Sidley, Kristine (REPS)

From: Julie Schilin [j.schilin@acfonline.org.au]
Sent: Friday, 16 April 2004 11:06 AM
To: Committee, Treaties (REPS)
Cc: d.henry@acfonline.org.au; w.smith@acfonline.org.au; Fiona Rae

Dear Sir/Madam,

Attached please find a submission to the JSCT enquiry into the Australia/U.S. Free Trade Agreement.

Kind Regards,

Julie Schilin

Acting Executive Assistant
Australian Conservation Foundation
Floor 1, 60 Leicester Street, Carlton, 3053, Australia
Ph +61 3 9345.1122 Fax +61 3 9345.1166

<http://www.acfonline.org.au/>

Australian
Conservation
Foundation
INC. ABN 22 007 498 482

Floor 1, 60 Leicester Street
Carlton VIC 3053
Telephone: 03 9345 1111
Facsimile: 03 9345 1166
Email: acf@acfonline.org.au
www.acfonline.org.au

Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

Australia/US Free Trade Agreement

I am writing to provide you with a comprehensive submission from the Australian Conservation Foundation (ACF) on the potential environmental impacts of the proposed Australia/US Free Trade Agreement (AUSFTA).

The Australian Conservation Foundation is one of Australia's leading national environment groups, with more than 60 000 members and supporters.

ACF believes that the AUSFTA threatens Australia's existing environmental laws and fetters Australian governments seeking to legislate to protect the environment or act on sustainability matters important to Australia's economic and social welfare.

ACF is deeply concerned that the potential environmental impacts of this agreement have not been formally assessed. Many serious questions about the environmental consequences of the AUSFTA therefore remain unanswered.

For these reasons, ACF opposes the signing of the AUSFTA by the Australian Government, and urges the Joint Standing Committee on Treaties to support this position.

We would welcome the opportunity to appear before the Joint Standing Committee to discuss these matters further.

Yours sincerely

Don Henry

Don Henry
Executive Director

Australian
Conservation
Foundation

April 2004

ACF Analysis of Australia-United States Free Trade Agreement

The Australian Conservation Foundation (ACF) is one of Australia's leading non-government environmental organisations. Recently, ACF, along with civil society worldwide, has given increasing attention to the complex relationship between international trade liberalisation on the one hand and ecologically sustainable development on the other.

This document summarises ACF's analysis of the '1000 page' draft text of the Australia-USA Free Trade Agreement (the AUSFTA), released on 4 March 2004. It concludes that the AUSFTA threatens Australia's existing environmental laws and fetters Australian governments seeking to legislate to protect the environment or act on sustainability matters important to Australia's economic and social welfare.

The potential environmental impacts of this agreement have not been formally assessed. Many serious questions about the environmental consequences of the AUSFTA therefore remain unanswered.

For these reasons, ACF opposes the signing of the AUSFTA by the Australian Government, and urges the Parliament to refuse to pass any enabling legislation required to bring these concerning aspects of the AUSFTA into effect within Australia.

Summary

1. The Australia-USA Free Trade Agreement's (the AUSFTA) Investment Chapter, Chapter 11, obliges the Commonwealth Government to compensate US investors if Australian laws on the environment, human rights or labour standards "significantly interfere" with their investments. This provides greater rights to U.S investors than are currently enjoyed by Australians under the Australian legal system. If this obligation is breached, the US Government will have the right to seek compensation from the Commonwealth Government or to force the removal of the offending laws. This represents a major threat to Australia's sovereignty and its environmental security. It will fetter future Australian governments seeking to legislate to protect the environment or act on other matters important to Australia's economic and social welfare.
2. Chapter 10, on trade in services, commits Australia to ensuring that its environmental, human rights, labour and other laws do not act as a barrier to trade in services. If they do, Australia can be taken by the US Government to a specially convened dispute settlement panel, which will be able to rule that the law must be repealed or compensation paid. This chapter could increase pressure for the privatisation of our national parks, and make it more difficult for Australian governments to regulate water use and distribution services.
3. While the AUSFTA has not resulted in any immediate changes to Australian quarantine laws, it puts in place procedures that may, in the future, weaken those quarantine laws and also laws governing the environmental release of GMOs.
4. Australia appears not to have made concessions allowing the removal of our laws governing the disclosure of genetically modified ingredients. However, the AUSFTA does open up the way for Australia to be forced to remove these disclosure laws in the future.
5. The AUSFTA presented an opportunity to promote sustainable development and other positive environmental outcomes in Australia and the United States as well as the wider Asia Pacific Region. Instead, it remains limited in its environmental scope and relies merely on voluntary initiatives as the preferred instruments for promoting environmental protection.
6. The AUSTFA includes an inadequate dispute settlement process that does not reflect the judicial traditions of Australia and the U.S
7. Australia has not undertaken an environmental impact assessment of the AUSFTA. Consequently, we lack assessment of the potentially significant environmental impacts arising from increased agricultural exports from Australia, and from the increased importation into Australia of a wide range of products.
8. Australians have no public process to review or recommend amendments to the AUSFTA's draft text. Unlike Congress, with its right of veto, our Parliament cannot vote on the AUSFTA. Parliament cannot stop the agreement being signed by our Prime Minister if it determines the AUSFTA is not in the national interest. The sole, weak course of action available to the Parliament is to block any enabling legislation required to implement the agreement – after it is signed - at the domestic level. This blatantly undemocratic situation requires immediate attention and reform.

