

September 27, 2018

The Honorable Robert E. Lighthizer  
United States Trade Representative  
600 17<sup>th</sup> Street, N.W.  
Washington, D.C. 20508

Dear Ambassador Lighthizer:

In accordance with section 105(b)(4) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, and section 135(e) of the Trade Act of 1974, as amended, we are pleased to transmit the report of the Trade and Environment Policy Advisory Committee on the renegotiation of the North American Free Trade Agreement.

Sincerely,



Jeffrey J. Schott  
Co-Chair  
TEPAC



Glenn Prickett  
Co-Chair  
TEPAC

**North American Free Trade Agreement 2018**

Report of the  
Trade and Environment Policy Advisory Committee

September 27, 2018

September 27, 2018

Trade and Environment Policy Advisory Committee (TEPAC)

**Advisory Committee Report to the President, the Congress, and the United States Trade Representative on the Draft Text of the Negotiation of the North American Free Trade Agreement 2018.**

**I. Purpose of the Committee Report**

Section 105(b)(4) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, ("Bipartisan Trade Act"),<sup>1</sup> 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, as amended,<sup>2</sup> not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

The report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, as amended by the Trade Facilitation and Trade Enforcement Act of 2015.<sup>3</sup> The report of the appropriate sectoral or functional committee must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Trade and Environment Policy Advisory 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. In this instance, some TEPAC members experienced delays in gaining access to the agreement text. Negotiations continued throughout the 30-day period during which we were required to write our report, and some parts of the agreement were not available for review or were still in bracketed text. As it has for over a

---

<sup>1</sup> 19 U.S.C. § 4204(b)(4).

<sup>2</sup> *Id.* § 2155(e)(1).

<sup>3</sup> *Id.* § 2155(e)(2)(contents of report), *id.* § 4201(a)(5),(7), (15); § 4201(b) (10), (22) (negotiating objectives related to the environment).

decade, TEPAC unanimously recommends that Congress consider increasing this review period to at least 45 days. Alternatively, the 30-day deadline for submitting reports should start when the text is presented to Congress, not when USTR notifies its intent to sign a deal but is still in the midst of negotiations. Congress should consider revisions in US law to that end if it wants thoughtful and complete advisory committee reports.

More broadly, many TEPAC members remain concerned that there is an inadequate level of transparency and public participation during the negotiation of trade agreements. 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.

TEPAC's role in the trade advisory committee system contributes important 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 agreements to have an effective voice during the negotiations.

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. 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. TEPAC recommends that that USTR include members with diverse viewpoints on all of its advisory committees.

## **II. Executive Summary of Committee Report**

Provided the Trade Agreement is a tripartite agreement that includes Canada and Mexico, TEPAC finds the agreement as a whole will contribute to improved environmental outcomes by building on the environmental provisions of NAFTA 1994. While it misses some important opportunities to advance sustainable development, the draft text we have examined largely meets the environmental objectives established by Congress in the Bipartisan Trade Act of 2015. It also includes several welcome new environmental initiatives e.g., to reduce marine litter, a prohibition on commercial whaling, enhanced language on IUU and sustainable fisheries management, and sustainable forest management, that will contribute to better environmental management in North America and beyond. Our report highlights where the pact advances environmental interests and where it is deficient.

## **III. Brief Description of the Mandate of TEPAC**

The TEPAC is a trade advisory committee established to provide general policy advice to the United States Trade Representative on trade policy matters that have a significant impact on the environment. More specifically, the TEPAC provides general policy advice on issues including: (1) negotiating objectives and bargaining positions before entering into trade agreements; (2) the environmental impact of the implementation of trade agreements; (3) matters concerning the

operation of any trade agreement once entered into; and (4) other matters arising in connection with the development, implementation, and administration of the trade policy of the United States.

#### **IV. Negotiating Objectives and Priorities of TEPAC**

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, as amended, Congress elucidated the principal trade negotiating objectives related specifically to environmental matters:<sup>4</sup>

(10) (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 4210(6) of this title) 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 non-tariff 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

---

<sup>4</sup> *Id.* § 4201(b) (10) (Labor and the Environment) and (22) (Fisheries Negotiations).

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.

