Center for International Environmental Law
and Defenders of Wildlife

Submission to the Committee of Government Representatives on the Participation of Civil Society

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I. Introduction

As multilateral trade liberalization treaties push forward the free-trade agenda, the conflict created between deregulated trade and the principles of environmental protection has become increasingly apparent. The growing extent to which multilateral trade treaties are able to influence and subvert public policy is enlightened by the tension between these two agendas. With the first draft of the Free Trade Area of the Americas (FTAA) due this next year, heeded input from civil society may help to make this agreement one that can reconcile the needs of multinational corporations with those of the citizens and ecosystems that fall within the jurisdictions of participating states of the FTAA.

The purpose of this paper is to highlight several specific concerns regarding the Free Trade Area of the Americas (FTAA) and its effect on environmentally sustainable development. The first concern is over the extent to which the Negotiating Groups of the FTAA will include public participation in the process of drafting the provisions of the FTAA and in the operation of the FTAA. A second, and related concern is the extent to which the negotiating parties' commitment to transparency and public participation will be reflected in the provisions of the FTAA relating to dispute resolution. A third concern is the likelihood that the FTAA may include investor protection rules similar to those in Chapter 11 of the NAFTA. Those rules coupled with the investor to state mechanism create an imbalance that favors investor rights over those of federal governments to enforce environmental regulations. Lastly, the inclusion of positive provisions for environmental principles could improve the investment regime by imposing obligations on investors to ensure that their actions meet minimum corporate accountability standards.

II. Public Participation

At the San Jose Ministerial, and again in Toronto, the FTAA negotiating parties reaffirmed their commitment to the principle of transparency in the negotiating process. This commitment is fundamental not only to the fulfillment of the democratic principles espoused in the Miami Declaration, but also to the success of the FTAA itself. The only way to gain popular support for the FTAA within the hemisphere is to allow the FTAA to be a transparent institution

that involves the input of civil society. Options for public participation are presented through an analysis of multilateral environmental treaties, which are on the forefront of efforts to create participatory international regimes. These options are summarized below and are discussed in further detail in the attached document, "Options for Public Participation." The first steps to moving towards increased transparency would be to release the negotiating positions submitted by the governments and any consolidated draft text. An important second step is to open future ministerial meetings to participation by NGOs.

The core of the popular backlash against multilateral trade agreements, such as the WTO and the MAI, in recent years can be attributed to the lack of transparency and public participation within these institutions. People do not understand the nuances of these trade agreements and for good reason; they have been excluded from the negotiations. There is only one avenue through which the FTAA will be able to earn its support from the public, and that is to allow the public and NGOs to be involved in the process. Providing a democratic check on the negotiations process of the FTAA will demystify the FTAA and make it a much more citizen-friendly trade agreement.

A. Options for Public Participation

Defining the degree and means by which civil society representatives will participate in the FTAA is crucial to its success. There are many options for including public participation in a multilateral agreement, as witnessed in developments in multilateral environmental law. The Rio Declaration on Environment and Development and Agenda 21 at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992 identified three principles, or "pillars," of public participation: access to information, access to decision-making, and access to justice. In the post-Rio period, these three principles have been incorporated into the rulemaking, implementation and monitoring phases of several multilateral environmental agreements, such as the U.N. Conventions on Climate Change, Biological Diversity, and Desertification. FTAA negotiators should first provide the framework in the FTAA draft that will establish the right of the public and NGOs to access information and take part in the decision-making process. Details of the participation mechanism can be worked out later.

i. Access to Information

The first principle of public participation, access to information, can be achieved by ensuring that public authorities make information available to the public in a transparent manner. Allowing for document dissemination facilitates this process. The Framework Convention on Climate Change (FCCC) instructs its secretariat to reproduce and distribute documents at the sessions and to publish and distribute official documents, for example. Hard copies of documents should be available at official meetings and they should be electronically available on the FTAA website. Documents should also be posted on the website in a timely manner. The types of information made available should be subject to limited restrictions. The WTO has failed to fully incorporate this principle. The well-publicized civil protests against the WTO at its

ministerial meeting in Seattle, Washington in 1999 were provoked significantly by a belief that the WTO operates secretly and without public accountability. Most WTO documents are made available to the public only six months after they have been "derestricted."

ii. Access to Decision-Making

Access to decision-making is a second principle of public participation that should be addressed in the FTAA. The public should be able to participate in the decision-making process both during the negotiating process and as an eventual agreement is implemented. Agenda 21, the action plan for the 1992 Rio Declaration, suggests that the U.N. system should take measures to enhance or establish mechanisms and procedures within each U.N. organization "to draw on the expertise and views of non-governmental organizations in policy and program design, implementation, and evaluation."

