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## FREE TRADE AREA OF THE AMERICAS

**Topic:** *Draft FTAA Investment Provisions Leaked: NAFTA + MAI*

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On April 20–22, 2001, President Bush and the leaders of thirty-three other nations of the Western Hemisphere met in Quebec City, Canada for the third Summit of the Americas. One of the central issues for discussion was the negotiation of the Free Trade Area of the Americas (FTAA)—a proposed expansion of the North American Free Trade Agreement (NAFTA)<sup>1</sup> to all of the countries of the Western Hemisphere except Cuba. The publicized goal of the agreement is to facilitate trade and deepen economic integration by eliminating tariff and nontariff barriers to trade and investment throughout the hemisphere.<sup>2</sup>

However, given that the FTAA, which some groups have dubbed “NAFTA for the Americas,” is based on the

NAFTA model, the agreement’s actual terms include expansive new rights and privileges for corporations and numerous new obligations and limitations for governments. A complete but bracketed draft text of the FTAA was prepared for the Quebec City summit, but has been kept secret. Shortly before the summit, the draft investment chapter was leaked to the Minneapolis-based Institute for Agriculture and Trade Policy (IATP), which posted it on the Internet, allowing confirmation of the FTAA’s proposed terms.

### **History of the FTAA Process**

Negotiations on the FTAA were launched in Miami in December 1994 at the first Summit of the Americas. There,

thirty-four nations' trade ministers agreed to a U.S. proposal to establish a comprehensive, hemisphere-wide trading bloc no later than 2005.<sup>3</sup>

At the second Summit of the Americas, held in Santiago, Chile in April 1998, the trade ministers created a Trade Negotiations Committee (TNC) to begin negotiating rules regarding agriculture, services, investment, dispute settlement, intellectual property rights, subsidies, anti-dumping, competition policy, government procurement, and market access. In 1998, the TNC established nine Negotiating Groups (NGs), which have since met periodically to discuss the countries' positions on the issues and write the actual draft text of the new agreement.<sup>4</sup> The trade ministers of the thirty-four countries have also met periodically to further their staffs' work.

At the November 1999 fifth FTAA Ministerial in Toronto, the trade ministers of the FTAA countries instructed the Negotiating Groups to prepare drafts of the agreement's nine main sections for review by the ministers before the sixth Ministerial, which was to be held in Buenos Aires, Argentina on April 7, 2001.<sup>5</sup> At the Buenos Aires meeting, the trade ministers reviewed the draft texts and provided directions for further negotiations.<sup>6</sup> In addition, the ministers affirmed a final completion date of January 1, 2005 after Brazil—backed by Venezuela, Argentina, Ecuador, and others—successfully resisted a U.S.-backed Chilean proposal to advance the completion date for the agreement to 2003.<sup>7</sup> Heads of state reaffirmed this timeline at the April 2001 Quebec City summit.

The Quebec City summit drew tens of thousands of citizens opposing the FTAA, adding Quebec City to the list of Seattle, Washington, D.C., Prague, Bangkok, Perth, and other venues of globalization talks that have seen major protests. Over 30,000 protesters traveled from all over Canada, the U.S., Latin America, and Europe to demonstrate. A three-mile-long concrete and chain link fence kept the protesters from Quebec's "old city," where negotiators met in a hilltop citadel whose fortifications date from the 1700s. More than 6,000 police officers were on hand to restrain the protesters—the largest mobilization of

police forces in Canada since the Second World War.<sup>8</sup>

The fortress atmosphere of the negotiations highlighted critics' complaints that the FTAA negotiations have been conducted behind closed doors and that even legislators from the involved nations have been denied access to the draft FTAA texts. The only response to this concern has been an attempt to mollify criticism of the FTAA by promising to release a draft text to the public. This was the unsuccessful strategy employed by negotiators of the failed Multilateral Agreement on Investment (MAI),<sup>9</sup> who twice released what are called "scrubbed" texts of the pact. A scrubbed text lacks vital information such as interpretive notes and references to the identities of the countries supporting the various alternate proposals. The April 2001 Buenos Aires Ministerial Declaration stated that the draft FTAA text would be made public after the Quebec City summit. However, the Declaration mentioned no specific date for the text's release, and the negotiators had not made public any parts of the agreement as of the writing of this article.

### The Investment Chapter

The investment chapter is the one portion of the draft text that has made it into the light of public scrutiny. Reflecting the continuing conflict between the national delegations to the FTAA negotiating groups, the scrubbed draft text is heavily bracketed and includes multiple proposed versions of many of the provisions.

Because the annotations that typically accompany working texts have been removed, it is unclear which of the often conflicting and very different alternate versions are likely to make it into a final document. As a result, the draft text does not provide clear answers to the questions posed by civil society groups about the FTAA, and the provisions described below are not guaranteed to remain the same as the agreement moves towards finalization.