\*\*\*

(22) (B) to eliminate fisheries subsidies that distort trade, including subsidies of the type referred to in paragraph 9 of Annex D to the Ministerial Declaration adopted by the World Trade Organization at the Sixth Ministerial Conference at Hong Kong, China on December 18, 2005; (C) to pursue transparency in fisheries subsidies programs; and (D) to address illegal, unreported, and unregulated fishing.

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, three environmental objectives appear in Congress' overall negotiating objectives:<sup>5</sup>

(5) 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;

\*\*\*

(7) 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.

\*\*\*

(15) to ensure that trade agreements do not establish obligations for the United States regarding greenhouse gas emissions measures, including obligations that require changes to United States laws or regulations or that would affect the implementation of such laws or regulations, other than those fulfilling the other negotiating objectives in this section.

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

(A) conduct[ing] environmental reviews of future trade and investment agreements consistent with Executive Order 13141 dated November 16, 1999, and its relevant guidelines; and

---

<sup>5</sup> *Id.* § 4201(a).

(B) report[ing] ... to the Committees;<sup>6</sup> and promot[ing] consideration of multilateral environmental agreements and consult[ing] with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing environmental exceptions under Article XX of the GATT 1994.<sup>7</sup>

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, trade agreements should "ensur[e] that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States .... "<sup>8</sup>

On June 28, 2017 the TEPAC submitted its recommendations for modernizing NAFTA to USTR. In that paper, we highlighted the importance of specific objectives related to environment and trade. These included

1. Make environmental obligations subject to dispute resolution
2. Improve regional marine conservation, including leveling the playing field for the seafood trade, requiring high standards of ecosystem-based fisheries management, projectecting marine mammals and sea turtles, and conserving sharks and eliminating the fin trade.
3. Ensure only legal trade in flora and fauna
4. Ensure only legal trade in wood products, including requiring traceability, improving coordination of enforcement actions and information-sharing and addressing deforestation and forest degradation
5. Protect against invasive species
6. Support transformative climate change and energy policies
7. Improve compliance with Multilateral Environmental Agreements (MEAs) such as CITES and strengthen and maintain environmental laws
8. Cross-border truck pollution
9. Enhance the institutional framework and capacity for environmental cooperation.

The Committee also proposed an extensive set of changes related to Investor-State Dispute Settlement (ISDS), although members were not unanimous as to their views regarding ISDS.

## **V. Advisory Committee Opinion on Agreement**

We welcome the opportunity to review a draft of multiple chapters of a new trade agreement between the United States, Mexico and potentially Canada. It is our profound hope that it will be a trilateral rather than just a bilateral US-Mexican agreement. Canada and the United States have had extraordinarily close relations since the settlement of boundary disputes in the 19<sup>th</sup> century, due to the proximity of our large land masses, the natural intertwining of our market-oriented

---

<sup>6</sup> *Id.* § 4204(d)(1).

<sup>7</sup> *Id.* § 4201(c)(3).

<sup>8</sup> *Id.* § 4201(b)(4).

economies, the movement of our citizens, the sharing of air and water resources and, of course, our shared values, similar heritages and shared experiences in conducting the great wars of the 20<sup>th</sup> century and ongoing intelligence operations. The reasons that have justified the updating of the 1993 NAFTA, including new or revised provisions dealing with enforcement, intellectual property rights, digital age services and the environment, apply to our relations with Canada as well as with Mexico, and their effectiveness will be sorely compromised if the new agreement does not include Canada as well as Mexico.

TEPAC's special concern is the environment, management of natural resources and the emissions consequences of the use of energy. The environmental and natural and energy resources of the United States and Canada and the use and management of those resources are intimately and inextricably interconnected. Neither polluted air and water nor wildlife species respect our boundaries. The management of natural resources, such as fisheries and forests, and use of energy and its impacts by the United States, immediately have consequences for Canada with most of its population living within 50 miles of our long, shared border, and conversely. The carefully crafted Chapter 24 on the Environment relating to standards and enforcement, protection of marine environment, domestic and transboundary air pollution, trade and biodiversity, exotic species, sustainable fisheries management, conservation of marine species, sustainable forest management, and investment in environment goals and services, including clean technology, will accomplish those laudable objectives effectively and efficiently only with the participation of Canada as well as Mexico. The eminently valuable provisions of Chapter 8 regarding gradual harmonization of energy efficiency test procedures and then energy performance standards with a view to advancing shared goals of improved energy efficiency and facilitation of shared investments and trade in environmental and energy goods and services will likewise be truly effective on a continental scale only with a trilateral agreement.

