Argentina 1.
Submission No. 1.1

AGREEMENT BETWEEN AUSTRALIA AND THE ARGENTINE REPUBLIC CONCERNING COOPERATION IN THE PEACEFUL USE OF NUCLEAR ENERGY

SUBMISSION TO JOINT SELECT COMMITTEE ON TREATIES

1. Sutherland Shire Council has sought my legal advice concerning this international agreement. The occasion for seeking my advice is the provision of the Argentine Constitution which forbids the entry into Argentina "of present or potential dangerous wastes, and of radioactive ones": s.41(4). The Agreement is a bilateral treaty which has the familiar structure of a nuclear safeguards agreement, but the departs from that familiar structure specifically to endorse an arrangement whereby Australian reactor fuel is processed or conditioned in Argentina "in order to make it suitable for disposal in Australia": Article 12.1(a). The Agreement obliges Argentina to accept Australian fuel and it obliges Australia to permit the return to Australia "of all conditioned fuel and all radioactive wastes resulting from " Argentinean processing, conditioning or reprocessing: Article 12.1.

2. A question has arisen concerning the constitutional authority of Argentina to agree to such an obligation. There is no doubt about Australian constitutional power to make an agreement (and to implement it by legislation) to deal with a matter physically external to Australia. Even apart from the attraction of legislative power by entry into a treaty obligation, the Commonwealth has plenary powers in relation to imports and exports. It would be a different matter if constitutional power was sought for nuclear activities within Australia apart from treaty obligations, as the conduct by the Commonwealth of nuclear facilities cannot be related to any express head of constitutional power. The infirm foundation for the Commonwealth's engagement in nuclear activities is not, however, the subject of today's submission.

3. The Argentine constitution is in a form familiar to constitutional lawyers from Commonwealth countries. It divides legislative, executive and judicial powers. It contains express guarantees of rights, but unusually, it makes specific provision for environmental rights and duties. These provisions were inserted in 1994 after a constitutional convention recommended them. Any person may enforce these constitutional guarantees: s.43. The guarantees restrain legislative and executive power of both the provincial and federal governments of Argentina.

4. The Argentine constitution also deals specifically with the power to make treaties. Unlike the Australian Constitution, treaties may not be made, or at least are not in force until both houses of the national parliament have endorsed the treaty by an absolute majority: s.75.22, s.75.24.

5. I am advised by the firm of Quattrini, Laprida & Asociados, a leading Argentine law practice, that Congress has not approved this agreement and hence it is not presently in force. I understand it is a matter of political controversy in Argentina but I do not know whether that will be sufficient to defeat its adoption by the Congress.

6. The more important question is whether the agreement is contrary to s.41 of the Argentine Constitution. As I have observed, this section is in the form of a guarantee which inheres to individuals as well as constrains the exercise of legislative and executive powers, including the power to make treaties. At this point, I should observe that in Argentina, there is a hierarchy of laws. At the peak of the hierarchy is the Constitution and below it are treaties and laws of the national parliament in that order. Just as in Australia, a law may not be made or a treaty entered into which is contrary to the Constitution (in Australia the power to make laws with respect to external affairs is expressed to be subject to the Constitution).

7. The kernel of the dispute is whether the constitutional guarantee prohibiting the importation to Argentina of radioactive wastes applies to irradiated spent fuel rods which are expected to arise from the use of the proposed nuclear reactor in Australia. The Argentinean company INVAP which has entered a contractual obligation with an Australian body, apparently to accept the spent fuel, does not have access in Argentina to fuel reprocessing technology capable of reprocessing low enriched uranium based spent fuel of a kind expected to arise from the proposed reactor. INVAP have advised that:

> *"We are always talking about conditioning for final disposal of the burnt fuel element, as it was required. It is not a reprocessing process. In this context, no extraction of any uranium for future use is considered. The entire residues from a conditional process should go back to Australia (if we are talking about Lucas Heights fuel) to final storage in a non-reusable form".* (Juan Jose Gil Gerbino, INVAP, to McSorley, 12 Dec 2000).

The process of conditioning wastes is well known in industry. Conditioning enables the waste to be disposed of in the most convenient and safest way. If

the spent fuel from Australia is only to be conditioned by INVAP then there is no doubt in my opinion that it will be received in Argentina as radioactive wastes. The receipt of such wastes will be a breach of the Argentine Constitution. Any person may approach the Argentine courts to remedy that breach. Likewise, there is no constitutional power for the government of Argentina or its congress to make or approve a treaty which imposes an international legal obligation on Argentina to accept radioactive wastes in breach of the Argentine Constitution.

8. I am well aware of the controversy concerning the definition of wastes in international agreements. It is now international practice when regulating the transportation of hazardous wastes to include in the system of regulation recyclable waste. On the other hand, the Joint Convention on the Safety of spent fuel management and on the Safety of radioactive management (1997: entered into force 2001) distinguishes between the reprocessing of spent fuel and the disposal of radioactive waste. The question is not, however, how the parties describe the spent fuel but rather what the Constitution of Argentina means when it prohibits the importation of radioactive "wastes". The parties to this agreement cannot by labelling the spent fuel as a resource avoid the provisions of a constitutional guarantee which would otherwise treat it as waste. Although international practice in relation to spent fuel may be influential in assisting the interpretation of the constitutional term, what is more compelling is the context in which the term appears (as part of a guarantee of environmental protection and health) and the debate which preceded its adoption in 1994. That debate which I have read suggests that the constitutional term will be given a broad and beneficial construction which protects Argentina from accepting the burden of another country's radioactive waste arisings. It would not prevent, however, an Argentinean company conditioning or reprocessing waste in Australia, and to that extent the agreement between Argentina and Australia may have some limited benefit. Otherwise, there is a very real question as to whether the agreement could lawfully be approved by the national congress of Argentina.

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27 August 2001