

Final Environmental Review

United States – Panama Trade Promotion Agreement

**Office of the U.S. Trade Representative
September 2011**

Executive Summary

Pursuant to authority delegated by the President in Executive Order 13277 (67 *Fed. Reg.* 70305) and consistent with Executive Order 13141 (64 *Fed. Reg.* 63169) and its Guidelines (65 *Fed. Reg.* 79442), the Office of the United States Trade Representative (USTR) submits this Final Environmental Review of the United States – Panama Trade Promotion Agreement (TPA or Agreement), as provided for under section 2102(c)(4) of the Trade Act of 2002 (Trade Act).

On November 18, 2003, in accordance with section 2104(a) of the Trade Act, U.S. Trade Representative Robert B. Zoellick notified the Congress of the President's intent to enter into negotiations for a Trade Promotion Agreement (TPA) with Panama. The formal launch of negotiations took place on April 26, 2004. Negotiations were concluded on December 19, 2006, and the Agreement was signed by U.S. Trade Representative Susan C. Schwab and Panamanian Minister of Commerce and Industry Alejandro Ferrer on June 28, 2007.

The environmental review process examines possible environmental effects that may be associated with the TPA. In identifying and examining these possible effects, the Administration drew on relevant published economic analysis and on public comments submitted in response to notices in the *Federal Register* (69 *Fed. Reg.* 19262, April 12, 2004, and 69 *Fed. Reg.* 41876, July 12, 2004) and a variety of sources of published information. The review also draws on the environmental and economic expertise of federal agencies. Consistent with Executive Order 13141 and its Guidelines, the focus of the review is on potential impacts in the United States. Additionally, this review includes consideration of global and transboundary effects.

Findings

1. In this Final Environmental Review, the Administration has concluded that changes in the pattern and magnitude of trade flows attributable to the TPA will not have any significant environmental impacts in the United States. Based on existing patterns of trade and changes likely to result from implementation of the TPA, the impact of the TPA on total U.S. production through changes in U.S. exports appears likely to be very small. As a result, the TPA is not expected to have significant direct effects on the environment of the United States. While it is conceivable that there may be instances in which the economic and associated environmental impacts are concentrated regionally or sectorally in the United States, the Administration could not identify any such instances.
2. In considering whether provisions of the TPA could affect, positively or negatively, the ability of U.S. federal, state, local, or tribal governments to enact, enforce, or maintain environmental laws and regulations, the Administration took into account the full range of TPA obligations, including those related to services, sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT), as well as provisions of the TPA Environment Chapter and related dispute settlement provisions. The Administration concluded that the TPA will not adversely affect the ability of U.S. federal, state, local, or tribal governments to regulate to protect the U.S. environment, and that these and related TPA provisions should have positive implications for the enforcement of environmental laws and the furtherance of environmental protection in both the United States and Panama.

3. This review also carefully examined the provisions of the Investment Chapter and their environmental implications. The Administration has not identified any concrete instances of U.S. environmental measures that would be inconsistent with the TPA's substantive investment obligations. The Administration does not expect the TPA's investor-state mechanism to result in an increased potential for a successful challenge to U.S. environmental measures.
4. Compared to its effects on the United States, the TPA may have relatively greater effects on Panama's economy. In the near term, however, net changes in production and trade are expected to be small because most goods exports to the United States from Panama already face low or zero tariffs. In addition, production and export of goods accounts for a small share of the Panamanian economy. Longer term effects, through investment and economic development, are expected to be greater but cannot currently be predicted in terms of type, timing, and environmental implications.
5. The TPA may have positive environmental consequences in Panama by reinforcing efforts to effectively enforce environmental laws, accelerating economic growth and development through trade and investment, promoting sustainable development of natural resources, and disseminating environmentally beneficial technologies. The public submissions process set out in Article 17.8 of the Environment Chapter has significant potential to improve environmental decision-making and transparency in Panama and to inform capacity-building activities.
6. Through increased economic activity in Panama, the TPA may have indirect effects on the U.S. environment, for example through effects on Panama's habitat for wildlife, including migratory species. This review examined a range of these possible impacts, but did not identify any specific, significant consequences for the U.S. environment. Nevertheless, the possibility of such effects requires ongoing monitoring. Monitoring of conditions in the U.S. environment will continue as an element of existing domestic environmental programs.
7. The TPA provides a context for enhancing cooperation activities to address both trade-related and other environmental issues. As a complement to the TPA, the United States and Panama have negotiated an Environmental Cooperation Agreement (ECA) that is expected to enhance the positive environmental consequences of the TPA. The ECA will establish a comprehensive framework for developing cooperative activities. An Environmental Cooperation Commission, consisting of high-level officials with environmental responsibilities from the United States and Panama, will oversee implementation of the ECA. The TPA encourages the development of environmental performance measures, and the Environmental Affairs Council, established by the Environment Chapter, will consider the status of cooperation under the ECA as it reviews progress under the chapter.

Final Environmental Review of the United States – Panama Trade Promotion Agreement

Executive Summary	i
I. LEGAL AND POLICY FRAMEWORK	1
A. The Trade Act of 2002	1
B. The Environmental Review Process	2
II. BACKGROUND	3
A. Economy and Environment in Panama	3
B. U.S. – Panama Goods Trade	5
III. THE UNITED STATES – PANAMA TRADE PROMOTION AGREEMENT	6
A. Overview of the United States – Panama TPA	6
B. The Environment Chapter and Related Environmental Provisions	9
IV. PUBLIC AND ADVISORY COMMITTEE COMMENTS.....	11
A. Public Comments	11
B. Advisory Committee Report	12
V. POTENTIAL ECONOMICALLY-DRIVEN ENVIRONMENTAL IMPACTS	13
A. Potential Impacts in the United States.....	13
B. Transboundary and Global Issues	14
VI. POTENTIAL REGULATORY IMPACTS.....	17
A. Regulatory Review.....	17
B. Investment	18
VII. ENVIRONMENTAL COOPERATION	21
Annex	
Organizations Providing Comments.....	23

I. LEGAL AND POLICY FRAMEWORK

A. The Trade Act of 2002

The Trade Act of 2002 (Trade Act) establishes a number of negotiating objectives and other priorities relating to the environment. As relevant here, the Trade Act contains three sets of objectives: (i) overall trade negotiating objectives; (ii) principal trade negotiating objectives; and (iii) promotion of certain priorities, including associated requirements to report to Congress.

The Trade Act's "overall trade negotiating objectives" with respect to the environment include:

- (1) ensuring that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources (section 2102(a)(5)); and
- (2) seeking provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental laws as an encouragement for trade (section 2102(a)(7)).

In addition, the Trade Act establishes the following environment-related "principal trade negotiating objectives":

- (1) ensuring that a party to a trade agreement with the United States does not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, while recognizing a party's right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to prioritize allocation of resources for environmental law enforcement (sections 2102(b)(11)(A)&(B));
- (2) strengthening the capacity of U.S. trading partners to protect the environment through the promotion of sustainable development (section 2102(b)(11)(D));
- (3) reducing or eliminating government practices or policies that unduly threaten sustainable development (section 2102(b)(11)(E));
- (4) seeking market access, through the elimination of tariffs and nontariff barriers, for U.S. environmental technologies, goods, and services (section 2102(b)(11)(F)); and
- (5) ensuring that environmental, health or safety policies and practices of parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against U.S. exports or serve as disguised barriers to trade (section 2102(b)(11)(G)).

