CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW * DEFENDERS OF WILDLIFE * FRIENDS OF THE EARTH

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Office of the U.S. Trade Representative
Room 122
600 17th Street, N.W.
Washington, DC 20508

Re: Specific Comments Concerning the Draft Text of the Free Trade Area of the Americas

On behalf of our hundreds of thousands of members, we hereby submit the following comments with respect to the Free Trade Area of the Americas (FTAA), released on July 3, 2001. As a result of the significant delay between the official announcement of the FTAA's impending release and the actual release of the draft following translation, the environmental community has had very little time to undertake the detailed review of the text that will ultimately be required. Nonetheless, even a cursory examination of the draft text reveals many areas in which the FTAA manifests an intentional apathy or outright hostility toward environmental protection, public participation and state sovereignty. The following comments are provided as an indicative list of our concerns with selected chapters of the draft text. They are not intended to be comprehensive or final. We understand that the FTAA negotiations are an ongoing process; and we will continue to offer input to U.S. negotiators participating in that process in the coming months.

- **Lack of environmental review to inform negotiations.**
- **No way to tell what the US positions are in the draft text, therefore hard to know what we should be commenting on. As we have asked for a long time now, please release US negotiating positions taken on behalf of the American people to the public at the same time they are given to and considered by 33 other countries. US pronouncements on transparency ring hollow when US public is prevented from even knowing what the US positions are!!**

Chapter on Government Procurement

With respect to the draft Chapter on Government Procurement, we offer the following preliminary comments:

- Article II, Para. 1(f)(iii) provides that the Parties agree "to [refrain from applying] [not apply] measures that: ... have the effect of denying equal access or opportunity to a supplier from another Party." The unqualified reference to measures that "have the effect of" denying equal

access or opportunity is overbroad and unnecessarily ambiguous. An otherwise legitimate measure for the protection of human health or safety, the environment or natural resources may nonetheless have an incidental, unanticipated and modest impact on access to markets. To ensure that the right of states to take such measures is not jeopardized, the phrase "have the effect of denying" should be deleted, and replaced with the word "deny".

- Article X, Para. 1(c) provides: "This chapter shall not apply to: ... measures necessary to protect morals, public order or security, human, animal and plant health and life, ..., provided such measures are not applied in a way that they constitute a means of arbitrary or unjustifiable discrimination among countries where the same conditions prevail, or a disguised restriction to international trade;"
  - This provision condenses the chapeau and exceptions in Article XX of the GATT 1994 into a single paragraph. It would eliminate the two-tiered analysis currently applied in the WTO context. It is unclear how the condensed language suggested in the FTAA draft would affect this analysis.
  - More importantly, measures linked to environmental protection are completely excluded from the proposed text. Where Article XX (g) of the GATT 1994 provides for exceptions " relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption," the FTAA draft has absolutely no comparable provision. In light of its importance to the protection of U.S. laws for the protection of natural resources and the environment, as evidenced by the United States' reliance on Article XX(g) in the ongoing *Shrimp-Turtle* dispute, the failure to include an analogous exception in the FTAA is deeply troubling. This error must be corrected. In addition, the FTAA include an explicit exception for laws necessary to protect the environment. Although GATT 1994 failed to include such an exception, its failure to do so should not be replicated in the FTAA.

- Article X, Para. 3, which appears to be an alternative to Para. 1, preserves the structure of Article XX of the GATT 1994, but also omits any provision for measures necessary to protect exhaustible natural resources. For the reasons discussed above, any analogue of Article XX within the FTAA must include an exception for measures necessary to protect natural resources and environmental laws.
  - This option also preserves the language of the GATT Article XX chapeau. As we have repeatedly observed, the language of the chapeau is ambiguous and prone to extremely broad interpretations that may undermine the rights explicitly reserved to Parties by the exceptions. To avoid this ambiguity, we believe the language should be revised to read as follows: "Unless it is demonstrated that such measures have been applied in an arbitrary or intentionally discriminatory manner, or as a disguised restriction on trade between the Parties, nothing in this Chapter shall prevent any Party from adopting, maintaining or enforcing measures...".

- Article XXIII, Para. 2 states: "Each Party shall provide, in the selection process, equitable

opportunities to the suppliers included in the lists or registries of the Parties. An entity shall not use the qualification process, including the time required for the process, to keep suppliers of another Party off a list of suppliers." The language of this provision is ambiguous. If the qualification process is not used to exclude certain suppliers from selection, what is it for?

