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**Before the Subcommittee on Trade
Of the U.S. House Committee on Ways and Means
On the Implementation of U.S. Bilateral Free Trade Agreements
With Singapore and Chile**

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Mr. Chairman, Congressman Levin, and Members of the Subcommittee, thank you for the opportunity to present the views of Oxfam America at this hearing today. We appreciate the invitation and your interest in gathering a variety of perspectives on the important issues raised by the Chile and Singapore Free Trade Agreements.

Oxfam America is an international development and relief agency committed to developing lasting solutions to poverty, hunger, and social justice. We are part of a confederation of 12 Oxfam organizations working together in more than 100 countries around the globe with an annual budget over \$400 million dollars.

Oxfam believes that trade can be an important engine for development and poverty reduction. Well-managed trade has the potential to lift millions of

people out of poverty. For this reason, Oxfam has focused on global trade rules and trade agreements as an integral part of our work to improve livelihoods and reduce poverty in developing countries.

Trade agreements set the rules for ongoing trade relationships. They present opportunities for developing countries, but they also present risks. That's why we believe that it is very important to get the rules right; and why Congress should look carefully at these FTAs to understand their implications. This is all the more important given statements by Administration officials that these agreements will serve as models for future trade agreements.

Today, I will focus my comments on two areas of concern to Oxfam America and our partners in developing countries: intellectual property and investment.

Intellectual Property

Important areas of concern for Oxfam are the intellectual property sections of the Chile and Singapore FTAs. Both Chile and Singapore are party to the existing WTO TRIPS agreement. But both FTAs include measures that strengthen patent rights and enforcement around pharmaceutical products. Both agreements go beyond the existing WTO TRIPs agreement and impose new requirements on our trading partners, implementing so-called "TRIPS-plus" provisions.

Many public health and intellectual property experts have warned that "TRIPS-plus" may undermine public health in poor countries. This concern has become a major issue at the WTO, and, in 2001, the primacy of public health over patent rights was affirmed in the Doha Declaration by all WTO members, including the United States. In 2002, Congress endorsed this commitment as part of Trade

Promotion Authority by instructing the USTR to respect the Declaration in trade negotiations.

Unfortunately, Oxfam feels this commitment to public health is not being upheld by the USTR. We are concerned about several “TRIPS-plus” provisions included in the Chile and Singapore FTAs. At the root of intellectual property rights systems is a balance between the interests of patent holders and the public interest. The provisions of these FTAs tip this balance inappropriately in favor of rights holders and, as a consequence, may limit access to affordable medicines.

Most of these provisions are aimed at delaying the introduction of generic competition, thereby prolonging the patent holder’s monopoly. Generic competition is crucial in bringing prices down to affordable levels, and anything that delays the entry of generic products can have a grave impact on access to affordable medicines. President Bush himself made this point in his State of the Union address when called for a major new commitment of funds to combat AIDS and other diseases. He referenced the fact that anti-retroviral drugs have dropped in price from \$12,000 per patient per year to around \$300. This dramatic difference, which will make life-saving treatment available to millions, is the result of generic competition.

Both the Chile and Singapore agreements contain “TRIPS-plus” provisions. However, there are more of them, and they are more extensive in the Singapore agreement. The U.S.-Singapore Free Trade Agreement includes provisions that:

* limit the use of “compulsory licensing”, an important mechanism for governments to obtain affordable medicines. Under compulsory licensing, the government can require the issuance of a license to produce a patented drug under certain conditions. Compulsory licenses provide an important safeguard to governments to counterbalance the monopoly rights granted to patent

holders. Compulsory licenses enable governments to deal with public health problems or instances of abuse of patent rights. Developed countries, including the United States, have used compulsory licenses – or the threat of them – to bring down drug prices. The U.S.-Singapore FTA will make it more difficult for Singapore to issue compulsory licenses in the public interest. The compulsory licensing provisions of the FTA go beyond TRIPS, restricting the circumstances under which this procedure can be used and expanding the rights of patent holders at the expense of the government and the public interest;

- * delay or impede the introduction of generic competition by (a) linking marketing approval to patent status, thereby preventing the immediate introduction of generic competition upon patent expiry, (b) mandating the protection of test data for five years, again delaying the development of and marketing approval for bioequivalent generic drugs, and (c) mandating the disclosure of applicants for generic marketing approval;

- * extend the term of patent protection to compensate for delays in regulatory approval. This would also delay the introduction of generic competition. Twenty years of patent protection is an adequate monopoly for patent holders to recover investments and generate profit. Extending this monopoly unfairly favors patent holders to the detriment of the public interest in accessing affordable medicines;