1. Investment - Chapter 11

The AUSFTA's investment chapter defines rules protecting US investors investing in Australia and, conversely, rules protecting Australians investing in the U.S.[1] Ironically, it is numbered '11', like its infamous cousin in the North American Free Trade Agreement (the NAFTA).

1.1 Investor- State Dispute Settlement Mechanism

At the present time, under Chapter 11, US companies will not have the right to sue the Australian Government for alleged violations of the AUSFTA. This is because Chapter 11 omits the highly controversial 'investor-state' dispute settlement mechanism included in other FTAs, such as the NAFTA. Investors have used the NAFTA's chapter 11 provisions to challenge US Canadian and Mexican environmental laws and social policies, and to claim sums as high as a billion dollars in compensation. Within North America, this has undermined public confidence in the desirability of trade and investment liberalisation.

However, the AUSFTA leaves the door open for an investor-state dispute mechanism to be established in the future. Article 11.16 states.

> *If a Party [U.S or Australian Governments] considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. Upon such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.*

This article, as currently worded, is ambiguous; it is not clear that the agreement of both Parties would be required in order to establish an investor-state dispute settlement mechanism.

1.2 Protection Against Expropriation and the Right to Compensation - The Impact on Environmental Laws

Although U.S investors do not have the standing to sue under the AUSFTA, Chapter 11 includes special protection for U.S investors against government expropriation of investments. This protection will grant U.S. investors greater rights than those currently enjoyed by Australians under Australian law and has the potential to have very significant impacts on Australian environmental laws.

The expropriation clause appears in article 11.7:

> *1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation ("expropriation"), except:*
> *(a) for a public purpose;*
> *(b) in a non-discriminatory manner;*
> *(c) on payment of prompt, adequate, and effective compensation; and*
> *(d) in accordance with due process of law.*

The key component of this article is 11.7(1)(c). This obliges the Australian Government to pay compensation to U.S investors if Australian laws (including environmental, human rights and labour laws) expropriate their investments either directly or indirectly through measures equivalent to expropriation. Where this obligation is breached, the U.S Government will have the right to bring the matter before a special dispute settlement panel convened under the provisions of Chapter 21.

If the panel finds a breach to have occurred, Australia must either repeal the offending law or pay compensation.[2]

A similar article appears in chapter 11 of the NAFTA. In the NAFTA case *Metalclad Corporation v Mexico* (2000), the tribunal provided an extremely broad definition of what constitutes expropriation. In addition to the more conventional notion of expropriation involving the taking of property, the Tribunal held that expropriation under the NAFTA includes covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. This definition was subsequently upheld on appeal to the Supreme Court of British Columbia.[3]

This definition of expropriation, likely to be applicable to the AUSFTA[4], will grant rights to U.S investors to obtain compensation from the Australian Government, well beyond the compensation rights enjoyed by Australians under Australian law.

Ordinarily, Australian law will only recognise a right to compensation when property has been acquired or "effectively sterilized." [5] This does not extend to circumstances where regulation significantly interferes with the use or the reasonably-to-be-expected economic benefit of property.

There is a good reason for this. To extend a right to compensation to circumstances where there has been a mere regulatory interference with the use of property would be enormously costly. The prospect of such costs would disable and/or limit the capacity of current and future Australian governments to pass legislation pursuing legitimate public interest objectives, such as environmental protection. Consequently, Article 11.7 will fetter the capacity of future Australian governments to legislate to protect the environment or act on other matters that become important to Australia's economic and social welfare.

The following are hypothetical examples that – while not giving rise to compensation under current Australian law - might require compensation to be paid to U.S investors under the AUSFTA:

- an amendment to a State planning scheme designed to protect sensitive coastal areas from development, which prohibits a U.S property owner from developing a coastal property
- an Australian law that bans the importation and use within Australia of certain harmful substances or goods, which affects a U.S company engaged in the exporting of such substances or goods to Australia
- new emissions standards on power generators that significantly interfere with the profits of U.S companies which own Australian coal fire power generators
- the declaration of new marine parks or other measures that deny U.S oil companies the right to drill for oil in sensitive marine areas within their exploration lease[6], and
- new anti-tree-clearing or water conservation laws which significantly interfere with the profits of U.S agricultural companies operating in Australia.[7]

1.3 Are environmental measures excluded from the operation of the Investment chapter?

The answer to this question is 'no'. Article 11.11 of Chapter 11 appears to give comfort to environmental concerns by stating that:

> *Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.*

However, if an environmental law expropriates or significantly interferes with the investments of a U.S corporation, the Australian government would still be liable to compensate that corporation, notwithstanding Article 11.11.

