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Fact Sheet #5:
CHILE AND SINGAPORE AGREEMENTS PRIORITIZE RIGHTS OF FOREIGN INVESTORS OVER THE PUBLIC INTEREST

NAFTA gave corporations the right to challenge our laws before secret arbitration panels, and to demand compensation from governments if those laws infringe on their rights. Multinational corporations have exploited NAFTA's flawed investment chapter to challenge legitimate government regulations designed to protect the environment, shield consumers from fraud, deliver public services, and safeguard public health. **The rights granted to foreign investors under NAFTA exceed the rights guaranteed to domestic investors under our Constitution, and Congress directed USTR to remedy this problem in future trade agreements.**

The Trade Act of 2002 directs trade negotiator to ensure "that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States." Yet the investment chapters of the Chile and Singapore agreements contain **large loopholes that allow foreign investors to claim rights above and beyond those that our domestic investors enjoy:**

- Both agreements prohibit "indirect" expropriations and "measures equivalent to" expropriation, **standards from NAFTA that have no basis in our domestic takings jurisprudence.** Annexes to the investment chapters include a list of factors laid out by the U.S. Supreme Court in constitutional takings cases to guide arbitration panels in these indirect expropriation cases, but the annexes lack the essential explanations and limitations set forth by the Supreme Court regarding each factor. This allows panels to interpret the factors as they see fit, and thus to grant foreign investors greater rights than they would enjoy under our domestic law.

- The agreements' **extremely broad definition of what constitutes property** ignores the Supreme Court's distinction between the narrow set of property interests that must be violated to constitute a taking and the broader set of property interests that fall under due process protections.

- The agreements' definition of **"fair and equitable treatment" refers to an undefined notion of customary international law that has no direct parallel in U.S. law.** The agreements state that "fair and equitable treatment" includes, but is not limited to, principles regarding denial of justice and due process, allowing panels to come up with additional definitions for "fair and equitable treatment" without any reference whatsoever to U.S. legal standards.

In addition, the agreements include the **deeply flawed investor-to-state dispute resolution** provisions of NAFTA. To control abuse of this private right of action, the Trade Act of 2002 calls for including measures to eliminate frivolous claims and creating a standing appellate mechanism in new trade agreements. These instructions were not followed in the Singapore and Chile FTAs:

- The agreements create **no standing appellate mechanism** to guard against inconsistency or abuse in the resolution of investment disputes; they only commit the parties to consider whether or not to create such a mechanism three years from now.

- The agreements contain **no exhaustion requirements or diplomatic controls** on investor suits. They do create an expedited procedure for dismissing frivolous claims, but this is not very different from the procedures for considering jurisdictional questions that already exist for NAFTA claims.

- Chile made a reservation that bars a foreign investor from ever taking a claim to arbitration under the FTA if the investor has already brought the case under Chile's own domestic procedures. **Yet the U.S. made no such reservation**, giving Chilean investors more rights to bypass our own judicial system than our investors will have with regard to Chile!

- The marked difference between the dispute resolution procedures and remedies available to individual investors and the enforcement provisions available for the violation of workers' rights and environmental standards **flouts the Trade Act's requirement that all negotiating objectives be treated equally,** with recourse to equivalent dispute settlement procedures and remedies.

The Chile and Singapore agreements' **intellectual property, procurement, and services rules also provide significant new rights to private companies** at the expense of the public interest:

- Rather than reaffirming the Doha declaration's recognition of the primacy of public health concerns in trade disputes, as the Trade Act of 2002 requires, **the Chile and Singapore FTAs' intellectual property rules undermine protections for public health.** The agreements contain a number of provisions that go beyond WTO intellectual property rules – including protections for pharmaceutical test data and restrictions on marketing approval and sanitary permits for medicines – which deprive governments of the flexibility they need to address public health crises.

- The agreements' **rules on government procurement bar the consideration of non-commercial criteria in purchasing decisions** at the federal and state level. These rules could be used to challenge a variety of important procurement provisions including incentives for recycling and resource conservation, living wage laws, anti-sweatshop laws, and project-labor agreements.

- The agreements mandate that foreign service providers competing with public providers be granted unlimited market access and national treatment. The agreements provide only limited carve outs for education and health care, and could **limit how we provide and regulate important public services including water and electricity.**

- In addition, the agreements **discipline how we regulate private service providers**, especially in the financial sector. To comply with these commitments, Chile will have to change its rules for the privatized portion of its pension system to allow 100% of workers' retirement savings to be invested overseas, thus locking in privatization and depriving their domestic financial market of needed investment.

The Chile and Singapore agreements expand NAFTA's failed model of privileging private investor rights over the public interest. The agreements fail to heed important Congressional negotiating objectives regarding investor rights, dispute settlement, and public health. The Chile and Singapore FTAs should be rejected. **Future trade agreements must affirm, rather than undermine, our government's ability to regulate foreign investors, protect public health, pursue responsible procurement policies, and provide public services.**