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

- (1) seeking to establish consultative mechanisms among parties to trade agreements to

strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science and reporting to the Committee on Ways and Means and the Committee on Finance (“Committees”) on the content and operation of such mechanisms (section 2102(c)(3));

(2) 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 (section 2102(c)(4)); and

(3) 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 *General Agreement on Tariffs and Trade 1994* (GATT 1994) (section 2102(c)(10)).

B. The Environmental Review Process

The framework for conducting environmental reviews of trade agreements is provided by Executive Order 13141–*Environmental Review of Trade Agreements* (64 *Fed. Reg.* 63169) and the associated Guidelines (65 *Fed. Reg.* 79442). The Order and Guidelines are available on USTR’s website at: <http://www.ustr.gov/trade-topics/environment/environmental-reviews>.

The purpose of environmental reviews is to ensure that policymakers and the public are informed about reasonably foreseeable environmental impacts of trade agreements (both positive and negative), identify complementarities between trade and environmental objectives, and help shape appropriate responses if environmental impacts are identified. Section 5(b) of Executive Order 13141 provides that “as a general matter, the focus of environmental reviews will be impacts in the United States,” but “[a]s appropriate and prudent, reviews may also examine global and transboundary impacts.” Reviews are intended to be one tool, among others, for integrating environmental information and analysis into the fluid, dynamic process of trade negotiations. USTR and the Council on Environmental Quality (CEQ) jointly oversee implementation of the Order and Guidelines. USTR, through the Trade Policy Staff Committee (TPSC), is responsible for conducting the individual reviews.

The environmental review process provides opportunities for public involvement, including an early and open process for determining the scope of the environmental review (“scoping”). Through the scoping process, potentially significant issues are identified for in-depth analysis, while issues that are less significant – or that have been adequately addressed in earlier reviews – are eliminated from detailed study.

The Guidelines recognize that the approach adopted in individual reviews will vary from case to case, given the wide variety of trade agreements and negotiating timetables. Generally, however, reviews address two types of questions: (i) the extent to which positive and negative environmental impacts may flow from economic changes estimated to result from the prospective agreement; and (ii) the extent to which proposed agreement provisions may affect U.S. environmental laws and regulations (including, as appropriate, the ability of state, local, and tribal authorities to regulate with respect to environmental matters).

II. BACKGROUND¹

Panama is an S-shaped isthmus located in Central America, bordering both the Caribbean Sea and the Pacific Ocean. Located between Colombia and Costa Rica, Panama has approximately 2,490 kilometers of coastline and an area of 75,420 square kilometers. The climate is tropical maritime with a prolonged rainy season.

A. Economy and Environment in Panama

Economy

Although Panama's economy is small in relation to that of the United States, Panama is an important trading partner. In 2010, bilateral goods trade between the United States and Panama totaled \$6.4 billion. The United States is an important market for Panama as a consequence of proximity and the existence of relatively few market barriers for Panamanian goods. Under the Caribbean Basin Initiative (CBI) and other U.S. trade preference programs, as well as duty-free treatment provided on a most-favored-nation (MFN) basis, most exports from Panama currently enter the United States duty-free.

Panama's economy is based primarily on a well-developed services sector that accounts for more than three-quarters of GDP. Services include those related to the Panama Canal, banking, the Colon Free Zone, insurance, container ports, and flagship registry. Manufacturing, mining, utilities and construction together account for about 17 percent of GDP. Agriculture, forestry and fishing account for 6 percent of GDP but employ roughly 15 percent of the workforce.

The Colon Free Zone (CFZ), located at the Caribbean entrance of the Panama Canal, is the largest free trade zone in the Americas and the second largest in the world. Total trade for the CFZ is more than \$16 billion a year in imports and re-exports. The bulk of the trade flowing through the CFZ is between Asia and Latin America.

Environment

Although Panama is a small country, the country's ecosystems contain considerable biological diversity and a high level of endemism.² Panama's biological diversity includes 10,444 species of plants, of which 1,176 are endemic, and a large number and variety of vertebrates, including 1,157 species of ocean fish, 206 species of fresh water fish, 179 species of amphibians, 229 species of reptiles, 957 species of birds, and 259 species of mammals.³

¹ Additional background information is available in the Interim Environmental Review, available at: <http://www.ustr.gov/sites/default/files/Panama%20interim%20review.pdf>.

² For additional information, see: "Nature, People and Well Being: Mesoamerica Fact Book," Partners and Donors Conference, Mesoamerican Biological Corridor, Paris, France, December 12-13, 2002, University of Costa Rica Development Observatory and the Central American Development and Environment Commission ("Mesoamerica Fact Book"), available at: http://www.ccad.ws/pccbm/docs/mesoamerica_factbook.pdf.

³ See "Informe del Estado del Ambiente, GEO Panamá 2009," Autoridad Nacional del Ambiente Panamá; available

Panama's marine and coastal environment is found in both the Caribbean Sea and the Pacific Ocean. The Pacific side of the isthmus is part of the Eastern Tropical Pacific Seascape, whose environment is governed by both a seasonal upwelling and the El Niño Southern Oscillation. This region is characterized by abundant and spectacular marine life, including migratory populations of fish, whales, fur seals, sea lions, sharks, and globally endangered sea turtles and seabirds. Important coastal habitats in the Pacific include coral reefs, large mangrove forests, estuaries, rocky coastal cliffs, and sandy beaches.⁴ On the Caribbean side of the isthmus, coral reefs are abundant and diverse. Mangrove forests and seagrass beds provide refuges, feeding grounds, and spawning areas for numerous coastal species of the Caribbean, such as bivalves, gastropods, octopus, squid, oysters, crabs, lobsters, sharks, snook, and snapper.⁵

Panama faces considerable challenges in protecting its environment as it supports its economic and population growth. Among the most pressing environmental issues are: deforestation, land degradation and soil erosion, loss of wildlife habitats and wetland destruction, threats to water quality such as water pollution from agricultural runoff, and depletion of fishery resources.

Land-Use and Forest Management: Although Panama has the second highest percentage of protected land in Central America, much of the original forest area has been developed over the past 60 years.⁶ Economic development and accompanying changes in land use have contributed to the expansion of urban areas and clearing of forest land for agriculture. This has resulted in significant loss of forest cover, and in some parts of the country desertification is a threat.

Water Use: The Panamanian climate produces considerable annual rainfall – on average, approximately 3,000 millimeters – with higher annual totals on the Pacific coast than on the Caribbean coast. Nevertheless, operation of the Panama Canal places a heavy demand on Panama's water supply: 58 percent of the annual rainfall is used in the operation of the Canal. Each lock in the system uses an estimated 10 million cubic meters of water daily in its operation. The Canal is currently designed to accommodate about 50 ships per day, and 52 million gallons of water is necessary in order for one ship to pass through the Canal lock system. The Panama Canal Authority (ACP) is responsible for the administration, use, and conservation of the hydrological resources of the Canal watershed. Over 50 percent of the water for Canal operations comes from land currently under protection through a fund created under the U.S. Tropical Forest Conservation Act.⁷

at: [http://www.anam.gob.pa/images/stories/documentos_pdf/INFORME GEO PANAMA 2009.pdf](http://www.anam.gob.pa/images/stories/documentos_pdf/INFORME_GEO_PANAMA_2009.pdf).

