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Consumer's Choice Council • Defenders of Wildlife
Earthjustice Legal Defense Fund • Friends of the Earth
Institute for Agriculture and Trade Policy
Natural Resources Defense Council
Pacific Environment • Sierra Club

**Federal Register Comments on US Position regarding
Qatar Ministerial Meeting of the World Trade Organization
May 22, 2001**

These comments are submitted in response to the April 5, 2001 Federal Register notice soliciting public comment on US objectives and preparation for the upcoming meeting of the World Trade Organization Ministerial Conference in Qatar on November 9-13, 2001.¹ These comments respond to all of the seven categories listed in the notice, although they are not organized around those categories. Attached to and incorporated into these comments is a set of Principles for Environmentally Responsible Trade developed by many of the groups submitting these comments. (see Annex I) To ensure that trade and investment policies are environmentally sound, these principles must be incorporated into all US negotiating positions as well as any grant of fast track authority.

In the year and a half since the Seattle Ministerial meeting, few of the concerns raised by the environmental community have been addressed. On the positive side, we appreciate the efforts of the Clinton Administration to implement Executive Order 13141 and the recent commitment of the Bush Administration to continue that process by conducting an environmental assessment of the WTO's "built-in" agenda. Given the Administration's budget priorities, in particular the shrinking budget for the Environmental Protection Agency, we are concerned that the necessary resources may not be made available to develop adequate methodologies and actually conduct meaningful assessments for the FTAA, the WTO built-in agenda, and various bi-lateral trade and investment agreements. Nevertheless, we look forward to working closely with the inter-agency team to ensure that the assessment process identifies and avoids the negative environmental and other social implications of trade and investment rules. At the same time, we hope that a rigorous assessment process can also identify ways in which trade and investment regimes can support and enhance environmentally sound, socially equitable, and sustainable development.

On the other hand, WTO rules and procedures continue to be used to attack environmental laws that our organizations have worked for decades to create, strengthen and protect. Equally important, the continued pressure to expand trade through broadened and intensified application of trade policy, without an equal effort to ensure that the right framework of environmental law and policy is in place, threatens to impede the conservation of our natural resources and the maintenance and improvement of a healthy environment. Yet while the US has sometimes raised general environmental concerns about

¹The comments in this document are intended to summarize and complement previous statements and express the collective views of our respective organizations.

trade and trade rules at the WTO, it has failed to take the concrete actions needed to address those concerns effectively.

As our groups have emphasized repeatedly in past communications, the Administration must combine its commitment to liberalizing trade with an equally strong commitment to environmental protection and sustainable development. Trade liberalization efforts should not supersede other policy goals, such as environmental protection and democratic decisionmaking, which the public regards as equally important. We view the work done towards environmental assessments of the WTO agriculture and services negotiations and of the FTAA as promising steps towards comprehensive policy making. We appreciate the US's call to improve public distribution of WTO documents, enhance public participation in WTO dispute settlement proceedings, and encourage reduction of fisheries subsidies that distort trade and encourage overfishing. These efforts fall far short, however, of the comprehensive reforms needed to ensure that the world trading system does not hinder sustainable development and environmental protection. For example, we have found unacceptable the previous Administration's inflexible position that no textual changes to the WTO Agreements are needed, indicating a reluctance to deal seriously with environmental concerns. Recent proposals by the US in the context of services and agriculture negotiations fail to address many of the concerns we have raised. Moreover, US resistance to the inclusion of the Secretariat of the Convention on Biological Diversity as an observer on the TRIPs Council and its attempts to undermine the development and use of the precautionary principle in trade and environmental agreements, are very troublesome.

The WTO Ministerial Conference offers an opportunity for the Administration to lead the review and reform that the international trade regime must undertake if it is to promote, rather than undermine, environmental protection and other core values of United States citizens. We stand prepared to help the Administration seize this opportunity by developing an agenda that fully recognizes environmental priorities. If, however, the Administration misses the chance to put the WTO on a course toward sustainable development, this will undermine support for subsequent negotiations at the WTO and for United States government authority to participate in those negotiations. Furthermore, it will invite united environmental opposition to the results. To avoid this, the Administration must develop an environmentally beneficial agenda for the Ministerial Conference, and a comprehensive plan for environmental review and reform of the WTO, that go well beyond the proposals advanced to date.

We recognize that the trade and environment issues confronting the WTO will not be resolved at a single ministerial meeting. What we do expect, however, is that the Administration formulate a plan for achieving solutions, and that it demonstrate a commitment to that plan through constructive, open engagement with the public, with Congress, and relevant agencies. Despite the complexity of the details, the outline of the plan we need to see has three simple themes, described below. Our organizations are united in support of the overarching principles expressed here. We will continue to evaluate the outcome of WTO and other trade negotiations on this basis.

Part I details our opposition to further expansion of the World Trade Organization (WTO) agenda at this time. Part II identifies specific reforms needed to WTO rules and procedures. Part III outlines procedural and substantive elements of the environmental assessment of existing and proposed multilateral trade agreements.