Nevertheless, analysis of the draft FTAA investment chapter shows that it incorporates and expands upon many of the features of NAFTA as well as those of the MAI. In fact, the structure and the actual language of the draft

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FTAA investment chapter mirror those of NAFTA's investment chapter—Chapter 11. The bracketed text begins with provisions identical to those of NAFTA, and then, depending on the topic, includes one or more alternate versions ranging from “NAFTA-lite” to language more extreme than the MAI.

Topics covered by the draft FTAA investment chapter include expansive definitions of the terms “investor” and “investment;” the same controversial investor-to-state rights provided in NAFTA's Chapter 11, including the right to compensation for losses, expropriations, and regulatory takings; restrictions on measures countries can take regarding financial transfers and speculation; a ban on performance requirements; and assorted exceptions (or exemptions) to the coverage of the chapter. Like NAFTA's Chapter 11, the FTAA investment chapter greatly expands the rights of foreign corporations and restricts national governments' abilities to regulate in the public interest.

#### Scope and Basic Definitions

The draft chapter covers measures adopted or maintained by a Party (signatory) that relate to investors of another party (foreign investors) and investments of those investors in the territory of the Party.<sup>10</sup> This mirrors NAFTA's Chapter 11. As in the case of NAFTA, this scope of coverage gives foreign investors new rights and privileges vis-a-vis national governments that domestic investors do not have. Specifically, the FTAA enables corporations, which are not signatories to the agreement, to challenge the laws and actions of governments, and to do so outside normal judicial arenas. It is unclear at present whether the text will incorporate a U.S. proposal to limit coverage of the agreement to investments made after the FTAA enters into force, or whether it will reflect alternative proposals, which would also extend coverage to investments made prior to the establishment of the agreement.<sup>11</sup>

With regard to the definitions of investor and investment, the draft chapter includes multiple versions that range from copies of the NAFTA language, which lists eight specific types of assets that are covered, to expansions that go beyond even the much broader definition found in the MAI, which defines investment as “every kind of asset and rights of any nature,” “owned or controlled, directly or indirectly, by an investor.”<sup>12</sup> Investments fitting these definitions would gain the FTAA's new protections. For example, one proposal would require each government to “promote, within its territory, the investments of investors of other Contracting Parties,” which amounts to forcing

governments to support foreign economic interests over domestic economic interests.<sup>13</sup>

The draft chapter includes two of the primary obligations from NAFTA and the General Agreement on Tariffs and Trade (GATT)—national treatment and most-favored-nation treatment requirements. The national treatment rule in the draft FTAA chapter requires governments to treat foreign investors no less favorably than domestic investors with respect to all phases and aspects of investment, from initial establishment of an investment to sale of the investment.<sup>14</sup> The current bracketed language of the provision could be interpreted to extend this right even to the market-entry phase (pre-investment phase), which would essentially grant investors an absolute right of entry to each signatory country.<sup>15</sup> In addition, the national treatment rule serves as a floor rather than as a ceiling—a government is required to treat foreign investors *more* favorably than domestic investors if the government provides such preferential treatment to any investor, such as one from a country that has some other commercial agreement or arrangement with the host country. One national treatment proposal in the draft chapter even omits NAFTA's qualifying phrase “in like circumstances,” which arguably would bar governments from considering differences between the situations in which domestic and foreign business concerns operate.<sup>16</sup>

The most-favored-nation treatment rule requires governments to treat investors from all signatory nations no less favorably than the best treatment given to any nation, including nonsignatory nations.<sup>17</sup> The goal of the provision is to guarantee that investors from FTAA member states will receive the most preferential treatment possible. But it also blocks governments from restricting investments by investors from a country that is responsible for racial or religious persecution or human rights violations such as child labor or forced prison labor. As with the national treatment provision, the brackets around the “in like circumstances” qualifying language in the most-favored-nation treatment provision means that governments may have no flexibility in how they adhere to the most-favored-nation rule.

The draft FTAA chapter also lays out a minimum standard of treatment for foreign investors that is equal to “the better of national treatment or most-favored-nation treatment.”<sup>18</sup> Other proposed language states that governments must accord to investors “fair and equitable treatment . . . in accordance with the norms and principles of international law,” and treatment that is free of de facto

impairment through “unjustified or discriminatory measures.”<sup>19</sup> These potential requirements could curtail a nation’s ability to regulate foreign investors within their territories. Finally, the draft FTAA chapter requires that governments give foreign investors “full protection and security,” which is a subjective protection not available to domestic investors.<sup>20</sup>

### Expropriation and Compensation

The draft chapter limits the powers of governments to “directly or indirectly nationalize or expropriate” an investment of a foreign investor, except when certain conditions are satisfied.<sup>21</sup> Among the proposed conditions are requirements that the governmental act be 1) for a public purpose; 2) on a non-discriminatory basis; 3) in accordance with due process of law and minimum standards of treatment; and 4) with compensation without delay at fair market value. Many countries already afford these rights to their own citizens and to foreign investors with regard to an actual taking of property—for instance, to build a public road.

