratop_e/spse/spse_agreement_cbt_e/cls2p1_e.htm)



“(i) encourage the adoption of international standards and require a science-based justification be provided for a sanitary or phytosanitary measure if the measure is more restrictive than the applicable international standard;

“(ii) improve regulatory coherence, promote the use of systems-based approaches, and appropriately recognize the equivalence of health and safety protection systems of exporting countries;

“(iii) require that measures are transparently developed and implemented, are based on risk assessments that take into account relevant international guidelines and scientific data, and are not more restrictive on trade than necessary to meet the intended purpose; and

“(iv) improve import check processes, including testing methodologies and procedures, and certification requirements,

“while recognizing that countries may put in place measures to protect human, animal, or plant life or health in a manner consistent with their international obligations, including the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (referred to in section 101(d)(3) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(3)));

“(I) developing, strengthening, and clarifying rules to eliminate practices that unfairly decrease United States market access opportunities or distort agricultural markets to the detriment of the United States, and ensuring that such rules are subject to efficient, timely, and effective dispute settlement, including—

“(iii) unjustified sanitary or phytosanitary restrictions, including restrictions not based on scientific principles in contravention of obligations in the Uruguay Round Agreements or bilateral or regional trade agreements;”

Chapter 7 of the Transpacific Partnership Agreement deals with Sanitary and Phytosanitary Standards (SPS), that is, standards set by the Parties to apply food safety and animal and plant health measures.

The TPP specifically carries out these objectives through the following provisions:

- Refers to the WTO’s SPS Agreement and affirms those rights and obligations.
- Establishes an SPS Committee
- Requires an “equivalence” assessment to recognize equivalence of health and safety protection systems of exporting countries;
- Requires SPS standards to be based on scientific principles and refer to international standards or scientific expertise
- Ensures that standards cannot have the effect of arbitrarily discriminating between Parties
- Requires risk assessment to ensure that standards are no more trade restrictive than required to protect health and safety.
- Has right to audit exporting Party’s competent authority and inspection systems

- Allows certification requirements only to the extent necessary to protect human, animal and plant life.
- Calls for transparency, cooperation, information exchange and cooperative technical discussions
- Requires notification and review of the scientific basis for emergency measures to restrict imports.
- Has a dispute settlement procedure involving scientific or technical issues, where an Arbitral Tribunal should seek advice from experts chosen by Tribunal.

At the same time, the WTO has recognized that "trade restrictions may be necessary to ensure food safety and animal and plant health protection." Of equal importance, Chapter 29 of the TPP recognizes the right of the parties, under Article XX of the GATT 1994, to adopt environmental regulations to protect human, animal, or plant life or health and to adopt measures relating to the conservation of living and non-living exhaustible natural resources. Furthermore, Articles 20.16.14 and 20.16.15 of the Environment Chapter recognize that environmental regulations to prevent illegal trade in fisheries products, including catch or trade documentation schemes, are appropriate.

#### **IV. Membership of Committee**

<u>Name</u>	<u>Organization</u>
Joseph G. (Jerry) Block Chair	Retired Partner, Venable LLP
Kitty Block	Humane Society
Jake Colvin	NFTC
Vanessa Dick	World Wildlife Fund - U.S.
Jennifer Haverkamp*	
Rhoda Karpatkin	President Emeritus, Consumers Union
Chris Lischewski	Bumble Bee Seafoods
Amanda Mayhew	World Animal Protection
Glenn Prickett,	The Nature Conservancy
Peter Robinson	U.S. Council for International Business
Lowell Rothschild	unaffiliated
James Salzman	University of California
Jeffrey Schott	Peterson Institute
Andrew Sharpless	Oceana
Adam Siegel	Retail Industry Leaders Association
John Smirnow	Solar Energy Industries Association
Frances Smith	Competitive Enterprise Institute
William Snape	Endangered Species Coalition
Cindy Squires	International Wood Products Association
Alexander Von Bismarck	Environmental Investigation Agency
Thomas Weirich	American Council on Renewable Energy