Applying for accreditation is the first step in gaining access to attend official meetings. Requirements for NGO accreditation vary according to the agreement. The Climate Convention allows any NGO that is legally constituted, non-profit and competent in climate change to be accredited. Unlike the accreditation requirements for the Climate, Biological Diversity, and Desertification Conventions, the North Atlantic Fisheries Organization (NAFO) has a more restrictive and detailed accreditation process. NAFO additionally requires information on the organization's decision-making process and funding, a history of the organization and its activities, papers produced by the organization pertinent to NAFO's subject matter, a history of NAFO observer status, and input that the organization plans to present at the meeting. These materials must all be submitted at least 100 days before the meeting.

The types of meetings open to NGO attendance varies according to the agreement. For the main Rio-era conventions, the trend has been to allow accredited NGOs to attend nearly all types of official meetings. This trend is also apparent in natural resources regimes, such as the Endangered Species Convention (CITES), the Dolphin Conservation Agreement, and the Inter-American Tropical Tuna Commission (IATTC). NAFO and other earlier agreements subscribe to a more conservative model in which they may attend meetings of the General Council or the Fisheries Commission, but are restricted from attending meetings of the subsidiary bodies or working groups.

Expressing views at meetings, such as permitting NGOs to make oral or written statements in the meetings they attend, permitting NGOs to distribute documents, and submit proposals, have been governed by practice over time in the treaties examined. At the Climate Convention, the number of speaking environmental NGOs is usually balanced with the number of business NGOs. If the chair of the meeting decides to not give the floor to an NGO representative at a meeting, s/he is expected to give a reason for not doing so. In contrast, NAFO offers formal opportunities for oral statements from NGOs, however only if the secretariat has been provided the NGO "input" at least 100 days in advance. Restricting statements to only those prepared over three months in advance may render such input irrelevant due to their lack of timeliness. This does not seem to be a constructive way of managing civil society participation at these meetings. This trend is consistent with the policies regarding NGO distribution of documents at meetings. The Climate Convention and CITES will

even provide tables outside of conference rooms for NGO observers to place materials that were not required to be approved prior to the meeting; under the NAFO, in contrast, NGOs may only circulate documents that have been submitted to the Secretariat at least 100 days prior to the meeting.

iii. Implementation

NGOs can contribute to the effectiveness of treaty implementation and compliance by providing monitoring, data management and outreach services; alerting parties to potential cases of non-compliance; and submitting legal briefs for compliance-related proceedings. NGOs are adept at engaging stakeholders though outreach. This can be useful to treaties facing potential pubic opposition due to a lack of public understanding. For example, the contracting parties of Ramsar Convention on Wetlands agreed that, to be effective, they must engage stakeholders in defining the issues and possible solutions needed for preserving wetlands. Involved NGOs develop strategic approaches to communication, education and public awareness about wetlands issues.

The side agreement to the NAFTA, the North American Agreement on Environmental Cooperation (NAAEC), serves as one example of how civil society can help to alert parties to potential cases of non-compliance. NAAEC requires each contracting party to effectively enforce its environmental laws insofar as they might affect international trade between parties. NAAEC empowers NGOs to petition the secretariat if they believe a party is neglecting to enforce its environmental laws effectively. Such a submission has the potential to lead to an exchange of views between parties and to the Council of the Commission on Environmental Cooperation (CEC) releasing a report on the matter to the public.