I. No WTO Expansion

The Administration must avoid rushing into more negotiations on liberalization that would place the environment and environmental laws further at risk. In light of the potential for significant environmental impacts, this is not the time to embark on further expansion of the WTO's power or the scope of its rules. Thus, we oppose the launch of negotiations within the WTO on investment liberalization, intellectual property, government procurement or accelerated sectoral liberalization, including "early harvest" of tariff reductions. Moreover, before new WTO disciplines are negotiated, a full sustainability assessment of the existing rules must be conducted to determine the effect of current policy on the environment and other social values (see Part III.2 below). Finally, we find elements of the negotiations on services and agriculture conducted to date to be deeply disturbing.

1. Investment

As we have repeatedly stated, multilateral investment rules beyond the current Agreement on Trade-Related Investment Measures (TRIMs) should not be the subject of negotiations at the WTO. Our objections to an investment agreement in the WTO go beyond the issues of establishing rights to sue for estimated lost profits and investor-to-state dispute resolution. We are also concerned that enforceable rights to national treatment and most favored nation status could pry open environmentally sensitive sectors in markets where regulatory frameworks are inadequate to manage the increased environmental pressures that would result. If unaccompanied by strong enforcement of environmental and labor rights, application of the principles of national treatment and most favoured nation could also increase "industrial flight" by companies seeking to avoid costs of compliance with labor and environmental requirements.

Prior to the negotiation of any investment liberalization rules in any forum, an over-arching international framework is needed to ensure that international investments promote sustainable development consistent with the needs and sovereign prerogatives of host countries and to guarantee that the environment is protected. The development of a binding Sustainable International Investment Regime should take place within the United Nations system, perhaps as part of the RIO+10 process. Any such agreement must include investor obligations with respect to environmental and community protection to balance the trend of existing and proposed investment agreements to include only protection for investor privileges.

2. Intellectual Property

As currently written, international rules on intellectual property – including those in the WTO as well as regional and bilateral agreements – are imbalanced, and are undermining progress towards sustainable development. By extending the duration, scope and/or geographical coverage of intellectual property rights, they are shifting control of information (and associated products) from consumers to producers, and from Southern to Northern countries, and are consolidating control over one of our most important resources – knowledge. This shift may have profound implications for successful implementation of international agreements, such as the Convention on Biological Diversity, and may affect technology transfer, investment, competitive markets, innovation, and access to essential products, such as genetic resources, drugs and seeds. This tendency, if left unchecked, may affect fundamental human rights to health and food security. The WTO's Trade Related Aspects of Intellectual Property (TRIPS) Agreement, in particular, places private interests above social, development and environmental interests, such as biodiversity protection, access to essential medicines

and technologies, and the rights of indigenous communities and farmers. Thus any negotiations concerning intellectual property must focus on curing these problems (as outlined in Part II.6 below) rather than extending the scope and coverage of the TRIPs Agreement.

3. Government Procurement

We oppose efforts to expand the scope and coverage of the Government Procurement Agreement (GPA). It has become clear that the current provisions constitute a threat to existing and future procurement standards designed to favor environmentally and socially responsible products. 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. For example, the European Union and Japan initiated a challenge based on the GPA to Massachusetts' selective purchasing law regarding Burma. Likewise, US trading partners have argued that US procurement preferences for recycled products and sustainably harvested wood are inconsistent with the GPA. Any extension or expansion of the GPA is therefore inappropriate at this time.

4. Accelerated Tariff Reductions

We oppose efforts to accelerate liberalization, especially in environmentally sensitive sectors such as forest, energy, or chemical products, in the absence of a careful and public assessment of the potential environmental impacts (see Part III.3 below). Furthermore, liberalization must not take place until effective national and international policy frameworks are in place and enforced to ensure that increases or shifts in trade and production in these sectors are sustainable.

5. Built-in Agenda

We believe that any negotiations on the built-in agenda must be informed by thorough environmental and sustainability assessments. To the extent that Parties are currently pursuing negotiations on services and agriculture in the absence of such assessments, they are flying blind and cannot possibly develop environmentally sound proposals.

Services. We have concerns that negotiations on services could have some of the same far-reaching implications for domestic environmental and health regulation as would investment liberalization. Services involve activities within a country's territory that relate to a host of regulatory functions performed by federal, state and local authorities, including such critical functions as the control of potential invasive species introductions in the transport sector. Over two-thirds of all trade in services occurs in sectors with substantial environmental impacts, including transport, tourism, energy, water, and waste disposal. If the GATS negotiations lead to expanded sectoral coverage and enhanced regulatory disciplines, a host of concerns involving environmental policy will be directly raised.

As an initial matter, any "mode 3/commercial presence" disciplines must only be considered in the context of the broader UN-based Sustainable International Investment Regime mentioned above.