\* recused from participation in this report

# **Attachment 1**

## **Separate Statement of Rhoda Karpatkin**

### **Implications of the TTP IP Chapter for Access to Medicines and Cost of Medicines**

The cost of health care in the U.S. is a major concern for American consumers, for our government, and for our economy. Costs to consumers continue to increase, as do costs to the federal government, most notably for pharmaceuticals purchased under government programs, including Medicaid, Medicare, and the Veterans Administration. Unaffordable costs to consumers lead to bankruptcy, preempt purchases of other essential consumer goods and services, and prevent access to the health care consumers require.

#### **Impact on generics**

Generic medicines are crucial in maintaining and expanding access to affordable medicines. The following sections of Article 18 will make medicines more expensive because they prevent or delay the entrance of generic medicines to the market during the extension period.

Article 18:37, Paragraph 2 requires that patents be made available where a new use, process, or method of a known product is claimed, including small changes in drug formulas or administration that do not improve a drug's efficacy. This allows an existing patented drug that has nearly exhausted its patent life to receive an entirely new patent term, preventing a generic from entering the market.

Article 18:48 requires that the patent term be extended to compensate owners for "unreasonable curtailment of the patent term ... as a result of the marketing approval process."

Article 18:50.1 (a) and (b), Article 18.50.2 and Article 18.52 give patented drugs additional years of protection from price competition by granting periods of data exclusivity under varying circumstances. Such exclusivity periods operate as an obstacle to getting affordable generic or biosimilar medicines into the market. Biologic drugs, now significant in cancer research, are granted 8 years of exclusivity.

#### **ISDS**

Intellectual property is a covered asset in the Investment chapter, thus enabling global pharmaceutical corporations to challenge the mechanisms that Congress, state legislatures, and public agencies use to manage pharmaceutical costs in public programs. ISDS is an avenue for global corporations to bypass normal legal channels to seek compensation for reduced profits, thus serving their interests rather than the overall national interest in assuring affordable access to medicines. Conferring such power on private ISDS arbitrators will chill and hamstring U.S. officials who must resolve issues within our constitutional system.

### **Government Decisions on Reimbursements**

Annex 26-A expands the rights of drug companies to monitor and challenge government decisions on reimbursements for drugs and medical devices. In Article 26-A-2, national health care authorities who have procedures for reimbursement, or who set the amounts, must justify decisions in writing to applicants, and allow companies to request appeals of reimbursement decisions. The section specifies the U.S. Center on Medicare & Medicaid Services as the affected authority with respect to coverage determinations. These sections give manufacturers undue leverage and opportunities to increase reimbursement rates. Customary practices, such as preferred drug lists and discounts, could be alleged to be trade violations.

## **Attachment 2**

## **Comments of the Competitive Enterprise Institute On the Trans-Pacific Partnership Agreement**

Submitted by Frances B. Smith, Competitive Enterprise Institute

### **General comments**

In responding to the mandate for the Trade and Environmental Policy Advisory Committee (TEPAC), the Competitive Enterprise Institute (CEI) believes that the Trans-Pacific Partnership Agreement carries out the objectives, including the environmental objectives, mandated by Congress in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (subsequently referred to as TPA).

The Agreement is very unlikely to have adverse effects on the U.S., either economically or environmentally. The U.S. is already an important trading partner of many of the TPP Parties.

Our reservations on the Agreement and our dissent from the TEPAC majority report stem from the Agreement's excessive reliance on environmental mandates as a direct means to advance various environmental objectives. As noted below, 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 (and might threaten other development/poverty reduction goals). Environmental goals should be pursued directly – not via restrictions to trade expansion.