2. Cross Border Trade in Services - Chapter 10.

Chapter 10 covers cross border trade in services. Under this chapter Australia commits to ensuring that its laws - including its environmental and public health laws - do not act as a barrier to trade in services in areas such as water, waste management, energy and conservation. All services are covered by this chapter except for financial services (which are subject to Chapter 13), government procurement, air services; subsidies or grants provided a party, and services provided in exercise of government authority.

2. 1 The Rule Governing Domestic Regulation - The Impact on Environmental Laws

A central component of chapter 10 is the commitment Australia makes with respect to its "domestic regulations" under article 10.7(2), which states:

> *With a view to ensuring that measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services, each Party shall endeavour to ensure, as appropriate for individual sectors, that such measures are:*
> *(a) based on objective and transparent criteria, such as competence and the ability to supply the service;*
> *(b) not more burdensome than necessary to ensure the quality of the service; and*
> *(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.*

This chapter will potentially open up Australian environmental laws and other measures of public policy to challenge by the US Government on behalf of disgruntled US corporate service providers who allege that such laws are an unnecessary barrier to trade. In the event of such a challenge, Australia must overcome two hurdles to show that its environmental regulatory measures are acceptable.

First, Australia must prove to a special arbitration panel, convened under chapter 21 of the AUSFTA, that its environmental laws are objective. Under this requirement, the panel might demand proof that an environmental law is based on evidence that the harm that it prevents is scientifically ascertainable. Such a requirement would depart from the precautionary principle (now part of Australian law), which would allow for regulation even when there is a lack of full scientific certainty of possible harm.

Second, through what is known as a "necessity test", Australia must prove to the panel that its environmental laws are the least burdensome laws available. In other words, Australia cannot simply adopt a reasonable regulatory approach but must instead identify a full range of alternative approaches and adopt the approach that will least affect the economic interests of U.S service providers.

If Australia fails to satisfy the panel with respect to these requirements, the panel will hand down a determination that the domestic law represents a barrier to trade. Australia will then have to choose to either repeal the offending law or pay compensation.[8]

The *General Agreement on Trade in Services* (GATS) generally exempts measures necessary to protect human, animal or plant life or health so long as such measures do not amount to a disguised restriction on trade in services.[9] Chapter 10 of the AUSFTA, however, does not. The absence of such an exemption is cause for concern.[10]

2.2 Privatising Biodiversity and Landscape Services.

Under the AUSFTA Australia has committed to liberalising rules governing trade in services relating to the "protection of biodiversity and landscapes".[11] This could pave the way for the privatisation of Australian national park and conservation services.

In the U.S, the Bush Administration has begun moves to privatise up to 70% of all jobs in the National Parks Service. Under the AUSFTA, private providers of nature conservation services in the U.S could demand market access to national parks services contracts in Australian equal to the access they have to US National Parks. The inclusion of biodiversity and landscape protection services in the AUSFTA therefore subjects Australia's National Parks, state forests and local nature reserves to market pressures and possible privatisation. In addition, it could lead to the reduction and/or hindering of indigenous management agreements and arrangements in national parks.

2.3 Water Services

Australia has also committed, under the AUSFTA, to liberalising its rules governing water-related services. This will undermine the ability of all levels of Australian government to regulate water access licenses and distribution services, threatening Australia's ability to manage its scarce water resources, and jeopardising the success of the National Water Initiative (the negotiations for which will be concluded after the signing of the AUSFTA).

3. Quarantine Laws and other Sanitary and Phytosanitary Measures - Chapter 7

The AUSFTA has not resulted in any immediate changes to our quarantine laws. This is good news for Australia's unique biodiversity, which relies on a strict application of our quarantine laws to keep out non-native pest species. However, Chapter 7 establishes a special committee and a standing technical working group that could agree to water down our quarantine laws and other sanitary and phytosanitary measures in the future.

Before describing the roles of these two bodies it is first necessary to define what is meant by the terms *sanitary and phytosanitary* measures. Sanitary (human and animal health) and phytosanitary (plant health) measures are designed to ensure that food is safe for consumers, and to prevent the spread of pests or diseases among animals and plants. These measures can take many forms, such as requiring products to come from a disease-free area, inspection of products, specific treatment or processing of products, the setting of allowable maximum levels of pesticide residues, and permitting the use of only certain additives in food. They may apply to domestically produced food or local animal and plant diseases, as well as to products coming from other countries.

Chapter 7 sets out rules governing sanitary and phytosanitary measures (S & P measures) that may, directly or indirectly, affect trade between the Parties. This chapter is very wide in scope. The most obvious S & P measures that affect trade are the quarantine regimes in place in Australia and the U.S. Other measures that could affect trade relate to laws with more of a domestic focus, such as the laws governing the release of Genetically Modified Organisms (GMOs) into the environment.