⁴ See "A New Future for Marine Conservation: Eastern Tropical Pacific Seascape," available at: www.conservation.org.

⁵ See P. Miloslavich and E. Klein (eds), Caribbean Marine Biodiversity: the Known and the Unknown (2005).

⁶ GEO Panamá 2009, *supra* note 3; and Mesoamerica Fact Book, *supra* note 2.

⁷ Further information on the debt-for-nature swap is available at: http://www.usaid.gov/our_work/environment/forestry/tfca_descs.html#Panama.

Environmental Laws: Panama's Environmental Law (Law No. 41 of July 1, 1998) established the framework legislation for standards of protection, conservation, and recovery of the environment, and created the National System of Protected Areas.⁸ It also created an autonomous entity, the National Environment Authority (ANAM), that is charged with the development of national environmental policy, management of natural resources and environmental issues, administration, and enforcement. ANAM issues environmental regulations and can also impose fines for violations of these regulations. Environmental impact studies are required for activities and projects, public or private, which could generate environmental risk. Failure to comply can lead to fines or temporary or permanent suspension of activities. Panama has specific environmental laws addressing air quality and emissions controls; water, including water control and effluents; land and biodiversity; and establishing and/or strengthening institutional mechanisms.

Although Panama has made progress in establishing national and regional frameworks for addressing environmental problems, the lack of fiscal and human resources has hampered Panama's ability to effectively implement and enforce its environmental laws. The challenges faced in enforcement at the national level include the need to strengthen enforcement and compliance mechanisms and national institutions. Local and regional levels of government also face constraints with respect to their ability to implement and enforce mandates and programs.

Panama is a party to international agreements on biodiversity, climate change, desertification, endangered species (CITES), hazardous waste, law of the sea, marine dumping, migratory species, fisheries, nuclear testing, ozone layer protection, ship pollution, tropical timber, wetlands, and whaling. In addition, Panama is also a party to regional agreements on biodiversity and woodlands protection, tuna, sea turtles, dolphins, protection and development of the marine environment, and transboundary movement of hazardous wastes.

B. U.S. – Panama Goods Trade⁹

The U.S. goods trade surplus with Panama was nearly \$5.7 billion in 2010. U.S. goods exports to Panama in 2010 were \$6.1 billion. U.S. goods imports from Panama in 2010 were \$379 million. Panama is currently the 36th largest export market for U.S. goods. The stock of U.S. foreign direct investment (FDI) in Panama in 2009 was \$7.8 billion and is concentrated largely in the non-bank holding companies and the banking sector. Major U.S. exports to Panama currently include petroleum oils, machinery and equipment, and aircraft. Major U.S. imports from Panama include fish and crustaceans, precious stones and metals, bananas, pineapples, and cane sugar.

⁸ Ley No. 41- Ley General de Ambiente (Pana.), July 1, 1998, online at http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1990/1998/1998_159_0225.pdf.

⁹ Additional details on U.S.-Panama goods trade are available from the U.S. International Trade Commission. See: "U.S.-Panama Trade Promotion Agreement: Potential Economy-wide and Selected Sectoral Effects". USITC Publication 3948, September 2007; available at: <http://www.usitc.gov/publications/332/pub3948.pdf>.

III. THE UNITED STATES – PANAMA TRADE PROMOTION AGREEMENT

A. Overview of the United States – Panama TPA

The TPA is a comprehensive trade agreement, addressing areas such as trade in goods and services, investment, trade-related aspects of intellectual property rights, government procurement, and trade-related environmental and labor matters.

The TPA consists of a preamble and the following 22 chapters and associated annexes: initial provisions; general definitions; national treatment and market access for goods; rules of origin and origin procedures; customs administration and trade facilitation; sanitary and phytosanitary measures; technical barriers to trade; trade remedies; government procurement; investment; cross-border trade in services; financial services; telecommunications; electronic commerce; intellectual property rights; labor; environment; transparency; administration of the agreement and trade capacity building; dispute settlement; exceptions; and final provisions. The complete text of the TPA, related annexes and side letters, and summary fact sheets are available on USTR's website at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>.

The following is a summary of the TPA provisions most relevant to this Final Environmental Review. The provisions of the Environment Chapter are described in Section III.B.

Market Access for Goods

Tariff commitments by the United States and Panama (the Parties) will provide immediate benefits for both countries. Approximately 87 percent of U.S. exports of consumer and industrial products to Panama will be duty-free immediately when the Agreement enters into force, and an additional five percent will be duty-free within five years. All remaining tariffs on consumer and industrial goods will be eliminated within ten years. Under the CBI and other U.S. trade preference programs, as well as duty-free treatment provided on an MFN basis, most goods from Panama already enter the United States duty-free. The Agreement will make duty-free treatment of Panamanian goods permanent, thereby providing certainty for businesses and investors.

More than half of current U.S. agricultural exports to Panama will become duty-free immediately, including high quality beef, other meat and poultry products, soybeans and soybean products, most fresh fruits and tree nuts, distilled spirits and wine, and a wide assortment of processed products. U.S. farm products benefiting from expanded market access opportunities through tariff-rate quotas include pork, chicken leg quarters, dairy products, corn, rice, refined corn oil, dried beans, frozen french fries, and tomato products. Tariffs on most remaining U.S. agricultural products will be phased out within 15 years.

Customs Administration and Rules of Origin

The TPA sets out rules for determining whether a good qualifies for preferential treatment, including methods for valuing products under certain product-specific rules of origin. The TPA includes specific obligations on customs procedures to ensure compliance with laws governing importation. In particular, the TPA requires internet publication of customs procedures, speedy

release of goods, the use of advance binding rulings, and specific commitments related to express delivery shipments, as well as provisions on the use of information technology and risk assessment techniques. The TPA addresses transshipment concerns by requiring Panama to maintain a monitoring program in its free trade zones and to provide U.S. Customs and Border Protection with access to information collected in connection with the program.

Sanitary and Phytosanitary Measures (SPS)

The United States and Panama reaffirm their commitments under the World Trade Organization (WTO) *Agreement on the Application of Sanitary and Phytosanitary Measures*, and the TPA creates a process for enhanced cooperation and coordination on sanitary and phytosanitary issues.

Technical Barriers to Trade

The United States and Panama reaffirm their commitments to the WTO *Agreement on Technical Barriers to Trade* (TBT), and the TPA creates a process for enhanced cooperation and coordination on technical regulations and standards.

Trade Remedies

The TPA includes provisions governing imposition of bilateral safeguard measures and provides that each Party maintains its rights and obligations under the WTO *Agreement on Safeguards*.

Government Procurement

The TPA will provide a more predictable procurement environment for U.S. suppliers. Panama has committed to using open, transparent, and non-discriminatory procurement procedures, including with respect to procurement by the Panama Canal Authority. The Chapter includes requirements for advance public notice of procurement opportunities and provision of tender documentation to all interested suppliers in a timely fashion, as well as timely and effective bid review procedures.