We believe that expanded market access and national treatment commitments in environmentally sensitive sectors could place undue restraints on environmentally protective

regulatory action. Our concerns are particularly significant for sectors in which countries have presented proposals, including energy, environmental services (including water services), tourism, transport and distribution (including mass retailing). For example, market access commitments could restrict the ability of state, local and federal governments to place quantitative limitations on environmentally harmful service operations such as operations related to oil and gas extraction, oil and gas pipelines, water extraction activities, and waste incinerators. In addition, national treatment commitments could limit regulatory action that creates a competitive disadvantage for foreign firms, such as restrictions on nuclear energy production.

We are also concerned about proposals to enhance the regulatory disciplines in Article 6.4 of the GATS and urge that no further disciplines be negotiated. The further development of necessity test disciplines would seriously restrain the ability of governments to take appropriate regulatory action on behalf of environmental protection. In addition, we are concerned that the elaboration of transparency requirements under Article 6.4 could result in the impairment of local and state environmental regulatory action. If sub-federal governments are required to enter into a consultative process with foreign governments concerning regulatory proposals, the ability to take needed environmental actions could be inappropriately impeded.

Further, we are concerned about the classification of activities involved in natural resource extraction as services. Just as manufacturing production is not generally treated as a service in the GATS, natural resource extraction and services directly related to such extraction are not appropriate for coverage under WTO rules. We believe that these activities should be explicitly excluded from the GATS.

While liberalization of environmental services could provide environmental benefits if appropriately undertaken, we believe that the current classification of such services makes it likely that liberalization could in fact harm, rather than benefit, the environment. By focusing almost exclusively on sewage, refuse disposal and sanitation services, liberalization will occur in "end-of-pipe" industries that often include such harmful activities as refuse incineration. Meanwhile, preventative and mitigative environmental services may be left completely unaddressed by the GATS negotiations. We believe that the negotiations should be focused on this latter set of proactive environmental services and should explicitly exclude any harmful service activities. We are also concerned that any GATS disciplines on subsidies are structured in a manner to protect the ability of governments to support environmentally beneficial or preferable services.

Finally, we are deeply concerned about the lack of an environmental exception in the GATS comparable to the Article XX(g) of the GATT for measures "relating to the conservation of exhaustible natural resources." We therefore urge that the language of Article XX(g) be included in the GATS. In addition, the reforms we have proposed concerning GATT Article XX should be adopted in GATS Article XIV as well. We are likewise concerned that the existing exception in GATS Article I for "services supplied in the exercise of governmental authority" is insufficient to protect the provisions of basic and essential public services, such as energy, water, transport, communication, and public health, from challenge and must be clarified to cover such sectors.

Agriculture. The United States has chosen not to make available to the public a comprehensive negotiating proposal as the Committee on Agriculture goes into the second phase of negotiations. This choice is regrettable and runs counter to the stated desire of USTR to increase the transparency of WTO negotiations in general. We hope that in the very near future all sectors of civil

society will have the same timely access to the negotiating documents and process that is presently enjoyed by the business sector.

In the statements made available to the public, the US calls on WTO members to gain "further deep reductions in support and protection, while encouraging non-trade distorting approaches for supporting farmers and the rural sector." We share the Administration's desire to reform policies and programs that encourage environmentally damaging expansion and intensification of production. At the same time, 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 assume the costs of farming in such a way as to prevent negative impacts that production practices may have on the environment of their neighbors. Such fiscally, socially and environmentally responsible farmers must not be allowed to be put at a competitive disadvantage with so-called low cost producers who rely on environmentally harmful subsidies to externalize environmental costs of their production. Current policies to expand production for trade tend to award such subsidies to the least responsible stewards of the land and rural communities.

Government policy also should take into account the economic importance of a vibrant rural sector, and not subordinate U.S. agricultural policy to the needs of transnational corporations. Report after report from the USDA and others shows that while the concentration of all segments of the food systems continues to erode market competition, whole towns are disappearing as the economics of farming have become ever less sustainable. The US has now in place a system whereby neither on the domestic nor on the international market do our agricultural products command even a cost of production price. The resulting and persistent dumping of commodities at 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 product 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.

U.S. agribusiness dumping, supported by U.S. 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. We can begin to address the near systemic distortions in agricultural trade and in U.S. agricultural markets, only if the U.S. government takes the initiative to table proposals at the WTO to phase out all forms of agricultural dumping.

The United States continues to maintain direct and indirect subsidies and protections that distort agricultural markets and threaten our environment, such as below-market pricing for water from government-funded projects and for grazing on public lands. The Administration should carry out a thorough review and restructuring of these policies and programs, and take them into account when notifying Aggregate Measure of Support commitments to the WTO Committee on Agriculture.

The WTO agricultural negotiations offer governments a chance to develop a multilateral understanding of which policies and programs should be reduced or phased out, and which should be permitted, on environmental, rural development and socio-economic grounds. Governments should also explore how to help developing countries implement such support programs, whether through multilateral financial and technical assistance or through some system of preferences. We urge the Administration to provide leadership on the issue of food security in these talks, a subject for

negotiations under Article 20 of the Agreement on Agriculture. Governments must consider the impacts that dumping of food exports has on the productive capacity of countries whose populations suffer from chronic hunger, and take such into account in implementing the AoA.

