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*** EARTHJUSTICE* FRIENDS OF THE EARTH US ***
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Collective Comments re: Doha Ministerial Declaration

October 25, 2002

I. Introduction

These collective comments by the non-governmental organizations listed above are designed to frame many of the important issues raised and concerns we share regarding the Doha Multilateral Trade Negotiations and Agenda in the World Trade Organization (WTO). While there are specific elements of the Doha Ministerial Declaration that are potentially positive (e.g., action on environmentally harmful fisheries subsidies), on balance we remain skeptical that the negotiations launched in Doha last year will be able to deliver on the changes to the global trading system necessary to achieve development that is socially and environmentally sustainable.

Despite the rhetoric seeking to characterize the Doha Work Program as a "development round," we note substantial skepticism among our Southern colleagues that this rhetoric will be realized in the negotiations. We also remain deeply concerned about the United States' role on a number of issues, including but not limited to, intellectual property, services, agriculture, and the granting of observer status to environmental inter-governmental organizations. As the comments below make clear, we see significant shortcomings in the manner and extent to which environmental and sustainability issues are addressed in the Doha Declaration.

We anticipate that the negotiations launched last year will evolve over time, and we view this as the first of many opportunities to provide our views on the scope and content of those negotiations. The comments in this document are intended to express the collective views of our respective organizations; however, given the breadth and complexity of the issues addressed, not every signatory necessarily subscribes to the details of each formulation.

II. Assessment

The Doha Ministerial Declaration refers to sustainability assessment or environmental reviews of trade agreements and policies, with specific reference to the need for technical assistance and capacity building (paras. 6 and 33). The WTO's discussions of assessment should be informed by the work of other organizations that have developed expertise on this issue. Institutional arrangements should be developed

between the WTO, United Nations Environment Programme (UNEP), United Nations Committee on Trade & Development (UNCTAD), and other relevant inter-governmental organizations specifically on trade-related assessments. Such institutional arrangements should include clear commitments for cooperation, and establish a mechanism for providing the necessary technical and financial assistance to under-resourced countries that have developed terms of reference for national or sectoral sustainability assessments. We urge the U.S. to provide financial assistance through the UNEP and UNCTAD Capacity Building Task Force for developing countries to conduct their own assessments.

In addition, we understand that the U.S. has initiated the process of conducting its own environmental review pursuant to Executive Order 13141 of the negotiations initiated by the Doha Declaration. We urge the U.S. to refrain from taking concrete positions, especially in the agriculture and services negotiations, without such positions being informed by the environmental review process. An environmental review process that serves as a mere *post hoc* rationalization for positions already adopted, or for bargains already struck, will be inconsistent with both the letter and spirit of the Executive Order.

III. Agriculture

The Doha Agenda links the outcome of the ongoing negotiations on agriculture to the other issues currently under review. The Agenda also seems to offer the possibility of an eventual elimination of European Union (EU) export subsidies under the Common Agricultural Policy (CAP). Nevertheless, the ambiguous phrasing of this commitment will likely permit continued use of such subsidies for some time to come. Given the pressure of EU expansion, it is inevitable that the CAP will change, although the exact nature of the reforms may still be unclear. In that light, the Doha language on agriculture seems particularly weak.

In other ways, Doha did little to change the stakes for agriculture: a framework for negotiations was already under consideration, as well as the list of topics to be included in those negotiations. As ever, countries used agriculture as a hostage to push progress in other areas of the talks, but at the end of the day, little changed in the assumptions about how negotiations would proceed.

Since Doha, the WTO Committee on Agriculture has agreed on a structure for the negotiations, and proposed a deadline of December 2002 for the first version of negotiating text. The U.S. government has frequently stated its support for greater transparency in WTO negotiations, but in agriculture, as elsewhere, it has failed to match its words with action. U.S. notifications of agricultural spending are provided three and more years late. Moreover, the 2002 Farm Bill, P.L. 107-171, formalizes the already very high spending levels on agriculture, raising the commitment to domestic support to some $17 billion per year for ten years. The program is failing on multiple counts, including that of supporting a diverse, vibrant and competitive agricultural sector in the US. It is urgent that we encourage a vigorous public debate in the U.S. on this issue, to

ensure the Administration's position is more coherent. Our trading partners have received the Farm Bill with understandable outrage.

We repeat our conviction that the Administration's agricultural policy can and must reflect the multiple environmental and social functions of agriculture. Support for environmentally responsible agriculture can help level the playing field for farmers who eliminate or internalize all or part of the environmental cost of their practices, and thereby confer a net benefit to the American public. Such fiscally, socially and environmentally responsible farmers must not be put at a competitive disadvantage with so-called "low cost" producers, who rely on environmentally harmful subsidies to externalize the costs of their production. Current policies to expand production for trade, while failing to ensure cost of production prices, award the bulk of our domestic support to the least responsible stewards of the land and rural communities.

We repeat our hope that the government will take action to address the excessive market power of transnational agri-businesses. Report after report from the United States Department of Agriculture (USDA) and others shows that the increasing concentration of all segments of the food systems in ever fewer hands is eroding market competition and driving whole towns to extinction as the economics of farming become ever less sustainable. The result is a U.S. system in which agricultural products cannot command even a cost of production price on either domestic or international markets. The resulting and persistent dumping of commodities at prices below the cost of production continues to ruin or imperil most American farmers, and devastate most American rural communities. Allowing agribusiness to pay less than the cost of production prices for its raw materials in most years, and rely on myriad taxpayer subsidies to maintain the mirage of "cheap food" for U.S. consumers, has contributed to a food system with severe and persistent economic, environmental and food safety liabilities.