We understand that there are some complex and challenging issues that remain that the US and Canada are continuing to negotiate in good faith, and we encourage and applaud those efforts. We recognize that trade arrangements in agricultural goods, including dairy products, may be contentious. We hope that they can be resolved, not only for reasons of enhanced trade and investment in agriculture but also because their resolution enhances the feasibility of shared pursuits of agricultural sustainability measures relating to nutrients, methane and other transboundary matters.

#### **A. Compliance with Congressional Objectives**

TEPAC finds the Trade Agreement substantially achieves Congress's specific environmental negotiating objectives.

##### Multilateral Environment Agreements (MEAs)

TEPAC finds the Trade Agreement to be consistent with the congressional negotiating objectives on Multilateral Environmental Agreements. The Agreement explicitly addresses parties' obligations under CITES (Article X.22), the Montreal Protocol (Art. X.9), MARPOL (X.10). It addresses the Ramsar Convention indirectly in Article X. 22, paragraph 4; CCAMLR and IATTC through the fisheries provisions; and the International Whaling Convention through the prohibition on killing of great whales in Article X.19.



### Non-derogation and effective enforcement

The Trade Agreement includes provisions requiring non-derogation and effective enforcement of existing environmental laws. It clarifies in footnote that “in a manner effecting trade” be interpreted broadly to refer to persons or industries engaged in trade, thereby avoiding the need for an arbitrary level of impact to be determined in order to establish violation of the non-derogation requirement.

### Dispute resolution

The Environment Chapter is subject to dispute resolution. TEPAC therefore finds that it is consistent with Congress’s mandate and TEPAC’s earlier recommendations.

### Fisheries

The Agreement’s provisions relating to fisheries negotiations satisfy in significant part, but not completely, the mandate of the Bipartisan Trade Act to address fisheries subsidies that distort trade, to pursue transparency in fisheries subsidies programs, and to address illegal, unreported, and unregulated fishing.

#### *Eliminate Fisheries Subsidies That Distort Trade*

Congress established the objective to “eliminate fisheries subsidies that distort trade, including subsidies of the type referred to in paragraph 9 of Annex D to the Ministerial Declaration adopted by the World Trade Organization at the Sixth Ministerial Conference at Hong Kong, China (“Hong Kong Declaration”).”<sup>9</sup> The Hong Kong Declaration, in turn, called on nations to “strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing.”<sup>10</sup>

Article 20 of the Agreement, “Fisheries Subsidies,” addresses Congress’ negotiating objective directly by prohibiting subsidies for fishing that negatively affects fish stocks that are in an overfished condition,<sup>11</sup> and indirectly by prohibiting “subsidies provided to a fishing vessel or operator” while listed for illegal, unreported, or unregulated (“IUU”) fishing.<sup>12</sup> These prohibitions address one of the most significant threats to the marine environment, together with global climate change and plastics pollution. Their terms are broad enough to encompass a wide range of harmful subsidies, but definite enough to allow for effective enforcement. Moreover, these terms improve upon the terms that the United States negotiated in the TPP, notably by including fishing vessel operators, as well as vessels, in the prohibition on subsidies for IUU fishing. Nevertheless, the terms fall short of the full ambition of the Hong Kong Declaration, because they do not prohibit all forms of fisheries subsidies that contribute to overcapacity and overfishing. Notably, the terms do not address subsidies that negatively affect the sustainability of a fish stock that is not yet overfished.

While the Agreement does not have binding provisions aimed at expanding the scope of prohibitions for fisheries subsidies that contribute to overcapacity and overfishing, it does call

---

<sup>9</sup> *Id.* § 4201(b)(22)(B).

<sup>10</sup> Annex D, para. 9, WT/Min(05)/Dec, (Dec. 22, 2005).

<sup>11</sup> Agreement Ch. 24, Art. 20.1(b).