Investment

The TPA establishes a secure, predictable legal framework for U.S. investors operating in Panama. The TPA imposes obligations pertaining to non-discrimination (national treatment and MFN treatment), expropriation, free transfers related to covered investments, prohibition on the use of certain performance requirements, minimum standard of treatment, and limitations on requirements relating to senior managers. These investor protections are backed by a transparent, binding international arbitration mechanism, under which investors may, at their own initiative, bring claims against either government for an alleged breach of the provisions of the Investment Chapter.

The TPA preamble states that the agreement does not provide foreign investors with greater substantive rights with respect to investment protections than domestic investors have under

domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in the TPA.

Services

The TPA permits substantial market access across the entire services regimes (based on the “negative list” approach), subject to limited exceptions. Panama has agreed to exceed its commitments made in the WTO, and to dismantle significant services and investment barriers. The TPA requires the Parties to provide national treatment and MFN treatment to each other’s services suppliers. Regulatory authorities must use open and transparent administrative procedures, consult with interested parties before issuing regulations, provide advance notice and comment periods for proposed rules, and publish all regulations.

Intellectual Property Rights

The Intellectual Property Rights Chapter provides for strong protection of copyrights, patents, and trademarks, including enhanced enforcement and non-discrimination obligations for all types of intellectual property. Through the copyright provisions, Parties will address the challenge of providing protection in the digital environment of the internet and provide important protection for performers and producers of phonograms. Under the TPA, the Parties will provide strong protections for trademarks and limit the grounds for revoking a patent. The Chapter provides for streamlined trademark filing processes and improved protection of trademark owners’ rights.

Labor

The TPA’s Labor Chapter reaffirms the Parties’ obligations as members of the International Labor Organization (ILO) and commits them to adopt and maintain in their laws and practice the fundamental labor rights, as stated in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, including for purposes of the Chapter a prohibition on the worst forms of child labor. The TPA further provides that neither Party may waive or otherwise derogate from the laws that implement this obligation in a manner affecting trade or investment between the Parties. The chapter commits each Party to effectively enforce its labor laws. Procedural guarantees ensure that workers and employers will continue to have fair, equitable, and transparent access to labor tribunals. All obligations in the chapter are subject to the same dispute settlement procedures and enforcement mechanisms as obligations in other chapters of the TPA. The Chapter also establishes a mechanism for further cooperation on labor matters.

Transparency

The Transparency Chapter requires each Party to ensure that laws, regulations, procedures, and administrative rulings of general application on matters covered by the TPA are published or otherwise made available to the public. In addition, the chapter requires each Party, to the extent possible, to publish in advance any measure it proposes to adopt and provide a reasonable opportunity for interested parties to comment. The chapter also requires each government to establish and maintain procedures for review of administrative actions regarding matters covered

by the Agreement. The Chapter also contains strong anti-corruption commitments, including criminalization of bribery in matters affecting international trade or investment.

Dispute Settlement

The TPA includes a government-to-government dispute settlement mechanism. The mechanism sets high standards of openness and transparency. It calls for public hearings and the public release of Parties' legal submissions and provides opportunities for non-governmental organizations to submit views. The Chapter includes an enforcement mechanism whereby if a Party fails to comply with an arbitral panel decision and the Parties cannot reach a mutually acceptable solution, the complaining Party may have recourse to trade sanctions or, alternatively, the defending Party may pay a monetary assessment.

Exceptions

For certain chapters, the Parties agreed to incorporate into the TPA Article XX of the GATT 1994 or Article XIV of the *General Agreement on Trade in Services* (GATS). The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal, or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources. The Parties also understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal, or plant life or health. The TPA also includes a general exception for measures that a Party considers necessary for the protection of its essential security interests.

Trade Capacity Building

Building on the Parties' trade capacity building efforts during the TPA negotiations, the TPA creates a Committee for Trade Capacity Building for the purpose of defining and identifying priority needs to assist Panama to implement its commitments and maximize the benefits provided under the TPA.

B. The Environment Chapter and Related Environmental Provisions

Following guidance in the Trade Act and the May 10, 2007, accord between the Administration and the bipartisan leadership of Congress, the TPA's Environment Chapter requires each Party: (1) to strive to maintain high levels of environmental protection and to strive to improve those levels; (2) to effectively enforce its environmental laws, and to adopt, maintain and implement laws and all other measures to fulfill its obligations under certain multilateral environmental agreements (MEAs) to which both Panama and the United States are party ("covered agreements")¹⁰¹¹; and (3) not to waive or otherwise derogate from environmental laws in order to

¹⁰ The chapter states that to establish a violation of this obligation, a Party must demonstrate that the other Party has failed to adopt, maintain, or implement a measure in a manner affecting trade or investment between the Parties.

¹¹ The covered agreements are: (a) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973, as amended; (b) the *Montreal Protocol on Substances that Deplete the*

attract trade or investment, except where the waiver or derogation is pursuant to a provision in the Party's law providing for waivers or derogations and is not inconsistent with the Party's obligations under a covered agreement. In addition, the Chapter commits each Party not to fail to effectively enforce its environmental laws, and its laws, regulations, and other measures to fulfill its obligations under covered agreements through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties. All obligations in the Chapter are subject to the same dispute settlement procedures and enforcement mechanisms applicable to obligations in other chapters of the agreement.

To assist in the administration and implementation of the Environment Chapter, the Agreement establishes an Environmental Affairs Council to oversee the implementation of the Chapter. The Council will comprise high-level government officials from each Party and will meet annually unless the Parties agree otherwise.

The Chapter encourages a comprehensive approach to environmental protection. Provisions on procedural guarantees promote good environmental governance by obliging each Party to provide appropriate and effective remedies for violations of its environmental laws and to ensure that environmental enforcement proceedings comply with due process, and are open to the public except where the administration of justice requires otherwise. These procedural guarantees are accompanied by provisions that encourage incentives and other voluntary mechanisms to protect the environment, including market-based incentives. Provisions on the relationship between the TPA and MEAs acknowledge the importance of effective domestic implementation of MEAs to which the United States and Panama are both party and the contributions that the TPA Environment Chapter and the ECA can make to achieve the goals of those MEAs. The TPA further provides that in the event of an inconsistency between a Party's obligations under the TPA and a covered agreement the Party shall seek to balance its obligations under both agreements. The Environment Chapter also provides for consultation, as appropriate, with respect to environmental issues of mutual interest.

Public Submissions Process

The TPA contains a public submissions process that will allow members of the public to raise concerns regarding the Parties' enforcement of environmental laws with an independent secretariat. The TPA public submission provisions are similar to the public submissions process established in the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR) and the Peru and Colombia Trade Promotion Agreements. The provisions build upon Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC).