However, while “expropriation” generally refers to a governmental seizure of property, the proposed FTAA language expands the scope of the term to include any governmental action that could be considered “equivalent to nationalization or expropriation” (following the MAI’s Chapter IV) or “tantamount to nationalization or expropriation” (following NAFTA Article 1110).<sup>22</sup> Interpreted broadly, these terms will allow foreign investors to sue governments directly for cash damages in closed trade arbitration bodies. Investors will be able to sue on the basis of any reduction in the value of their investments that might result from adverse judicial decisions or regulations such as those relating to the protection of health, safety, and the environment.<sup>23</sup> Investors have already used the language in NAFTA’s Chapter 11 to bring cases against all three NAFTA governments. In the cases settled or decided to date, corporations have won all four, including one case that succeeded in reversing a Canadian environmental policy.<sup>24</sup>

Attempts to establish a right to make such “regulatory takings” claims have failed in the U.S. Congress, and such claims would face significant judicial hurdles in U.S. courts.<sup>25</sup> But the draft FTAA provisions would authorize these claims. Foreign investors would be able to bypass U.S. courts and much more easily force governments to compensate them for profits lost because of vital public interest regulations such as zoning or environmental protection measures. As well as threatening existing

public interest policies, this is likely to have a chilling effect on the willingness of federal, state, and local governments to take regulatory action in the public interest when it could affect foreign investors.

The definition of expropriation has yet to be finalized, and public summaries of the U.S.’s negotiating proposals suggest that the U.S. has not yet submitted a proposal for a definition.<sup>26</sup> Disagreements between regulatory agencies and trade agencies within the Bush Administration reportedly have led to an impasse regarding whether the definition of expropriation should allow for regulatory takings claims.<sup>27</sup> However, recent statements from the Office of the United States Trade Representative (USTR), which negotiates for the U.S., indicate that USTR will continue to accede to U.S. corporate demands and will push for stronger, NAFTA-style investor-to-state provisions in the FTAA.<sup>28</sup> A recent letter to USTR from a coalition of corporate groups including the National Association of Manufacturers, the U.S. Chamber of Commerce, and the U.S. Council for International Business called for the inclusion of regulatory takings provisions and opposed any dilution of the NAFTA model in the FTAA.<sup>29</sup>

### Compensation for Losses

Another new right that the FTAA draft chapter would confer upon investors is the right to “nondiscriminatory” treatment (or national treatment and most-favored-nation treatment) with regard to restitution or compensation for losses due to war, civil strife or insurrections, national states of emergency, natural disasters, or “other similar events.”<sup>30</sup> This socialization of investor risks comes closer to the provisions of the MAI than to NAFTA, which lacks explicit provisions on the subject.

In fact, the draft FTAA investment chapter replicates almost exactly the MAI’s requirement that governments compensate foreign investors if they requisition all or part of an investment or unnecessarily destroy all or part of an investment during a disaster or episode of civil strife, even if domestic investors are not compensated.<sup>31</sup> Thus, a foreign investor bereaved by the loss of or damage to an investment in the course of a riot, strike, or hurricane could ask an FTAA dispute resolution panel to determine whether or not the destruction of its property by the governmental unit was “necessary” and award compensation based on that judgment.

Domestic businesses damaged or destroyed by government forces, on the other hand, would not have

such recourse under the FTAA. This provision empowers dispute resolution panels—composed of corporate investment attorneys—to judge the validity of governments’ tactical decision making during natural disasters and periods of armed conflict, invasion, or insurrection.

### Capital Transfers

With regard to regulation of capital flows, the draft FTAA chapter appears closer to the MAI’s tight limitations on governmental action than to the looser provisions of NAFTA. The draft FTAA chapter requires that governments permit free transfers of investment capital into their economies and free transfers of both capital and profits out of their economies.<sup>32</sup> The various proposed provisions cover a litany of financial tools, including wages, stocks, bonds, interest, dividends, capital gains, royalty payments, management fees, sale or liquidation proceeds, technical assistance fees, natural resource extraction or intellectual property license fees, payments related to contracts or loans, and payments resulting from government compensation for expropriation or loss.<sup>33</sup>

In addition, the FTAA’s broad definition of the term “investment” and its national treatment requirement mean that governments would be prohibited from discriminating between domestic and foreign capital flows.<sup>34</sup> Accordingly, nations would be prevented from using many of the tools that are effective in preventing capital flight, responding to currency fluctuations, and fostering long-term investment. Coupled with structural adjustment programs (SAPs), which have been forced upon many of the Latin American and Caribbean FTAA negotiating countries as a price of economic assistance from the International Monetary Fund and the World Bank, the FTAA provisions will deprive countries of significant economic autonomy.