Laws relating to GMOs are likely to be the source of significant conflict under the AUSFTA. The U.S is a strong advocate for the use of GMOs. In May 2003, it launched legal proceedings against the European Union (E.U), alleging that the EU's five year moratorium on biotech food and crops was not science-based and therefore in breach of the WTO rules pertaining to sanitary and phytosanitary measures.[12]

The outcome of this proceeding has enormous implications for Australian jurisdictions.[13] For example, complete moratoriums on GM crops are in place in Western Australia, Tasmania, and Victoria, while other Australian States have in place geographically confined moratoriums and laws that prohibit the use of GM crops on a commercial basis. Should the U.S be successful in its WTO case against the E.U, it will no doubt request that all Australian States permit the use of GM crops in accordance with Australia's commitments under WTO rules and the mechanisms now in place under the FTA.

3.1 The Committee on Sanitary and Phytosanitary Matters

Chapter 7 establishes a Committee on Sanitary and Phytosanitary Matters (the S&P Committee) comprised of U.S and Australian officials with responsibility for sanitary and phytosanitary matters, such as quarantine and GMO laws. According to article 7.4 (5), the mandate of the S&P committee is, amongst other things, to:

> *Review progress on and as appropriate, resolve through mutual consent, sanitary and phytosanitary matters that may arise between the Parties' agencies with responsibility for such matters; and*
>
> *Consult on matters related to the development or application of sanitary and phytosanitary measures that affect, or may affect, trade between the Parties;*

This mandate threatens to weaken Australia's S&P measures by providing U.S officials with an avenue to review Australia's proposed and existing measures in this area. If the U.S officials believe that such measures are not science-based or are applied in a manner that may affect trade between the parties, they may seek consultation with the Australian officials on the S&P Committee with a view to having the offending measures removed or enforced in a less stringent manner.

On the positive side, should the consultations fail to result in a consensus, there is no avenue for arbitration through the AUSFTA's dispute settlement provisions.[14] This provides a safety mechanism to ensure that the Australian Government, if it chooses, can deny U.S requests to weaken Australia's S&P measures. The U.S Government would be forced to seek settlement of the dispute under the WTO.

3.2 The Standing and Technical Working Group on Animal and Plant Health Measures

Chapter 7 also establishes a technical working group on animal and plant health measures (the Technical Working Group). Like the S&P committee, it will be made up of a U.S and Australian representatives.

According to annex 7-A (4) the Technical Working Group will provide a forum for:

> *(a) resolving specific bilateral animal and plant health matters with a view to facilitating trade and, where possible, achieving consensus on scientific issues;*
>
> *(b) engaging, at the earliest appropriate point in the risk assessment and regulatory processes of each Party, in scientific and technical exchange and cooperation regarding animal and plant health matters that may, directly or indirectly, affect the trade of either Party; and*
>
> *(c) considering specific measures or sets of measures likely to affect, directly or indirectly, trade between the Parties that are designed to protect animal or plant life or health within the territory of the importing Party from risks arising from the entry, establishment or spread of pests, diseases, disease carrying organisms or disease-causing organisms.*

This mandate also threatens to weaken Australia's S&P measures by providing U.S representatives with an avenue to review Australia's proposed and existing measures in this area. If the U.S representatives believe that such measures are not science based or applied in a manner that may affect trade between the parties, they may seek consultation with the Australian representatives on the Technical Working Group with a view to having the offending measures removed or enforced in a less stringent manner.

Again, however, should the consultations fail to result in a consensus, there is no avenue for arbitration through the FTA's dispute settlement provisions.[15] This provides a safety mechanism to enable the Australian Government, if it wishes, to deny U.S requests to weaken Australia's S&P measures. Instead, the U.S Government would be forced to seek settlement of the dispute in accordance with the WTO rules.

4. GMO Food Labelling Laws and other Technical Regulations and Standards - Chapter 8

During the AUSFTA negotiations there was some concern that the US Government would seek a specific commitment from Australia to remove its genetically modified ingredient disclosure laws with respect to food products. The AUSFTA appears not to include a specific concession from Australia to this effect. This is good news for those concerned about the undisclosed use of GMO's.

However, Chapter 8 may open up the possibility of Australia being forced to remove these disclosure laws in the future. Under article 8.2 of this chapter, Australia and the US reaffirm their rights and obligations under the WTO rules governing *Technical Barriers to Trade* (the WTO rules).

These WTO rules relate to the increasing number of technical regulations and standards imposed by countries on goods and services. Ordinarily, such technical regulations and standards are intended to protect human health and safety, protect plant and animal life, protect the environment and prevent deceptive and misleading conduct, and are permitted under the WTO rules.

In some circumstances however, these technical regulations and standards are viewed as creating an unnecessary barrier to trade. In particular, Article 2.2 of the WTO rules requires that technical regulations must not be "prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to trade".

The WTO website states that unnecessary obstacles to trade can result when (i) a regulation is more restrictive than necessary to achieve a given policy objective, or (ii) when it does not fulfil a legitimate objective. Article 2.2 of the WTO rules specifies that legitimate objectives include, amongst other things, national security requirements, prevention of deceptive practices, protection of human health or safety, and protection of animal and plant life or health or the environment.