In relation to the TPP and environmental goals, CEI would emphasize the importance of recognizing that higher environmental standards are best achieved through better economic and institutional conditions, and that trade and open economic systems can lead to improved economic performance, help to reduce poverty, and increase living standards for all participants. As people achieve greater wealth and more economic independence, more resources can be – and usually are -- freed up to protect the environment. This is called the environmental Kuznets curve, based after Noble laureate Simon Kuznets.<sup>7</sup> When incomes are low, there can be deterioration in environmental amenities, as people may not focus on environmental quality but concentrate on economic growth. However, as people see their incomes rise, the demand for enhanced environmental quality generally increases.<sup>8</sup>

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<sup>7</sup> [https://en.wikipedia.org/wiki/Kuznets\\_curve](https://en.wikipedia.org/wiki/Kuznets_curve)

<sup>8</sup> Bhagwati, Jagdish. 2000. On Thinking Clearly About the Linkage Between Trade and the Environment. *Environment and Development Economics* 5 (4):485; <https://reason.com/archives/2015/09/24/capitalism-makes-you-cleaner>; see also Yandle, Vijayaraghavan, and Bhattarai 2002; see more at: <http://www.perc.org/articles/property-rights-path-sustainable-development#sthash.rev5AMOG.dpuf>



Besides the exchange of products and services, economic and social ideas can also flourish through increased trade.

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

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

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 the Parties' capacity to improve the environment, strengthening these fundamentals should be encouraged.

Thus, CEI does not concur with the majority report's view that increased trade requires greater regulatory oversight of environmental issues. Trade may indeed increase the use of natural resources, such as wild fish and trees for lumber, but, in many cases, degradation of those resources is not caused by greater trade but by the lack of institutional arrangements, such as property rights, that would deal with those resources in a more sustainable way.

### **Environmental objectives**

CEI agrees with the majority report that TPP meets the environmental objectives set forth in the Trade Act of 2015.

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

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)<sup>9</sup> 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. We should build on those findings, which have the potential to significantly improve the policy recommendations of our committees.

### **Sanitary and Phyto-Sanitary Standards (SPS)**

Chapter 7 of the TPP deals with Sanitary and Phyto-Sanitary Standards (SPS). CEI dissents from the TEPAC majority in not including a statement in its Executive Summary on how the TPP in its section on SPS addresses the risk of non-tariff trade barriers, even though it is dealt with in the body of the comments.

The comments Summary is intended to be a synopsis of the important points covered in the more detailed comments. SPS is clearly an important environmental issue, for, as trade barriers such as tariffs have been significantly reduced, non-tariff trade barriers have become more prominent. These protectionist policies can take many forms, from food safety standards that are not based on science to customs and border procedures that put obstacles in the path of free trade. In the area of agriculture particularly, the U.S. has seen some countries using consumer safety as a pretext for discriminating against U.S. products.

The TPP rightly addresses this risk and specifically carries out the Congressional objectives in the Trade Act of 2015. To honor the transparency goals of TEPAC, as it is expressed in the TEPAC majority comments, the SPS section should have been noted in the Summary of the TEPAC majority report.

### **Public participation**

As does the majority of TEPAC, CEI strongly supports public participation as an integral part of the democratic political process. It is encouraging that the TPP Parties have committed to provisions that call for greater civic involvement and transparency in relation to environmental issues.

CEI, however, does not agree with the majority report that endorses a greater role for public participation in the negotiation of FTAs. Negotiators represent our elected officials, and, as such, should be able to represent the diverse views of the public. Subjecting what are delicate government-to-government talks to outside pressures while trust is being established would undermine the process.

On the issue of diversity of viewpoints among members of USTR Advisory Committees, CEI would point out that markets and property rights could be playing a much more important role in ensuring both economic and environmental goals. However, this

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<sup>9</sup> [http://www.researchgate.net/profile/Madhusudan\\_Bhattarai/publications](http://www.researchgate.net/profile/Madhusudan_Bhattarai/publications).

viewpoint is vastly under-represented on TEPAC, and, indeed, on other committees. Efforts should be made to enlist representatives of the pro-trade, free market community on these and other issues.

CEI dissents from the majority report's approval of new layers of environmental structures, such as the Environmental Committee (Article 29.19). It is critical that we focus efforts not on detailed bureaucratic and procedural approaches to environmental concerns but on building the underlying institutional frameworks that can make a real difference.

