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**Before the
Subcommittee on Commerce, Trade and Consumer Protection
of the House Committee on Energy and Commerce**

Concerning the U.S.-Singapore and U.S.-Chile Free Trade Agreements

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Thank you for the opportunity to testify before the Subcommittee today on behalf of Friends of the Earth concerning the recently negotiated free trade agreements with Chile and Singapore. Friends of the Earth is a national environmental advocacy organization. We founded and belong to Friends of the Earth International, a network of groups with more than one million members in 70 countries worldwide. Friends of the Earth has worked to address trade and environmental issues for many years, including serving on the U.S. government's Trade and Environment Policy Advisory Committee and, recently, the Industry Sector Advisory Committee on Chemicals and Allied Products.

The Chile and Singapore agreements may be limited in economic terms, but they are significant when it comes to the environment. Trade involving both of these countries has substantial international environmental implications. Natural resources are at the heart of Chile's export trade: its four largest export sectors to the United States are edible fruits and nuts, mined products (copper), forestry and wood products, and fish and seafood. The Chilean forestry sector in particular is enormously important. Both in scale and in diversity of species and ecosystems, Chilean native forests are irreplaceable on a global level. The primary temperate forests of Chile represent one-third of the remaining primary temperate forests in the world, and the United States was the largest purchaser of Chilean forestry products in 2000. A 1997 World Resources Institute report showed that 45 percent of Chile's original undisturbed forest already has been lost, while 76 percent of the remaining frontier forest is threatened.

Singapore is known as a significant transportation corridor for environmentally sensitive trade, including trade in endangered species, illegally logged and traded timber, and ozone depleting substances. Most notably, Singapore is a major hub for the laundering of illegal wildlife, particularly from Indonesia and Malaysia. For example, Singapore is the major exporter of wild-caught sulphur-crested cockatoos, even though the birds' natural range is limited to Indonesia, a country that has prohibited their export. In addition, authorities seized 6 tons of African elephant ivory being transshipped to Asia through Singapore in July 2002, though trade in elephant ivory has been banned for more than a decade. A recent report has also indicated that, during a ten-month period in 2001-

2002, Singapore exported millions of dollars of illegal ramin, an internationally protected tree species, to the United States without the permits required by the Convention on International Trade in Endangered Species (CITES).

However, the Chile and Singapore agreements are significant not only because of their direct implications for environmental concerns. They also serve to set critical parameters for future trade agreements, including future bilateral agreements and broader regional agreements such as the Central America Free Trade Agreement (CAFTA) and the Free Trade Area of the Americas (FTAA). Unfortunately, the precedents that the Chile and Singapore agreements set for future trade agreements do not provide sufficient protection for the environment and could lead directly to the undermining of critical environmental laws and regulations. We believe these agreements set our trade policy on a wrong course that the environment cannot sustain. I would like to focus attention on two particular areas of concerns – investment rules and environmental provisions – and touch briefly on two other issues – services, which I know is of substantial interest to this committee – and intellectual property rights.

Investment

During debate over the Trade Act of 2002, many members of Congress, including several on the Committee, raised significant concerns about the investment rules in Chapter 11 of the North American Free Trade Agreement (NAFTA). These rules provide private foreign investors the right to bring complaints before international arbitral tribunals when they believe that the investment provisions of the trade agreement have been violated. Environmental and public interest organizations and state and local lawmakers voiced concern about the increasing number of investment cases in which companies sought compensation for the effects of environmental and public interest laws and regulations. Mexico and Canada have each lost Chapter 11 cases involving environmental protections, and the United States has been challenged under Chapter 11 for such actions as California's phase-out of a toxic gasoline additive, MTBE. The consumer protection mandate of this Subcommittee is surely relevant to addressing the potential threat posed by such challenges.

We continue to stress that that the investment rules in NAFTA provide investor rights that go far beyond those provided in U.S. law and enable inappropriate challenges to be brought against government actions in the public interest. In response to heightened attention to these issues, Congress required in the Trade Act that investment provisions “ensur[e] that foreign investors are not accorded greater substantive rights with respect to investment protections than United States investors in the United States....” Section 2102(b)(3).

The approach to international investment rules embodied in the Chile and Singapore agreements contains some incremental improvements over NAFTA's Chapter 11. We would especially note the transparency requirements for the investor suit process itself. We do not believe, however, that the provisions we have reviewed comply with the direction from Congress that new international investment rules not provide foreign

investors with “greater substantive rights” than domestic investors enjoy under U.S. law. Nor does the approach address the fundamental problems that environmental groups and others have identified with the NAFTA model.

First, on the issue of expropriation, or takings, the inclusion of clarifications setting out a shared understanding of the expropriation, or takings, standard provides some incremental improvements. However, the clarifications fail to adequately reflect U.S. law in many respects, including the particular Supreme Court decision, *Penn Central*, on which USTR intended to base much of the standard in these agreements. The agreements focus on a limited and imbalanced set of the critical factors used by the Supreme Court in determining takings cases.