<sup>12</sup> *Id.* Art. 20.1(a).

upon the Parties to make “best efforts” to refrain from introducing new fisheries subsidies that contribute to overcapacity and overfishing and that are not expressly prohibited in the Agreement, and from extending or enhancing such existing subsidies,<sup>13</sup> as did the TPP. It also advances beyond the TPP by requiring that the Parties “shall” work in the WTO towards strengthening rules on fisheries subsidies.<sup>14</sup>

#### *Pursue Transparency in Fisheries Subsidies Programs*

The Hong Kong Declaration also called upon nations to increase transparency for fisheries subsidies that contribute to overcapacity and overfishing.<sup>15</sup> Article 20 of the Agreement satisfies the transparency negotiating objective by building on the transparency provisions included in the TPP, requiring subsidies notifications as well as notifications of lists of vessels and operators engaged in IUU fishing.<sup>16</sup>

#### *Address IUU Fishing*

The Agreement satisfies Congress’ negotiating objective to address IUU fishing both through the IUU terms of Article 20, discussed above, as well as through the provisions of Article 21 “Illegal, Unreported, and Unregulated (IUU) Fishing.” Article 21 builds on the TPP, by including similar requirements to “combat” IUU fishing, but specifically identifying the requirement to take actions consistent with the Port State Measures Agreement. Article 21 also establishes new requirements for vessel documentation and transparent registry data. Nevertheless, the Agreement falls short of TEPAC’s recommendation that the Parties commit to “adopt, implement, and effectively enforce” the Port State Measures Agreement.

### **B. Additional Environment Chapter Obligations**

In addition to meeting Congress’ negotiation objectives, as described above, the Agreement contains a number of other provisions directly and indirectly affecting environmental issues and additional TEPAC recommendations, as described below.

#### Marine provisions beyond the listed MEAs

In addition to addressing Congress’ specific negotiating objectives related to fisheries, the Agreement builds on work done in the TPP and addresses four other important marine conservation issues.

#### *Marine Litter*

In an important new provision, addressing an issue not covered by the TPP, Article 12 of the Agreement recognizes the importance of taking action on marine litter, including plastics and microplastics. Marine plastic pollution is gaining recognition as one of the most serious threats to the oceans, so requiring Parties to “take action to prevent and reduce marine litter” is a significant step for this Agreement to address the problem. In addition, Article 12 specifically recognizes that abandoned, lost, or otherwise discarded fishing gear (“ghost gear”) is a significant problem to be addressed, as had been recommended by TEPAC. However, Article 12

---

<sup>13</sup> *Id.* Art. 20.3.

<sup>14</sup> *Id.* Art. 20.10.

<sup>15</sup> Annex D, para. 9.

<sup>16</sup> Agreement, Ch. 24, Art. 20.7-9.

could have been strengthened by requiring specific commitments from the parties to take concrete measures to address the problem.

### *Marine Wild Capture Fisheries*

The short article recognizes the importance of fisheries conservation measures while also recognizing the importance of basing such measures on science and consulting with the other Parties on such measures when they restrict trade. In our view, the article should have encouraged the parties to devote additional resources to fisheries conservation.

### *Sustainable Fisheries Management*

Article 18 builds on TPP provisions addressing overfishing, fish stock recovery, and bycatch. Significantly, it adds requirements for each Party to adopt or maintain measures against commercial fishing with poison or explosives and to adopt or maintain measures designed to prohibit shark finning (though it notably does not require that sharks be landed with fins naturally attached). It also adds a non-binding commitment addressing cooperation to protect marine habitat from adverse impacts from fishing. The article addresses many of TEPAC's initial recommendations, but falls short in several areas. TEPAC continues to counsel that the measures for a sustainable fisheries management system be made binding rather than hortatory, including having a binding provision for protecting marine habitat. TEPAC is also disappointed that the article fails to include TEPAC's recommendation of an explicit commitment to monitor and report all catch, landed or discarded, including through electronic monitoring.

### *Conservation of Marine Species*

Article 19 builds on TPP provisions addressing the conservation of sharks, sea turtles, seabirds, and marine mammals. Most significantly, paragraph 2 prohibits the commercial killing of great whales "unless authorized by a multilateral treaty to which the Party is a party." This provision is particularly important should Canada join in the Agreement, since Canada is not a party to the International Whaling Convention. Paragraph 1 also improves on the TPP by calling out specific examples of important measures to promote long-term conservation of marine species, including, for example, studies and assessments on the impact of fisheries operations on non-target species and their habitat and gear-specific studies on their impacts on non-target species. However, this article falls short of the level of ambition that TEPAC called for in its recommendations, for it does not, among other things, (1) require time and area closures, (2) include an explicit, stand-alone prohibition on take for commercial purposes and trade and transit in their products of sea turtles and all marine mammals, or (3) require that the data collection and studies be performed by an independent body.

