australian network of environmental defender's offices

– Submission on the Australia-US Free Trade Agreement to the Joint Standing Committee on Treaties inquiry

April 2003

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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15 April 2004

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

Dear Sir/Madam

Submission on Australia-US Free Trade Agreement

Thank you for the opportunity to comment on the Australia-US Free Trade Agreement ("the Agreement") released on 4 March 2004 and tabled in Parliament. The Australian Network of Environmental Defender's Offices (ANEDO) has reviewed the Agreement and wishes to make a number of comments about it.

1 Introduction

The Agreement is an improvement on the draft version vis-à-vis the environment. It now contains a discrete Chapter on the Environment and embeds environmental issues more fully into the Agreement. This is evident in several ways.

First, the Preamble to the Agreement contains a commitment to:

> IMPLEMENT this Agreement in a manner consistent with their commitment to high labour standards, sustainable development and environmental protection

Second, the Investment Chapter contains a provision outlining the relationship between investment and the environment (Article 11.11). It states:

> INVESTMENT AND ENVIRONMENT
>
> 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.

Third, there is a separate Chapter on the environment. Chapter 19 deals with a number of matters including:

- the proper enforcement of environmental laws
- procedural guarantees concerning fair, transparent and equitable proceedings, including rights of access to judicial and administrative forums
- measures to enhance environmental performance, particularly voluntary, market-based measures
- institutional arrangements
- cooperation
- consultations
- the relationship between the Agreement and environmental agreements where both parties are signatories to multilateral agreements.

Fourth, a Joint Committee encharged with supervising the implementation of the Agreement is required to consider each Party's review of the environmental effects of the Agreement at its first meeting..

Fifth, the Agreement provides that an "annual monetary assessment" should be paid into a fund where a party state has failed to effectively enforce its environmental laws "for appropriate... environmental initiatives, including efforts to improve or enhance... environmental law enforcement".[1]

More generally, however, there remains a concern that the Agreement lays the foundation for pushing Australia towards US-style policies and approaches by weakening Australia's regulatory control, despite the inclusion of a specific Environment Chapter, and does not contain enforceable provisions regarding the environment and regulation. Furthermore, it would seem that many new regulations may still be challenged as barriers to trade. Also, provisions that are designed to preserve democratic values, approaches and institutions - based on the robustness of the legal and political systems in Australia and the US - are qualified and subject to change.

2 Environmental coverage

The Agreement is more comprehensive in its coverage of environmental factors, as compared to the draft Agreement. The inclusion of a separate Environment Chapter and, in particular, the review of the environmental effects of the Agreement away from the minutiae and politics of negotiations, are welcome developments. Nevertheless, significant concerns remain.

i) Investment and the Environment

As noted above, Article 11.11 contains a provision designed to protect the environment and the right of States to regulate these activities. It provides:

[1] See Articles 19.2.1(a) and 21.12.4.

> 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.

There are, however, a number of problems with such provisions. **First**, a provision such as Article 11.11 is patently unenforceable. It should be strengthened to ensure that – by redrafting the test regarding "in a manner sensitive to environmental concerns" - environmental and public health and safety laws are not compromised in the name of investment.

Second, it is unlikely that one party would complain if the other party sought to encourage investment. For example, if Australia was to induce US investors through lowering its standards (environmental or otherwise), it seems a fanciful scenario that the US would seek to invoke the consultation provisions.

ii) Relationship between international instruments

Article 19.8 deals with the relationship between the Agreement and international environmental agreements, where both parties are signatories to multilateral agreements. The Agreement is silent on the position where only one party or neither party has signed an international agreement. Future changes in the international arena are not considered. In this respect, it should be noted that the US has not yet ratified the *Convention on Biological Diversity 1992*, nor has either party ratified the *Kyoto Protocol 1997*. It is precisely in these areas where controversy is likely to arise and where the Agreement needs to set down procedures for dealing with such differences.

iii) Enforceability

Many of the provisions are aspirational and platitudinous, as with the Agreement as a whole:

> each Party shall ensure that its laws provide for and encourage high levels of environmental protection and shall *strive to continue to improve* their respective levels of environmental protection, including through such environmental laws and policies. [emphasis added] (Article 19.1)

> each Party shall *strive to ensure* that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws[emphasis added] (Article 19.2.2)

> each party is to encourage voluntary and market-based mechanisms "as appropriate and in accordance with its law".(Article 19.4)

Given the lack of detail, it remains a live question as to whether the Environment Chapter – and particularly, the agreement to negotiate a United States–Australia Joint Statement on Environmental Cooperation[2] - provides adequate safeguards to protect the interests of the environment. By way of contrast, Canada, Mexico and the US created the Commission for

[2] Article 19.6(1).