- Article XXIII, Para. 3 prevents the exclusion of suppliers for any reason beyond their legal, technical, and financial ability to fulfil the contract specification. This interferes with the right of a government to incorporate public policy goals into its purchasing decisions. As has long been recognized under United States Constitutional Law, this practice is appropriate when a state or subsidiary government is acting as a market participant.[1] In United States law, the market participant doctrine reflects the understanding that when they are acting as buyers rather than as regulators, a government is no different than any private market participant. In such circumstances, governments should have a larger latitude to incorporate values and policy goals into purchasing decisions, just as private actors do. The same rationale applies with even greater force in the international context, where a State may have important policy goals which may alternately advanced or hindered by its procurement practices.

- Article XXVI, Para. 2 states: "Each Party shall ensure that, where appropriate, the technical specifications shall be [based [primarily]] [specified in terms of] on the performance requirements of the product or service being procured, rather than on design and descriptive characteristics." This paragraph limits permissible technical specifications to those related to the product rather than the process by which it is made. Its provisions are environmentally unsound and would disfavor sustainably-produced goods and services.

- Article XXVI, Para. 3 appears to contain three alternative formulations of the same principle:
  - Option 1, which begins, "Technical specifications shall be based on international standards, national norms or technical standards...," would require Parties to conform their technical specifications with the provisions on technical barriers to trade. This is difficult to examine without the draft text of those provisions. It is unclear whether the FTAA Parties intend to apply the TBT standards of the WTO, or to develop separate TBT standards at a later date.
  - Option 2 requires Parties to conform their technical specifications to a "domestic or international consensus standard." Although it permits a Party to specify a government-unique standard, the burden is on that Party to prove why a consensus standard is inadequate. As experience with the WTO has demonstrated, this requirement poses a substantial obstacle to States that wish to take precautionary action to protect human health or safety, the environment or their natural resources from potentially significant risks when information relating to those risks is incomplete. For this reason, Option 2 is inconsistent with the precautionary principle.
  - Option 3 is the worst of the three. It provides no opportunity for Parties to set their

[1] Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

own standards and forces them to conform their specifications to international standards where available. International standards are, in many cases, significantly lower than our domestic standards.

- In Article XXXV, Para. 4(c), strike "bodies.", and add "entities within the Party."

Chapter on Investment

With respect to the draft Chapter on Investment, we offer the following preliminary comments:

- In Article 1, first Para. 3, subpara.(c), add "and protection of the environment and natural resources" after " protection of the cultural heritage." Investment liberalization should not impede a Party's right to protect the environment and natural resources within its own territory.

- In Article 1, Para. 5, insert "environmental management and protection" after "law enforcement."

- In Article 2, insert "and no more favorable than" after "treatment no less favorable than" in all of the options for paragraph 1. This is particularly important in light of the history of Chapter 11, under which the investor-to-state mechanism was interpreted to permit foreign investors to receive compensation from local governments for financial losses from indirect expropriation. Under domestic laws, local investors are not extended the same privilege. The rights and privileges extended to foreign investors should be coterminous with those enjoyed by domestic investors.

- Article 6, which provides for fair and equitable treatment, is ambiguous. Given the ambiguity of customary international law in this area, the scope of protection provided by this paragraph is uncertain. Because there is no clear standard to gauge "treatment in accordance with international law," broad discretion is left to the arbitration panels. These panels were intended to serve as commercial arbitration mechanisms, not bodies to decide broad public policy disputes. Indeed, the ambiguity of similar provisions in the NAFTA forced the North American Free Trade Commission to issue clarifications in an attempt to address the problem.

- In Article 7, Para. 1, Options 2, 3, and 4 are overbroad.

- Strike Article 7, Para. 2.

- Strike "or investment" from Article 6, Para. 4. Its inclusion makes this provision much broader than the NAFTA. Insert "or enforcing" after "adopting"to clarify the Parties' right to enforce these measures.
    - Move the reference to environmental measures in the introductory phrases to its own subsection so that it is conferred equal status with the other provisions. This structure would facilitate analysis of environmental measures under the two-tiered approach articulated by the WTO Appellate Body in the *United States - Gasoline* decision.

- Maintain the clarification in subsection (c): "living or non-living." This clarification corresponds with the WTO Appellate Body decision in Shrimp - Turtle, in which the Appellate Body determined that the term "exhaustible natural resources," as employed in the GATT 1994, refers to both living and non-living natural resources.