That committee would set up mechanisms and procedures for public participation relating to exchanging information, providing input for meetings, and receiving public views and comments on the issues. CEI would offer that such a framework creates a complex bureaucratic structure that may deflect the focus toward procedural and bureaucratic minutiae rather than substantive issues. In addition, it may also raise the influence of groups championing environmental values over societal ones.

### **Trade and Biodiversity**

Article 20.13 promotes the importance of conservation and the sustainable use of biological diversity and their role in achieving sustainable development. While the majority report views the inclusion of that article with approval, CEI would point out that the article fails to observe that all TPP Parties already are signatories to the Convention on Biological Diversity and to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

The majority seems confident that more forceful pressures (via trade sanctions) are suitable means of increasing the effectiveness of species protection. As I've noted on many occasions, trade policy can increase the wealth of developing nations which tends to increase *national* support for such protection. To encourage dominant TPP partners to exert their greater economic power to impose such restraints on such nations may well threaten – not protect – species.

The Agreement also fails to recognize that property rights and technological advances to produce higher yields and greater resource efficiency in agriculture are critical components in building a more sustainable future. Low economic growth and subsistence agriculture in developing countries is the greatest threat to fragile ecosystems. Stagnant economic growth and fiscal problems can exacerbate environmental problems.

While current policy does indeed view trade restrictions as critical to ensuring the survival of an array of flora and fauna around the world, some nations have experimented with expanding private ownership (to give local value to such species) which relies on foreign purchases. CEI does not believe we should foreclose such opportunities and, thus, do not support the prohibition recommendation.

Rather than seeking to block trade in all endangered flora and fauna, we should promote meaningful property rights in the developing world and encourage sustainable trade in these resources.

### **Transition to low emission economy/Climate change**

CEI dissents from the majority view that climate change should be addressed in TPP. The Congressional negotiating objectives wisely refrained from including climate change. The issue of climate change is extremely complex and not easily dealt with through policies that may have unintended consequences on those countries least able to deal with those. Numerous international, multi-lateral, and bi-lateral fora exist to deal with that issue, as outlined by EPA.<sup>10</sup> In addition, the G20 meetings are increasingly focusing on climate change.

Given the disparate consequences of climate change – and the policies proposed to address it – and the great differences in Congress on this topic, the TPA objectives explicitly ruled out coverage of this topic in the TPP. This recommendation would exceed TEPAC's charter and may weaken the acceptability of our other recommendations.

CEI is also concerned that the TEPAC majority's view that more resources be devoted to such areas as development of renewable energy sources, sustainable urban infrastructure, and emissions monitoring among others could be counter-productive and mirror some of the problems arising from programs such as ethanol.<sup>11</sup>

### **Fisheries**

CEI agrees with the TEPAC majority report that subsidies to fishing fleets and their infrastructure has contributed significantly to over-fishing the oceans. However, CEI is disappointed that the majority report, in its discussion of the depletion of marine resources, recommends "command and control" approaches to fisheries management, rather than the exploration of property rights in fisheries, which approach has already shown its value. Again, economic aid is less important than the steps that only the partner nations can take – specifically extending to fisheries the property rights protections that have done so much to protect fisheries in New Zealand and elsewhere. Moreover, the majority view that tightening import restrictions on imports of species viewed as threatened contradicts the whole goal of trade treaties. Such provisions should have been mandated by Congress if our Committee were to comment in this manner.