Environmental Cooperation under a side agreement to NAFTA. The Commission promotes environmental cooperation among the three countries, and sets down the dispute settlement provisions that can be invoked if a country persistently fails to enforce environmental laws that have conferred a trade benefit. Part of the mandate of the Commission is to help harmonize standards upwards and to oversee the enforcement of existing laws. It is also charged with, among other things, monitoring the environmental effects of NAFTA.

It is submitted that the establishment of such a Commission with full and proper oversight and monitoring powers would be a welcome addition to the Agreement.

3 Compensation for expropriation

The Agreement retains a provision entitling a corporation to compensation in the event that an investment is expropriated or nationalized.[3] Specifically, Article 11.7 provides:

> ARTICLE 11.7: EXPROPRIATION AND COMPENSATION
>
> 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.

A limit on expropriation is imposed by the following "rare circumstances" provision, which reads:

> Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations [Annexure 11-B 4(b)].

(i) The position under Australian law

Compensation for expropriation offends the settled position under Australian law.

A clear distinction has long been held in Australian law between compensating property owners for the acquisition of their property (the domestic equivalent of nationalisation) and not providing compensation where mere restrictions are imposed (the domestic equivalent of expropriation). The language and interpretation of Article 11.7 and Annexure 11-B 4(b) undercuts this distinction, with far-reaching consequences for environmental protection.[4]

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[3] Article 11.7

[4] In practice, environmental regulations have almost exclusively been the subject of challenge under parallel provisions in the North American Free Trade Agreement As noted in Cebon M (2003) Australian US Free Trade Agreement: Environmental Impact Assessment at http://www.ozprospect.org/pubs/FTA.pdf.

It is first necessary to trace the position under Australian law more closely.

Section 51(xxxi) of the *Commonwealth Constitution* gives the Commonwealth the power to acquire property from any State or person for any purpose for which Parliament has the power to make laws. Such acquisition must be on just terms.[5]

The High Court in Australia has defined "property" expansively to include every species of valuable right and interest. This definition will therefore encompass real and personal property, and include rents and services, rights of way, and rights of profit or use in land of another.

Cases considering section 51(xxxi) of the Constitution have thus focussed on the notion of what constitutes "acquisition" of property. The application of section 51(xxxi) was considered by the High Court in *Commonwealth v Tasmania* (the *Tasmanian Dams* case). Three of the four judges who dealt with the issue, determined that there was no acquisition by the Commonwealth as it had not acquired a proprietary interest in the land. As Mason J said:

> to bring the Constitutional provision into play it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.[6]

The restrictions on use were irrelevant to the question of acquisition. Subsequent cases have talked about the Commonwealth acquiring an "identifiable benefit or advantage": per Kirby in *Commonwealth v Western Australia.*[7]

This principle was distinguished in the case of *Newcrest Mining (WA) v Commonwealth.*[8] The case concerned mining leases acquired by Newcrest at Coronation Hill adjacent to Kakadu National Park. The Coronation area was incorporated into the National Park through proclamations under the (CTH) *National Parks and Wildlife Conservation Act 1975*, which banned operations for the recovery of minerals.

The Court held that the mining company, had been denied the exercise of its rights under the mining tenements it had been granted and that "there was an effective sterilisation of the rights constituting the property in question" (per Gummow J at 634). In this respect, a distinction was explicitly drawn between "sterilisation" and "mere impairment" where, for example, other uses were available (per Gummow J at 634).

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[5] The Northern Territory is the only one of the States and Territories Constitutions that contains a provision requiring compensation for acquisition of property or any lesser modification of any property right. However, all jurisdictions have legislation to this effect.

[6] (1983) 158 CLR 1 at 145-6.

[7] [1999] HCA 5 at [185].

[8] (1997) 190 CLR 513.