Under the TPA public submissions process, a person of a Party may file a submission alleging that

Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended; (c) the *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*, 1973, done at London, February 17, 1978, as amended; (d) the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, done at Ramsar, February 2, 1971, as amended; (e) the *Convention on the Conservation of Antarctic Marine Living Resources*, done at Canberra, May 20, 1980; (f) the *International Convention for the Regulation of Whaling*, done at Washington, December 2, 1946; and (g) the *Convention for the Establishment of an Inter-American Tropical Tuna Commission*, done at Washington, May 31, 1949.

a Party is failing to effectively enforce its environmental laws with a secretariat that the Parties will designate, and the secretariat will review the submission in light of specified criteria.¹² The secretariat will prepare a factual record if either member of the Council requests that it do so. The TPA also provides that the Council will review any factual record prepared in light of the objectives of the Environment Chapter and the ECA, and may make recommendations to the ECA's Environmental Cooperation Commission concerning matters addressed in the factual record, including recommendations related to the further development of the Party's mechanisms for monitoring its environmental enforcement. This provision is an important innovation that is not found in the NAAEC.

Further details of the submissions process, including measures to ensure effective public participation in that process in furtherance of the TPA environment package goals, will be established through working arrangements to be developed by the Parties.

Combined with other elements in the environment package (e.g., robust environmental cooperation and capacity building under the ECA, see Section VII *infra*), the public submissions process should significantly contribute to improved environmental governance and transparency in Panama.

IV. PUBLIC AND ADVISORY COMMITTEE COMMENTS

To determine the scope of this review, the Administration considered information provided by the public, advice of USTR's advisory committee on trade and environment issues, the Trade and Environment Policy Advisory Committee (TEPAC), and input from environmental, trade and investment experts within federal agencies. In addition to providing guidance on the scope of the environmental review, any information, analysis, and insights available from these sources were taken into account throughout the negotiations and were considered in developing U.S. negotiating positions. As envisaged by the guidelines, environmental reviews are an ongoing process to examine environmental issues and inform the negotiating process.

Pursuant to Trade Act requirements (section 2104(e)), advisory committees, including TEPAC, submitted reports on the TPA to the President, USTR, and Congress within 30 days after the President notified Congress of his intent to enter into the Agreement. The TEPAC report is summarized in section IV.B.

A. Public Comments

This review was formally initiated by publication of a notice in the *Federal Register*, which requested public comment on the scope of the review (see 69 *Fed. Reg.* 19262, April 12, 2004). Comments received in response to that notice were taken into account in the preparation of this Final Environmental Review. Further public comment was requested on the Interim

¹² The TPA's public submissions procedure is not available to U.S. persons wishing to raise concerns regarding U.S. enforcement of U.S. environmental laws because such persons already have available to them other remedies including the procedures under Articles 14 and 15 of the NAAEC.

Environment Review (see 69 *Fed. Reg.* 41876 (July 12, 2004)).¹³

Comments on the scope are summarized in the Interim Environmental Review. These comments requested that duty-free access to the U.S. markets not be permanently granted for either sugar or garlic and dehydrated onion, noting that the environmental standards required for the production of these agricultural products are much higher in the United States than in Panama. No comments were received on the Interim Environmental Review.

B. Advisory Committee Report

Under Section 135(e) of the Trade Act of 1974, as amended, advisory committee reports must include advisory opinions as to whether and to what extent an agreement promotes the economic interests of the United States and achieves the applicable overall and principal negotiating objectives set forth in the Trade Act of 2002. The reports must also include advisory opinions as to whether an agreement provides for equity and reciprocity within the sectoral or functional area of the particular committee. The advisory committee reports are available at:

http://ustraderep.gov/Trade_Agreements/Bilateral/Panama_FTA/Reports/Section_Index.html.

A majority of TEPAC members supported the conclusion that the TPA meets Congress's negotiating objectives as they relate to environmental matters. The committee's report on the TPA notes similarities between the TPA and the CAFTA-DR and therefore makes reference to the TEPAC report on the CAFTA-DR as a source for a detailed assessment of relevant provisions. The report stressed the need for an experienced, well-funded secretariat and the need to learn lessons from the CAFTA-DR experience as the ECA with Panama is implemented.

The report reiterates the view that public participation helps ensure that an agreement and its provisions operate as intended, while guaranteeing more effective enforcement of environmental laws. The TEPAC majority also noted the inclusion of enhanced public participation mechanisms and that the TPA's investment provisions demonstrate continued improvements, as compared to earlier trade agreements. A majority of members also expressed the view that trade agreements can create opportunities to enhance environmental protection. The TEPAC majority recognized the enhanced public participation provisions of the TPA and noted with approval that dispute settlement panels will accept submissions from civil society. A majority of TEPAC members also supported the negotiation of the ECA, yet expressed concern that the ECA lacked specificity regarding areas of cooperation and affords little guidance on the areas that might be addressed. The TEPAC majority also expressed concerns regarding the availability of funds for activities to be undertaken through the ECA.

A minority of TEPAC members expressed concerns, including that: (1) the Agreement's environmental provisions would not ensure that environmental protection in Panama is improved in a meaningful way; and (2) the public submissions process does not provide clear outcomes or actions to ensure effective enforcement of environmental laws.

¹³ The Interim Review is available at: <http://www.ustr.gov/sites/default/files/Panama%20interim%20review.pdf>.

V. POTENTIAL ECONOMICALLY-DRIVEN ENVIRONMENTAL IMPACTS

A. Potential Impacts in the United States

The impact of the TPA on total U.S. production through changes in U.S. exports appears likely to be very small. Panama is an important trading partner, but current U.S. exports to Panama account for a small fraction of total U.S. goods exports (less than half of one percent) and an even smaller share of total U.S. production. In its analysis of the potential economy-wide effects of the TPA, the U.S. International Trade Commission (USITC) estimated that the TPA was likely to have a positive, but small effect on the U.S. economy due to the small size of Panama's economy relative to that of the United States.¹⁴ Although small changes in production and export in environmentally-sensitive sectors could provide a basis for concern regarding the TPA's direct environmental effects in the United States, no instances warranting such concerns were identified and none were raised in public comments or the reports of the advisory committees (see section IV). Any increases in exports are expected to be in sectors whose production does not raise specific environmental concerns. Based on this information and analysis, the Administration has concluded that changes in the pattern and magnitude of trade flows and production attributable to the TPA will not have any significant economically driven environmental impacts in the United States. Liberalization of services can be expected to have an economic impact in the United States although here, too, the effect of the TPA is likely to be small, and we could not identify any environmentally sensitive sectors in the United States likely to be affected by such impacts.

Environmental reviews of other trade agreements have identified invasive species as a domestic environmental concern related to increases in goods trade that may result from trade agreements.¹⁵ Goods trade can provide pathways for invasive species, and the introduction of invasive species can result in harmful effects on the environment and economy of the host country. The risk of introduction of invasive species varies across traded commodities and trading partners. Although this review of the TPA did not identify any specific concerns related to the introduction of invasive species from Panama, there is a baseline risk that invasive species may move between Panama and the United States. It is difficult to quantify the extent or the magnitude of the TPA's likely effect on this risk. The net change in the volume of trade and the associated commodity pathways for invasive species is likely to be small (see above). However, change in the volume of trade and the number of potentially invasive species that may be transported is only one factor in a broad-scale assessment of the risk of introducing invasive species.