II. Reform WTO Rules and Procedures

We welcome President Bush's statement in Quebec City that "Our commitment to open trade must be matched by a strong commitment to protecting our environment and improving labor standards." To date however, the Administration's actions have not demonstrated any such commitment to environmental or labor concerns. To make significant progress, the Administration will need to make positive proposals on both substantive and procedural rules, including existing rules of the WTO, as well as the terms of reference for any further negotiations – whether as part of the built-in agenda or some future round of negotiations. The Administration will need to make a clear political statement that affirms environmental values *and* defines a clear process involving the right mix of agencies and other partners for achieving progress on a range of issues.

Substantively, the Administration will need to take action to ensure that the scope of WTO rules is limited to trade policy and does not intrude into matters that come under environmental law and policy. WTO rules must provide for deference to international and national environmental standards (Part II.1), and protect the consumer's right to know (Part II.2). At the same time, WTO rules can and should be applied so that they encourage the elimination of environmentally damaging subsidies that also distort trade (Part II.3). Likewise, intellectual property rules must be modified to promote sustainable development (Part II.4). Procedurally, the Administration must take steps to ensure that all WTO forums take the environmental implications of their work into account (II.5), and that their operations become transparent and accountable (II.6).

1. WTO Deference To International And National Environmental Standards And Institutions

WTO rules need to be reformed so that they stay within the bounds of trade policy and do not intrude into areas within the jurisdiction of environmental institutions and regulations. Ad hoc dispute settlement decisions alone are not a solution to the impact that WTO rules as currently interpreted may have on measures to protect the environment and public health. United States leadership of a multilateral approach to a number of issues is needed to ensure that WTO forums — including the Dispute Settlement Body — and WTO rules consistently defer to regulations and other measures adopted by international and national institutions, including measures based on the precautionary principle.

In the absence of such consistency, there is a serious risk that these institutions will be impeded from pursuing legitimate environmental objectives through negative interpretations advanced by trade policy-makers, ad hoc challenges, and the threat of adverse decisions in WTO dispute settlement. Of particular concern are the GATT, the TBT Agreement, the SPS Agreement, and the Services Agreement; also relevant are the TRIPS Agreement as well as agreements on subsidies and agriculture.

The Doha Ministerial is a critical opportunity for the United States to send a clear signal that trade policy must be developed and applied consistently with environmental principles, and to define a process and terms of reference for achieving agreement on how to ensure that WTO rules do not interfere with environmental measures. That process should aim at the following specific outcomes.

- a. *Burden and Standard of Proof.* Ensuring that the complaining party in a WTO dispute settlement proceeding has the burden to show the lack of an adequate basis for challenged local or national environmental and health regulations, and that WTO dispute settlement bodies employ a deferential standard of review, perhaps along the lines of Article 17.6 of the Anti-Dumping Agreement.
- b. *SPS.* Ensuring that the provisions of the SPS Agreement:
 - i. Do not interfere with the right of national governments to develop and enforce high environment and health standards at the level they deem appropriate;
 - ii. Fully recognize and provide for implementation of the precautionary principle;
 - iii. Acknowledge clearly that international standards establish minimum, not maximum standards for the levels of environmental and health protection set by WTO Members.
- c. *Acknowledge Multilateral Environmental Agreements (MEAs) in WTO Rules.* Consistent with past statements of the G-8, there must be an affirmation that trade-related environmental measures (TREMs) authorized or required under multilateral environmental agreements or internationally recognized environmental principles are equal in authority to and consistent with WTO rules, including Article XX of the GATT, the TBT Agreement and the SPS Agreement. Criteria should be defined indicating to the WTO how to recognize the types of agreements or principles that fit within the MEA category. Contrary to USTR's suggestion in the past, the concept is not to establish criteria for evaluating whether an MEA measure is legitimate. Rather, such measures will be deemed legitimate by virtue of their adoption under an MEA.
- d. *Build Effectiveness of MEAs including Trade-Related Measures.* The Administration needs to make it a positive priority to build effectiveness of MEAs. Where trade-related measures are appropriate means for addressing the environmental problem, the Administration should support their use. A WTO decision to defer to MEAs will do little good if MEAs are written to include "carve-outs" that ensure that WTO rules prevail over MEA obligations. Disputes over the implementation of MEAs should be resolved by MEAs, not by the WTO. Thus, we are also seeking a commitment from the Administration not to advocate the inclusion of "savings clauses" in future MEAs. The Administration should also work with other countries through appropriate environmental institutions such as the United Nations Environment Programme (UNEP) to develop principles of trade policy to which negotiators of MEAs can refer during negotiations.
- e. *Production or Processing Methods (PPMs).* The Administration must take a leadership role in ensuring that distinctions between products based upon PPMs related to environment, human rights and internationally recognized labor standards are recognized as legitimate measures for promoting sustainable commerce that are consistent with WTO rules. The manner in which products are produced or processed can have significant consequences for human health and the environment. Improper production and processing methods may cause harm not only to the states in which the

production occurs, but also to the global commons and to countries and regions far beyond the borders of the producing country. Governments have a right to draw distinctions based on that harm.