### Trade in flora and fauna

The commitments related to conservation and trade in the revised NAFTA text satisfy, to some extent, TEPAC's prior recommendations on this subject. The agreement requires enhanced shipping inspections to interdict illegal wildlife trade and requires parties to treat transnational wildlife trafficking as a serious crime. TEPAC is also pleased to see commitments by the parties to protect domestic fauna and flora, strengthen governmental capacity for conservation, and share information on strategies and best practices for combating illegal trade in wildlife and wild plants. And while the text does require the parties to "take measures to combat and cooperate to

prevent” trade in products taken in violation of the laws of the source country, TEPAC is disappointed that the parties failed to commit to “prohibit” such trade, as well as the possession and transport of such products as TEPAC had previously recommended. In addition, TEPAC would have liked to see mandatory commitments related to the transshipment of illegally traded or taken products, as well as inclusion of concerted demand reduction efforts for wildlife products and commodities which are grown or manufactured unsustainably or at great cost to local wildlife populations. Demand reduction is a critical piece of trade-related conservation efforts. Finally, TEPAC notes that the effectiveness of any commitments to curb illegal wildlife/natural resources trade and protect wildlife will hinge on their implementation. New laws and/or regulations may be required, and sufficient resources dedicated to capacity building and enforcement are critical.

### Wood products

We are pleased to see provisions which require all Parties to take specific measures to stop the trade in illegally logged wood and wood products. Illegal logging remains an acute danger to the environment and the economic future of many developing countries as well as a threat to forestry jobs in the United States. It is also a significant source of finance for organized crime. Mexico, Canada and the U.S. are all major players in the international wood trade and therefore have a critical role to play, by prohibiting such trade in their own markets, in sending global signals that the market for stolen wood is shrinking.

We are also pleased to see strong support for sustainable forest management in the agreement, which notes that forest products, when sourced from sustainably managed forests, contribute to global environmental solutions, including sustainable development, conservation and sustainable use of resources and green growth. We support the provisions of the agreement that seek to promote sustainable forest management and promote trade in legally harvested products. We also note the inclusion of provisions to enhance the effectiveness of inspection of shipments containing wild fauna and flora, and to better enable forest products to move through all inspections with appropriate efficiency. To implement these measures, we support the development of electronic CITES certificates that allow for pre-shipment approval or disapproval to streamline the port inspection process and conserve port inspection resources.

### Invasive species

TEPAC is pleased to see that the revised NAFTA text acknowledges that threats from the proliferation of invasive species and calls for information exchange between the Parties regarding all stages of combating invasive species. TEPAC is disappointed, however, that the Parties’ commitments are limited to information exchange and do not require the Parties to take affirmative steps to address invasive species.

### Climate Change and Energy

TEPAC members regret that the revised NAFTA text does virtually nothing to directly address the challenges to trade, growth, and the environment posed by global warming. There is a preponderance of scientific evidence that human-induced climate change caused by greenhouse gas (GHG) emissions represents a serious threat to human health, economic activity, and the

environment.<sup>17</sup> The risks posed to the countries of North America by global warming of 2 degrees C or more above a preindustrial baseline include: increased stress on water resources; decreased agricultural activity; and increased frequency and severity of extreme weather events, including droughts, floods, forest fires and hurricanes, with resultant impacts on human health, productivity, and infrastructure.<sup>18</sup>

The NAFTA countries are all party to the UNFCCC and should be encouraged to continue to pursue cooperation in alignment with that treaty. Trade accords like NAFTA can and should be a part of cooperative efforts by each country to mitigate these problems. Unfortunately, the revised NAFTA fails this important test; indeed, it represents a step backward from the limited and in our view inadequate provisions of the Trans-Pacific Partnership Agreement in the section on “Transition to a Low Emissions and Resilient Economy.”

We recognize that Congress has mandated that trade accords should not include provisions that regulate GHG emissions. However, statutory language does not proscribe provisions that incentivize trade and investment in areas like infrastructure investment and support for renewable energy supplies that promote constructive climate policies. Press reports indicate that Canada has been eager to address the climate change issue, and we regret the text reflects no effort to find common ground on this issue.<sup>19</sup> Given the congressional TPA limitations, we would urge a more robust provision promoting improvements in energy efficiency and investments in clean energy, including renewable sources of power and sustainable transportation vehicles. This new agreement should have an explicit goal of facilitating trade and exchange of scientific information among the three countries so that they could become world leaders in the development of advanced, highly efficient power, transportation, building energy systems and appliance technologies.