The draft chapter includes a few exceptions to the proposed capital transfer rules, starting with NAFTA’s exceptions for measures relating to bankruptcy, securities trading, criminal or penal offenses, financial reporting, and judgments in adjudicatory proceedings.<sup>35</sup> It also includes additional proposed exceptions covering income tax obligations, social security, severe balance of payments disequilibria, and nonfulfillment of labor obligations.<sup>36</sup> Unlike the MAI’s exceptions, which were invalidated by tautological language in the final clause of its capital transfers provision,<sup>37</sup> the FTAA draft chapter’s exceptions appear to be usable.

As with much of the draft chapter at this point, the transfer

provisions remain in dispute and heavily bracketed, with the U.S. proposing expanded rights for investors and more limited regulatory powers for governments, while other countries are suggesting intermediate proposals.<sup>38</sup>

### Performance Requirements

Performance requirements, which are regulations that impose terms or requirements on investments, are used by governments to achieve economic development objectives. Less wealthy countries often employ performance requirements such as mandatory export requirements for the products of foreign investment, conditions on hard currency movements for balance of payments purposes, and rules requiring that foreign business concerns use domestic suppliers, materials, or labor. In wealthier countries, performance requirements are closely linked with politically sensitive objectives such as job creation in poor areas (*e.g.*, via tax credits for investing in certain areas), community reinvestment to counter racial discrimination in bank lending (*e.g.*, via rules on those who charter banks), and environmental protection (*e.g.*, via environmental impact assessment requirements).

NAFTA’s Chapter 11 prohibits eight types of performance requirements, including requirements for domestic content of products, local services procurement, mandatory export percentages for production, and technology transfer.<sup>39</sup> The draft FTAA chapter incorporates these provisions but expands them significantly by prohibiting governments from conditioning the receipt of benefits or advantages on an investor’s fulfillment of certain performance requirements.<sup>40</sup> For example, the agreement would forbid giving a tax break to a real estate investor who agrees to clean up an environmentally damaged area.

However, the FTAA draft chapter is not as restrictive as the much tougher provisions of the MAI, which eliminated a partial environmental exception provided by NAFTA. The FTAA draft chapter does include NAFTA-like proposals to allow signatory governments to impose performance requirements that are 1) necessary to ensure compliance with FTAA-compatible laws and regulations; 2) necessary to protect human, animal, or plant life or health; or 3) related to the conservation of living or nonliving exhaustible natural resources.<sup>41</sup> But the inclusion of “necessary” and “least trade restrictive” tests in the application of these exceptions means that these exceptions will be very difficult to apply successfully.

The presence of alternate proposals—in addition to a hemisphere-sized catch-all provision allowing for review by

the FTAA Investment Committee of *any* governmental requirement that “adversely affects the trade flow”<sup>42</sup>—further undermines the potential effectiveness of these exceptions. Depending on the final configuration and interpretation of these performance requirement bans, the FTAA could easily become the straitjacket for governments that the MAI would have been.

### Investor-to-State Dispute Resolution

The draft FTAA chapter grants investors (corporations or individuals) the explicit right to seek monetary damages from governments by initiating a binding dispute resolution process before an international arbitral tribunal if they feel that their rights under the agreement have been violated.<sup>43</sup> The draft chapter lists two venues for investor-to-state disputes: 1) the facilities of the International Convention on the Settlement of Investment Disputes (ICSID), which is a part of the World Bank; and 2) the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Such tribunals are staffed by trade lawyers, not judges, and are closed to public participation, observation, and input. And while they offer none of the basic due process or openness guarantees afforded in national courts, they can pass judgment on democratically enacted national policies. The provisions effectively create a parallel legal system for the exclusive use of foreign economic actors, who may then bypass the legal systems of the countries in which they operate. Corporations thus may obtain private enforcement of special benefits and privileges resulting from trade agreements.

The establishment of secret and unaccountable international trade tribunals as the venue for investor lawsuits against governments means that almost any democratically created public policy can be challenged

behind closed doors and without public knowledge. In addition, the provisions contravene the long-standing legal principle of sovereign immunity, which holds that governments may not be sued in the absence of explicit authorization by the legislature.<sup>44</sup>

These rights mirror those granted to investors under NAFTA’s highly controversial Chapter 11 and the defunct MAI, and they far outstrip the rights granted under GATT and the WTO agreements. Corporate investors have used NAFTA’s Chapter 11 to challenge national and local laws, governmental decisions, and even the governmental provision of services in all three NAFTA countries. To date, companies have filed more than a dozen NAFTA arbitration cases, with total damages claimed surpassing US\$13 billion.<sup>45</sup>