In light of this situation, the U.S. should: (1) end its policy of export credits for agriculture, to be consistent with the stated policy of rejecting export subsidies; (2) recognize that private monopolies and cartels are a greater threat to the trading system than most state trading enterprises; and (3) therefore use its negotiating power in the multilateral system to ensure that meaningful competition prevails.

American farm families and communities are not the only casualties of U.S. agricultural policy. U.S. agricultural dumping, supported by massive export credit, insurance and transportation subsidies to agribusiness, continues to drive farmers out of business in poorer countries. The food security of these countries is undermined as they use precious hard currency reserves to pay for foods that their farmers could grow and market if they did not have to compete with dumped products. The internal displacement and economic and social instability engendered by these measures have long-term security implications for the U.S. Consequently, the U.S. government should table proposals at the WTO to phase out all forms of agricultural dumping, both in the talks on export subsidies and on domestic support, where dumping practices originate.

At the same time, serious consideration must be given to the proposal from developing countries for a Development Box. This idea is akin to the existing boxes: a categorization of policies that either prohibit or protect certain practices, in some cases at the expense of "sound" trade policy. For example, export support and trade-distorting domestic support of many kinds are legal under the Agreement on Agriculture – a situation that was a step backwards from the General Agreement on Tariffs and Trade (GATT) rules for agriculture. The Development Box would allow countries with large, mostly poor, rural populations, with heavy dependence on a particular commodity for their foreign exchange needs or with balance of payments problems that make international purchases of food uncertain, to protect their domestic agriculture production. This is necessary both because of the prevalence of food at dumped prices in international markets, and because agriculture is too critical a sector not to be protected as a country might protect its national security. Food is a fundamental human right, and its availability on an international market does little to ensure this fundamental right is respected and protected.

The U.S. continues to learn more each day about the costs of our current agricultural model. Food safety concerns loom large as we come to understand the damage caused by reliance on antibiotics and hormones in our livestock production. Fishing industries on U.S. coasts see their harvest diminish as a result of the excessive nitrates on which our cropland has come to depend. In reality, our "cheap" food is proving very expensive: for our children's health, for our water, for our soil and our air. As the government starts slowly to take account of this reality, and as agri-business itself shows some signs of responding, it is time to ensure that our trade policy supports vibrant rural communities in the U.S. and abroad, biological and genetic diversity around the planet, and, above all, access to nutritionally adequate food for all. More of the same simply will not do it, yet more of the same is our government's position. It is time for a change.

IV. General Agreement on Trade in Services (GATS)

General Concerns

We are deeply concerned that negotiations on services will have far-reaching implications for domestic regulations to protect citizens' health, safety and the environment, or to achieve other legitimate policy objectives. "Services" potentially implicated by these negotiations include a host of regulatory functions performed by federal, state and local authorities. In addition, over two-thirds of all services trade occurs in sectors with substantial environmental impacts, including – in addition to the two just mentioned – waste disposal and sanitation, water provision generally, energy, tourism, transport, and distribution (including mass retailing).

If the GATS negotiations lead to expanded sectoral coverage and enhanced regulatory disciplines, this will raise a host of concerns relating to environmental and other regulatory policies. Given these concerns, we believe that the U.S. and other WTO

Members should conduct a thorough and comprehensive assessment of the environmental, social and developmental implications of services trade liberalization under the GATS and feed these results into the assessment discussions in the Council for Trade in Services (CTS). Any assessment processes, either at the national or at the WTO level must provide the opportunity for meaningful public comment. It is crucial that Members conclude such assessments of the effects of trade in services and liberalization under the GATS *before* continuing any request-offer negotiations because only such comprehensive assessments will allow countries to determine their negotiating positions based upon informed views of the potential impact of GATS commitments. In particular, the U.S. should not be entering into the request-offer process until that process is fully informed by the environmental assessment mandated by the letter and spirit of Executive Order 13141.

In addition, given the potential impact of GATS commitments on environmental concerns, including domestic legal and regulatory regimes, we believe that the WTO and its member countries should make all requests and offers available to the public. At minimum, each country should make public the requests and offers it has made or received in the form of a compilation.

The paragraphs that follow describe the ways in which GATS disciplines could impede effective legal and regulatory efforts to protect the environment or to achieve other legitimate policy objectives. In addition to these specific concerns, we believe that it would be impossible to anticipate in advance all the legal and regulatory impacts of services liberalization in environmentally sensitive sectors. Given these potential legal and regulatory impacts, we are deeply concerned about the lack of an environmental exception in the GATS comparable to GATT Article XX(g) for measures "relating to the conservation of exhaustible natural resources."

The inclusion of a provision at least equivalent to GATT Article XX(g) into the GATS is essential to ensuring that measures to protect the environment are not inappropriately or unintentionally undermined by GATS disciplines. In part, this language is needed in order to incorporate a set of environmental concerns, involving the protection of exhaustible natural resources, such as water, air, and energy resources, that would not be addressed by Article XX(b). Most importantly, however, the value of this exception has been demonstrated in GATT cases before the WTO, including the Shrimp-Turtle case. In particular, the language in XX(g), which legitimizes measures *"relating to"* a relevant environmental aim, provides for a substantially more inclusive use of the exception than the currently existing narrow necessity language in GATS Article XIV(b). We, therefore, urge the incorporation of an Article XX(g) exception in the GATS.