It is ACF's view that Australia's genetically modified ingredient disclosure laws have been designed for the legitimate objective of protecting human health and safety.[16] However, as is evident from their WTO case against the E.U, outlined above, the US believes that measures designed to protect human, animal and plant life from GMOs are not science based and are therefore not a legitimate objective for the purposes of Article 2.2 of the of the WTO rules. Based on this argument, the US could request that Australia remove its GMO disclosure laws. If Australia refuses, it could initiate proceedings under WTO dispute settlement procedures with a view to having the laws repealed.

5. The Environment Chapter - Chapter 19

The AUSFTA includes a specific chapter relating to the environment. This chapter was introduced in accordance with legislation in the United States that sets out specific negotiation objectives relating to environmental matters.[17] The ACF supports the inclusion of specific environmental objectives, commitments and procedures in international trade agreements.

5.1 Inadequate Content of Chapter 19

However, Chapter 19 is an inadequate response to the negative environmental impacts that will arise from free trade between Australia and the US and fails to meet the environmental provisions contained in previous FTA's to which the US is a party. For example:

- Chapter 19, unlike the NAFTA, fails to set up an independent body or commission to ensure the environmental objectives of the AUSFTA are met.[18]
- Unlike the NAFTA, Chapter 19 fails to establish a "citizen submission process" to allow citizens to allege a failure to effectively enforce environmental laws.
- Chapter 19, unlike the NAFTA, fails to establish a special grants project that enables not-for-profit NGO's to apply for grants to fund community based environmental projects.
- Article 19.4 of Chapter 19 includes a troubling provision that encourages the Parties to use voluntary measures, as opposed to regulatory instruments, to achieve and maintain high levels of environmental protection:

> *The Parties recognize that flexible, voluntary and market-based mechanisms can contribute to the achievement and maintenance of high levels of environmental protection. As appropriate and in accordance with its law, each Party shall encourage the development of such mechanisms, which may include partnerships, sharing of information, and market-based mechanisms that encourage the protection of natural resources and the environment.*

This article does not reflect the weight of international opinion, which now acknowledges that voluntary initiatives will be ineffective in achieving their environmental objectives if used as a substitute for regulation. This was one of the key messages of UNEP's discussion paper, *Voluntary Initiatives: Current Status Lessons Learnt and Next Steps (2000)*:

> *Typically, the successes and failures of an initiative result not so much from its own design as from the strengths and weaknesses of outside pressures (e.g. fear of regulatory action or liability claims, anticipation of new tax burdens or new market opportunities). Voluntary initiatives should not be proposed and adopted as substitutes for regulation or used as justification for dismantling regulatory capacity.*[19]

5.2 Proposed 'U.S. - Australia Joint Statement on Environmental Co-operation'

Chapter 19 also includes a commitment by the parties to negotiate a "United States–Australia Joint Statement on Environmental Co-operation." Given the history of environmental cooperative projects between the two parties, such as the climate change partnership that has been used by US and Australia to undermine the Kyoto Protocol, the ACF is sceptical about the types of environmental cooperation to be ushered in under such a joint statement. To be effective in meeting its environmental objectives, the statement must set measurable and enforceable targets addressing such issues as:

- reductions in greenhouse gas emissions
- improvements in water quality and river health, and
- improvements in the health of terrestrial and marine biodiversity.

Areas of potential cooperation could include projects designed to promote:

- environmental security in the Asia Pacific region
- sustainable agricultural practices
- conservation of marine biodiversity
- the identification and removal of environmentally harmful subsidies
- a significant reduction in greenhouse pollution
- corporate environmental and social responsibility, and
- the strengthening of environmental laws.

6. The Dispute Settlement Mechanism - Chapter 21

Chapter 21 outlines special procedures that will facilitate a settlement should a dispute between Australia and the US arise under the AUSFTA. These procedures can only be triggered by the Australian and US Governments and not by private plaintiffs. Furthermore, the dispute settlement mechanisms do not apply to some disputes, such as those arising under Chapters 7 and 8.

Article 21.5 of Chapter 21 obliges the Parties to first engage in consultations with a view to resolving the dispute. Should these consultations fail, a special dispute settlement panel (the Panel) will be convened under article 21.7 with the authority to resolve the dispute. The Panel may rule that a particular environmental law or other public policy measure is inconsistent with a Party's obligations under the AUSFTA (for example, in violation of obligations in Chapter 10), or that a Party has failed to fulfil its obligations under the AUSFTA (for example, the payment of compensation under chapter 11).[20] As a consequence of this ruling, the contravening party will have the choice of either removing the offending law (Article 21.10) or paying compensation (Article 21.11).