The TPA does not alter either country's regulatory framework for managing risks associated with the introduction of invasive species. The TPA also does not alter related regulations such as those regulating agricultural and other trade for the purpose of protecting against the introduction of agricultural pest or diseases. In addition, the TPA's cooperation mechanism provides the opportunity for the two countries to cooperate to monitor and assess risks associated with invasive species.

¹⁴ The USITC report is available at: <http://www.usitc.gov/publications/332/pub3948.pdf>.

¹⁵ See, for example, final reviews of the CAFTA-DR and the United States-Peru Trade Promotion Agreement, available at: <http://www.ustr.gov/trade-topics/environment/environmental-reviews>.

B. Transboundary and Global Issues

The Administration examined a large number and wide variety of environmental issues with potential global and transboundary impacts in determining the scope of this review. These issues were provisionally identified through public comments and through an open-ended scoping process with agencies with environment, trade, and economic expertise. The Administration subsequently eliminated topics from further and more detailed analysis when initial findings revealed that there was no identifiable link to the TPA. The following topics warranted further consideration.

Economically-Driven Environmental Effects in Panama

As compared to its effects in the United States, the TPA may have relatively greater impacts on the Panamanian economy and, through those impacts, on its environment. However, as described above (see section II.C), the services sector accounts for the largest share of the Panamanian economy. In addition, because tariffs for many Panamanian agricultural and industrial goods are already low, we concluded that the TPA is not likely to lead to any significant economically driven environmental impacts in Panama through changes in trade flows and increases in Panamanian industrial or agricultural production.

The environmental effects of the TPA may be both positive and negative in Panama. Given the long shared history of the Canal, U.S. investment in Panama is already quite high. The TPA may further increase investment, trade, and production in the region, which may be associated with further pressure on the environment. However, commitments in the TPA, such as those to effectively enforce environmental laws, are likely to have a positive effect, especially when coupled with capacity-building and environmental cooperation activities.

Migratory Birds and Wildlife

Panama is home to the second highest number of birds of any country in Central and North America. Panama's four sites designated under the Ramsar Convention on Wetlands of International Importance include the Bay of Panama, which is also a designated site of the Western Hemisphere Shorebird Reserve Site, with mudflats and mangroves that host millions of migrating shorebirds important to North American ecosystems. Of the 1,007 migratory bird species currently protected under the U.S. Migratory Bird Treaty Act (MBTA), some 350 neotropical migratory species (mainly songbirds) migrate through or are winter residents in Panama and other Central American, Caribbean, or South American countries. Sixteen globally threatened bird species occur regularly in Panama. Of these, two are endangered (the Great Green Macaw and the Yellow-billed Cotinga), and 14 are classified as vulnerable.¹⁶ There are also 24 regularly occurring near threatened species in Panama. A number of the bird species listed under the U.S. Endangered Species Act (currently 77 endangered and 15 threatened species) are found in Panama.¹⁷

¹⁶ Birdlife International, Important Bird Areas AMERICAS: Panama (2009), available at: <http://www.birdlife.org/datazone/userfiles/file/IBAs/AmCntryPDFs/Panama.pdf>.

¹⁷ Of the MBTA-protected species, 131 are currently listed by the U.S. Fish and Wildlife Service as Birds of

Deforestation and subsequent loss of migratory bird and wildlife habitat is a concern throughout Central America, including Panama. Although Panama has designated large areas as national parks, and large tracts of tropical forests remain intact, a variety of land use practices, including commercial and subsistence agriculture and development, diminish the extent and quality of habitat for migratory birds in Panama. While the services sector dominates Panama's economy and export earnings, approximately half of Panama's current goods exports to the United States consist of agricultural products. However, (as noted above) most U.S. imports from Panama, including agricultural products, already enter the United States duty-free under U.S. trade preference programs or on an MFN basis. Therefore, the Administration has concluded that the TPA is not likely to have a significant, negative impact on habitat in Panama for migratory birds through increases in trade and production of products that may be associated with deforestation and forest degradation.

Documented trade in wild plants, animals and animal products between the United States and Panama is relatively small, and most of it is regulated under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), to which both the United States and Panama are parties. Generally, U.S. tariffs on wild plants and animals imported from Panama are already very low or zero; therefore, the Administration has concluded that the TPA is not likely to cause an increase in wildlife trade.

Although implementation of CITES in Panama has raised some concerns in the past, Panama is now classified as a "Category 1" country under the CITES National Legislation Project. Category 1 is the designation for countries with national legislation that is adequate to implement the provisions of CITES.¹⁸ Along with other obligations in the Environment Chapter (see section III.B), this obligation is subject to the TPA's dispute settlement procedures and enforcement mechanisms.

Given the legal protections for wildlife and endangered species in place in both the United States and Panama, and the fact that the TPA includes commitments to effectively enforce environmental laws and the obligation to implement covered MEAs, such as CITES, the Administration has concluded that the TPA is unlikely to contribute to an increase in illegal trade of wildlife or endangered species. The TPA's provisions related to customs cooperation may help to reduce illegal trade, and the TPA's cooperation mechanism will provide opportunities to enhance cooperation related to wildlife and endangered species conservation.

Turtles

The Inter-American Convention for the Protection and Conservation of Sea Turtles (IAC) is the only binding treaty in the world to protect sea turtles. Panama joined the IAC recently and has just begun to participate in the Scientific and Consultative Committee. Its continued participation will be critical for regional efforts to conserve sea turtles, particularly since it is home to five out the

Conservation Concern.

¹⁸ Additional background information is available in the Interim Environmental Review, available at: <http://www.ustr.gov/sites/default/files/Panama%20interim%20review.pdf>.

seven species of sea turtles in the world between its Pacific and Caribbean coasts – green, hawksbills, leatherbacks, olive ridleys, and loggerheads.

Section 609 of Public Law 101-162 requires the President (who has delegated the authority to the Department of State) to make annual certifications to the Congress for countries that meet the requirements of Section 609 in terms of sea turtle protection for commercial shrimp trawl fisheries. Any country that is not certified may not export commercially-harvested shrimp and shrimp products to the United States. This certification requirement does not affect shrimp and shrimp products from aquaculture or artisanal fisheries. This certification program has been applicable to South American countries with shrimp fisheries in the Pacific Ocean since 1996. Certification decisions are based in part on bi-annual verification visits conducted by Department of State and National Marine Fisheries Service personnel to observe compliance and enforcement. To meet the standard for certification a country must have a regulatory program governing the incidental take of sea turtles in commercial trawl shrimp fisheries that is comparable to that in the United States and an incidental take rate of sea turtles in those shrimp fisheries that is comparable to that in the United States.

On May 1, 2011, the Department of State certified 39 countries, including Panama, as meeting the requirements set by Section 609 of P.L. 101-162 for continued export of shrimp to the United States.

The TPA will not affect the certification requirement in Section 609, or the manner in which the Department of State assesses and makes decisions on the effectiveness of foreign governments in their implementation and enforcement of their domestic laws related to protection of sea turtles. The TPA is expected to provide opportunities to reinforce efforts to protect turtles through the obligation to effectively enforce environmental laws and through environmental cooperation activities aimed at turtle conservation.