In December 2000, Canada indicated that it would seek a review of the controversial Chapter 11 provisions of NAFTA and would push for the addition to NAFTA of an interpretive note limiting the scope of investor-to-state disputes.<sup>46</sup> Until recently, the U.S. has rejected Canada’s plea. Now, however, the U.S. has indicated its willingness to study the issue, although it has maintained its opposition to making any changes to NAFTA’s terms. Canadian Trade Minister Pierre Pettigrew has also suggested that he would not agree to FTAA language that does not deal with Canada’s concerns about investor-to-state issues.<sup>47</sup> This idea is expected to encounter substantial resistance from the United States. Ambassador Robert Zoellick, the U.S. Trade Representative, has indicated that he would not consider shrinking the rights given to corporations under NAFTA’s Chapter 11, and industry groups in the U.S. have put pressure on the U.S. to continue to support broad powers for investors in the FTAA.<sup>48</sup>

## FOOD SAFETY

**Topic:** *Codex Committee Endorses Proposal to Weaken Food Irradiation Standards*

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At its meeting in The Hague on March 12–16, 2001, the Codex Committee on Food Additives and Contaminants

(CCFAC) endorsed a proposal that would significantly weaken global food irradiation standards.<sup>49</sup> If approved by

the full Codex Alimentarius Commission (Codex), the Proposed Draft Revised Codex General Standard for Irradiated Foods would remove the maximum limit on the amount of radiation to which food could be exposed. It would also eliminate virtually every assurance that irradiated food will be of good quality, handled by trained workers, and processed under safe and clean conditions in government-inspected facilities.

“Codex Alimentarius” is Latin for food law. The Rome-based Codex Alimentarius Commission (Codex) was established as a voluntary standard-setting body in 1962 by the World Health Organization and the United Nations Food and Agriculture Organization, primarily to facilitate international trade in food and agriculture products.<sup>50</sup> Codex standards were elevated to a new and more prominent role by the North American Free Trade Agreement (NAFTA) and World Trade Organization (WTO) agreements, which specifically recognize Codex as setting the world’s presumptively “trade-legal” food safety standards. Countries maintaining more restrictive food safety regulations—including those relating to food irradiation—than those endorsed by Codex could find their regulations challenged in WTO and NAFTA tribunals by other countries that view them as barriers to trade.

The measure endorsed by CCFAC would scale back Codex’s existing food irradiation standards in the following ways:

The current food irradiation dose limit of 10 kiloGray (the equivalent of 330 million chest x-rays) would be completely removed, meaning that any food could be exposed to any level of radiation, no matter how high the dose.<sup>51</sup>

Irradiated food would no longer have to be “of suitable quality;” be in “acceptable hygienic condition;” and be handled “according to good manufacturing practices.”<sup>52</sup>

Food irradiation facilities would no longer have to be designed to “meet the requirements of safety efficacy and good hygiene practices of food processing;” be staffed by “adequate, trained and competent personnel;” and be licensed or inspected by government officials. In addition, food irradiation facilities would no longer have to maintain certain records on radioactive activities.<sup>53</sup>

Food irradiation would no longer have to be carried out “commensurate with . . . technological and public health purposes” and be conducted “in accordance with good radiation processing practice.”<sup>54</sup>

Except for the proposal to remove the radiation dose limit, all of the amendments were made by changing the word “shall” in the existing regulation to the word “should.”<sup>55</sup> This occurred in nine instances. According to U.S. Department of Agriculture (USDA) officials in the U.S. Codex office, in four of the nine instances, the word “shall” was crossed out and the word “should” was written in by hand during the CCFAC meeting. Because the changes were made during the meeting itself, the public had no advance notice and no opportunity to comment on these significant changes.

If the proposal is approved by the full Codex Commission, the changes could place numerous U.S. food and nuclear safety regulations at risk of challenge by WTO member states as being potential trade barriers. Among them are Nuclear Regulatory Commission rules requiring that all irradiation facilities using radioactive material be licensed and regularly inspected; USDA rules requiring beef, pork, and poultry products to meet certain quality standards; and USDA and Food and Drug Administration (FDA) rules requiring food to be processed under hygienic conditions.

The proposal could undermine the strict limitations on food irradiation maintained by several member nations of the European Union, particularly Austria, Denmark, Finland, Greece, Ireland, Luxembourg, Spain, and Sweden.<sup>56</sup>

CCFAC endorsed the proposals despite a growing body of evidence suggesting that high-dose irradiated food may not be safe for human consumption. At a CCFAC preview meeting hosted by FDA in Washington, D.C. on February 13, 2001, Public Citizen brought to the attention of FDA and USDA officials recent research questioning the safety of irradiated food. Studies published in 1998 revealed that a chemical formed in certain irradiated foods that contain fat (such as beef, chicken, eggs, and certain seafood and fruit) caused cellular and/or genetic damage to human cells and rat cells.<sup>57</sup> The chemical, called 2-DCB, or 2-dodecylcyclobutanone, has never been found naturally in food.<sup>58</sup>

The studies were conducted at the Federal Research Center for Nutrition in Karlsruhe, Germany one of the most prestigious food irradiation laboratories in the world. The

studies were co-funded by the International Consultative Group on Food Irradiation, which formally advises Codex on food irradiation policies.