- f. *Effective environmental exceptions.* The United States must ensure that effective environmental exceptions apply across all WTO agreements in order to preserve the ability of governments, at all levels, to enact environmental and social policies. The WTO should only prohibit measures that can clearly be demonstrated to be a restriction on trade primarily intended to discriminate. To that end, we urge the rejection of the least trade restrictive test in applying environmental exceptions. Instead, the WTO should seize the opportunity to define the environmental exceptions as covering any relevant environmental measure passing muster under the Article XX chapeau. Such a revision would permit coverage of a broader range of environmental measures as "valid policy objectives" for Article XX, including Multilateral Environmental Agreements.
- g. *Procurement.* The Government Procurement Agreement should be clarified or amended to ensure that it recognizes the right of governments to use social and environmental criteria in making purchasing decisions. Comments submitted by several of our organizations to USTR in January 1999 on this topic are still relevant.
- h. *UNEP and other Environmental Institutions.* The Administration should advocate for the adoption of cooperative agreements between WTO and international environmental institutions, including UNEP, by which the WTO defers to the role of appropriate institutions in addressing environmental aspects of international decisions. Specifically, institutions such as UNEP and the secretariats of relevant MEAs should have a substantial role in the settlement of environment-related disputes under the Dispute Settlement Understanding (DSU) and in the definition of key international environmental principles such as the precautionary principle. We also believe the United States should incorporate, and urge other WTO Members to incorporate, the methodology that UNEP is developing for the assessment of trade liberalization and other trade-related policies. Deference to such outside expertise is necessary in light of the specialized nature of WTO as a trade policy institution lacking environmental expertise.

These issues may be addressed in a variety of precise legal forms. For instance, a clarification could involve language in a statement adopted by a WTO Ministerial Conference or the WTO General Council, an agreed-upon interpretation formally adopted by the General Council, or an amendment to the text of the relevant agreement.

As a general matter, we would like to emphasize that the use of trade measures that affect developing countries' ability to accomplish environmental goals should be accompanied by financial and technical assistance to those countries to help them achieve those goals. This is consistent with the Rio bargain that developed countries would assist developing countries in raising environmental standards and combating environmental problems, so that all could share in sustainable development and an improved global environment. The merit of this approach was recognized in the Appellate Body's Shrimp/Turtle decision. Unfortunately, developed countries have failed to carry out their end of the bargain, with foreign assistance budgets declining, and debt relief proposals still inadequate. A renewed political commitment from the United States and other industrialized countries would contribute significantly to multilateral agreement on the program outlined here, and would offer long

term payoffs for the United States economy and environment.

2. Protection of the Consumer's Right To Know

Markets can allocate resources properly only if consumers have the necessary information to make informed decisions. Unfortunately, some WTO Members — including the United States government itself — have advanced interpretations of WTO rules that threaten to restrict the power of governments and private organizations to provide consumers with information they want about the environmental and health aspects of products and their production. We urge the United States to work with other WTO Members to launch a process that leads to the following outcomes:

- a. Ensuring that the WTO Agreement on Technical Barriers to Trade (TBT) does not interfere with the ability of governments and private organizations to protect the consumer's right-to-know and to promote sustainable consumption through open and transparent labeling programs, including that for genetically modified food;
- b. Ensuring that the TBT Agreement recognizes the legitimacy of regulations and standards that distinguish between products based on the environmental consequences of their manufacture, use and disposal; and
- c. Ensuring that the TBT rules do not conflict with speech protected under the U.S. Constitution, including third-party certified private labeling programs.

As with the proposals in Part II.1 above, we are open to further discussion about the precise legal form that these assurances should take. Generally, however, the principle is that the WTO must recognize that the TBT Agreement effectively includes an exception along the lines of Article XX, to the extent it applies to ecolabeling.

3. Eliminate Environmentally Damaging Subsidies

We have welcomed and supported the US Government's previous willingness to push for the elimination of fishery subsidies that have contributed to the current global fisheries crisis. The Doha ministerial should unambiguously place the fishery subsidies issue on the negotiating agenda, and should do so in the context of an open interdisciplinary and inter-organizational procedure that includes other institutions with relevant and needed expertise alongside the WTO. We urge the United States to push for a similar review of other environmentally damaging subsidies, such as those in the forest and energy sectors. At the same time, WTO Members must ensure that WTO rules allow governments to craft measures that reward the social and environmental values conferred by certain activities, such as adoption of environmentally responsible technologies and development of renewable sources of energy. The ability of the WTO to play a constructive role on environmentally damaging subsidies will be a significant test of the organization's ability to produce the oft-promised "win-win" outcomes for trade and the environment.