In addition to the long-term solution articulated in the previous paragraph, we suggest that the U.S also take immediate action to address our concerns. The U.S. should actively pursue a policy, which suggests that all WTO Members' national commitments include a horizontal condition identical to the exceptions in Article XX(g) and XX(b) of the GATT. Further, we urge that all U.S. requests explicitly indicate the expectation of

the United States that other countries will use a similar horizontal condition. In addition, all U.S. offers should explicitly include such a horizontal condition.

Specific GATS Disciplines and Classification

In regard to particular GATS disciplines, we believe that expanded market access and national treatment commitments in environmentally sensitive sectors could place undue restraints on regulatory action designed to protect the environment or to achieve other legitimate policy objectives. Our concerns are particularly significant for sectors in which countries have presented initial expressions of interest for increasing market access, which include all of the sectors mentioned above. These concerns have, in many cases, been reinforced by the draft European Commission requests that became public last spring.

Market access commitments under GATS Article XVI could restrict the ability of state, local and federal governments to place quantitative limitations on environmentally harmful service operations. In the energy sector, for example, such commitments could conflict with quantitative limitations involving exploration (including the use of seismic testing trucks); pipeline size, right-of-way, and throughput; truck transport; bulk storage and refining; and electricity source requirements. In the environmental services sector, market access commitments could conflict with quantitative limitations involving waste disposal, including: hazardous waste and other landfills; waste disposal in rivers, oceans and other bodies of water; sewerage; garbage incineration; and transboundary waste transport.

In addition, national treatment commitments could limit regulatory action that creates a disadvantage for foreign service providers. The reach of national treatment is extremely broad under the GATS. Discrimination occurs not only when a regulatory action intentionally treats a foreign service provider differently, but whenever regulation "modifies the conditions of competition in favor of [domestic] services or service suppliers" -- even if that effect occurs unintentionally and as the result of formally identical treatment of domestic and foreign services or services providers. For example, the Canadian government has indicated its concerns regarding the discriminatory impact of U.S. renewable portfolio standards for electricity that limit or exclude hydropower, an electricity source for which Canada has abundant resources that are greater than those in the U.S. Similarly, reasonable and necessary measures to reduce alien invasive species risks may have a differential impact on transport providers from different regions. Analogous concerns likely arise in a number of other sectors and regulatory arenas.

We are also concerned about proposals to strengthen the regulatory disciplines in Article VI.4 of the GATS, and we urge that no further disciplines be negotiated. Strengthened necessity or additional proportionality test disciplines would seriously restrain the ability of governments to take regulatory action to protect the environment or to achieve other legitimate domestic policy objectives. In addition, we are concerned that the elaboration of transparency requirements under Article VI.4 could constrain local,

state and federal environmental regulatory action and impede democratic processes. If sub-federal governments, or federal governments on their behalf, were required to enter into a consultative process with foreign governments concerning their regulatory proposals, this could significantly impede the ability to take needed environmental or other legitimate regulatory action.

Further, we are concerned about the classification as services of activities relating to natural resource extraction. Such classification proposals currently involve energy exploration and extraction and water collection. Just as manufacturing production is not generally treated as a service in the GATS, natural resource extraction and activities directly related to such extraction are not appropriate for coverage under WTO rules on services trade. The EC-Bananas case demonstrates the potentially broad reach of the GATS to include measures that affect a service, "regardless of whether the measure directly governs the supply of a service." Given the expansive interpretation of the GATS mandate under that jurisprudence, we believe that natural resource extractive activities and any measures affecting such extractive activities should be *explicitly* excluded from coverage under the GATS, including any request/offer negotiations.

Finally, we are also concerned that the existing exception in GATS Article I for "services supplied in the exercise of governmental authority" is insufficient to protect from challenge the provision of basic and essential public services, such as energy, water, transport, communication, and public health. We believe this exception should be clarified to clearly protect such basic and essential public services.

Environmental Services

We would like to highlight particular concerns related to environmental services. The Doha Declaration sets a critical context for future negotiations on environmental services. Paragraph 31 of the Doha Declaration mandates environmental services negotiations as an element of the WTO's Trade and Environment agenda and, according to the Declaration, "[w]ith a view to enhancing the mutual supportiveness of trade and environment." We believe that thereby the Doha Declaration establishes environmental benefit as the clear benchmark for these negotiations.

We welcome any effort to negotiate reductions to barriers in environmentally beneficial environmental services. If the removal of barriers is focused on sectors and technologies that in fact clearly and primarily protect the environment, public health and safety, and if the liberalization commitments clearly exclude environmentally harmful services and services with unknown impacts, the negotiations can provide significant benefit. We note, however, that in addition to market access commitments significant capacity building and technical assistance will be necessary to allow all WTO Members to take advantage of these opportunities.

Most importantly, we are deeply concerned that the current WTO definition of environmental services in the GATS W/120 will impede this aim. The current classification primarily includes service sectors – sewage services, refuse disposal

services, sanitation and similar services – that do not provide clear environmental, health and safety benefits, but often have the opposite effect. The classified services are exclusively "end-of-pipe" services, and do not involve preventive environmental activities that would be clearly consistent with the Doha mandate. Moreover, these sectors often involve environmentally harmful activities – such as garbage incineration, oceanic or riverine dumping, transboundary hazardous waste transport, and shipbreaking – and a number of potentially harmful activities, including landfills and sewerage.