TEPAC believes a modernized NAFTA should include: 1) commitments to expand investment in energy infrastructure that enables the development and distribution of renewable energy

---

<sup>17</sup> IPCC 2014, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [R.K. Pachauri and L.A. Meyer (eds.)]. IPCC, Geneva, Switzerland; US National Academy of Sciences and the Royal Society 2014, *Climate Change: Evidence and Causes*, <http://dels.nas.edu/resources/static-assets/exec-office-other/climate-change-full.pdf> (accessed 7 June 2017); US Environmental Protection Agency 2009, *Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2009-0171-11645> (accessed 7 June 2017); Academia Brasileira de Ciências et al. 2008, *Joint Science Academies’ Statement: Climate Change Adaptation and the Transition to a Low Carbon Society*, <http://www.nationalacademies.org/includes/climatechangestatement.pdf> (accessed 7 June 2017).

<sup>18</sup> Romero-Lankao, P., J.B. Smith, D.J. Davidson, N.S. Diffenbaugh, P.L. Kinney, P. Kirshen, P. Kovacs, and L. Villers Ruiz, 2014: North America. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Barros, V.R., C.B. Field, D.J. Dokken, M.D. Mastrandrea, K.J. Mach, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1439-1498; US Environmental Protection Agency 2009, *Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2009-0171-11645> (accessed 7 June 2017).

<sup>19</sup> See, for example, Friedman, Lisa. “Canada’s strong words on climate face a test in Trump’s NAFTA makeover,” *The New York Times*, August 28, 2018.

sources; 2) coherent regulatory approaches across North America that encourage the deployment of carbon abatement technologies; and 3) the elimination of fossil fuel subsidies by 2025 in accordance with commitments made at the North American Leaders Summit in June 2016. We continue to recommend that the NAFTA parties undertake studies on the implications of carbon pricing for trade and investment in North America.

While some aspects of the Environment and Energy Chapters may indirectly impact climate change issues, for example, the sections on trade in environmental goods and services and on air quality, the overall head-in-the-sand approach of this trade agreement to climate change represents a momentous lost opportunity to make progress against the world's most essential environmental problem.

### Investor-State Dispute Settlement (ISDS)

As indicated on our June 2017 letter to Ambassador Lighthizer regarding the then-upcoming NAFTA renegotiations, TEPAC members have a range of viewpoints regarding ISDS. The issue was a major focus for a number of us in the Trans-Pacific Partnership Agreement (TPP) negotiations, and a number of improvements were negotiated to address many of those concerns. Some of us believed that preserving an ISDS procedure was an important protection for investors against arbitrary government action. Others of us believed that this protection was unnecessary, and too open to abuse by large multinational corporations to undermine a host government's sovereign legal and regulatory authority – for protecting the environment, and for protecting the public more broadly.

In our June 2017 letter, we made a number of recommendations for narrowing and clarifying its availability in the renegotiated NAFTA, so as to address some of the concerns raised regarding its appropriate use. Some of these recommendations were based on changes that had been agreed to in TPP.

Specifically, we recommended that the negotiators consider:

- Restricting available remedies and limiting damage awards to cost of investments incurred.
- Strengthening substantive obligations, to remove excessive Tribunal discretion and protect parties' sovereign right to enact public welfare measures.
- Creating a permanent roster of arbitrators, subjected to more rigorous prior background checks for potential conflicts of interest and to ensure subject matter expertise.
- Establishing clear standards for intervention and requiring that amicus briefs be part of the case proceedings and considered by dispute panels.
- Adding an appeals process to help ensure consistency and accountability to applicable law.
- Requiring Claimants to pursue and exhaust the host country's domestic legal processes before taking a matter to ISDS.
- Making all documents submitted to or considered by a Tribunal in an ISDS dispute publicly available on a federal government website.