As researcher Donald Leal has noted:

A growing body of research reveals that fisheries that have adopted rights-based management strategies achieve sustainable catches and profits. As with other natural resources, the ideal

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<sup>10</sup> <http://www3.epa.gov/climatechange/EPAactivities/internationalpartnerships.html>

<sup>11</sup> CEI Issue Analysis, Frances B. Smith, "Corn-Based Ethanol: A Case Study in the Law of Unintended Consequences," June 2007.

approach is to establish well-defined, enforceable, and transferable property rights in the resource itself. But this approach has been slow to develop because, unlike land, most marine species are mobile and access is difficult to monitor. For now, specifying rights in either the harvest of fish or in the area of harvest has proven more feasible. . . . Economists have documented the economic benefits from implementing these approaches, such as higher fishing incomes, better product quality, and lower fishing costs. Using a global data base, scientists reported in *Science* in 2008 that such approaches have the wherewithal to halt and even reverse the global trend in stock depletion. Once these approaches are adopted, the next phase of property rights evolution in fisheries may well entail the assumption of management rights and duties by fishers themselves. This has been a historical feature of some community-oriented coastal fisheries, and it has now emerged in New Zealand in some ITQ fisheries.<sup>12</sup>

### **Investment Provisions**

In dissenting from the TEPAC majority report on the investment provisions in the TPP, CEI would like to address a broader issue. We would point out that concerns about investments are better dealt with in a separate investment agreement--if countries wish to do so--but should not necessarily be part of a trade agreement.

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

The provisions in the TPP regarding the definition of investment and what would constitute an "expropriation" might or might not be an improvement from previous approaches; 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.

### **Funding Issues**

CEI dissents from the TEPAC majority recommendation that increased funding be appropriated to enforce this agreement. Such funding would extend trade-related "aid" to other nations, expanding the scope and scale of foreign aid. This is a separate issue from trade and, in my view, has no place in this report. If nations wish to support this treaty, it is their responsibility to take steps to ensure it is operative.

### **Some Issues with the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA)**

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<sup>12</sup> PERC Report: Volume 28, No. 2, Donald Leal, Summer 2010.

The 107-page TPA legislation sets out the principal negotiating objectives for all U.S. trade agreements and deals with a host of trade-related and other issues, including intellectual property, investment, labor and environment issues and capacity building in those areas, promotion of sustainable development, currency practices, as well as beefed-up procedures for consultation with Congress. During the extended consideration of TPA, many policymakers brought up other non-trade issues that should be included in the legislation.

These ever-expanding demands show what happens when trade agreements are steered away from their primary purpose and get captured by special interest groups. It is a continuing onslaught on trade agreements as repositories for non-trade issues. Including those issues introduces unneeded complexities and special interests' pleadings. Many of those issues have their own international fora specifically designed to consider those specialized areas. In addition, including numerous extraneous issues creates much more contentious debate on trade agreements and almost makes trade an extraneous issue in trade agreements.

Trade involves an exchange of goods and services by buyers and sellers that benefits both parties. Increased trade can lead to economic growth for all parties to trade agreements. That growth can lead to improved labor conditions and environmental improvements. Derailing agreements by forcing other issues to be equally considered can curtail that growth and indeed impede progress in those other areas.

## **Attachment 3**

Snape and Karpatkin Appendix to TEPAC Report  
December 1, 2015

Many of us began our journey in the field (and sea) of “trade and the environment” when the first tuna-dolphin decision by the General Agreement on Tariffs and Trade (GATT) was leaked in early 1991. Almost a quarter-century later, I hereby submit my first individual TEPAC statement to the President “on behalf” of a coalition of environmental, conservation, scientific, animal rights and related groups, as part of my legal commitment to provide advice on the Trans-Pacific Partnership (TPP). The TEPAC report is filed, as required by Congress, ironically just days after the latest tuna-dolphin decision by the World Trade Organization (WTO); this recent appellate panel inexplicably rejected a non-discriminatory and environmentally-valid U.S. dolphin conservation law. *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/RW, 20 November 2015 (hereinafter “*United States – Tuna/Dolphin Measures*”).

While the Dispute Settlement panels under TPP would, by definition, be different than the WTO panels that decide cases such as *United States – Tuna/Dolphin Measures*, the legal principles governing both are virtually identical, particularly with regard to GATT Articles I, III, and XX and the WTO TBT, SPS and Subsidies Codes. Thus, within the rigid and frequently severe confines of existing interpretation of international trade law, as encompassed by the WTO and TPP, I believe the United States Trade Representative (USTR) and his talented staff have done a commendable job in attempting to incrementally reconcile massive international trading demands with any notion of economic or ecological sustainability.