In addition, the European Union is seeking to add water collection and distribution services to the environmental services negotiations. First, because they do not provide explicit environmental benefits, water services do not properly belong within the environmental negotiations mandated by the Doha Declaration. Further, we are deeply concerned that water services may include bulk water transfer services and services relating to extraction of water from natural sources. If the water services classification does include these elements, a number of GATS disciplines – including disciplines on domestic regulation, market access prohibitions on quantitative restrictions, and national treatment restrictions – could pose substantial limitations on the ability of governments to regulate to protect their water supplies and sources. We are not convinced that language contained in existing negotiating proposals, including footnotes to those proposals, will adequately address our concerns.

In our view, the current definition of environmental services and the proposed addition of water services do not fulfill the intended environmental mandate of Paragraph 31 of the Doha Declaration. We believe that the sectors covered by the environmental services negotiations should explicitly and without doubt be environmentally beneficial. To accomplish this aim, the scope of the environmental services negotiations should *include* services that are clearly environmentally beneficial and explicitly *exclude* services that are either environmentally harmful or whose impact is uncertain. The negotiations bear the burden of ensuring that the outcome meets this test.

We believe that an appropriate definition of environmental services that meets these criteria is available in footnote 19 of the current U.S. Schedule of Specific Commitments. Although the original intent of the footnote is in question, its focus on "systems for environmental cleanup, remediation, prevention and monitoring," along with other similar services, appears to provide a categorization that does come close to defining an appropriate set of environmental services. Such a description of service activities could also easily be used to delineate the sectors covered by the GATS environmental services classification. We urge that the U.S. propose the use of footnote 19 or a similar categorization as the basis for the classification list for environmental services; that the U.S. indicate to other countries in its requests that it requests that those countries use such a categorization; and that the U.S. retain the footnote in its environmental services offers.

Energy Services

We would like to highlight our significant concern with the assertion of "technological neutrality" in the energy services paper presented by the U.S. Such neutrality completely fails to take account of the substantially different impacts of different sources of energy. In GATS negotiations, the U.S. should indicate the critical need to opt for energy sources based on their environmental impacts. At a minimum, the right to make environment-related choices concerning energy sources should be *explicitly* provided in country commitments, and U.S. requests and offers should ensure that such an outcome will be achieved.

V. TRIPS issues

General Comments

Existing international rules on intellectual property rights, including those of WTO and WIPO, are imbalanced and are undermining progress towards sustainable development. Overly strong intellectual property rights (IPRs), together with extended protection of scope and duration of these rights, are shifting control over information from consumers to producers and from Southern to Northern countries, thereby consolidating control over one of the most important resources -- knowledge. This shift in balance is affecting negatively access to and transfer of technologies, investment flow, incentives to individual and community innovators, access to drugs, development potentialities and the implementation of international environmental agreements, as in the case of the Convention on Biological Diversity (CBD).

In some cases, IPRs are just protecting economic investments and activities with very small or non-existing intellectual added-value, opening the door for legal monopolies in the field of biotechnology and information technologies. This situation raises citizens' concerns in both the developed and developing world, and is deeply limiting the scope of the public domain.

The TRIPS Agreement and the Doha Ministerial Declaration

The WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) elevates private economic rights above societal rights to public health, food security, development, and a safe, sustainable environment. As a consequence of the WTO's Doha Ministerial Declaration and other relevant Ministerial texts, some initial steps towards rebalancing the TRIPS Agreement have been taken. These steps included the recognition of health concerns by trade ministers within the TRIPS and Public Health Declaration, the initiation of negotiations on implementation issues, including the relation between the TRIPS Agreement and CBD and the protection of traditional knowledge and folklore.

We believe that, if established at an appropriate level, intellectual property rights can and should promote innovation, encourage investment and balance the public interest in access to new products, processes and other forms of innovation with the need to reward all type of innovators for their creativity. As presently crafted, however, the WTO's TRIPS Agreement fails to strike the proper balance between public and private goals. We therefore urge the United States to support an amendment and review of the TRIPS Agreement in light of public concerns. In particular, we request that the United States:

a. Support the full implementation of the Declaration on TRIPS and Public Health. This would imply provision of additional demand-driven capacity building programs to developing countries by the WTO, WIPO, UNCTAD, UNDP, and other relevant inter-governmental organizations and developed countries, in order to find ways to enhance flexibility given by this Declaration;
b. Find an expeditious solution for countries with insufficient manufacturing capacity in the pharmaceutical sector to effectively use compulsory licensing under the TRIPS Agreement, consistent with paragraph 6 of the TRIPS and Public Health Declaration. In finding this solution, article 30 of the TRIPS Agreement must be authoritatively interpreted in such a way that countries without manufacturing capacity can issue compulsory licensing for import medicines from any source. In this sense, countries with manufacturing capacity should be able to allow production and export of medicines under patent to countries needing those medicines. Moreover, quantitative restrictions on exports contained in article 31(f) of the TRIPS Agreement should be removed;
c. Support proposals to amend the TRIPS Agreement to ensure that it is consistent with the objectives and principles of the CBD. We support the proposals put forward by India and Brazil to incorporate the principles of prior informed consent and benefit sharing for access to genetic resources (GR) and traditional knowledge (TK) and to disclose the origin of those GR and TK in the patent filing procedure, as a precondition for granting patents, in a manner that is consistent with the objectives and principles of the CBD.
d. Support permanent observer status to the CBD Secretariat in the TRIPS Council of the WTO. We understand that the United States is among the only countries actively opposing the CBD's request for observer status. This opposition is difficult to reconcile with the Administration's statements about the importance of building mutually supportive relationships between the WTO and MEAs, and its support of WTO transparency.
e. Support the developing countries' proposals to amend article 27.3(b) of the TRIPS to require WTO members to provide for the protection of traditional knowledge and folklore by an effective *sui generis* system in light of the CBD, the International Treaty on Plant Genetic Resources for Food and Agriculture under the United Nations Food and Agricultural Organization, and existing regional and national regulatory frameworks.
f. Establish mechanisms, including a technology transfer fund, to promote the transfer of environmentally sound technology to least developed countries. We believe that more can be done and should be done to implement obligations under