B. FTAA Transparency

The FTAA should take the first steps to implement the principles of transparency and public participation at the most basic level. Since the first draft of the FTAA is not yet complete, there is good opportunity to involve the civil sector in the creation of the language and provisions that will define the FTAA. This would also prove to be a good way to mitigate public opposition to the treaty.

To date, the FTAA negotiators have made only modest progress in making information publicly available. Consistent with Annex III of the Toronto Declaration, the Trade Negotiations Committee has made available to the public the compilations of hemispheric trade provisions compiled by the various Negotiating Groups. While these compilations may be of utility to persons doing scholarly comparisons of existing trade agreements, they do little to facilitate informed public participation in the FTAA negotiations. Such participation can be facilitated only by timely access to pertinent negotiating documents, such as the "annotated outlines" that have been completed by the Negotiating Groups and the draft chapters currently being prepared. We encourage the negotiating parties to make publicly available the current versions of these documents, negotiating positions that have been tabled by the parties, and the

consolidated draft text. To ensure the accessibility of this information in the future, the next ministerial declaration adopted by the negotiating parties should declare that all such materials are public documents.

The FTAA should also open its future ministerial meetings to NGO participation and allow side events, such as seminars and presentations by NGOs and academics, to be hosted by NGOs. At the Climate Convention (FCCC), events and exhibits organized mainly by the NGO community provide fora for the exchange of information between observers, the party delegates, the United Nations and other agencies and intergovernmental organizations. The secretariat arranges for and provides rooms and equipment to NGOs for use at these events.

III. Dispute Resolution

In the Summit of the Americas Plan of Action, which announced the FTAA, the American nations committed to making "trade liberalization and environmental policies mutually supportive." The negotiating parties renewed this commitment in the San Jose Declaration, declaring this a General Objective of the negotiations. The San Jose Declaration also recognized that the FTAA should not simply mimic the WTO structure, but "improve upon WTO rules and disciplines wherever appropriate." The Dispute Resolution provisions provide a unique opportunity for the parties to fulfill both of these objectives.

It is now widely recognized that the dispute resolution process established under the WTO Agreements is incompatible both with national efforts to protect the environment and with the principles of transparency and public participation to which the FTAA negotiating parties are committed. Due to an unfortunate combination of over-broad commitments and poorly-crafted exemptions, legitimate environment and health policies adopted by every WTO party are subject to attack as trade-distorting measures. Even when a policy might survive a WTO-challenge, the costs of defending the policy before the WTO can be prohibitive. These problems are exacerbated by the non-transparent, non-participatory nature of the WTO dispute resolution process. This secrecy often prevents parties from seeking potentially valuable assistance from members of academia, the NGO community and the general public who may have both resources and expertise to contribute to the process.

If the FTAA is to garner the widespread public support that is critical to its success, the negotiating parties must not replicate the errors of the WTO. The FTAA must include broader and more explicit language exempting legitimate environmental and health policies from unreasonable trade challenges. Just as importantly, the negotiating parties' commitments to transparency and public participation must be explicitly reflected in the FTAA's dispute resolution procedures. At a minimum, the procedures must provide for public notice of disputes, public access to submissions by disputing parties, and the submission--and consideration--of *amicus* briefs by concerned persons. In addition, the procedures should allow persons with expertise in environmental matters to be empanelled in disputes that raise environmental issues.

IV. Expropriation and Compensation in NAFTA Ch. 11

The NAFTA investment chapter (Chapter 11) is a likely model for FTAA investment rules, which raises several disturbing matters. The definition of expropriation in NAFTA remains too broad, while case studies, such as the Metalclad Case and the Ethyl Case, have demonstrated that an expropriation provision can significantly restrict the ability of governments to enforce environmental regulation, forcing governments to "pay to regulate" polluters. Similarly, Article 1105 of NAFTA is also problematic in that it requires countries to treat other countries in the trade agreement according to "minimum standards of international law." Since there is no clear standard to gauge "minimum standards of international law," broad discretion is left to the NAFTA arbitration panels which were intended to serve as a commercial arbitration mechanisms, and not a body to decide broad public policy conflicts.