- In Article 10, Para. 1, Option 1, strike all references to "indirect" nationalization or expropriation. The definition of expropriation in the draft text is too broad. The provision as drafted, like Chapter 11 of the NAFTA, would subject environmental measures to challenge as expropriation. It would force local governments to pay investors whenever a regulation results in investor financial losses and would thereby undermine the exercise of sovereignty by local governments and their efforts to exercise their regulatory functions. In effect, it would require governments to "pay to regulate" polluters.
  - The expropriation provisions should explicitly state that they do not apply to regulation that falls within government powers to protect public health, safety, and the environment. While Article 12 permits the Parties to adopt measures for the protection of human, animal and plant life, it fails to exclude them from the compensation requirements described in Article 10. Fear of investor lawsuits would almost certainly chill the adoption of environmental or health measures by governments in the future.
  - Option 3 is preferable to Option 1 in that it permits the Party concerned and the affected investor to negotiate. In these circumstances, negotiation is preferable to arbitration.
  - Para. 6, Option 1 is superior to Para. 6, Option 2 in that it requires arbitral panels to apply "the law of the Party making the expropriation" in their review of disputes brought under this Article.

- Under Article 12, insert: (x) Protect natural resources and the environment.
  - This change would make the draft text consistent with Article XX of the GATT 1994.

Draft does not include: an appellate mechanism to ensure that mistakes by panels are corrected and provide the process with some semblance of a modern judicial process.

Chapter on Dispute Resolution

With respect to the draft Chapter on Dispute Resolution, we offer the following preliminary comments:

- In Para. 10, the definition of "Measure" is substantially overbroad. The text that reads, "any [actual [or proposed] law, decree, agreement, administrative provision [or governmental practice], among others]" would chill future legislation, as legislators would fear that even proposed regulations could expose the State to attack under this agreement. Further, the inclusion of "agreement," a term which encompasses treaties, is inconsistent with international law. The FTAA cannot preempt State obligations under other treaties or prevent States from entering future treaties that supercede their obligations hereunder. Finally, the "among others" language would make this definition unlimited in scope.

- In Para. 10, the second bracketed phrase is also ridiculously overbroad. It encompasses virtually any legal decision made by a state or local government or agency. It seems designed to generate conflicts and controversy.

- In Para. 19(a), strike "[avoidance or to the]." The FTAA should not circumscribe the means by which Parties avoid trade disputes.

- In Para. 19(b), strike "[or proposed]," "[or would be]," and "[or, even if not inconsistent could cause nullification of impairment of any benefit that a Party could reasonably have expected to accrue to it under this Agreement in the sense of Annex XX (Nullification or Impairment)]." This language is remarkably vague and overbroad. It would profoundly chill the development of environmental laws in developing countries by exposing them to the threat of WTO suits for even proposing new standards. Further, the reference to laws "not inconsistent" with the FTAA obligations could undo any protections built into the treaty.

- In Para. 20, insert "domestic law and" before "international law." Domestic law should serve as an immediate first resort in trade disputes. Immediate application of the FTAA dispute mechanisms would unnecessarily waste resources in litigation and diplomacy. Furthermore, it would prove particularly burdensome for developing countries.

- In Para. 23, strike the bracketed phrase, which reads: "exclusively in accordance with the provisions of this Chapter." It places an unnecessary restraint on bilateral negotiation and diplomacy and may interfere with the amicable resolution of disputes when factors other than trade are relevant to those disputes.

- In Para. 25, the list of principles expands the dispute settlement provisions beyond existing international law principles without defining the new principles. We are particularly concerned with the "confidentiality" principle, in light of our persistent calls for greater transparency in trade dispute settlement processes.

- In Para. 30, the categorical exclusion of non-governmental participation in the dispute resolution system is outrageous. It denies the public the opportunity to participate in trade disputes in any way. Through its exclusion of all non-governmental participation, Para. 30 reverses even the very limited public participation system developed within the WTO.

- Strike Para. 36, which reads: "[The Parties undertake to complete the constitutional and legislative procedures outlined in this Chapter. Without prejudice to the generality of the foregoing, the Parties shall ensure the uniformity of their laws, regulations and administrative procedures with the obligations set out in this Chapter and with the other provisions of the FTAA Agreement.]" The President cannot commit the country to change its constitution. Nor can the President and Congress together do so.

- Insert new: 50bis. Prior to requesting consultations with another Party regarding measures, a Party shall seek public comment regarding the matter.

- In Para. 51, strike "or proposed."