“The results urge caution, and should provide impetus for further studies,” wrote the lead researcher of the German studies.<sup>59</sup> Despite being aware of these studies, U.S. Codex delegates supported the CCFAC proposal to weaken food irradiation standards. The German delegation opposed the proposal,<sup>60</sup> as it has at several international food safety meetings in recent years, because of concerns

over 2-DCB and other “unique radiolytic products” that appear only in irradiated food.

Although research into the potential toxicity and mutagenicity of 2-DCB is continuing,<sup>61</sup> the proposal to weaken food irradiation standards is now at Step 5 of the 8-step Codex standard-setting process. The proposal is scheduled to be debated by the full Codex Commission at its meeting in Geneva on July 2–7, 2001. If approved in Geneva, the proposal will be reviewed by member nations (Step 6), sent back to CCFAC for review (Step 7), and then returned to the full Codex for final adoption (Step 8).

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### **Department of Agriculture**

#### ***Performance Standards for the Production of Processed Meat and Poultry Products— Notice of Technical Conference and Public Meeting; Extension of Comment Period (FSIS)***

66 Fed. Reg. 19102 (Apr. 13, 2001).

Notice of technical conference and public meeting. Meetings May 9, 10 and 11 2001. Comments due Jun. 28, 2001.

#### ***Retained Water in Raw Meat and Poultry Products; Poultry Chilling Requirements (FSIS)***

66 Fed. Reg. 19713 (Apr. 17, 2001).

Final Rule effective Jan. 2002; Correction.

### **Department of Health and Human Services**

#### ***Draft Guidance for Industry on Postmarketing Safety Reporting for Human Drug and Biological Products Including Vaccines; Availability (FDA)***

66 Fed. Reg. 14391 (Mar. 12, 2001).

Notice; Comment Request. No comment due date specified.

#### ***International Cooperation on Harmonisation of Technical Requirement for Approval of Veterinary Medicinal Products (VICH); Final Guidance on “Environmental Impact Assessments (EIA’s) for Veterinary Medicinal Products (VMP’s) - Phase I” (VICH GL6); Availability (FDA)***

66 Fed. Reg. 14589 (Mar. 13, 2001).

Notice. Submit written comments at any time.



***Acceptance of Foreign Clinical Studies; Availability (FDA)***

66 Fed. Reg. 14590 (Mar. 13, 2001).

Notice of Final Guidance. Submit written comments at any time.

***International Cooperation on Harmonisation of Technical Requirements for Registration of Veterinary Medicinal Products (VICH); Final Guidance for Industry Entitled "Stability Testing of New Biotechnological/Biological Veterinary Medicinal Products" (VICH GL17); Availability (FDA)***

66 Fed. Reg. 19177 (Apr. 13, 2001).

Notice. Submit written comments at any time.

***Preparation for ICH Meetings in Tokyo, Japan, Including Progress on the Common Technical Document and Possibilities for New Topics; Notice of Public Meeting (FDA)***

66 Fed. Reg. 20664 (Apr. 24, 2001).

Notice of Public Meeting. Meeting May 8, 2001.

**Department of State*****Public Meeting to Discuss Progress on International Harmonization of Chemical Hazard Classification and Labeling Systems (Bureau of Oceans and International Environmental and Scientific Affairs)***

66 Fed. Reg. 21429 (Apr. 30, 2001).

Notice of Public Meeting. Meeting May 8, 2001.

**Department of Transportation*****Aviation Rulemaking Advisory Committee: Emergency Evacuation Issues (FAA)***

66 Fed. Reg. 13120 (Mar. 2, 2001).

Notice of establishment of the Occupant Safety Issues, Aviation Rulemaking Advisory Committee (ARAC).

***Aviation Rulemaking Advisory Committee: General Aviation and Business Airplane and General Aviation Operations Issues (FAA)***

66 Fed. Reg. 13119 (Mar. 2, 2001).

Notice of establishment of the General Aviation Certification and Operations Issues, Aviation Rulemaking Advisory Committee (ARAC).

***United Nations Economic Commission for Europe; World Forum for the Harmonization of Vehicle Regulations: Meetings for Calendar Year 2001 (NHTSA)***

66 Fed. Reg. 14433 (Mar. 12, 2001).

Notice of schedule of meetings.

***Aviation Rulemaking Advisory Committee; General Aviation Certification and Operations Issues— New Task (FAA)***

66 Fed. Reg. 14428 (Mar. 12, 2001).

Notice of new task assignment for the Aviation Rulemaking Advisory Committee (ARAC).

***Aviation Rulemaking Advisory Committee, Transport Airplane and Engine Issues— New Task (FAA)***

66 Fed. Reg. 16087 (Mar. 22, 2001).

Notice of new task assignment for the Aviation Rulemaking Advisory Committee (ARAC).

## Environmental Protection Agency

### ***Zoxamide 3, 5-dichloro-N-(3-chloro-1-ethyl-1-methyl-2-oxopropyl)- 4-methylbenzamide; Pesticide Tolerance***

66 Fed. Reg. 18725 (Apr. 11, 2001).

Final Rule effective Apr. 11, 2001. Comments due Jun. 11, 2001.