These powerful rights granted to foreign investors coupled with the investor-to-state dispute mechanism create a one-sided situation. Although not a complete solution, one option for addressing this imbalance is to include a corresponding right of action for citizens who feel their rights have been relegated to secondary status below the rights of investors under the FTAA. Finally, the best solution to the dilemma caused by the investor-to-state mechanism would be to just eliminate it and substitute it with the more traditional state-to-state mechanism.

A. Expropriation Rules in NAFTA: Case Studies

NAFTA's Chapter 11 requires its contracting parties to compensate investors for acts, even when taken in the public interest, that directly or indirectly expropriate or nationalize a foreign investment and for measures *tantamount to* nationalization or expropriation. This vague language leaves the precise definition of expropriation to the discretion of the court, international arbitration panel, or other dispute resolution body. If such a body were to employ a broad interpretation of expropriation, a government could be required to "pay to regulate" polluters if the body found that an environmental regulation had reduced the value of a foreign investment, either directly or indirectly. The chilling effect of such a legal framework on government efforts to protect the environment could be enormous.

Two cases already adjudicated under NAFTA illustrate the danger. In one case, a United States corporation with Mexican subsidiaries known as Metalclad Corporation brought and won a claim against the government of Mexico because the Mexican state San Luis Potosi did not grant the company an operating license for a hazardous waste disposal facility. Metalclad has been awarded $16.7 million in the case. In another case, the Canadian government agreed to pay the U.S. based Ethyl Corporation $13 million in damages to settle a claim that Ethyl had brought alleging that Canada violated the expropriation provisions of NAFTA by banning the import a gasoline additive, MMT, which is widely believed to create a public health risk. The Ethyl Case demonstrates how vulnerable governments may be to corporate pressures, lacking the legal resources to confront a challenge from lawyers representing large corporations. Under the threat of lawsuits such as these, governments will

inevitably become much more cautious about introducing and enforcing regulations that are intended to protect the environment.

The proper balance between private and public rights remains a deeply controversial issue. The question of at what point regulations deny investors the "use and enjoyment" of their property to such an extent that they deserve compensations remains open. If allowed to be broadly defined and adjudicated in a closed, unaccountable forum, the expropriation provision threatens to elevate property rights above all other considerations, including public policy. If expropriation language is to be included in the FTAA, it must be drawn much more narrowly than the NAFA Chapter 11 language. Based upon these considerations, if expropriation protection is included, the act of expropriation must be narrowly defined to preserve the traditional rights of sovereign governments to regulate in the public health.

B. Article 1105: Minimum Standards of International Law

Under Article 1105 of the NAFTA, foreign investors are entitled to fair and equitable treatment under the minimum standards of international law. Since there is no clear standard in international law by which to abide, the ambiguity presented by this provision provides the NAFTA arbitrations panel the opportunity to define these standards according to their discretion. Since arbitration mechanisms under NAFTA were primarily designed to be commercial arbitration mechanisms, they are not equipped to deal with broad public policy issues, such as those brought up in the Metalclad and Ethyl cases, which deal with the contours of the powers of countries to regulate public health and the environment. The precarious balance between international commercial interests and domestic public policy enforcement that is supposed to be achieved in such arbitrations panels highlights the essence of the conflict between trade and the environment. The trade world inherently strives for deregulation, since every regulation potentially could be a barrier to trade. The environmental world, on the other hand, requires governmental regulation to achieve its goals.

C. Investor-to-State Mechanism should be balanced with corresponding right of action for citizens

To the extent that investors are granted directly enforceable rights, there ought to be a corresponding right of action granted to citizens as well. NAFTA represents the first time a multilateral trade agreement has substituted the traditional State-to-State mechanism with an Investor-to-State mechanism, allowing investors to bring claims for monetary damages against host countries. As discussed above, the international arbitral panels established under Chapter 11 do not provide appropriate fora for resolving disputes in a way that balances the concerns of investors with the concerns of neighboring property owners and local communities. Arbitrations take place in secret, without the participation of all stakeholders in a dispute. Private individuals, and sub-national levels of government, are not allowed to present their views during the arbitration or even informed that a claim has been brought although they may be the parties with the most direct interests in the outcome of the controversy. Moreover, rather than setting up an intergovernmental dispute resolution system, Chapter 11 relies on private, for-profit

arbitration institutions. The arbitration system lacks safeguards to ensure that arbitrators are trained to understand the risks to human health and the environment posed by inadequate regulation as well as the needs of business.