article 66.2 of the TRIPS Agreement. In this sense, incentives and appropriate mechanisms for transferring technology to least developed countries should be established by the United States in its own legislation. These incentives could include, among others, tax incentives to U.S. firms for improving technology transfer, educational and capacity building programs, and scientific cooperation agreements.

g. Reconsider the application of non-violation complaints to the TRIPS Agreement. We share the view of almost all WTO members that non-violation complaints "*may constrain members' ability to introduce new and perhaps vital and social, economic development, health, environmental, and cultural measures*" (proposal from Cuba, Dominican Republic, Egypt, Indonesia, Malaysia and Pakistan) and support the recent proposal "that the TRIPS Council recommends to the 5th Ministerial Conference that the violations of the type identified in article XXIII:1(b) and (c) of GATT 1994 be determined inapplicable to the TRIPS Agreement." (Argentina, Bolivia, Brazil, Colombia, Cuba, Ecuador, Egypt, India, Kenya, Malaysia, Pakistan, Peru, Sri Lanka, and Venezuela).
h. Support the view expressed by many WTO Members that "[a]pplication of non-violation and situation complaints is unnecessary …[and]… raises systemic concerns…[because it may]…[u]ndermine regulatory authority and … infringe sovereign rights by exposing to challenge any measure that affects intellectual property and that could not have been foreseen at the time of the Uruguay Round…[and] …[l]imit use of the flexibilities inherent in the TRIPS Agreement to secure objectives relating to public health, nutrition, technology transfer, and other issues of public interest in sectors of vital importance to socio-economic and technological development."
i. Undertake a full sustainability assessment of the TRIPS Agreement under Article 71.1. This review implies an examination of the entire TRIPS Agreement. We encourage the Administration to support a full review of the environmental, social and economic implications of the TRIPS. Such an assessment will permit policy designers throughout the world to better measure actual and potential impacts of the implementation of the TRIPS Agreement. This assessment should also include the concerns of consumers and users in all fields of technology, in light of articles 7 and 8 of the TRIPS Agreement.

VI. Investment

Our organizations have consistently voiced serious concerns with attempts to negotiate multilateral rules on investment liberalization. Given the experience with Chapter 11 of the North American Free Trade Agreement (NAFTA), it is clear that the "unintended" consequences of such rules are significant and poorly understood. Before any further liberalization of investment is contemplated in any forum, governments should undertake to review the large body of existing work which examines both the impacts of foreign investment, and possible frameworks for the development of investor obligations and the rights of host countries in alternative forums, drawing in doing so

upon the expertise of UN agencies and MEA Secretariats, academics, development agencies, and civil society.

We are pleased that, despite the spin that some have attempted to put on paragraph 20 of the Doha Declaration, investment negotiations were not launched in Doha. Some developed country Members of the WTO have generated controversy by suggesting that paragraph 20 commits Members to negotiations on investment. That they have done so belies developed country assertions that the Doha Declaration represents the launch of a 'Development Round'. We find it doubtful that the Doha Declaration provides a legitimate blueprint for a development round when (i) many developing countries are opposed to negotiation on the so-called Singapore issues[1], and (ii) no such mandate is provided by the Doha Declaration.

It is clear from a plain text reading of Paragraph 20 of the Doha Declaration that the launch of negotiations on investment within the WTO is dependent upon an explicit consensus amongst Members at the next WTO Ministerial meeting. The chairman's clarifying statement reiterates the plain text of this paragraph.[2]

Given the high level of skepticism among many developing countries over whether an agreement on investment within the WTO is really in their best interests, it seems unlikely that this negotiating mandate will be forthcoming at the next Session of the WTO Ministerial Conference.

We share the developing countries' concerns with such a mandate. The WTO is the wrong forum for negotiating an international agreement on investment. In particular:

- The instruments developed for disciplining trade in goods under the WTO are inappropriate for disciplining investment flows;
- The WTO continues to act with a strong bias towards trade liberalization above other policy objectives (such as equity and sustainable development); and
- The non-transparent operating culture of the WTO is such that its rules are developed, interpreted and applied in a way that often excludes those countries and interests seeking to develop appropriate developmental and environmental policies.

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[1] This has been articulated since Doha. See, for example, BRIDGES Weekly Trade News Digest Vol.6 Number 15 April 23, 2002. However, in the run up to Doha Ministerial Conferences of the LDC Group, of the African region under the OAU, and of the ACP Group, all issued statements opposing WTO negotiations on investment. India, Pakistan, Nigeria (on behalf of LDCs, ACP and other African countries) and Tanzania spoke against investment and other 'Singapore issues' on the penultimate day of the Ministerial meeting in Doha. No developing country spoke in favour of it.