- In Para. 53, strike "trade." Other Parties may have legitimate concerns beyond trade interests.
- In Para. 54, strike the three bracketed inserts: "[legitimate] [substantial trade]," "[legitimate] [substantial]" and "[and based on similar facts and circumstances]." Each Party is the best determinant of what its legitimate interests are.
- In Para. 56, the sixty (60) day time period for agreement is most appropriate. The United States needs longer time limits to allow it to consult the public and conform with applicable laws.
- Insert new: Para. 63bis. Prior to requesting that a neutral panel be established, pursuant to Article XX (Establishment of the Group of Experts), a Party shall seek public comment regarding the matter.
- Strike Paras. 66 and 67.
- In Para. 86, insert ", at least one of whom shall have expertise relevant to the issues and type of measure in dispute" after "competence and integrity."
- In Para. 95, replace "may, with the consent of the parties to the dispute" with "shall." Insert "or interested person" after "invite any Party."
- Insert new: 107bis. Before referring it to a neutral panel, a Party shall seek public comment regarding the matter.
- In Para. 110, the fifteen (15) day option is preferable to the ten (10) day option.
- In Para. 112, the ten (10) day option is preferable to the seven (7) day option.
- Strike Para. 114. Each Party should determine for itself whether it has a legitimate interest in the dispute.
- Strike "[up to thirty (30)]" from Para. 120.
- In Para. 124, replace "[and of the sectors or subject matter of the covered agreements]" with "or relevant areas of law." Strike "[,after approval by the institutional body]."
- In Para. 131(a), the second option, which calls for a five (5) member neutral panel is preferable. Five members allows for greater diversity of expertise and opinion. It also provides a stronger check on poor analyses.
- In Para. 147, strike the first bracket, which reads: "[within three months of the establishment of the neutral panel]." Three months is too short to allow for public input.
- In Para. 153, insert: a[1]) the procedures shall assure prompt public access to information regarding disputes and the right of the public to submit amicus curaie briefs or other relevant information.
- In Para. 155, insert ", person, or group of persons" after "any Party."
- Strike "[trade]" from Para. 167. Other Parties may have a legitimate concern beyond trade

interests.

- Strike Para. 184(c).

Chapter on Services

- Negotiate the Services chapter as a bottom-up, positive list agreement, rather than as a top-down, negative list agreement, as is indicated as an option in the text. All countries should have the maximum available flexibility to determine in which sectors they want to constrain their regulatory and enforcement powers over service operations, including national treatment and market access limitations. A positive list approach is particularly important for developing countries that will need to ensure environmental and social sustainability in sensitive sectors such as forestry, mining, fishing, energy extraction and production, transport and tourism.

- Ensure that environmental regulatory efforts will not be undermined by the terms of the chapter, and in particular include sufficient environmental exceptions.

- In Article 1, para. 1.9(b), insert environmental protection after law enforcement. Services liberalization should not circumscribe a Party's right to enforce environmental standards within its territory.

- Article 8, Para. 2 under Domestic Regulation is far too ambiguous with respect to the reasonable period within which a Party must inform an applicant of the status of its application. The permit processes established under many domestic environmental regulations can prove very long. The text should state that the time periods established in these regulations for responses to permit applications are presumptively within the reasonable period.
  - Remove any "necessity" provisions for domestic regulation that would restrict the right of governments to adopt laws and regulations protecting the environment.

- Article 8, para. 6(b) is too restrictive. It limits permitted qualification procedures and technical standards to those necessary to ensure the quality of the service. Services can involve activities that require regulatory standards that are peripheral to the quality of the service itself. Environmental regulations that affect transport services, for instance, may not directly impact the quality of the transport service itself, but are nonetheless necessary to ensure that the activity is conducted in a safe and environmentally-sound manner.
  - The same also applies to para. 1(b) under Granting [permits, authorizations] [licenses and certificates].

- The General Exceptions regarding environmental concerns must be clear, effective and fully inclusive of relevant environmental concerns. In the current text, the first option for General Exceptions is superior to the second. While the first option provides an exception for measures (b) to protect human, plant and animal life and health and preserve the environment, the second option contains no such exception.
  - However, neither option is sufficient. In neither option do the General Exceptions include an exception for measures relating to the conservation of exhaustible natural

resources (the language of GATT Article XX(g)).

- Additionally, the language of the environmental exception that is available in the draft text as an option uses the term "necessary" to describe measures that meet the exception's criteria. This term has been interpreted in GATT/WTO jurisprudence to require a least-trade-restrictive test and has therefore been used to limit the application of wholly appropriate environmental laws and regulations. In sum, the Services chapter must be revised to include an exception for exhaustible natural resources and to use the term "relating to" to qualify measures for the exception for all types of environmentally-related measures.
- Exclude from negotiations any natural resource extractive activities in such sectors as forestry, fossil fuels, water, mining, and fishing. No option in the current text provides such an exclusion.

- In Annex 1, include the impact of trade agreements on the ability of Parties to prevent species invasions among the factors to consider in the preparation of disciplines on subsidies.