Australian Conservation Foundation

11 June 2004

Supplementary Submission of the Australian Conservation Foundation to the Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America

Response to Question on Notice From Senator O'Brien

On 7 June 2004, during the appearance before this committee by Wayne Smith and Dr Peter Chirstoff on behalf of the Australian Conservation Foundation (ACF), Senator O'Brien invited ACF to respond to a question on notice. This question related to the observations of Senator Brandis concerning his interpretation of the meaning and effect of certain provisions within the environment chapter (ch.19) and their relationship to other provisions contained in the investment chapter (ch.11). More specifically Senator Brandis was of the view that two provisions contained in chapter 19, articles 19.1[1] and 19.2(2)[2] acted as "safeguards" which would ensure that the AUSFTA would not derogate from the existing environmental regulations in Australia and that in the event of any inconsistencies with other chapters (eg chapter 11) the environment protections would prevail.

With all due respects to Senator Brandis, the Senator has misinterpreted the relationship between chapters 19 and other AUSFTA chapters, particularly chapter 11. By operation of article 11.7 of chapter 11, should a government measure, such as an environmental law, directly or indirectly expropriate the investments of a U.S investor, the Australian government would be obliged to pay compensation to the investor. As outlined in our original submission at page 4, this article 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 and 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.

Article 11.2 of chapter 11 states that "in the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the

[1] Article 19.1- Recognizing the right of each Party to establish its own levels of environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies, 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.

[2] Article 19.2 (2)- The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws. Accordingly, 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 in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

inconsistency." The question then arises, (as was raised by Senator Brandis) is there an inconsistency between the compensation obligations of article 11.7 and the so called "safeguards" of chapter 19. The answer to this question is no. There are several reasons upon which ACF base this conclusion:

(1) Articles 19.1 and 19.2(2) are not legally enforceable obligations under the FTA. In the first instance, they contain non-prescriptive language such as the word "strive." In other words, the U.S and Australian governments must try hard to implement the spirit and intent of articles 19.1 and 19.2(2) but they are not obliged to do so. In the second instance, neither of the two articles is subject to the dispute settlement provisions contained in chapter 21 (see article 19.7(5)) even if it could be argued that they imposed some type of obligation. ***As a side note- the only provision contained in chapter 19 that is legally enforceable and subject to chapter 21 dispute settlement, is article 19.2(1)(a).***

(2) In contrast, the expropriation requirements contained in article 11.7 impose a legally enforceable obligation under the AUSFTA. It does not contain any non-prescriptive language and is subject to the dispute settlement provisions of chapter 21 (see article 11.16(2)).

(3) While trying to allay fears that article 11.7 will impede upon governments who may wish to legislate on environmental matters, Annex 11-B 4(b) of chapter 11 actually confirms that the expropriation obligations apply to environmental and public health regulations. It states that "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." Even if such circumstances are rare, ACF is concerned that they may involve some extremely important environmental laws or measures. What if, for example, the rare circumstances involved world heritage protection laws, such as those used to protect the Great Barrier Reef, Fraser Island or the Franklin River? What if they involved legislation to minimise Australia's greenhouse gas emissions or the damage done to the ozone layer? What if they involved measures to protect Australia's valuable water reserves? If future Australian governments are faced with the prospect of compensating U.S companies for indirect expropriation, even in these rare circumstances, it will be an unacceptable fetter on their capacity to legislate on matters that are critical to the environmental and social welfare of Australia.

Expropriation clauses have been one of the major sources of contention surrounding the implementation of free trade agreements both in Australia and around the world. It is for this reason that ACF believes that it is important for the committee and its members to fully understand the meaning of such clauses and the effect they may have on the ability of future Australian governments to legislate on environmental and social welfare matters.

We thank Senator O' Brien for the opportunity to respond to his question on notice and to clarify the relationship between the legally enforceable obligations of chapter 11 and the non-enforceable obligations of chapter 19 of the AUSFTA.