Tuna/Dolphin

The Inter-American Tropical Tuna Commission (IATTC), established by international convention in 1949, is responsible for the conservation and management of fisheries for tunas and other species taken by tuna-fishing vessels in the eastern Pacific Ocean. The United States and Panama are members of the IATTC.

The International Dolphin Conservation Program¹⁹ (AIDCP) is a legally-binding multilateral agreement which entered into force in February 1999. AIDCP aims to: progressively reduce incidental dolphin mortalities in the tuna purse-seine fishery to levels approaching zero through the setting of annual limits; seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins; and ensure the long-term sustainability of tuna stocks in the Agreement Area, as well as that of related marine resources, taking into consideration the interrelationship among species in the ecosystem. The United States and Panama are parties to the AIDCP.

¹⁹ See <http://www.iattc.org/IDCPENG.htm>.

In January 2009, the United States identified Panama as having vessels engaged in illegal, unreported, or unregulated (IUU) fishing under the High Seas Driftnet Fishing Moratorium Protection Act based on noncompliance with IATTC and Northwest Atlantic Fisheries Organization (NAFO) conservation and management measures. Panama subsequently took actions to address, or provide information challenging the basis of, the IUU fishing activities of their vessels and received a positive certification.²⁰

In January 2011, the United States again identified Panama as having vessels engaged in IUU fishing under the High Seas Driftnet Fishing Moratorium Protection Act based on noncompliance with IATTC measures.²¹ The United States is currently engaged in consultations with Panama regarding these matters, and a certification decision on Panama will be released in the next biennial report to Congress (due in 2013).

Panama has expressed a willingness to better control its tuna fishery. While some issues remain outstanding, Panama has been engaged with the United States and other delegations on issues of IUU fishing, capacity controls, and tuna conservation and management.

The TPA does not alter or supersede the IATTC or the AIDCP. On the contrary, through the obligation to effectively enforce environmental laws (including those related to implementation of commitments under the IATTC), the TPA is expected to complement and reinforce existing fisheries management and dolphin conservation activities.

VI. POTENTIAL REGULATORY IMPACTS

A. Regulatory Review

Consistent with Executive Order 13141 and its Guidelines, this review included consideration of the extent to which the TPA might affect U.S. environmental laws, regulations, policies, and/or international commitments. Within the range of TPA obligations, those related to investment, services, and TBT can have particular significance for domestic regulatory practices concerning the environment, health, and safety. Previous environmental reviews, including the preliminary and final reviews for U.S. free trade agreements with Jordan, Chile, Singapore, Australia, Morocco, Central America and the Dominican Republic, Bahrain, Oman, and Peru, have considered potential impacts on the U.S. regulatory regime with respect to all of these obligations and have found that the respective trade agreements were not anticipated to have a negative impact on U.S. legal or regulatory authority or practices. Further, the reviews noted the potentially positive impact that the agreements could have on the U.S. environmental regulatory regime as a result of the agreements' commitments concerning effective enforcement of U.S. environmental laws, not waiving U.S. environmental laws to attract trade or investment, and providing for high levels of environmental protection in U.S. environmental laws and policies. As a result of the May 10, 2007, accord between the Administration and the bipartisan Congressional leadership, the TPA and other trade agreements pending at that time include strengthened environmental provisions.

²⁰ See January 2011 Biennial Report to Congress, available at: http://www.nmfs.noaa.gov/msa2007/docs/biennia_report_to_congress.pdf.

²¹ Ibid.

Based on this previous analysis, and given that the core obligations in these areas are similar to those undertaken in the earlier trade agreements, the Administration has concluded that the TPA will not have a negative impact on the ability of U.S. government authorities to enforce or maintain U.S. environmental laws or regulations.

For a more in-depth analysis of general trade agreement commitments and their potential regulatory impacts in the United States, see the previous reviews at: <http://www.ustr.gov/trade-topics/environment/environmental-reviews>.

B. Investment

Investment provisions in trade agreements were a matter of intense debate during Congress' consideration of the Trade Act. The central question was the appropriate balance that should be struck between protecting the rights of U.S. investors abroad and preserving the ability of the federal government and state and local governments to regulate with respect to health, safety, and the environment.

In the Trade Act, Congress recognized that securing a stable investment climate and a level playing field for U.S. investment abroad are important objectives of U.S. trade policy. By fostering economic growth and job creation, investment can bring important benefits, including potential benefits to the environment: as wealth grows and poverty decreases, more resources become available for environmental protection, with potential benefits for developing countries, particularly as they develop constituencies in favor of increased environmental protection. However, Congress also gave weight to concerns that arbitral claims brought by investors against governments (through "investor-State" arbitration) could be used inappropriately to challenge U.S. domestic laws and regulations, including those concerning the environment. As the Conference Report accompanying the Trade Act states: "[I]t is a priority for negotiators to seek agreements protecting the rights of U.S. investors abroad and ensuring the existence of a neutral investor-State dispute settlement mechanism. At the same time, these protections must be balanced so that they do not come at the expense of making U.S. Federal, State, and local laws and regulations more vulnerable to successful challenges by foreign investors than by similarly situated U.S. investors."²²

The Trade Act strikes a balance between these two goals by recommending U.S. trade negotiating objectives that clarify several substantive investment obligations of particular concern (notably, provisions on expropriation and "fair and equitable treatment"). The objectives seek to ensure that foreign investors in the United States are not accorded greater substantive rights than U.S. investors in the United States, while also securing for U.S. investors abroad core protections that are comparable to those that would be available to them under U.S. law. Other objectives in the Trade Act addressed concerns that investor-State arbitration be conducted efficiently and arbitral tribunals interpret substantive obligations in a consistent and coherent manner. After enactment of the Trade Act, the Administration consulted extensively with Congress and with the business community and environmental non-governmental organizations (NGOs) in order to clarify

²² See H.R. Rep. No. 107-624, at 155 (2002).

provisions, develop new procedures, and ensure that those provisions and procedures fully satisfied the Trade Act’s objectives. These provisions and procedures were ultimately incorporated into each of the trade agreements negotiated under the Trade Act.

Previous environmental reviews of trade agreements have examined investment provisions in detail, particularly those clarifications and improvements included in trade agreements negotiated after the Trade Act was enacted.²³ The Administration concluded that the investment provisions should not significantly affect the ability of the United States to regulate in the environmental area.²⁴ In this review, the Administration has re-examined that conclusion in light of public and advisory committee comments and the most recent experience.

Relevant TPA Investment Provisions

The TPA Investment Chapter includes the following substantive clarifications and procedural innovations with relevance to the environment. These provisions were developed based on careful consideration of Trade Act guidance and consultations with interested constituencies:

Expropriation. The expropriation provisions have been clarified in an annex to ensure that they are consistent with U.S. legal principles and practice, including a clarification that non-discriminatory regulatory actions designed and applied to protect the public welfare (including environmental protection) do not constitute indirect expropriation “except in rare circumstances.” To determine whether an indirect expropriation has occurred, the annex directs tribunals to examine several factors, which derive from the analysis of the U.S. Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the seminal case on regulatory expropriation. The annex also clarifies that only tangible or intangible property rights or interests in an investment are subject to the TPA’s obligations with respect to expropriation.