One illustrative area is the TPP Investment Chapter, described with more detail in the overall committee report. USTR has successfully pushed to clarify language protecting legitimate domestic (federal and sub-federal) environmental laws from private investor attack. What USTR has not done, and perhaps could not do, is question and change the concept of powerful private multinational corporate interests suing governments for large sums of money in the first place, a waiver of sovereign immunity historically unprecedented in international law. Worse yet, not only is this “second bite at the legal apple” foreclosed to civil society, i.e., there is no comparable authority for a non-government charitable organization to sue another government, but civil society also must rely upon a completely discretionary “amicus” procedure to defend these types of industry attacks. If we are going to enshrine this type of supra-jurisdictional forum for capital interests, a concept I personally question outside direct expropriation, then we at least need to open this process up completely to all interests (e.g., grant intervenor status to civil society parties, akin to U.S. Federal Rules of Civil Procedure).

The one-sided nature of multilateral and regional trade agreement tribunal procedures is not limited to “investment” disputes. In country to country disputes, such as *United States – Tuna/Dolphin Measures*, WT/DS381/AB/R (16 May 2012), civil society is also denied open access to arbitral panel proceedings. *Id.* ¶18. This results in panel decisions with obvious deficiencies in scientific, conservation or related matters. See, e.g., *United States – Tuna/Dolphin Measures* (20



November 2015)(panel repeatedly failing to understand or appreciate the unique biological associations of the Eastern Tropical Pacific Ocean). The TPP, like the WTO, would maintain an arbitral panel's discretion to reject civil society submissions during a dispute. Similarly, and again *United States – Tuna/Dolphin Measures* is emblematic, the TPP maintains the WTO model of interpreting a) non-discrimination and b) national treatment in ways that unfairly target domestic and multilateral environmental measures. This central problem, in my view, infects many TPP chapters and provisions in addition to the Environment: Technical Barriers to Trade, Sanitary and Phytosanitary Standards, Financial Services, Electronic Commerce, Government Procurement, Regulatory Coherence, Subsidies, and others. Much has been written about these topics in the literature, and I will not here repeat them.

In sum, not all legal trade is good or free. Not all legal trade is environmentally sustainable. Further, we still don't place adequate commitment and resources into stopping illegal trade, though I recognize the effort with some of the TPP provisions discussed in the overall report. We know that international trade significantly increases greenhouse pollution with concomitant climate change impacts, and also subjects native ecosystems to extremely harmful invasive exotic species. Ultimately, international trade law must recognize when more trade is bad policy.

Although we may not always agree, I want to thank the many individuals at USTR who have worked diligently on the TPP and with this Committee. I also want to thank TEPAC Chair Jerry Block for his leadership.

Respectfully submitted,

William John Snape, III  
Member, U.S. Trade and Environment Advisory Committee (TEPAC)  
Chair Emeritus and General Counsel, Endangered Species Coalition  
Senior Counsel, Center for Biological Diversity  
Professor and Practitioner in Residence, American University, Washington College of Law

Rhodah Karpatkin  
President Emeritus, Consumers Union

## **Attachment 4**

## **TEPAC: WWF-US Annex**

*WWF-US offers the following annex as points of clarification on specific issue areas.*

### ***Trade in Species and Parts***

The TPP eliminates tariffs on products meeting the rules of origin that are traded between the TPP countries, including tariffs on a number of critically endangered or overfished species and species parts. This raises the very real concern that U.S. producers will be competing with products from countries where resources are poorly managed and illegally harvested. In addition, in the absence of effective resource and wildlife management and enforcement of national and multilateral conservation obligations, tariff reduction under the TPP will be an additional factor driving global depletion. This highlights the importance of effective implementation of the TPP conservation obligations, particularly on illegal natural resource trade and sustainable fisheries management, including working with TPP partners to implement shark conservation measures, including finning bans.