If investors are to be granted such broad rights, there should be a corresponding counterbalance within the institution that gives equal right to citizens to bring claims to the Panel if that citizen feels as though their legal rights have been subverted in favor of international investment regimes. Individuals and the civil sector should be able to bring direct action against a government.

The Investor-to-State mechanism exacerbates the concerns about trade and environment conflicts. The ability of an investor to bring direct action against a government on the basis of expropriation is compounded by the fact that such disputes would be decided according to the discretion of a commercial arbitrations panel that is not sufficiently equipped to settle public policy conflicts. It seems as though one solution to this problem would be to preclude the creation of an Investor-to-State mechanism in the FTAA. Instead, a State-to-State mechanism should be sufficient to deal with investor concerns in a multilateral trade agreement.

V. Positive Provisions in Investment Agreements

There are a number of "positive provisions" that could improve investment regimes. In particular, investment rules must contain provisions that: prevent host countries from attracting investment by lowering or relaxing health and environmental standards; require investors to conduct environmental impact assessments for any significant projects; give citizens and local communities access to relevant information regarding investments; ensure that environmental standards are progressively improved and consistently enforced; and create mechanisms for Parties and citizens to raise issues related to the environmental and social impacts of increased economic activity due to greater investments flows. Above all, a regime that grants broad rights to investors, as the NAFTA does, should impose concomitant responsibilities on investors to ensure that their actions meet minimum corporate accountability standards.

A sound investment agreement should give investors incentives to promote sustainable development rather than pursue short-term gain. First, an investment agreement should not be linked to a free trade agreement. Second, governments should assess existing foreign direct investment and proposed multilateral rules to determine past and potential impacts on environmental and social policy and economic security before these governments design a new investment agreement. Third, expropriation provisions should explicitly state that they do not apply to regulation that falls within traditional government powers to protect public health, safety, and the environment. Fourth, Investor-to-State dispute settlement fora, to the extent they exist, should employ legal experts who are trained in public policy, not merely business practice and should be transparent and open to all interested parties.

VI. Conclusion

We have sought to provide a brief overview of some of the problematic issues surrounding the FTAA. Without adherence to public participation principles, the FTAA will

face public opposition in the U.S. There needs to be a democratic check on the trade process in order to gain popular support. This paper and the attached document highlights many options for public participation that have been adopted in multilateral environmental agreements. They all draw upon the three principles of public participation-access to information, access to decision-making, and access to justice. The most immediate way the FTAA can begin to embrace these principles is to open future FTAA ministerial meetings to NGO participation and to make public the tabled negotiating positions by the participating parties as well as consolidated text when it becomes available.

The commitment to public participation must also be reflected in the FTAA's dispute resolution procedures. Consistent with their commitment to improve upon the WTO system, the negotiating parties should ensure not only that the FTAA's trade rules provide adequate protection for legitimate environmental and health policies, but also that members of the public affected and protected by those policies can participate fully in trade disputes that implicate them.

Likewise, serious concerns are raised by the possibility that the FTAA may include an investments chapter similar to Chapter 11 of the NAFTA. The expropriation and fair and equitable treatment provisions in NAFTA present significant risks for governments and their efforts to adopt and enforce environmental regulations. Cases under NAFTA show the investor-to-state mechanism can reverse the polluter pays principle so that governments would have to pay to regulate polluters instead. The arbitration mechanisms used by NAFTA to resolve such issues were originally intended to deal with international commercial arbitrations and not broad public health and environmental policy issues. This creates an imbalance within the trade regime, favoring foreign investors over the rights of citizens of participating countries. One way to add more balance to this mechanism would be to grant a corresponding right of action to citizens and NGOs. Another option is to eliminate the investor-to-state mechanism all together, thus allowing national governments to act as a public policy filter on the types of claims brought to dispute settlement. Finally, the FTAA should also include positive provisions that focus on promoting environmentally sustainable principles.