Minimum standard of treatment/“fair and equitable treatment.” The minimum standard of treatment obligation, including the obligation to provide “fair and equitable treatment” and “full protection and security,” is clarified to provide that these concepts do not require treatment in addition to or beyond that contained in customary international law, and do not create additional rights. Specifically, “fair and equitable treatment” is defined to include the obligation not to “deny justice” in criminal, civil, or administrative adjudicatory proceedings, in accordance with “due process” protections provided in the principal legal systems of the world, including that of the United States. An annex gives further guidance concerning the Parties’ understanding of the term “customary international law.”

Increased transparency in the investor-State mechanism. The TPA provides that all substantive documents submitted to or issued by an arbitral tribunal shall promptly be made public and that

²³ See, for example, final reviews of the Singapore, Chile, Morocco, and CAFTA-DR free trade agreements, and the U.S.-Peru Trade Promotion Agreement.

²⁴ The full text of the investment chapters included in U.S. trade agreements currently in force can be accessed through: <http://www.ustr.gov/trade-agreements/free-trade-agreements>. Additional information can also be found in the interim and final environmental reviews available at: <http://www.ustr.gov/trade-topics/environment/environmental-reviews>.

hearings are open to the public, subject to provisions ensuring the protection of classified and business confidential information. It also expressly authorizes *amicus curiae* submissions, allowing the public to present views on issues in dispute.

Elimination and deterrence of frivolous claims. The TPA includes an expedited procedure to allow for the dismissal of frivolous claims (based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, *i.e.*, the claimant has failed to state a claim upon which relief may be granted) and for the dismissal of claims based on jurisdictional objections. It also expressly authorizes awards of attorneys' fees and costs after a tribunal decides, as a preliminary question, whether to dismiss a claim for lack of jurisdiction or for failure to state a claim on which relief may be granted.

Promoting consistency and coherence of arbitral decisions. The TPA allows interim review of draft tribunal decisions by litigants and by the non-litigating Party. The litigants may comment on the draft decision.

In addition to these improvements developed specifically in response to the Trade Act, the TPA includes several provisions, similar to those in previous agreements, that accommodate the flexibility that environmental regulators need to do their job and demonstrate the Parties' intent that the investment obligations should be interpreted in a manner consistent with each Party's right to regulate in the environmental area:

National treatment and MFN treatment for investors and their investments "in like circumstances." As in earlier U.S. bilateral investment treaties (BITs) and in Chapter 11 of the North American Free Trade Agreement (NAFTA), the national treatment and MFN obligations of the TPA Investment Chapter apply to investors "in like circumstances." This means that domestic regulation (including environmental regulation) may, in furtherance of non-discriminatory policy objectives, distinguish between domestic and foreign investors and their investments, as well as among investors of different countries and their investments, without necessarily violating the national treatment and MFN obligations. For example, regulators in appropriate circumstances may apply more stringent operating conditions to an investment located in a wetland, or in a more heavily polluted area, than to an investment located in a less environmentally sensitive area.

Relationship to other provisions. The TPA includes provisions making clear that in the event of any inconsistency between the Investment Chapter and any other chapter (including the Environment Chapter), the other chapter will prevail to the extent of the inconsistency. While the Administration does not believe there to be any inconsistencies between the Investment Chapter and any other chapters, this provision clarifies the Parties' intentions with respect to the relationship between different chapters. The TPA Investment Chapter also provides that nothing in the chapter shall be construed to prevent a Party from taking measures otherwise consistent with the Investment Chapter to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns. Furthermore, in the agreement's Environment Chapter each Party commits not to waive or derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties, except where the waiver or derogation is provided for in its law.

Potential Environmental Regulatory Impacts

The Administration has been unable to identify any concrete instances of U.S. environmental measures that would be inconsistent with the TPA's substantive investment obligations, and none have been called to the Administration's attention by commenters. No claims have ever been brought against the United States under the almost 40 BITs that are currently in effect or under any of our trade agreements other than the NAFTA. In the 17 years that the NAFTA has been in effect, 15 cases have been brought against the United States by Canadian or Mexican investors. The United States has prevailed in all of the cases that have been decided to date.

The Administration also considered the views of the TEPAC and other commenters on investment issues (see Section IV). The TEPAC majority concluded that the clarifications to the TPA's investment provisions were an improvement over those in NAFTA Chapter 11 (particularly the clarification of the meaning of "indirect expropriation"), although the majority noted that some concepts could be further clarified. The majority also found that these clarifications reduced the possibility of a successful claim relating to a U.S. environmental measure. In addition, the majority noted that other provisions provide important protections for environmental regulation: the provision that another chapter (including the Environment Chapter) prevails over the Investment Chapter in the event of an inconsistency; the provision that nothing in the Investment Chapter should be construed to prevent a Party from taking measures otherwise consistent with the Chapter to regulate investment in an environmentally sensitive manner; clarifications of the minimum standard of treatment obligation; and the national treatment and MFN treatment obligations. Some members in a minority found that the CAFTA-DR provisions did not provide sufficient protection for U.S. environmental regulation, while other members in a minority expressed concerns that investment protections had been inappropriately weakened.

Many of the innovations developed as a result of the Trade Act – including in the areas of expropriation, the minimum standard of treatment, and performance requirements – serve as safeguards to ensure that legitimate public interest regulation is fully protected.

Based on the above considerations, and given that U.S. environmental measures can be challenged in U.S. courts under current law, the Administration does not expect the TPA to result in an increased potential for a successful claim relating to such measures. The TPA's innovations (like those of all post-Trade Act U.S. trade agreements) should further reduce the risk that arbitral tribunals will misapply the investment provisions of the TPA. The Administration will continue to review the potential impact of investment provisions on environmental measures, however, as it implements this agreement and other trade agreements with similar provisions.

VII. ENVIRONMENTAL COOPERATION

The Trade Act of 2002 establishes that a principal negotiating objective of the United States is to strengthen the capacity of our trading partners to protect the environment through the promotion of sustainable development. In addition, the Trade Act instructs negotiators to seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science. Environmental cooperation is expected to be an important

complement to the environmental provisions of the TPA.

The United States and Panama already work together on a bilateral basis to address environmental issues through a number of ongoing programs. The United States and Panama also work extensively through other mechanisms such as the Organization of American States, the Inter-American Development Bank, the Summit of the Americas, the UN Environment Program, and the World Bank. U.S. agencies have several regional and bilateral programs with Panama, principally under the auspices of the Agency for International Development, the Department of Commerce, the Department of State, NASA, and the Environmental Protection Agency.

The Parties have negotiated an Environmental Cooperation Agreement, which is expected to contribute to national and regional efforts to protect, improve, and conserve the environment. Equally important, it will provide opportunities for information sharing and cooperation between the Parties. Public participation in the cooperative work, including public-private partnerships, will be an important element of this framework.

The United States and Panama also recognize the importance of their ongoing cooperative activities, including those taking place pursuant to relevant MEAs.

ANNEX
Organizations Providing Comments²⁵

Received in response to 69 *Fed. Reg.* 19262 (April 12, 2004)

American Dehydrated Garlic and Onion Association
American Sugar Alliance

Received in response to 69 *Fed. Reg.* 41876 (July 12, 2004)

None

²⁵ See Section IV for additional information.