#### **NOTES**

1. North American Free Trade Agreement (NAFTA), 32 I.L.M. 605, HR Doc. No. 103-159, 103 Cong. 1st Sess. (1993) [hereinafter NAFTA], *available in* <<http://www.nafta-sec-alena.org/english/nafta/nafta.htm>>.
2. *See* Summit of the Americas Trade Ministerial, Joint Declaration, Denver, Colorado, June 30, 1995, *available in* <[http://www.ftaa-alca.org/ministerials/denver\\_e.asp](http://www.ftaa-alca.org/ministerials/denver_e.asp)> and on file with Public Citizen.
3. Office of the United States Trade Representative (USTR), U.S. Positions in the Free Trade Area of the Americas, Jan. 2001 [hereinafter U.S. Positions], *available in* <<http://www.ustr.gov/regions/whemisphere/over.html>> and on file with Public Citizen.
4. *Id.* Each NG holds a varying number of meetings each year, while the trade ministers meet once or twice a year at meetings called “ministerials.” The heads of state have met at the three Summits of the Americas.
5. Free Trade Area of the Americas, Declaration of Ministers Fifth Trade Ministerial Meeting, Toronto, Canada, Nov. 4, 1999, *available in* <[http://www.ftaa-alca.org/ministerials/minis\\_e.asp](http://www.ftaa-alca.org/ministerials/minis_e.asp)> and on file with Public Citizen.
6. *Id.*
7. *See* Free Trade Area of the Americas Sixth Meeting of Ministers of Trade of the Hemisphere, Ministerial Declaration, Buenos Aires, Argentina, April 7, 2001, *available in* <[http://www.ftaa-alca.org/ministerials/BAmin\\_e.asp](http://www.ftaa-alca.org/ministerials/BAmin_e.asp)> and on file with Public Citizen; Doug Palmer, *Americas Ministers Set 2005 Deadline*, REUTERS, Apr. 7, 2001; Larry Rohter, *Brazil Flexes New Muscle in Another Trade Fight*, N.Y. TIMES, March 27, 2001; *Venezuela, Brazil Resist Early Americas Free Trade Zone*, REUTERS, Apr. 2, 2001; Thomas Catan, *Setback for US over Trade Zone Timetable*, FINANCIAL TIMES, Apr. 9, 2001.
8. Dana Milbank and Paul Blustein, *Bush Uses Quebec Forum to Push for Trade Powers*, WASH. POST, Apr. 22, 2001, at A01; Mark Memmott, *Battle Brewing Before Summit Leaders Meet Friday to Discuss Freer Trade*, USA TODAY, Apr. 19, 2001, at 6A.
9. The MAI was secretly negotiated first in the World Trade Organization (WTO) and then in the Organization for Economic Cooperation and Development (OECD), whose thirty member countries include the U.S., Japan, Australia, and most of Western Europe. The OECD governments suspended negotiations on the MAI after a copy was acquired by civil society groups and posted on the Internet in 1998. *See* OECD, About OECD - Member Countries, *available in* <<http://www.oecd.org/about/general/member-countries.htm>> and on file with Public Citizen.
10. FTAA Report FTAA.ngin/02, Nov. 29, 2000 [hereinafter Draft Chapter], at art. 1(1).
11. *FTAA Investment Text Includes Proposal for Investor-State Disputes*, INSIDE U.S. TRADE, Apr. 20, 2001, at 14.
12. Draft Chapter art. 16.
13. *Id.* art. 1.
14. *Id.* art. 2; *cf.* Multilateral Agreement on Investment, ch. III, National Treatment 3, on file with Public Citizen.
15. *See* Draft Chapter art. 2.

16. *Id.* In practice, however, the “in like circumstances” language has not proven to be a powerful defense. In the NAFTA arbitration case brought by Mexico against the United States, a NAFTA panel ignored the U.S.’s arguments that Mexico’s lack of adequate truck safety standards meant that Mexican and U.S. trucking firms were not in “like circumstances,” and that the U.S. therefore could refuse to consider applications from Mexican trucking firms for access to U.S. roads. See *Unsafe Mexican Trucks Headed for U.S. Highways*, HARMONIZATION ALERT, Jan./Feb. 2001, at 1, available in <<http://www.harmonizationalert.org/JanFeb2001/January%20February2001.htm>> and on file with Public Citizen.

17. Draft Chapter art. 3.

18. *Id.* art. 5.

19. *Id.* art. 6.

20. *Id.*

21. *Id.* art. 10.

22. *Id.*

23. INSIDE U.S. TRADE, Apr. 20, 2001, at 13.

24. The cases decided to date are, *Ethyl Corporation v. Canada*, *S.D. Myers v. Canada*, *Pope and Talbot v. Canada* and *Metalclad v. Mexico*.