[2] In clarifying paragraphs 20, 23, 26 and 27 of what was then the draft Declaration of WTO Members at Doha, the chairman commented that his "*understanding is that, at [the Fifth Session of the Ministerial Conference], a decision would indeed need to be taken, by explicit consensus, before negotiations on Trade and Investment… could proceed*". In the chairman's view, "*this would give each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join in an explicit consensus*". The Chairman's clarification was unopposed by the Members.

Investment flows can only facilitate sustainable development where they are properly governed to deliver social and environmental benefits. Any future negotiations on international investment agreements should be preceded by negotiations establishing the obligations of investors and the rights of host countries. A legally binding international framework on corporate accountability and liability is therefore one prerequisite for negotiations on an international investment agreement. We urge the U.S. to lead efforts to develop such a framework.

VII. Procurement: Protecting Environmental and Social Procurement Preferences

Paragraph 26 of the Doha Declaration indicates that, prior to the next Ministerial Conference, work on procurement within the WTO will focus on the proposed Multilateral Agreement on Transparency in Government Procurement rather than on expanding the coverage of the plurilateral Government Procurement Agreement (GPA). Paragraph 26 also states that negotiations on the proposed multilateral agreement will be limited to transparency issues and will not address substantive limits on standards used in government procurement decisions. We support increased transparency, and hope that the United States' commitment to transparency will be reflected in the manner in which it conducts its negotiations pursuant to the Doha Declaration.

We wish to reiterate, however, that we remain concerned that the current provisions of the GPA constitute a threat to existing and future procurement standards designed to favor environmentally and socially responsible products. Several of the United States' trading partners have argued that U.S. procurement preferences for recycled products and sustainably harvested wood are inconsistent with the GPA. We support the use of government purchasing power as an effective, market-based mechanism to promote environmental and social policy goals, and are concerned that the GPA undermines the ability of governments to do so. The environmental and consumer concerns with the relationship between trade rules and procurement policy were addressed extensively in the *Comments on the Procurement Provisions of the Free Trade Area of the Americas,* submitted jointly on September 29, 2000 by several of the organizations associating themselves with these comments.

VIII. Fisheries Subsidies

In the Doha Ministerial Declaration, Members agreed to clarify and improve WTO disciplines on fishing subsidies (para. 28). As these negotiations now get underway, we urge the United States to demonstrate leadership in the negotiations and deliver a result that addresses the need to conserve fisheries resources.

If the fishing subsidy negotiations are to yield a success for sustainable development, governments will have to deliver results that adhere to the following principles:

- Improved WTO disciplines should explicitly require governments to eliminate harmful subsidies that contribute to export of excess capacity and overfishing. This will require disciplines that recognize international economic harms beyond the simple distortion of export markets (the traditional, albeit not mandatory, focus of the WTO);
- Improved WTO disciplines on fishing subsidies should take full account of the importance of the fishing subsidy issue to developing countries, as well as of the need for special and differential treatment of developing countries within the WTO rules system;
- Improved WTO disciplines on fishing subsidies should recognise that some types of fishing subsidies can play an important role in the transition to sustainable fisheries and responsible fishing practices, and can be an important element of sustainable development. However, even potentially beneficial fishing subsidies should be subject to substantially improved monitoring and reporting requirements;
- Improved WTO disciplines on fishing subsidies should be administered through innovative institutional arrangements that provide appropriate roles for specialized intergovernmental bodies outside the WTO with expertise and authority in the realms of fisheries management and marine conservation (including, *e.g.*, the Food and Agriculture Organization, the United Nations Environment Programme, and the Convention on International Trade in Endangered Species). These roles should go beyond the mere provision of "expert advice," and should help ensure that the WTO will not be drawn into the role of a fisheries management or conservation body, nor infringe on the powers or autonomy of such bodies;
- Improved WTO disciplines on fishing subsidies should be administered in a manner that is fully transparent, and that provides meaningful opportunities for effective public participation; and
- The WTO fishing subsidies negotiations should be carried out in a manner that is transparent, that provides for the formal and effective involvement of other appropriate intergovernmental bodies, and that guarantees adequate and timely opportunities for participation by all affected stakeholder groups within civil society. Particular attention and support should be given to encouraging the participation of affected communities in developing countries.

IX. Dispute Settlement Understanding

The environmental community has longstanding concerns regarding the impact of the WTO dispute settlement process on environmental protection at both the national and international levels, and with the lack of transparency and openness in the process. We appreciate that the U.S. has tabled thoughtful proposals on the specific issue of transparency, but we would strongly object to merely tabling proposals without a political commitment to ensure action. As the comments below make clear, moreover, our concerns with the dispute settlement process are not limited to this single issue. The U.S.

must take a prominent role within the WTO to assure that the prerequisites for legitimate dispute resolution are adopted. Further, addressing these critical issues in a timely manner should be a priority for the U.S.

Transparency and Public Participation

One of the most fundamental problems with the dispute settlement process is its lack of transparency.[3] The current practice of WTO adjudication bodies under the Dispute Settlement Understanding (DSU) severely restricts public access to information regarding requests for consultation, requests for establishment of panels, written submissions of parties, and hearings conducted by dispute settlement bodies. Experience has proven that the limited provisions in the DSU permitting but not requiring parties to release their own submissions are inadequate to ensure timely public access to important information.