Simply listing some of the factors the Supreme Court discussed in the *Penn Central* case, but without the essential explanations and limitations that were set forth in that case and in subsequent rulings, provides no assurance that foreign investors will not in fact be granted greater rights than U.S. investors. This failure to provide explanations and limitations for critical standards includes the use of the “character of government action” as a factor in expropriation analysis. “Character of government action” taken out of context is an extraordinarily ambiguous phrase and could easily be misapplied by tribunals that are neither trained in nor bound by U.S. precedent.

The agreements also fail to include critical standards established in U.S. jurisprudence. For example, they do not include the critical Supreme Court “parcel as a whole” principle that a governmental action must permanently interfere with a property in its entirety in order to meet a threshold requirement to constitute a taking. Property rights are not defined in the agreements, nor is there any reference to the fact that under Supreme Court cases takings claims must be based upon compensable property interests, which are defined by background principles of property and nuisance law. Furthermore, the agreements fail to include the fundamental distinction between land and “personal property” and the significantly different treatment that these categories of property have been afforded under U.S. law. In addition, the language concerning the analysis of an investor’s expectations is too vague, leaves too much to the discretion of the arbitrators, and does not indicate the deference to governmental regulatory authority that is found in U.S. jurisprudence.

The agreements indicate that non-discriminatory regulatory actions to protect legitimate public welfare objectives do not constitute an indirect expropriation, or regulatory taking, except in rare circumstances. But while this language provides some direction for arbitral panels, it fails to adequately convey the degree to which it is unlikely that a regulatory action would be considered an expropriation under U.S. law. It would take an extreme – *not just a rare* – circumstance for any of the thousands of our country’s laws and regulations to be found to constitute an expropriation. It would be more accurate to state that regulatory actions designed to protect health, environment, or the public welfare do not constitute an expropriation, except in instances equivalent to a permanent, compelled, physical occupation. Yet the agreements do not say this.

Other critical elements of the investment chapters also do not comport with standards under U.S. law. In regard to minimum, or general, treatment, we are deeply concerned that the standard is inherently subjective and incapable of precise definition and opens the door to wide-ranging interpretation by tribunals. For example, the tribunal decision in the *Metalclad* case under NAFTA Chapter 11 considered a local government's disagreement with the Mexican federal government over a permitting decision for a hazardous waste treatment facility to constitute a violation of this standard. While we welcome the clarification that the minimum treatment standard includes procedural due process, inclusion of one principle in a standard does not eliminate the significant potential of a broader, unbounded interpretation of the standard that goes far beyond U.S. law.

In addition, the definition of investment in these agreements differs markedly from that in NAFTA and appears to be even broader in scope. The definition is broad as to include protection of investments such as shares, stock, and other forms of equity; bonds, debentures, loans, and other debt instruments; and futures, options and other derivatives. The effect of this definition is not clear, but at a minimum it raises questions as to the types of property interests the agreement seeks to protect and whether those notions are consistent with the limited notion of protected property interests under the U.S. Constitution and case law.

The lack of an appellate process under the investment rules and the lack of any clear oversight role for U.S. courts inhibit the development of a clear jurisprudence consistent with U.S. investor protections. There can thus be no assurance that any of the substantive rights in these agreements will be applied in a manner consistent with the U.S. legal norms as required by the Trade Act.

We believe that the failure to include a general environmental exception to the investment chapter is a further indication that international investment rules remain a significant threat to environmental and other policies enacted by governments to further the public interest. If, as the supporters of strong investment protections argue, such rules pose no threat to legitimate environmental regulations or actions of government, then it is difficult to understand why it would not be appropriate to ensure that result by clearly carving out such regulations from the ambit of the rules. The agreements do so for other portions of the agreement, but not for investment.

We are also concerned by the transfer of funds obligations in the investment provisions of the Chile and Singapore agreements. These obligations, which were highly controversial and the cause of a substantial delay in the completion of the agreements, in most cases prohibit the use of capital controls to address financial crises. Capital controls are strongly endorsed by pro-trade economists such as Jagdish Bhagwati as a necessary tool to address global financial volatility. From an environmental viewpoint, the availability of such policy tools is important because financial instability and crises are generally not conducive to sustainable development policies.

Finally, we see the continuation of an imbalanced approach to the treatment of private multinational investors as opposed to citizens generally in international economic law. Investors are given explicit rights and enforcement mechanisms to hold governments accountable. On the other hand, as we will discuss below, there is no citizen enforcement mechanism included in either agreement – not even a process analogous to the NAFTA Commission for Environmental Cooperation citizen submission process.

Environmental Provisions

As global trade increasingly integrates economies – a fact beyond the control of any of us here today – we believe it is vital that the potential environmental impacts of increased trade be fully addressed. We therefore believe that environmental concerns about the impacts of trade, in sectors ranging from forestry to transportation, should be treated jointly with the commercial issues addressed in trade agreements. The environmental community's longstanding position is that environmental provisions should have enforcement parity with commercial provisions and must be robust in improving environmental standards in the participating countries. We also believe that environmental provisions must include an effective process for citizens to bring complaints regarding environmental issues that are addressed in the agreement. Unfortunately, while the US-Chile and US-Singapore, include environmental provisions in their core text, they don't meet those tests and also represent steps backward from earlier agreements negotiated by the United States.