25. U.S. courts have supported a narrow definition of takings that is based on the constitutional requirement that property owners be compensated when their property is put to a public use (*i.e.*, for the construction of highways, utilities etc.). Corporations and conservative property rights groups have worked for two decades to broaden this notion of takings to encompass what they call “regulatory takings” by opposing a variety of reasonable regulations that tangentially impact property value. For example, property rights groups have launched legal attacks on environmental zoning and other public interest laws that impact private property. However, the majority of these cases have made little headway in the courts and regulatory takings bills have repeatedly failed in Congress. In 1993, the U.S. Supreme Court ruled that “our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.” *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 642–45 (1993).

26. INSIDE U.S. TRADE, Apr. 20, 2001, at 13.

27. *Zoellick Cool to Restrictions on Investor State Disputes*, INSIDE U.S. TRADE, Apr. 20, 2001, at 5.

28. *Id.*

29. *U.S. Industry Pushes NAFTA Investment Model in Future Agreements*, INSIDE U.S. TRADE, April 27, 2001, at 23–24.

30. Draft Chapter art. 11.

31. *Id.*

32. *Id.* at art. 9.

33. *Id.*

34. *Id.* at art. 2.

35. *Id.* at art. 9.

36. *Id.*

37. Multilateral Agreement on Investment, ch. IV(4), on file with Public Citizen.
38. INSIDE U.S. TRADE, Apr. 20, 2001, at 13–14.
39. NAFTA art. 1106.
40. Draft Chapter art. 7.
41. *Id.* at art. 7.
42. *Id.*
43. *Id.* at art. 15.
44. *See, e.g.,* U.S. CONSTITUTION, Amend. XI.
45. *See* Mary Bottari, *NAFTA's Investor "Rights": A Corporate Dream, A Citizen Nightmare*, MULTINATIONAL MONITOR, v. 22, no. 4, April 2001.
46. INSIDE U.S. TRADE, Apr. 20, 2001, at 13.
47. MAUDE BARLOW, *THE FREE TRADE AREA OF THE AMERICAS AND THE THREAT TO SOCIAL PROGRAMS, ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE IN CANADA AND THE AMERICAS* (2001), *available in* <<http://www.canadians.org>> and on file with Public Citizen.
48. *U.S. Industry Pushes NAFTA Investment Model in Future Agreements*, INSIDE U.S. TRADE, Apr. 27, 2001.
49. Thirty-Third Codex Committee on Food Additives and Contaminants, Proposed Draft Revised Codex General Standard for Irradiated Foods, ALINORM 01/12A, App. VII, annotated Mar. 12–16, 2001, The Hague [hereinafter Draft Standard], on file with Public Citizen; *Codex Committee Moves to Strike 10 KiloGray Irradiation Cap*, FDA WEEK, v. 7, no. 12, Mar. 23, 2001, at 1; David Safford, *Committee Recommends Removing Limit on Irradiation Absorbed by Food*, BNA FOOD SAFETY REPORT, v. 3, no.13, Mar. 28, 2001, at 287.
50. *See* Codex Alimentarius Commission, *Understanding the Codex Alimentarius*, *available in* <<http://www.fao.org/docrep/w9114e/w9114e00.htm>> and on file with Public Citizen; PUBLIC CITIZEN, HARMONIZATION HANDBOOK 6–7 (2000), *available in* <<http://www.harmonizationalert.org>> and on file with Public Citizen.
51. Draft Standard § 2.2.
52. Draft Standard § 4.2.
53. Draft Standard § 2.3.
54. Draft Standard § 4.2.
55. *See* Draft Standard.
56. *See* Letter from Jim Murray, European Consumers' Organisation/Bureau Européen des Unions de Consommateurs (BEUC), to R.J. Coleman, Director General, Health and Consumer Protection, European Commission, Dec. 5, 2000, on file with Public Citizen.
57. H. Delincee and B. Pool-Zobel, *Genotoxic Properties of 2-dodecylcyclobutanone, A Compound Formed on Irradiation of Food Containing Fat*, RADIATION PHYSICS AND CHEMISTRY, v. X, no. X, at 39–42 (1998); H. Delincee et al., *Genotoxicity of 2-dodecylcyclobutanone*, Food Irradiation: Fifth German Conference, Karlsruhe, Germany, Nov. 11–13, 1998.
58. M. H. Stevenson, *Identification of Irradiated Foods*, FOOD TECHNOLOGY, v. 48, no. X, at 141–144 (1994).
59. H. Delincee et al., *supra* note X.

60. Thirty-Third Codex Committee on Food Additives and Contaminants, Draft Report, The Hague, Mar. 12–16, 2001.
61. Thirty-Third Codex Committee on Food Additives and Contaminants, Comment from the U.N. Food and Agriculture Organization, the International Atomic Energy Agency, and the World Health Organization on 2-Dodecylcyclobutanone, The Hague, March 12–16, 2001.