4. Reform the TRIPS Agreement to Promote Sustainable Development and the Public Interest

We believe that, if established at appropriate levels, intellectual property rights can promote innovation, encourage investment, and balance the public's interest in access to new products, processes and other forms of innovation, with the need to reward inventors for their creativity. We are

concerned, however, that the WTO's TRIPS Agreement fails to strike this balance and achieve these goals, and we therefore urge the United States to support a re-examination of the TRIPS Agreement. In particular, we request the United States to:

- a. *Support proposals to amend the TRIPS Agreement to ensure it is consistent with the objectives of the Convention on Biological Diversity.* We support the proposals put forward by India and Brazil to amend the TRIPS Agreement to require patent applicants to disclose the source of genetic resources, and provide information of prior-informed consent, as a precondition to granting patents, in a manner that is consistent with the objectives of the Convention on Biological Diversity (CBD);
- b. *Support full observer status for the Convention on Biological Diversity in the TRIPS Council.* 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 with its support for WTO transparency. We urge the Administration to go on public record as supporting of full observer status for the CBD in the WTO's TRIPS Council;
- c. *Undertake a full sustainability assessment of the TRIPS Agreement under Article 71.1.* Commencing in 2002, the WTO TRIPS Council is mandated to undertake a full review of the TRIPS Agreement. We encourage the Administration to support a full review of the environmental, social and economic implications of the TRIPS Agreement, in line with the President's Executive Order requiring a sustainability review of future trade negotiations, including those in the WTO's built-in agenda;
- d. *Implement a moratorium on challenges to developing country IPR rules, especially where environment and health issues are involved.* We understand that the United States is challenging, formally and in bilateral discussions, a number of countries' national intellectual property laws. We believe that the United States should be the first to support efforts by developing countries to take IPR-related measures to promote technology transfer, and access to essential products, and request the Administration to refrain from challenges that place these efforts at risk;
- e. *Establish formal mechanisms, including a technology transfer fund, to promote the transfer of environmentally sound technology to least developed countries.* We believe that more can and should be done to implement the obligation, included in Article 66.2, to establish incentives for the transfer of technology to least developed countries. We call on the United States to initiate a discussion in the TRIPS Council about a formal mechanism, including a technology transfer fund, to implement this obligation in a manner that supports the technology transfer obligations in Multilateral Agreements, and helps least-developed countries to achieve environmentally sustainable development;
- f. *Reconsider the application of the non-violation complaint to the TRIPS Agreement.* We share the view of many WTO Members that the non-violation remedy "may constrain Member's ability to introduce new and perhaps vital social, economic development, health, environmental and cultural measures" (See, Proposal from Cuba, the Dominican Republic, Egypt, Indonesia, Malaysia and Pakistan, *Non-Violation or Impairment under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)*, at para. 4, (IP/C/W/141)). By allowing complaints even where there is no violation of formal TRIPS provisions, this remedy threatens to elevate private property rights over the interests of the users of intellectual property, and over

other important national public policy considerations, and we therefore urge that the moratorium on its application, contained in Article 64, be extended indefinitely; and

g. *Support a full review of the TRIPS provisions relating to genetic resources.* The TRIPS provisions on genetic resources, included in Article 27.3b, raise a series of environmental, ethical, economic and social issues, which must be addressed systematically in the ongoing review of this provision. We urge the United States to accept and systematically address the list of issues proposed by the Chair in the March 2000 TRIPS Council meeting, and to engage in a substantive review of Article 27.3b.

5. Recognize Environmental Aspects of WTO Decision-Making

Another key question is how to reform the procedures and institutions of the WTO so that decision-making takes into account its environmental implications. In the past, the United States has proposed to use the Committee on Trade and Environment (CTE) on a “rolling basis” and in an advisory capacity to address the environmental aspects of WTO decisions. But compartmentalizing environment in the CTE has not worked in the past and will not work in the future. The US has offered no concrete steps that would effectively link the CTE to the real decision-making forums at the WTO.

In our view, much more is needed to ensure that the WTO takes environment into account in its decision-making. As a general matter, all relevant WTO bodies — including councils, committees, and working groups — must include reference to environmental protection and sustainable development among their objectives or terms of reference, consistent with the preamble of the WTO Agreement itself.

The WTO will also have to adopt procedures that ensure that these forums take these objectives seriously. For instance, each forum could periodically consult with international environmental institutions with relevant expertise, report on the environmental implications of its work, and make recommendations on how to address environmental impacts of the trade policies with which it is concerned. The CTE might have a role through review and comment on that report. Another option is for the WTO’s Director General to present a review of the WTO’s record on environment and sustainable development in a section of the annual report after soliciting and considering public comment on that record. The United States itself could do a better job of integrating environment by including representatives from relevant agencies such as the EPA on delegations when forums such as the SPS or TBT Committees discuss environment-related issues.