There are a number of positive aspects of the dispute settlement process. First, in a positive step towards increased transparency, the rules of procedure for the Panel require the Party's written submissions, oral statements and responses to questions to be made public (Article 21.8 (c)). Second, the rules of procedure require the Panel to accept written submissions from NGOs with respect to the subject matters of the dispute (Article 21.8(d)). Third, the dispute settlement mechanism applies to breaches of the Parties' commitments under the environment and labour chapters. So for example, if either the US or Australian governments fail to effectively enforce their environmental laws in a manner affecting trade between the parties, the other Party may initiate proceedings under Chapter 21.

However, these positive aspects of Chapter 21 are outweighed by significant problems inherent in the dispute settlement procedure. First, dispute settlement mechanisms of this type have been developed to resolve international disputes of a private commercial nature and not the sorts of disputes involving government policy or public welfare measures which might arise under the AUSFTA.

Second, the three 'Panelists' hearing the dispute are appointed by the parties themselves. This is done through a process in which each Party chooses one panelist and the third is then negotiated or chosen by a neutral person from a standing list of qualified panelists. This process enables the Party initiating the dispute to select at least one panelist on the basis of known views or orientations that would tend to support its position, which has huge potential for bias. Lastly, the decision of the Panel is final and there is no mechanism for appeal.

This process is unsatisfactory and contrary to the judicial traditions of Australia and the U.S. It might be acceptable for international disputes of a private commercial nature. However, it is not appropriate for a body that has the power to provide a ruling that would, in effect, require governments to repeal national laws or to pay millions of dollars in compensation with tax payer's money to disgruntled foreign investors and service providers.

7. Environmental Review and Parliamentary Scrutiny of International Trade Agreements.

The Australian Government is remarkably under-prepared to ensure that trade agreements such as the AUSFTA do not have a negative impact on the Australian environment. For example, unlike under US law,[21] there is no Australian legislation in place that requires the Australian Government to undertake a review of the environmental impacts of free trade agreements. Furthermore, unlike under US law,[22] there is no Australian law that sets out Australian environmental objectives for free trade agreements.

7.1 Environmental Impact Assessment

As a direct consequence of the lack of regulation in this area, there still has not been an environmental impact assessment of the AUSFTA carried out by the Australian Government. This omission is all the more apparent considering that the US government commenced its environmental review of the AUSFTA one year ago, in March 2003.[23]

Without an environmental impact assessment, Australia is unable to fully assess the potential environmental impacts arising from the AUSFTA, such as:

- the impact the AUSFTA will have on Australia's environmental laws and social policy measures, as outlined in parts 1 to 5 of the text above
- the environmental impacts arising from the predicted increase in Australian agricultural output, which will intensify the impacts of a sector that already accounts for a significant proportion of Australia's current environmental problems. Increases in agricultural production will probably lead to more tree clearing, more salinity, less water for our rivers, more species on the extinction list and a huge repair bill for the Australian public, unless adequate environment measures are in place.
- the transboundary environmental impacts of "two-way traffic" across the Pacific that will increase under the AUSFTA, and
- the increase in greenhouse gas emissions that will arise as a consequence of the concession made to allow US made "petrol-guzzling" motor vehicles into Australia duty free.[24]

On 9 March 2004, the Commonwealth Government announced it had contracted the Centre for International Economics (CIE) to carry out an "assessment" of the 1000 page AUSFTA. The study will look at the implications of the AUSFTA for output and economic welfare over time, its impact on employment, the states and territories and the environment, and rules of origin, government procurement and intellectual property issues. It will include case studies on agriculture, automobiles and textiles and clothing. The CIE's final report is due by 8 April 2004.

This assessment does not provide the rigour of a comprehensive environmental impact assessment. The latter are carried out over the course of at least several months (not 30 days), are undertaken by trained environmental experts (not economists), provide mechanisms for public input into the terms of reference and at the assessment stage, and finally, are carried out pursuant to a statutory framework (not on an *ad hoc* basis).

7.2 Role of Parliament

Now that the draft text of the AUSFTA has been agreed, the role of the Australian Parliament is limited. In Australia, decisions on international trade agreements are made by the Executive and not by the Parliament as a whole. This means that decisions relating to the determination of objectives, negotiating positions, the parameters within which the Australian delegation can

operate, and the final decision as to whether or not to sign are taken at Ministerial level or by Cabinet - not the Parliament.

The Commonwealth Government's literature on the treaty process points out that a certain level of scrutiny of international trade treaties is provided when such treaties are tabled in Parliament for debate, ordinarily for a period of 15 sitting days. This debate is informed by a review conducted by the Joint Standing Committee on Treaties (JSCOT), which reports to Parliament on whether Australia should take binding treaty action and on other related issues that have emerged during its review. However, Parliament's role is limited to a debate on the issue. No mechanism exists which enables Parliament to vote to accept or reject the AUSFTA, even if JSCOT in its final report were to conclude that the trade agreement is not in the national interest. Parliament's sole recourse, if it determines that the trade agreement is not in the national interest, is to refuse to pass any enabling legislation that might be required to implement the AUSFTA at the domestic level.