Similarly, we remain concerned at the lack of any requirement that dispute panels accept and consider *amicus curiae* briefs or other submissions made by interested natural persons or non-profit, public interest organizations. At present, dispute panels consider public submissions only when they are appended to the submission of a party, and then only to the extent that the public submission supports arguments made by the party itself. This approach effectively nullifies any opportunity for meaningful public input.

Securing meaningful improvements in the transparency and openness of the dispute settlement process should be a principal negotiating objective of the United States. USTR should seek changes to the dispute settlement process that will:

- Require the Secretariat to publish on the WTO website every request for consultations or establishment of a panel, or decision to convene a panel;
- Require that all submissions be published on the WTO website, subject only to narrowly drawn provisions to redact confidential business information;
- Require dispute panels to provide sufficient public notice of dispute resolution timetables to permit interested persons and bodies to prepare submissions; and
- Require dispute panels and the AB to accept written submissions from any interested person or body, and give those submissions due consideration.

[3] As noted in the recent U.S. submission on transparency: "Other international dispute settlement fora and tribunals are open to the public, such as the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the European Court of Human Rights, and the African Court on Human and Peoples' Rights. Those fora deal with issues that are intergovernmental in nature and are at least as sensitive as those involved in WTO disputes. For example, these fora have addressed boundary disputes, use of force, nuclear weapons, human rights violations, and genocide." [citations omitted] United States, *Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency*. TN/DS/W/13 (August 22, 2002),

Need for Non-Trade Experts on Panels

The DSU explicitly acknowledges that having panel members with relevant sectoral expertise is critical to resolving disputes fairly and reasonably. This need for relevant expertise is equally important when a dispute involves complex issues of human health and environmental protection. Despite this need, the DSU currently does not provide for empanelling persons with environmental expertise. It must do so.

Chilling Effect of WTO Disputes on Environmental Protection

Regardless of the ultimate outcome, the commencement of any WTO dispute can impose substantial burdens on the party complained against, including the substantial costs of defending even a clearly justifiable measure. As a result of these burdens, the institution or mere threat of a WTO complaint can have a substantial chilling effect on efforts by Member States to improve their environmental laws. To reduce this impact, the DSU should require Members to consider environmental consequences before initiating dispute settlement procedures.

When the Member whose environmental measure is complained against is a developing country, the resulting chilling effect is at once more severe and more regrettable. By definition, the financial and human resources required to successfully defend a WTO dispute are far scarcer in developing than developed countries. The need to allocate scarce resources effectively may compel a developing country to withdraw a worthwhile measure in the face of a threatened WTO challenge, even if the measure would likely survive scrutiny. As a result, the persistent risk of such challenges could impede the development of the environmental regimes in developing countries, and deny to the citizens of those countries the levels of environmental protection accorded in the United States and elsewhere. The Members should explore mechanisms that would address and reduce this risk, such as providing financial or technical assistance to developing countries defending environmental, health, and safety laws, or requiring the complaining party to bear the costs of litigation when it challenges a measure taken by a developing country to protect human health or the environment.

Recognition of Substantial Non-Trade Interests of Third Parties

Finally, the WTO should recognize that, in the context of human health and the environment, a Member might have substantial, *non-trade* interests in the outcome of a dispute to which it is not a party. Environmental protective measures taken (or not taken) within one State may have profound impacts within the territories others. The DSU must reflect this fact and permit any Member that has a substantial interest in a dispute to intervene therein, regardless of whether that interest is trade-related.

X. Relationship Between MEAs and WTO Rules and Institutions

The relationship between MEAs and the WTO is an issue of utmost importance. The WTO's Doha Ministerial Declaration establishes a mandate for negotiations on two issues of direct relevance to MEAs.

First, paragraph 31(i) of the Declaration mandates negotiations on the "relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements." The limited mandate established by the Declaration falls far short of what is required to strengthen the mutual supportiveness of MEAs and the WTO. It fails to address the two primary issues of concern between MEAs and the WTO – the issue of measures against non-parties to an MEA, and of non-specific trade measures between MEA parties. Rather, the WTO is seeking to negotiate an issue that requires little clarification on either substantive or procedural grounds. Substantively, we believe the there is no inconsistency between WTO obligations and specific trade measures applying between parties to an MEA. This view is consistent with the decision in *Shrimp 21.5* [United States – Import Prohibition on Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4, 22 OCTOBER 2001, WT/DS58/AB/RW], in which the Appellate Body upheld a U.S. measure under Article XX of GATT on the basis that "as long as … ongoing serious good faith efforts to reach a multilateral agreement" exist, the U.S. measure was justified. Specific trade measures multilaterally agreed between parties to an MEA could hardly be treated by the WTO in a manner less favorable than the U.S.' unilateral measures in *Shrimp*. Procedurally, WTO Members stated in the 1996 CTE Report to the Singapore Ministerial that parties to an MEA should seek to resolve disputes about trade measures in the context of the MEA. The WTO's mandatory jurisdiction rule should be revised to clearly reflect this deference to MEAs. It would be preferable to have no negotiated outcome than to have an outcome any less clearly deferential to MEAs than the one we have urged be adopted.

In light of this limited mandate, we call on the U.S. to promote as the main outcome of these negotiations a general statement regarding the consistency of MEAs and WTO agreements, and avoid more specific attempts to define an MEA, or to establish procedures or criteria applying to specific trade measures between parties to an MEA. Indeed, where trade measures are specific, and apply only between parties, the MEA is the appropriate place to discuss their interpretation and application.