6. Improve Transparency, Public Participation And Accountability At The WTO

We very much appreciate the efforts made by the United States to advance democratic reform within the WTO. We ask that the Administration continue to include increased transparency, participation and accountability as a priority on its negotiating agenda in all aspects of trade negotiations. However, effective achievement in this area will require more actions in addition to broader and faster access to working documents and consideration of NGO submissions in dispute settlement. It will also require, at a minimum:

- a. Opening dispute settlement and appellate body proceedings to public observation;

- b. NGO participation in discussions of environment-related issues by other WTO decision-making forums, such as the SPS Committee, the TBT Committee, the TRIPS Council, the Agriculture Committee, the CTE, and relevant negotiating groups; and
- c. The development of a meaningful consultative process between the WTO, NGOs, member governments and businesses.

We recognize the validity of concerns raised by developing countries that they may have fewer resources than do some NGOs. The United States and other developed countries should support fuller participation by poorer WTO Members, for instance through financial and technical assistance.

A first step towards improved transparency of the WTO and trade policy must begin at home. We are willing to work with the Administration to provide input into the negotiating agenda, yet little information and no documents have been shared with the NGO community as the Administration prepares its position for the WTO Ministerial. We urge the Administration to be transparent, to share information and documents, to engage the NGO community in a constructive dialogue. Gathering input through the Federal Register notice and comment mechanism is but a first step in this process. The Administration must also ensure balanced representation on advisory committees dealing with trade issues that have environmental implications consistent with the Federal Advisory Committee Act. Furthermore, we reiterate our request that the United States include NGOs on its delegation to the WTO Ministerial meeting, especially since other governments have already done so.

III. Environmental Assessments of Current and Proposed Trade Policies

As noted above, we are pleased with the progress that has been made on institutionalizing the practice of conducting environmental assessments of trade talks and with the guidelines issued last year. We nevertheless remain concerned on a number of fronts about the adequacy of the process and whether it will result in substantive policy changes. We believe that the assessment should include a review of both past and current impacts of existing trade policies on the environment and on environmental law and policy, a similar review of foreseeable impacts of proposals for negotiations, and consideration of policy alternatives. We remain very concerned about the conduct of assessments of proposed tariff reductions in environmentally sensitive sectors. Finally, we have concerns about the US taking positions in the agriculture and services negotiations without the benefit of the promised environmental assessment to inform those positions.

1. Procedures and Criteria for Assessment

Without going into great depth here, we have a number of on-going concerns with the process initiated under the previous Administration. In our view, the guidelines implementing Executive Order 13141 and experience to date suggest a number of flaws that must be addressed.

- We have yet to see an adequate commitment of resources from the relevant agencies for elaborating methodologies and conducting assessments. The best of intentions may founder on the shoals of limited resources.
- While progress is being made on the quantitative analysis of direct trade effects, there has been little to no attention paid to date to the regulatory or legal impacts of

agreements or how to assess those impacts. Many of our most fundamental concerns with trade rules rest squarely in this category.

- There are not clear feedback mechanisms to ensure that the conclusions of an assessment actually influence US trade policy. For example, US positions in both the built-in WTO agenda and the FTAA have been developed without benefit of the environmental assessment process.
- We remain very concerned that global and transboundary effects of trade negotiations will be slighted in future analyses.
- We have yet to see a commitment to evaluating various policy alternatives and mitigation strategies in the assessment process.
- By focusing on "environmental" issues, the assessment process seems to ignore broader social and development concerns that are also inextricably linked to trade policy.
- The role of state and local governments in the assessment process remains unclear – although trade rules may well limit their regulatory prerogatives.

In the past we have suggested that the assessment of trade policy should be based on experience with the National Environmental Policy Act (NEPA). Clearly the process instituted to date falls far short of the NEPA standard. To the extent that the process evolves, it must move closer to NEPA's mandated procedures and methodologies, as elaborated through regulations of the Council on Environmental Quality, and enriched through decades of federal agency experience with implementation. At a minimum, the assessment process should be framed in terms of two basic questions. Is the framework of laws, policies and institutions in place to ensure that additional multilateral steps to liberalize trade will lead to environmentally and socially beneficial outcomes? If it is not, then what institutional, legal and policy changes must we make before we move forward with further liberalization?

Finally, we urge the Administration to take the lead in facilitating an environmental assessment of trade negotiations at the multilateral level by a balanced panel of experts drawn from the WTO Secretariat, international institutions with environmental and other relevant expertise, the scientific community, and the public.

2. Assessments of Existing Trade Policies

Forward-looking assessments must be complemented by consideration of lessons learned. To date, unfortunately, governmental consideration of environmental impacts of trade policy has been inadequate. We urgently need to gain a better understanding of the impacts of past trade policies. Thus, the Administration should also conduct an assessment of the environmental impacts of the WTO Agreements adopted in the Uruguay Round, carried out consistent with the principles we have outlined for conducting an assessment.