This process stands in stark contrast the process in place in the United States. Pursuant to the *Trade Act* 2002 (US), the President has authority to negotiate trade agreements on behalf of the U.S. However this authority is not absolute. The *Trade Act* sets out requirements for consultation between the President and Congress including a Congressional Oversight Group to ensure the interests of both the legislative and executive branches of government are respected. The President must inform Congress at least 90 days in advance of his intention to initiate trade negotiations and at least 180 days before signing any trade agreement proposals which could change US anti-dumping and other trade remedy laws. The *Trade Act* also sets out clear negotiating objectives with respect to trade agreements including, amongst other things, matters relating to environmental and social issues. Whilst it does not grant authority to Congress to amend a trade agreement, Congress still has the right to vote to accept or reject the agreement following a 90 day consultation period. Furthermore, the *Trade Act* grants Congress the power to revoke the President's negotiation authority if it is of the view that the President failed to adequately consult Congress during the negotiation process. [25]

ACF shares the concerns of many U.S NGOs that the *Trade Act* 2002 does not address the serious concerns surrounding investor lawsuit rules like the NAFTA's Chapter 11 and the fact the Act does not provide adequate protection for Multilateral Environmental Agreements that may come in to conflict with trade agreements.[26] Notwithstanding the inadequacies inherent in the U.S trade legislation, when compared to the US process for entering into international trade agreements, the Australian process is marred by its over-reliance on Executive powers, which thwarts the principles of transparency, public accountability and precautionary review which are part of the process of parliamentary oversight.

8. What Should be Done?

8.1 Refuse to pass legislation giving domestic effect to the most concerning aspects of the AUSFTA

As discussed above, the Australian Parliament's sole recourse at this stage, if it determines that the trade agreement is not in the national interest, is to refuse to pass any enabling legislation that might be required to implement the AUSFTA at the domestic level.

ACF urges the Parliament to seriously consider the negative impacts of the AUSFTA highlighted above, and to refuse to pass any enabling legislation required to bring those aspects of the AUSFTA into effect within Australia.

ACF urges this course of action particularly in relation to the aspects of Chapters 10 and 11 of the AUSFTA discussed above, which are of great environmental concern.

8.2 Enact new legislation giving Parliament an adequate role in approving proposed international free trade agreements.

ACF also recommends that the Australian Government legislate to:

1. ensure Parliament has the right to review and, where required, amend or veto proposed trade agreements.[27]
2. require a triple bottom line assessment to be undertaken of the environmental, social and economic impacts of international trade agreements prior to Australia signing
3. set out Australia's broad objectives for any trade agreement to which Australia is to be a party - namely to:
   - promote sustainable development, and therefore enhance environmental protection, human rights and labour standards alongside traditional economic measures
   - maintain or strengthen environmental standards and environmental laws
   - maintain or strengthen human rights and labour standards
   - ensure that foreign nationals do not gain greater rights than those enjoyed by Australians
   - reserve Australia's right to prohibit trade in products that represent a threat to biosecurity or the environment at large, and to exclude products manufactured according to inadequate environmental standards or processes
   - eliminate government practices and policies that unduly threaten sustainable development, such as environmentally harmful subsidies
   - ensure Australian governments remain unfettered in their capacities to make laws to protect the natural environment and promote sustainable development
   - ensure that where an international trade or investment agreement is in conflict with a pre-existing environmental or human rights treaty, that the latter takes precedence, and
   - reserve the right to use trade bans to enforce environmental and human rights agreements where appropriate, and
4. reform the process governing Parliamentary and public scrutiny of international trade agreements by:
   - requiring a full Parliamentary debate and vote before draft international trade agreements are signed
   - requiring JSCOT to report on its review of any international trade agreement prior to the introduction of enabling legislation and in sufficient time to inform any Parliamentary debate and vote regarding the agreement
   - ensuring JSCOT has sufficient time and resources to carry out its review function effectively
   - establishing a special sub-committee of JSCOT (with appropriate expertise and resources) to review international trade agreements, and
   - requiring that the full draft text of a trade agreement be publicly released for comment and scrutiny prior to signing

Conclusion

After careful analysis of the draft text of the AUSFTA, the Australian Conservation Foundation has formed the view that it is not in the national interest for Australia to sign the present agreement, or to implement binding treaty action to bring the agreement into effect.

The AUSFTA threatens Australia's existing environmental laws. It also fetters the capacity of Australian governments to legislate on environmental and other issues of public interest. Furthermore, there has not been an adequate environmental impact assessment undertaken of the agreement, leaving too many questions unanswered about the environmental consequences of the AUSFTA.

For these reasons, ACF opposes the signing of the AUSFTA by the Australian government, and urges the Parliament to refuse to pass any enabling legislation required to bring these concerning aspects of the AUSFTA into effect within Australia.

Prepared by Michael Kerr (legal practitioner)
ACF Adviser on International Trade.