Despite the wide view of the term "property" in the cases, the High Court took the view in *Health Insurance Commission v Peverill*[9] that if the rights that are diminished or terminated are purely statutory entitlements, not based on antecedent common law rights in property, compensation will not be payable.

On this reasoning, in *Commonwealth v WMC Resources Pty Ltd*[10] there was found to be no acquisition where a Commonwealth law extinguished an exploration permit over part of the continental shelf between Australia and East Timor. This was distinguished from the position in *Newcrest* because the Commonwealth had no underlying common law interest in the shelf (as compared to *Newcrest* where the tenements were not just created by statute, but a modification to the Commonwealth's pre-existing common law title).

Similarly, in *Minister for Primary Industries v Davey*,[11] fishing units established under the (CTH) *Fisheries Act* 1952 were accepted as property rights, but as statutory entitlements were subject to the valid amendment of the relevant management plan under which they were issued. In this case, the making of amendments to the management plan that affected the rights to take fish under the fishing units was not an acquisition or other dealing with property according to the High Court. Instead, it was an exercise of powers inherent to the Commonwealth under the statute. Such statutorily based property rights are said, therefore, to be defeasible interests.

In summary, these cases, taken together, arguably signal a move by the High Court to find 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 "sterilised".

(ii) North American Free Trade Agreement and US domestic law

By contrast, the history in relation to provisions such as Article 11.7 (or 1110 under the North American Free Trade Agreement or NAFTA) has seen a blurring of the distinction between acquisition and mere regulation. For example, in *Metaldad v Mexico* (1997) the NAFTA tribunal awarded the US-based Metalclad corporation US$16.7 million in compensation after they were denied the right by Mexico to operate hazardous waste facility in a "special ecological zone". Furthermore, a Canadian corporation, Methane Corporation, is presently suing the US for $970 million after a ban by California and other states on the fuel additive MTBE. Similarly, in the current case of *Sun Belt Water v Canada*, a US corporation has sought US$10.5 billion from the Canadian Government for loss of expected profits following British Columbia's decision to ban the bulk export of water. This is despite the fact that the US corporation has never actually exported water from Canada.

These examples mirror the position under US constitutional and domestic law where the distinction between compensation for acquisition but not for regulation (or takings) has not

[9] (1993-94) 179 CLR 226.

[10] [1998] HCA 8.

[11] (1993) 119 ALR 108.

been preserved. The Fifth Amendment provides that private property shall not be ***taken*** for a public use, without just compensation. In *Tulare Lake Basin Water Storage District v United States*, a group of California water users averred that they were owed compensation under the Fifth Amendment Takings Clause when their water rights were abridged by the Federal Government. The Court ruled that they were owed compensation.[12]

(iii) The implications of dissolving the distinction

The ability to grant compensation in cases where a Government is using its regulatory powers has widespread implications in practice. **First**, compensation for restrictions on, or regulation of, the environment may create a climate whereby Governments are hesitant to regulate properly and effectively for fear of the financial repercussions. In the rare cases where regulation has given rise to compensation under Australian law (possible as there is no constitutional rule at a State level), this has been the experience.[13]

Furthermore, in the US case of *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency*[14] (which preceded *Tulare*) Justice Stevens echoed a concern about "reluctant regulation". His Honour noted that land use regulations are ubiquitous and most of them impact upon property values in some tangential way -- often in completely unanticipated ways. Treating them all as *per se* takings (restrictions requiring compensation) would transform government regulation into a luxury few governments could afford.

Second, adoption of the investment chapter in its current form may potentially involve the Australian Government and community in complex and costly litigation over what regulations require compensation. Again, this has occurred under domestic law in the USA with Court decisions made on an *ad hoc* basis amidst what would seem to be an increasingly acrimonious, divisive and ideologically-driven public debate.[15] The "rare circumstances" exception under Annexure 11-B 4(b) only adds to the uncertainty. If Australia goes down this path, the security and certainty sought under the Agreement may prove illusory.

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[12] See Parobek CS (2003) "Of Farmers' Takes and Fishes' Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide" 27 *Harvard Environmental Law Review* 177.