In addition, Article 20.17.2 requires the Parties to adopt, maintain and implement laws, regulations and other measures to fulfill its obligations under CITES, but only insofar as it affects trade or investment between the Parties. Given that legal trade in CITES Appendix 1 listed products amongst TPP Parties is very limited, the requirement that a violation affect “trade or investment between the Parties” may be a difficult threshold to meet. For example, the only legal ivory trade is limited to bona fide antiques, certifiable pre-Convention items and ‘personal effects.’ In 2014, the legal worked ivory trade between TPP countries was limited to 15 small shipments of ivory carvings, primarily between Australia and New Zealand. A country’s failure to effectively implement CITES should trigger a TPP violation even in the absence of direct trade between the Parties in the product. Otherwise, the CITES provision in TPP may offer little assistance in addressing some of the most crucial impacts of trade on wildlife, such as rhino horns illegally sourced in Africa and exported to Vietnam.

### ***Investor-State Dispute Settlement***

Serious concerns have been raised about the Investor State Dispute Mechanism (ISDS), which allows foreign investors to bring claims directly against host governments in the event that they believe they have not received adequate protections under the country’s laws and regulations. It is critical that ISDS should not be used as a means to undermine environmental regulations, and ISDS claims should be met with strong safeguards that protect a country’s right to regulate for environmental objectives.

### ***Potential Regulatory Impacts***

The ability of U.S. government authorities to revise or introduce new environmental laws or regulations is essential. However, in assessing new regulations it is not only difficult to

quantify environmental risks and costs but also the benefits from ecosystem services and natural capital. The implementation of cost-benefit analysis in regulatory impact assessments encouraged (although not required) by the TPP raises the issue of measuring the benefits of environmental regulations. The TPP text recognizes that some costs and benefits are difficult to quantify and monetize. The risk is that consistent underestimation of the net benefits from environmental regulations potentially undermines the implementation of effective and essential protections for ecosystems, threatened species and biodiversity in the United States and other TPP countries.

### ***Environmental Review***

The TPP Interim Environmental Review (IER) was released by USTR in August 2013 and a number of comments were submitted by September 25, 2013. WWF notes the importance of the Environmental Review for carefully assessing and considering the impact of trade agreements on the environment in order to inform the negotiations. However, the TPP IER, while helpful descriptively, did not appear to be well integrated into the development of US positions across the range of TPP negotiating issues.

In addition, the analysis undertaken for the Environmental Review does not use available econometric models to generate information on CO<sub>2</sub> emissions, climate change, air pollution, materials use and waste,<sup>13</sup> or the impact on biodiversity loss.<sup>14</sup> Instead, the IER concludes that the overall adverse impact of the TPP on the environment in the United States resulting from changes in the pattern and magnitude of trade and production will not be significant, largely because the increase in U.S. exports would represent only 0.6% of U.S. production.

We observe that resource constraints may limit USTR's ability to quantify environmental impacts, but believe that the IER should note that an apparently small increase in percentage terms can have a large absolute value that may better reflect the potential environmental impact from increased resource use and pollution and that even a small increase in risk can bring with it significant impacts. We also note that the general conclusion that the environmental impacts from the TPP will be limited because tariffs are already low is unsupported. If successful, the TPP will expand trade through reductions in non-tariff barriers and easier trade facilitation that drives market expectations for growth.

We commend USTR for identifying key potential adverse impacts both domestically as well as considering global and trans-boundary impacts. These non-U.S. environmental impacts are likely to be the most significant impacts on the environment from the TPP, given the size of the U.S. and Japanese markets for a wide range of natural resources and wildlife sourced in the TPP countries, as well as for products whose footprint comes with high costs to biological diversity and ecosystems.

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<sup>13</sup> E3ME model from Cambridge Econometrics

<sup>14</sup> Biodiversity Threats from International Trade. Nature. 2012. University of Sydney input-output model.