The Agreement addresses some of the concerns raised about the potential for ISDS to be misused, and some, though not all, of the changes we recommended for consideration. In particular, the Agreement limits the use of ISDS to host government actions that take place after establishment of the investment. And it is further limited to only instances of denial of national treatment, denial of most-favored-nation status, and direct expropriation of property (as distinct from indirect appropriation – which we understand to mean that it is limited to only instances of actual confiscation of and takeover of the investment assets). In order to use ISDS even in these specified instances, the investor must first exhaust all available avenues for relief under the host government’s domestic law or have spent a minimum of 30 months actively seeking to pursue relief under that law.

In our view:

- The limit on grounds for recovery to national treatment, MFN, and direct appropriation, and the limit to recovery for loss established by evidence, not speculative, or return of expropriated property, largely – if not entirely – addresses our recommendation regarding appropriate limitations for remedies and damage awards.
- These same limits also largely, if not entirely, address our recommendation regarding limiting Tribunal discretion and protecting sovereign rights to enact public welfare measures.
- The requirement that arbitrators be subject to established conflict-of-interest restrictions, which can be augmented by the Parties, and the requirement that there be three, one chosen by each disputing party and the third chosen by agreement, substantially – though not entirely – addresses our recommendation regarding a permanent roster of arbitrators carefully screened for conflicts of interest and expertise. We encourage the governments to exercise their authority to enact appropriately robust conflict-of-interest restrictions.
- The express authorization for Tribunals to accept and consider amicus briefs from outside parties with a significant interest substantially – though not entirely – addresses our recommendation regarding clear standards for intervention and amicus participation. In this regard, we note that the Tribunal, while required to consult with the disputing parties, may accept amicus submissions over the objections of a party. We hope Tribunals will be encouraged to be receptive to accepting amicus submissions whenever, in the words of the provision, doing so “may assist the tribunal in evaluating the submissions and arguments of the disputing parties.”
- Our recommendation regarding an appeals process was not addressed.
- Our recommendation regarding exhaustion of domestic legal processes was substantially – though not entirely – addressed. A 30-month deadline for a host government’s legal processes to run their full course may not be realistic for many kinds of legal challenges.
- The transparency requirements largely, if not entirely, address our recommendation regarding making the process public. All written documents must be public, and the hearings must be open to the public and a written transcript be published, except where information is specifically designated as protected; and even then, a redacted version of the information must be made public, and the designation can be challenged. There is not

an explicit requirement that the materials all be posted on a U.S. government website; we recommend that this be among the means of making the materials public.

We note that five industrial sectors are excepted, with respect to investments pursuant to contract with the host country's national government, from the limitation to claims regarding national treatment, MFN, or direct expropriation, and from the requirement to exhaust domestic remedial avenues. These five sectors will thus continue to have recourse, for those contracts, to broader ISDS procedures, essentially the procedures that would have applied under TPP. These sectors are oil and gas, power generation, telecommunications, transportation services, and infrastructure. Those of us who recommended eliminating or narrowing the availability of ISDS would have preferred that the Agreement not have made these exceptions. These are all sectors in which significant adverse environmental or consumer impacts are foreseeable. We note, however, that the other improvements and clarifications outlined above apply even as to these five sectors.

Finally, it is our understanding that if Canada joins the agreement, as anticipated, there will be no ISDS provision applicable as between Canada and the United States. Since both the USA and Canada have long histories of independent judicial systems that have not exhibited bias towards investors from the either country, we support the proposed arrangement to provide for no ISDS process between these two countries.

Thus, while some of our members would have preferred a further scaling back, or even full elimination, of ISDS, the consensus among our members is that the changes made here are positive.

## **VI. Membership of Committee**

Joseph G. (Jerry) Block	Retired Partner, Venable LLP
Kitty Block	Humane Society International
Jake Colvin	National Foreign Trade Council
Azzedine Downes	International Fund for Animal Welfare
Amanda Mayhew	World Animal Protection
Glenn Prickett	Committee Co-Chair, The Nature Conservancy
James Salzman	UC Santa Barbara
Jeffrey J. Schott	Committee Co-Chair, Peterson Institute
Andrew F. Sharpless	Oceana
Cindy Squires	International Wood Products Association
James Tripp	Environmental Defense Fund
Alexander von Bismarck	Environmental Investigation Agency (EIA)
Lisa Jacobson	U.S. Council for Sustainable Energy
Joe Lonardo	Vorys LLP
Norine Kennedy	U.S. Council for International Business
George Slover	Consumers Union