- * restrict parallel importation of medicines placed on a foreign market at a lower price than in the home market. “Parallel importation” is a key means of obtaining affordable drugs and is not limited under the WTO agreement on intellectual property (TRIPS). This provision may make Singapore responsible for policing patent violations abroad, by requiring Singapore to restrict parallel importation of certain drugs based on the terms of licensing contracts in other countries. The WTO TRIPS agreement leaves it to countries to decide whether or not to provide for international exhaustion in their national IPR

regimes, so language in the Singapore FTA which limits parallel importation in any way is “TRIPS-plus”. Although it is controversial, it should be noted that many Americans engage in parallel importation by buying drugs in Canada to take advantage of cheaper prices there.

Some of these provisions seek to bring Singapore (and Chile) patent law up to American legal standards. Some of them appear to go beyond U.S. law in protecting patents and restricting generic competition.

In addition to the intellectual property concerns around access to medicines, patent provisions of the Singapore and Chile FTAs restrict the flexibility accorded to governments under the TRIPS agreement to decide the scope of what may be patented under their national laws. For instance, both the Chile and Singapore FTAs require the patenting of plants, which is a controversial issue among environmentalists and indigenous communities. Under the WTO TRIPS agreement (Article 27.3 (b)) each country is free to decide how this issue will be regulated in national laws.

Oxfam is particularly concerned that the IPR provisions of the Chile and Singapore FTAs may serve as models for other trade agreements. The pharmaceutical industry has lauded the recently Singapore FTA, noting that “it establishes key precedential provisions to be included in other FTAs now being negotiated, including the FTAA” (p 1, IFAC report).

Experts have concluded that stringent IPR standards (a) do not lead to increased innovation in developing countries, (b) may harm public health, and (c) are not appropriate to countries of lower levels of economic development. Using the Singapore and Chile FTAs as a template for future trade agreements would be dangerous and inappropriate. The FTAA, for example, includes a number of poor countries facing health crises, all of which are already subject to IPR protections provided under the WTO TRIPS agreement. Imposing more

stringent, “TRIPS-plus” standards of IPR protection could undermine public health and the ability to deal with crises such as AIDS. In addition, we believe the USTR should not seek to require the patenting of plants as part of our trade agreements. This complicated issue should be resolved in the context of a variety of development and environmental considerations.

Investment

Oxfam believes that the investment rules in the Chile and Singapore FTAs serve as a poor template for future trade agreements, and could undermine the ability of developing country governments to assure that foreign investment contributes to development goals. While the investment provisions in the Chile and Singapore agreements are problematic on their own, Oxfam is primarily concerned about the example they set for future agreements.

Foreign direct investment (FDI) has the potential to stimulate economic activity and create jobs in a manner that supports national, regional, and local development strategies. In many developing countries, capital investments are critically needed for all manner of human and economic development goals. However, for developing countries, the quality of investment probably matters more than the overall quantity. And the investment rules in the Chile and Singapore agreements restrict the ability of governments to guarantee the quality of investment in their countries. The Chile and Singapore agreements restrict the use of performance requirements, an important tool to assure that investments promote economic and social development. Through foreign investment, developing countries hope to spur economic linkages up and down the production chain. They often hope for technology transfer to allow countries to develop their own production capacities and increase the value added in country. But restrictions on performance requirements – such as requiring the use of local materials and technology transfers – mean that productive investments can be isolated from the rest of the economy, offering

little indirect benefit. In fact, the model used in developing countries often ensures that investments are confined to enclave zones, with few, if any, backwards linkages to the domestic economy. The case of Mexico under NAFTA is instructive. FDI flows to Mexico between January 1994 and September 2002 reached an astonishing \$116 billion. However, nearly half of this has gone to manufacturing low value-added goods in maquiladoras along the U.S.-Mexico border. These maquiladoras largely use imported materials and export to foreign markets, mostly the United States. The broader benefit to the Mexican economy has been modest.

Oxfam is troubled by the investor-to-state mechanism by which foreign investors may bring complaints before international arbitral tribunals when their business interests have been impaired by government actions taken. The potential use of this mechanism to challenge regulations that are designed to protect public health, safety, and the environment represents a serious threat to governments' ability to provide for the basic human rights of its citizens. Moreover, Oxfam and many others are concerned about the lack of transparency and accountability of the investor-state dispute settlement mechanism that bypasses domestic judicial systems and does not have an appellate process.