For example, the IER notes the current deforestation and other ecosystem pressures from palm oil plantations in Malaysia that produce largely for export. The United States does not have tariffs on palm oil imports so the marginal impact from the TPP may be assumed to be limited. However, this analysis does not appear to account for tariff reduction in other TPP countries, the reduction in non-tariff barriers, or the development of new supply chains arising from general trade facilitation. Without sustainable palm oil production, such increased production will lead to further threats to forests and peat lands in Malaysia.

## **Attachment 5**

## **TEPAC: EIA Annex**

The Environmental Investigation Agency offers the following points on the TPP agreement:

### **Illegal Trade of Fauna and Flora:**

An overall increase in trade results in an increase in illegal trade in flora and fauna, or trade in "stolen" natural resources, unless strong measures are enacted to actively prevent it. The TPP, for the first time in the history of trade among nation states contains a principle that has the potential to counteract some of the negative effects of liberalizing trade and refers to the need to prohibit trade in stolen natural resources. The principle reflects an emerging new international standard that is absolutely critical for the future responsible management of the world's environment. The TPP includes this emerging norm by requiring that "each Party shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of that Party's law or another applicable law."

This follows action by major markets around the world, including the United States, the European Union, and Australia to expressly forbid the import of illegally sourced wood. For the TPP to be part of this positive global movement toward shutting down the market for stolen natural resources, the Parties must adopt clear prohibitions on such illegal trade in both flora and fauna as well as strong sanctions, penalties, and enforcement that will deter future trafficking in poached or illegally harvested timber, wildlife and fish. If fully implemented and strongly enforced, this commitment could signal that even free trade agreements will work to stop trade in stolen forests, fish, and endangered species, which would be a great step forward.

### **Implementation and Enforcement:**

While stronger provisions have been included in the environment chapters of FTAs that the United States has negotiated in the years since the May 10th Agreement, we have no evidence that these are being enforced. To the contrary, under the terms of the Peru FTA, for example, we have documented a systemic lack of enforcement leading to any tangible consequences, even in the face of irrefutable evidence that the illegal timber harvest and trade continues unabated.

We strongly support the comments in the TEPAC report that stress the need for adequate resourcing by the United States and all Parties and commitment to strong implementation and enforcement. This will be an essential element if the potential within many of the provisions in the environment chapter will have an impact beyond the words on the page.

### **ISDS:**

The TPP as a whole has serious implications for the environment above and beyond trade. In particular the investor state dispute settlement (ISDS) provisions allow corporations to sue governments in private tribunals over legitimate regulatory action to safeguard natural resources. Despite some changes to the text, the underlying mechanism and the danger it poses remain intact.

### **Halting Commercial Whaling:**

Since the May 10<sup>th</sup>, 2007 bipartisan trade deal, the International Whaling Convention (IWC) has been included in as a commitment for all FTA Parties to adopt, maintain and uphold obligations under this agreement. The United States has been a lead champion for whale conservation and ending the commercial trade, yet as the United States looks to enter into an agreement with Japan through the TPP, the language around whales no longer references the IWC, but instead commits countries to "promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures. Such measures should include, as appropriate... conservation and relevant management measures, prohibitions, and other measures in accordance with relevant international agreements to which the Party is party."

Last year the International Court of Justice (ICJ) found in Australia's favor in an IWC case, and ordered Japan to cease whaling in the Antarctic. However, in recent months, Japan has decided to resume these commercial whaling practices and challenge this and any future ICJ rulings by calling into question its jurisdiction, saying it "does not apply to ... any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea."

While we appreciate that the TPP language expands the scope of focus to marine mammals beyond whales, the urgency to protect whales is mounting at this time, not diminishing – and yet this TPP provision appears to have weaker enforcement potential than the FTAs with previous reference to the IWC commitments. The key point is that actions to protect whales and halt commercial whaling are prioritized and effectively enforced, and we urge the U.S. to direct resources and policy prioritization towards monitoring and enforcement to stop commercial whaling.