This review should cover all relevant WTO Agreements, such as the General Agreement on Tariffs and Trade (GATT), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and agreements on subsidies and agriculture. In relation to the TRIPS Agreement, we are concerned that the expanded scope and enforcement of intellectual property rights required under the WTO TRIPS Agreement may affect the transfer of technology required under multilateral environmental agreements (MEAs), the rights of farmers and indigenous peoples, and the equitable distribution of benefits required under the Convention on Biological Diversity.

3. Assessment of Proposals for Accelerated Sectoral Liberalization

Beginning in the context of Asia-Pacific Economic Cooperation (APEC), and more recently in the WTO, the United States has proposed accelerated reduction of tariffs, accompanied by examination of non-tariff measures, of a number of sectors, including environmentally sensitive sectors such as energy, chemicals, fish and forest products. In light of the potential environmental impacts of these efforts, we urge the Administration to assess carefully the environmental effects of accelerated liberalization in all sectors, and to define and implement policy measures to maximize environmental benefits and mitigate harmful impacts. The United States should not push for accelerated liberalization until full environmental assessments have been conducted — of the proposals for both tariff and non-tariff measures — along the lines discussed in this letter. In light of the severe threats confronting the world's forests and fisheries, and the demonstrably inadequate national and international frameworks for conserving them, this approach is particularly important with respect to the fish and forest product sectors.

4. Assessment of the Built-In Agenda

We anticipate providing detailed comments on the assessment of the built-in agenda in response to the separate Federal Register notice, but note here that the US has been and continues to develop significant negotiating proposals and positions in the absence of such a review.

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Annex I

American Lands Alliance • Center for International Environmental Law
Consumer's Choice Council • Defenders of Wildlife • Earthjustice Legal Defense Fund
Friends of the Earth • Institute for Agriculture & Trade Policy
National Wildlife Federation • Natural Resources Defense Council
Sierra Club • World Wildlife Fund

PRINCIPLES FOR ENVIRONMENTALLY RESPONSIBLE TRADE

TRADE AGREEMENTS SHOULD SUPPORT, NOT UNDERMINE, ENVIRONMENTAL PROTECTION.
TO THAT END, THE ABOVE-SIGNED ORGANIZATIONS BELIEVE THAT THE FOLLOWING PRINCIPLES SHOULD
INFORM ALL ASPECTS OF UNITED STATES TRADE POLICY.

- I. **Do Not Undermine Environmental Standards.** Trade agreements should not be used to weaken national or international health and environmental standards. In particular, trade rules must:
 - § ensure that domestic environmental laws and regulations cannot be challenged by private investors before international tribunals;
 - § allow distinctions between products if they are produced, for example, in a way that harms endangered species, ecosystems, or the global commons;
 - § respect the right of governments to adopt precautionary standards to protect health and the environment;
 - § ensure deference to multilateral environmental agreements (MEAs) when there are conflicts between trade rules and trade-related provisions of MEAs; and
 - § ensure the availability of strong and clear environmental exceptions to trade and investment rules for laws and regulations that protect health, the environment, and natural resources.
- II. **Encourage Environmental Progress.** In order to ensure sustainable development, trade agreements must encourage environmental progress and discourage harmful environmental impacts. In particular, trade policymakers should:
 - § ensure that market opening agreements are accompanied by strong environmental initiatives to evaluate and raise environmental performance in countries to protect natural resources that would be vulnerable to increased exploitation;
 - § provide for binding, enforceable measures in trade agreements to maintain and effectively enforce environmental laws and regulations and prohibit the lowering of environmental standards to attract investment or gain trade advantages;
 - § ensure that environmental provisions in trade agreements are subject to the same dispute resolution and enforcement mechanisms that apply to all other aspects of the agreements;

- § provide a mechanism for citizens to seek review of failures to enforce health and environmental laws (e.g., see NAFTA);
- § require that foreign direct investors disclose basic information on their environmental practices;
- § develop a systematic program to improve environmental performance through capacity-building assistance, technology transfer, and corporate accountability;
- § work to develop cooperative, multilateral solutions to trade and environment conflicts; and
- § encourage the elimination of environmentally-harmful subsidies and economic incentives.

III. Require Democratic Procedures. Trade agreements must be developed and implemented through open and fully democratic procedures. In particular:

- § trade agreements under negotiation should be subject to comprehensive environmental reviews involving public participation throughout the process, the results of which should be taken into account in the final agreement;
- § trade agreements should provide for meaningful public participation in a trade dispute, including review and comment on the written record, access to hearings, and submission of friend-of-the-court briefs.
- § the public should have access to negotiations and the working texts of trade agreements, and have a permanent role in trade advisory committees and trade institutions;
- § trade disputes and informal interventions should be initiated only after public notice and comment; and
- § consistent with Congress' constitutional authority to regulate foreign commerce, Congress must provide new mechanisms to hold trade negotiators and policymakers accountable to implement the above trade and environment principles, including mandatory negotiating objectives.