[1] The form that an investment may take is defined very widely under the agreement. Pursuant to chapter 11, article 11.17(4) the term **investment** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

[2] See chapter 21, articles 21.7 to 21.11

[3] *Mexico v Metalclad Corporation* 2001 BCSC 664 at 35

[4] Chapter 11, Annex 11B of the US.FTA states that article, 11.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

[5] The High Court has found acquisition in two circumstances. First, where there has been a formal acquisition of a property right that is supported by an antecedent proprietary right recognised by the common law. Second, where there has been an indirect (or de facto) acquisition – that is, where a property right has been "effectively sterilised". See *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

[6] See for example, *Commonwealth of Australia v WMC Resources Ltd* [1998] HCA 8 (1998) 152 ALR 1. In this case the High Court held that compensation was not payable by the Commonwealth for the extinguishment of an exploration lease.

[7] U.S corporation, McDonalds, is one of Australia's largest landholders.

[8] See chapter 21, articles 21.7 to 21.11

[9] *The General Agreement on Trade in Services* (WTO), article XIV.

[10] The exception is qualified by the requirements that the laws cannot amount to a disguised restriction on trade or a means of arbitrary or unjustifiable restriction between countries.

[11] In Australia's initial offer under the GATS, Australia has agreed to liberalise rules governing services in the area of "protection of biodiversity and landscapes." Under AUSFTA these services will also be liberalised as all services have been liberalised unless they fall into one of the four categories excluded from the operation of chapter 10.

[12] For background material on this case go to the following website: http://www.ictsd.org/issarea/environment/biotech_case.htm

[13] It is perhaps for this reason that Australia joined itself as a third party to the U.S- E.U biotech dispute.

[14] Chapter 7, article 7.3(2).

[15] Chapter 7, article 7.3(2).

[16] Australia's gene technology labelling requirements are contained in FSANZ food standard 1.5.2. Although these labelling requirements do not go as far as ACF would like, they were introduced in response to strong public concern about the risks posed to human health and safety by GM foods and a variety of objections relating to GMO production processes. FSANZ itself acknowledges that although the GM foods to date have been derived from foods with a long history, the GM versions are new to the diet and as such do not yet have a long history of safe use. ACF believes that the potential hazards of genetic engineering in food and fibre production currently far outweigh the presumed benefits to producers, consumers and Australian ecosystems.

The basic purpose of the labelling requirements is to provide consumers with information about the GM content of food. With the disclosure of this information, consumers can then make up their own mind whether they wish to avoid the food for health and safety reasons.

Australia's gene technology labelling laws have therefore been designed for the *legitimate objective* of protecting human health and safety. What is more, the labelling laws are the least trade restrictive alternative to a complete prohibition on such products, which is probably the most cautious approach to eliminate the health and safety risks posed by gene technology.

Accordingly, Australia's gene technology labelling laws are not inconsistent with the WTO's TBT agreement. Australia has a legitimate right to maintain such laws even under international principles that have been developed to promote free trade. Any efforts to remove them would be to elevate the small inconvenience that such laws pose to U.S. food producers above the legitimate public health and safety concerns of Australian residents.

[17] See the *Trade Act* 2002 (U.S), section 2102

[18] In order to achieve the environmental objectives of NAFTA, the parties to the agreement set up the Commission for Environmental Cooperation of North America (CEC)

[19] UNEP, *Voluntary Initiatives: Current Status, Lessons learnt and Next Steps.* UNEP, 2000 at 11. Quote from Robert Gibson, University of Waterloo, Canada- UNEP workshop participant To view the discussion paper see http://www.uneptie.org/outreach/vi/reports/voluntary_initiatives.pdf at 11. for similar findings see generally, OECD, *Voluntary Approaches for Environmental Policy: An Assessment.* Paris: OECD, 1999. For a more recent OECD report on voluntary initiatives, see OECD, *Voluntary Approaches for Environmental policy: Effectiveness, Efficiency and Usage in Policy Mixes.* Paris: OECD, 2003.

[20] Article 21.9.

[21] Executive Order 13141 *Environment Review of Trade Agreements* , 64 Fed.Reg.63,169 (Nov,1999)

[22] See Section 2102 of the Trade Act 2002 (U.S).

[23] Notice initiating the review was given on 13 March 2003. See http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/03-5990.htm

[24] For more information on the environmental impacts of the FTA see OZProspect, *The Australia-U.S Free Trade Agreement: An Environmental Impact Assessment* 2003, available at http://www.ozprospect.org/pubs/FTA.pdf.

[25] The full text of the Trade Act 2002 is available at ~~http://otexa.ita.doc.gov/AGOA-CBTPA/H3009_CR.pdf~~

[26] For a full list of concerns, see letter from U.S NGOs to U.S Congress on 26 July 202 available at http://www.ciel.org/Tae/Fast_Track_29Jul02.html

[27] It is clear that the Australian Parliament has the Constitutional power to pass legislation to provide guidance on how those powers are to be exercised and for it to have a right of veto over proposed trade agreements. See the findings of the Senate Legal and Constitutional Committee, Trick or Treaty? *The Commonwealth's Power to Make and Implement Treaties* 1995 at chapter 16. A copy of the report can be viewed at http://www.aph.gov.au/senate/committee/legcon_ctte/treaty/report/index.htm