Second, the Ministerial Declaration in paragraph 31(ii) calls for negotiations for procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and criteria for granting observer status. We understand that requests for observer status by environmental institutions are being held up as part of a broader question of observer status in the Trade Negotiations Committee (TNC), and that the United States is among the countries blocking progress on this issue. We call on the Administration to state publicly its support for observer status for MEAs and UNEP in relevant WTO bodies, and to seek a tailored and expedited solution for MEAs in the CTE, the Council for TRIPS and other relevant organs. An expedited solution for

environmental institutions is warranted in light of the importance attached by WTO Members to this issue, as indicated both by the establishment of an explicit negotiation mandate, and language in the Declaration encouraging "efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations."

XI. Labeling: Protecting the Consumer's Right to Know

Paragraph 32 of the Doha Declaration instructs the Committee on Trade and Environment (CTE) to address "labelling requirements for environmental purposes" and to report to the Fifth Session of the Ministerial Conference concerning whether there is any need either to clarify the relevant WTO rules governing labeling or to conduct further negotiations on the subject. We urge USTR to take this opportunity to promote interpretations of trade rules that support the right of consumers to know about the products they purchase, including how those products are manufactured. The consumer's right to know should be the central principle guiding United States' policy regarding the relationship between trade rules and product labels. Unfortunately, however, USTR has refused to support this principle, and instead has been promoting interpretations of trade rules that undermine the rights of consumers both in the United States and abroad.

The primary point of contention concerning the status of environmental product labels under trade rules has been the extent to which labels can be based upon the "production and process methods" (PPMs) by which products are made, rather than the physical attributes of the product. PPM-based labels are an important tool for providing consumers with information about the environmental and social consequences of the products they purchase. For example, the new U.S. organic program, which went into effect on October 21, 2002, labels food as "organic" based upon the manner in which it is produced rather than by the physical characteristics of the food itself. Similarly, federal U.S. law requires disclosure of whether food has been irradiated (21 C.F.R. § 179,26(c)).

There is also broad and growing support for other types of PPM-based labeling. In 2001, the U.S. House of Representatives passed by a vote of 291 to 115 an amendment to the Farm Bill that directed the Food and Drug Administration to develop a label to certify that chocolate products are not made with child slave labor. *See* 147 Cong. Rec. D655-01, D656. Enacted on May 13, 2002, the Farm Security and Rural Investment Act of 2002, P.L. 107-171, includes the "Consumer Right to Know Act," which requires country of origin labels for fruits, vegetables, meat, fish, and peanuts.

Yet despite the broad public support these labeling initiatives enjoy, the Bush Administration has questioned the legitimacy of PPM-based labeling requirements. USTR has suggested that regulations being developed by the EU that would require the labeling of genetically engineered food may violate trade rules. *See USTR Negotiator Warms of Possible GMO WTO Case Over EU Moratorium,* INSIDE US TRADE (June 28, 2002). Numerous other countries – including Australia, China, Japan, Brazil, New Zealand, South Korea and Thailand – have also adopted or are developing regulations requiring the labeling of genetically engineered food.

Similarly, despite the overwhelming support that the "country of origin" labeling provision has received from both farm groups and consumer organizations, the Bush Administration lobbied against it, suggesting that it might violate trade rules. *See Letter from Secretary of Agriculture Ann Veneman to House Agriculture Committee Chairman Larry Combest (indicating that the country of origin labeling requirement* "potentially ... violate(s) international trade agreements"), *quoted in Daschle, Johnson Urge U.S. Change on Meat Origin Rule in WTO*, INSIDE US TRADE (March 22, 2002). The Administration's suggestion that country of origin labeling requirements violate trade rules threatens not only the rights of consumers in the United States, but also the rights of consumers in numerous other countries that already have country of origin labeling requirements for food, including Argentina, Chile, Indonesia, Malaysia, and Russia.

The Administration's use of trade rules to undermine labeling standards could also threaten various U.S. labeling programs that enjoy broad public support, including the "organic" food label. Accordingly, we urge USTR to refrain from promoting interpretations of trade rules that could undermine the right of consumers to know about the food and other products that they are purchasing.

XII. Forests

We are concerned about the potential negative impact of WTO negotiations on market access on a variety of sectors, including forests. A recent report by the World Commission on Forests and Sustainable Development noted: "Over the last two decades of the 20th century, rapid deforestation has taken its toll-some 15 million hectares of forests are lost annually, largely in the tropics. It is also clear that the structural integrity of much of the forest cover that remains has deteriorated."

While most forest tariffs are already quite low, eliminating all tariffs could have a significant negative impact on some products and some markets (e.g., China). Further trade liberalization in the forest sector should take place only after thorough assessments are conducted and adequate regulatory frameworks and resources are in place -- both internationally and domestically -- to ensure sustainability.

The U.S. should reject any measures that threaten to treat legitimate conservation measures as illegal non-tariff barriers. We object to any new trade rules that might provide a basis for WTO dispute challenges against legitimate domestic measures to protect forests, such as regulations designed to prevent entry of invasive pests. Similarly, the United States should vigorously oppose any negotiations that could lead to restrictions on legitimate third-party certification and ecolabeling of forest products. Finally, we urge the United States to refrain from adopting a position on further liberalization of the wood products sector until a thorough environmental review has been conducted in accordance with the letter and spirit of Executive Order 13141.

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