Center for International Environmental Law Defenders of Wildlife
Friends of the Earth National Environmental Trust
National Wildlife Federation Natural Resources Defense Council Sierra Club

July 9, 2003

RE: Chile and Singapore Free Trade Agreements Are Wrong Models for the Environment

Dear Member of Congress:

As Congress prepares to consider the U.S.-Chile and U.S.-Singapore Free Trade Agreements (FTAs), we are writing to convey our concerns regarding the environmental implications of these agreements. We urge Congress to insist that the environmental safeguards in these agreements be strengthened and to reject the use of these FTAs as models for future trade initiatives such as the Central America Free Trade Agreement (CAFTA) and the Free Trade Area of the Americas (FTAA).

We share Congress' goal of building a global economy that protects the environment, while raising living standards for all people throughout the world. Regrettably, these agreements include investment rules similar to those in other agreements that have been used to undermine environmental protection. Further, the agreements do not include robust provisions to promote environmental improvement in all three countries, and they fail to meet the standards set in the environmental provisions of previous trade initiatives, including the U.S.-Jordan free trade agreement. The result is not only detrimental to the environment, it is also harmful to future progress on trade.

While we have numerous concerns related to these agreements, we note the following shortcomings in two specific areas of the Chile and Singapore FTAs: Investment Rules and Environmental Provisions.

Investment Rules

In the recent past, a series of challenges to environmental laws by private investors under the investment chapter of NAFTA (Chapter 11) has become a major issue in undermining public confidence in the desirability of trade and investment liberalization. In response to these and other concerns, Congress adopted a mandate in the Trade Act of 2002 that requires investment provisions of future trade agreements to ensure that foreign investors are not accorded "greater substantive rights" than U.S. investors enjoy under U.S. law.

However, the important "no greater rights" Congressional standard has not been met in the U.S.-Chile and U.S.-Singapore FTAs. While the Chile and Singapore FTAs provide for incremental changes, particularly in the area of improved transparency, the agreements fail to apply longstanding and fundamental principles of U.S. Supreme Court jurisprudence. For example, the agreements fail to ensure that government regulation to

prevent a public nuisance is not an expropriation, or 'taking.' Further, the investment rules do not make the critical distinction found in U.S. law between land and personal property, nor do they ensure that an expropriation challenge is based on the *permanent* impact of a government action on a property in its *entirety*. Moreover, vague standards such as "character of government action" have been taken out of context and will be left completely to the interpretation of international tribunals not bound by U.S. legal standards.

In reviewing these and future agreements, Congress should ensure the complete application of the "no greater rights" standard for expropriation challenges and should also limit claims for 'fair and equitable treatment' to the procedural due process standard in U.S. law.

Finally, the investment rules in the Chile and Singapore FTAs fail to explicitly preclude foreign investor suits that can be used to undermine the environmental laws of the United States, Chile, and Singapore. Instead, for example, these FTAs include a troubling provision allowing foreign investors to bring suits challenging government decisions about natural resource agreements, such as Federal oil and gas leases; this could result in entirely new avenues to challenge domestic regulations. Consequently, it is essential that investment rules provide a general environmental exception as does the WTO General Agreement on Tariffs and Trade (GATT). Such an exception would ensure that non-discriminatory environmental policies would not be vulnerable to inappropriate attacks.

<u>Environmental Provisions</u>

In the Trade Act of 2002, Congress made the environment a principle negotiating objective. However, while the Chile and Singapore FTAs include environmental provisions, the language used in many cases is ambiguous and provides little assurance that the environmental promises of the agreements will be fulfilled. Key aspects of environmental provisions in previous trade agreements are also completely absent. Notably, the agreements fail to place environmental requirements on a par with commercial issues, as was the case in the Jordan free trade agreement.

Moreover, by contrast with the NAFTA environmental side agreement, the Chile and Singapore FTAs do not include a "citizen submission process" that allows citizens of the countries involved to allege a failure to effectively enforce environmental laws. The citizen submission process in NAFTA is a limited but positive tool that has provided an independent review mechanism to place a spotlight on critical environmental issues. For example, the attorneys general of New York, Connecticut and Rhode Island recently made a submission under NAFTA highlighting Canada's failure to effectively enforce its clean air standards for power plants. The failure to include any citizen submission process in the Chile and Singapore agreements creates a serious imbalance with the private right of action granted to multinational enterprises under the investment rules.

The U.S.-Chile and U.S.-Singapore FTAs are also notable for their failure to establish an independent environmental cooperation institution like that established under the NAFTA environmental side agreement. Trade agreements should be accompanied by a systematic multilateral program with specific goals, timetables, and funding to assess and improve international environmental performance. The U.S.-Chile and U.S.-Singapore FTAs are not accompanied by specific resource and financial commitments to implement the environmental cooperation goals of the agreements. Further, we are also concerned that the ambiguous definition of "environmental laws" in the Chile FTA leaves open the strong possibility that natural resources issues, representing over 40% of Chile's exports, will not be covered by the agreement's environmental rules. Finally, the agreements fall short by not providing adequate deference to existing national and international environmental standards.

As Congress begins an expedited review of these agreements, we urge Congressional support to address these and other concerns in a meaningful manner. We believe that there is a consensus in the country for ensuring that progress on international trade and investment is accompanied by progress on the environment. Without further improvement, the U.S.-Chile and U.S.-Singapore FTAs should not be regarded as the appropriate model for United States trade policy. We look forward to working together to resolve these important issues.

Sincerely,

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