[13] In particular, South Australia and Victoria. See Bonyhady T (1992) "Property Rights" in Bonyhady T *Environmental Protection and Legal Change* Federation Press at p (South Australia) and Raff M (1998) "Environmental Obligations and the Western Liberal Property Concept" 22 *Melbourne University Law Review* 657 at p 659 (Victoria). For a concise overview of these issues see also Bates G (2002) *Environmental Law in Australia* Butterworths at pp 33-38.

[14] 2002 WL 654431 (US. 23 April 2002).

[15] See *Pennsylvania Central Transport Company v New York City* 438 U.S. 104. For a comprehensive bibliography in relation to the takings cases and debates see Dorsett MH (1999) *Shifting Terrains: Upsetting the Balance Between Public and Private in the Takings Debate* (Southwest Missouri State University, which can also be found at http://208.13.158.54/departments/plan/issue/linkpgs/takings.html generally and Parobek CS (2003) "Of Farmers' Takes and Fishes' Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide" 27 *Harvard Environmental Law Review* 177 in relation to water cases. For a sense of the complexities at work, see Raff M (1998) "Environmental Obligations and the Western Liberal Property Concept" 22 *Melbourne University Law Review* 657 at pp 681-683.

Third, as Professor Jan McDonald from Griffith University has observed, these different constitutional provisions and interpretations would have unconscionable and inequitable implications for Australia in practice. In effect, it would mean that an expropriation provision would allow for a US investor to claim for a regulatory expropriation (albeit only in "rare circumstances"), while an Australian company would be prevented from ever so doing under s 51(xxxi).

It is thus submitted that the "rare circumstances" exception under Annexure 11-B 4(b) needs to be deleted. The Agreement should clearly state that compensation is only payable on the nationalisation of property, a position in conformity with the Australian law regarding compensation for acquisition. This would ensure a degree of equity between the parties on this point.

4 Barriers to trade: the ambit of the Agreement

Water, water related services,[16] the regulation of genetically modified organisms (including labelling laws)[17] and quarantine standards. have not been excluded from the Agreement. This means that these areas could be challenged as barriers to trade if new regulations were sought to be imposed, being potentially a market access restriction (raising the compensation issues noted above).

These provisions thus have the potential to undermine the ability of all Australian Governments (Federal, State, Local) to regulate an array of environmental services. It is imperative that Australia maintains control over the management of its own natural resources and in accordance with an evidence-based regulatory framework, not one based on the fear of potential compensation claims.

5 Dispute Settlement Provisions

i) Institutional arrangements

The Agreement sets up a complex mosaic of institutional arrangements and dispute settlement provisions (Chapter 21). These cede enormous control over the ongoing direction and interpretation of the Agreement to trade law representatives from the party states, who sit on dispute settlement panels with powers to recommend that a party should pay compensation (including the amount) or have benefits suspended. The hearings may not necessarily be in public and there are no appeal provisions against their determinations. In effect, such provisions undercut the ability of Governments to regulate in the public interest.

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[16] Water related services that should be excluded from the Agreement include natural waterways (i.e. rivers and lakes); water collection, purification and distribution services and infrastructure; wastewater management, and recycling/reuse treatment to distribution services and infrastructure.

[17] As noted in Cebon M (2003) Australian US Free Trade Agreement: Environmental Impact Assessment at http://www.ozprospect.org/pubs/FTA.pdf.

ii) The Appropriate Forum

The Agreement has moved away from draft provisions for investor-state dispute settlement. This change is to be welcomed and amounts to an affirmation of the fact that "both countries have robust, developed legal systems for resolving disputes between foreign investors and government".[18]

However, once again, the Agreement does not *preclude* such means of settling disputes. Specifically, Article 16(1) of Chapter 11 allows that:

> If a Party 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.

The question as to what constitutes a "change in circumstances" is left undefined. The invocation of the trigger by a party would open the way for disputes to be heard by an international arbitration tribunal, with no guarantee of open hearings or avenues for appeal.

Should you have any queries, please do not hesitate to contact Jeff Smith, Director, NSW Environmental Defender's Office, on 02 9262 6989.

Yours sincerely
Environmental Defender's Office

Jeff Smith
Director
On behalf of ANEDO

[18] Investment Fact Sheet on the Department of Foreign Affairs and Trade website: see www.dfat.gov.au/trade/negotiations/us_fta/outcomes/index.html