Most significantly, the agreements lack any independent citizen petition mechanism to address failures by countries to carry out their environmental commitments under the agreement. The failure to include any such process, even one similar to the process provided for in the NAFTA side agreement on the environment, the North American Agreement on Environmental Cooperation (NAAEC), is a serious omission. The NAFTA procedures are inadequate and lack any clear and effective follow-through mechanism for enforcement. Yet, if nothing more, the framework has allowed some important environmental issues to be raised. For example, just last week, the attorneys general of New York, Connecticut and Rhode Island, along with 48 Canadian and United States non-governmental organizations and two towns in New York State, filed a citizen submission asserting that Canada is failing to effectively enforce the Canadian Environmental Protection Act and the federal Fisheries Act against Ontario Power Generation's (OPG) coal-fired power plants.

We believe that it is fundamentally imbalanced and inappropriate to omit a citizen petition mechanism for environmental provisions when the investment rules in these agreements include a private right of action for foreign investors. Moreover, we believe this imbalance represents a failure to fulfill the Trade Act's mandate to seek equivalent dispute settlement mechanisms. An equivalent dispute mechanism for environmental provisions would grant citizens the right to bring environmental complaints with the same effectiveness as private investors are able to exercise under investor rights rules.

In addition, the Chile and Singapore agreements do not contain binding language to prohibit the countries involved from lowering their environmental standards outright. The countries have agreed merely to hortatory language that each party “strive to ensure that it does not waive or otherwise derogate from” its environmental standards. Yet even a country’s failure to meet this ‘non-waiver or derogation’ standard cannot be the basis for a dispute settlement proceeding under the agreements. This inability to address a violation of the ‘non-waiver or derogation’ standard through a dispute settlement process makes these agreements a clear step backwards from the Jordan Free Trade Agreement, which allows for such disputes.

It is also quite clear on any plain reading of the agreements that the dispute mechanism for violations of environmental provisions is not equivalent in a number of respects to the dispute settlement process for commercial provisions. The agreements thus clearly fail to provide for parity of enforcement and thereby represent a clear step backward from the Jordan agreement, in which the dispute settlement rules did not distinguish among the agreement’s provisions, and a departure from the requirements of the Trade Act.

Finally, it is vital to comment on the cooperative environmental arrangements that are tied to these agreements. These cooperative arrangements are included in the agreement in the case of Chile and are still being negotiated in the case of Singapore. While the aims that these cooperative arrangements aspire to are important and very worthwhile, it seems extremely unlikely that these commitments will be at all effective in practice. Most important, the need for financial resources to realize the cooperative commitments has gone completely unaddressed by the U.S. government, nor has any consultation with Congress concerning funding issues taken place. U.S. agencies have even acknowledged that they lack the necessary resources to carry out the cooperative programs agreed to in negotiations.

Services

While services are not often considered to have impacts on the environment, the environmental implications of services negotiations are in fact quite substantial. Service sectors such as transportation, energy (including pipelines, electricity and other activities) and water all have important environmental ramifications. The NAFTA case involving cross-border trucking, which was decided largely under the agreement’s services chapter, dramatically illustrates the environmental effects of such trade provisions. The recent decision by the 9th Circuit Court of Appeals finding that the Department of Transportation had not carried out an adequate environmental review process for the opening of the border to cross-border trucks made the environmental implications quite clear.

In the Chile and Singapore agreements, the services chapters primarily address cross-border services. In the context of these agreements, then, the effects of the agreement for services such as cross-border land transport, pipelines, electricity distribution, and water distribution are limited. However, these agreements do set

parameters for the services chapters in future agreements such as the CAFTA and FTAA where these concerns will be relevant. It is particularly troubling that the Singapore and Chile services chapters do not include an exception for “measures relating to the conservation of exhaustible natural resources,” an exception that is found in the General Agreement on Tariffs and Trade (GATT) and that the United States has relied on to defend U.S. law before WTO panels.

Intellectual Property Rights

The Singapore agreement does not include a critical exception found in Article 27.3(b) of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that permits governments not to issue patents for plants and animals. It is unclear whether the Chile agreement implicitly incorporates this exception by reference to the TRIPS agreement, or whether the exception is also omitted in the Chile agreement. The lack of this exception will remove the flexibility needed by governments to enact measures to protect biodiversity, including plant genetic resources, and to ensure sovereignty over genetic resources as provided for in the Convention on Biological Diversity.

Conclusion

In conclusion, the Chile and Singapore agreements are significant not only in their own right, but also as potential precedents for future agreements. As negotiations progress on other trade agreements, including a number of bilateral agreements and regional agreements such as the CAFTA and FTAA, it will be vital not to repeat the serious flaws in the Chile and Singapore agreements. The concerns that I have laid out here concerning investment rules, environmental provisions, services and intellectual property should all be fully addressed in future agreements. Indeed, lessons from the Chile and Singapore agreements and other past agreements can be built upon to construct a trade policy that is truly inclusive of environmental concerns. Otherwise, we believe that our country’s trade policy will proceed down an unsustainable path.