The experience of such mechanisms under NAFTA is not encouraging. Since NAFTA came into force in 1994, corporations in all three member-countries have used the investor-state mechanism to file cases challenging domestic laws that were designed to protect health, safety, and environment. One of the most noteworthy cases brought under the NAFTA Chapter 11 investor provisions is a 1997 complaint filed by the U.S.-based waste disposal company Metalclad against the Mexican government. Metalclad claimed that the Mexican state of San Luis Potosi had violated its NAFTA rights when it prevented the company from opening a waste disposal plant after the company had taken over a facility with a history of contaminating local groundwater. The local government

denied Metalclad a permit to reopen the facility and later declared the site part of a 600,000-acre ecological zone. Mexico was ultimately forced to pay Metalclad over \$15 million in compensation due to these decisions.

Congress was clear when providing the authority to negotiate new trade agreements that the investment provisions of new trade agreements should not provide substantive rights to foreign investors beyond those provided domestic investors. However, it is our judgment that the Chile and Singapore agreements do not comply with this mandate. The provisions in the Chile and Singapore agreements go beyond the set of guidelines for regulatory takings and due process that have been established in U.S. jurisprudence by the U.S. Supreme Court. This failure to appropriately constrain the investment rules not only risks the authority of foreign governments to protect the public health and environment, but also the United States. For example, by failing to appropriately and clearly limit the way in which the rules apply to different types of property and by failing to include the critical 'parcel as a whole' principle, the investment rules could limit the ability of developing country governments - or the U.S. - to establish development moratoriums on projects that are socially or environmentally harmful.

We are also concerned that the Chile and Singapore agreements limit the use of important policy tools that developing countries need to reduce their financial instability in times of crisis. The Chile and Singapore agreements restrict measures that would impede the free flow of capital, even when those measures are designed to prevent financial meltdowns during emergency balance-of-payments problems. Economists and analysts from range of perspectives agree that banning these policies is a very poor idea. Recently, Jagdish Bhagwati, professor of economics at Columbia University, and Daniel Tarullo, professor of law at Georgetown, have argued that the ban on capital controls is "bad financial policy, bad trade policy, and bad foreign policy and constitute a bad trade-off for increased trade and investment flows" (Financial

Times, March 17, 2003). On April 1, 2003, Joseph Stiglitz, former World Bank Senior Vice President, and Nancy Birdsall, a former World Bank policy research director and vice president of the Interamerican Development Bank joined Bhagwati to testify before the House Financial Services Committee on the capital control provisions of the Chile and Singapore agreements. All of them argued that that the restrictions on their use constitute a major source of concern. Even *The Economist* (May 3, 2003) has made the case for maintaining capital controls as a viable policy alternative to prevent financial instability.

The investment provisions in the Chile and Singapore agreements are important to consider in their own right. But as a model for future trade agreements, particularly for less developed countries, they are terrible. In many of the poorest countries where Oxfam is active, in Latin America and Southern Africa, our partners are extremely concerned about ensuring that their governments will continue to play their legitimate role of regulating investment in order that it contribute to, not undermine, sustainable development.

Finally, the investment provisions in the Chile and Singapore agreements also fail to provide sufficient protections for internationally recognized worker rights and environmental standards. The agreements lay out weak language that each party “strive to ensure that it does not waive or otherwise derogate from” its existing labor and environmental standards. However, this does not commit countries to harmonize upwards, to ensure that their laws comply with core labor standards as defined by the International Labor Organization, or with international environmental standards.

Conclusion

Oxfam America appreciates the opportunity to testify today and to share our concerns about the Chile and Singapore FTAs. From our perspective as a

development and humanitarian organization, there is reason to be concerned that these agreements will not promote the goals of sustainable development and poverty reduction. On the other hand, neither Chile nor Singapore are countries that suffer the extremes of poverty and economic vulnerability. In that sense, they are more truly trading partners, with relatively robust and diversified economies. Our primary message today is that the IPR and investment provisions of these FTAs raise serious concerns and would be unacceptable for countries that have fewer options and have populations at greater risk. As you know, the USTR is currently engaging in negotiations for trade agreements with countries where we believe a different standard should be set. In particular, we hope for a much improved outcome to the negotiations around a Central America Free Trade Agreement, the Free Trade Area of the Americas, and the FTA with the Southern African Customs Union.

Thank you again for this chance to share Oxfam's perspective.

For more information, see www.maketradefair.com and Oxfam America's website: www.oxfamamerica.org.