



June 17, 2004

Secretary  
Senate Select Committee on the Free Trade Agreement  
between Australia and the United States of America  
The Senate (Suite S1.30.1)  
Parliament House  
Canberra ACT 2600  
AUSTRALIA

By Fax: 61 2 6277 3830

**Re: Australia- U.S. Free Trade Agreement (AUSFTA)**

Dear Secretary:

We have been informed by the Australian Conservation Foundation (ACF) that on June 7<sup>th</sup>, 2004, while presenting their evidence to the Senate Select Committee investigating the AUSFTA, the Committee's Chair was interested in knowing what concerns the Sierra Club had with respect to the FTA and whether it shared the concerns raised by ACF. We are pleased to have the opportunity to share our concerns with you.

Founded in 1892, and now with close to 750,000 members, the Sierra Club is the oldest and largest grassroots environmental organization in the U.S. We support a global trading system that strengthens, not weakens, environmental safeguards, workers' rights and democratic values.

From December 2003 to May 2004, the U.S. Trade Representative completed bilateral and regional negotiations for FTAs with no less than nine countries, Australia included, and commenced FTA negotiations with an additional five countries. Despite this cascade of trade deals, the Sierra Club and other U.S. non-governmental organizations (NGOs) have been actively engaged in the AUSFTA and share many of the concerns raised by ACF in its AUSFTA submission. On November 26<sup>th</sup>, 2003, Sierra Club was one of six U.S. NGOs that wrote an open letter to the Australian Parliament expressing concern that AUSFTA may undermine environmental protection initiatives within Australian and U.S. jurisdictions.

Now that the final text to AUSFTA has been publicly released, it is clear that our primary concern with the FTA still remains: AUSFTA threatens to undermine environmental protection initiatives within Australia and the U.S. In the rush to establish trade agreements that liberalize the rules of cross border trade and investment, it is inexcusable to enter into such agreements at the expense of our environmental safeguards and other

important social policy initiatives. For this and other reasons outlined below, the Sierra Club is opposed to the implementation of this agreement in its current form.

### *Investment Chapter*

Despite the exclusion of an investor-state clause, many negative components of NAFTA's investment chapter appear to have been incorporated into AUSFTA. Of particular concern is the inclusion of a "NAFTA style" expropriation clause (article 11.7). This article obliges the Australian and U.S. governments to pay compensation to foreign investors if their laws (including environmental, human rights and labor laws) expropriate their investments, either directly or indirectly, through measures equivalent to expropriation.

We believe this clause will leave the door open for an extremely wide definition of expropriation to be adopted, one which requires compensation to be paid to foreign investors when government actions "significantly interfere" with the use of property. This is in addition to the more conventional notion of expropriation that involves the taking of property.

An expropriation clause of this nature, in our view, would be contrary to long standing legal principles enshrined in U.S. and Australian law which have permitted our respective governments to regulate the use of land for environmental protection purposes without a legal requirement to pay compensation. In so doing, it will provide foreign investors with greater legal rights than those currently enjoyed by U.S. and Australian investors under their respective domestic legal systems and limit the ability of Australian and U.S. governments to legislate environmental matters in the future.

It is a positive sign that the AUSFTA does not include an investor state dispute settlement mechanism. Such a mechanism appears in the North American Free Trade Agreement (NAFTA) and many other FTAs negotiated by the U.S. government. While we recognize that limited changes have been made to the expropriation standards we believe that this is far from ensuring that environmental and public health standards would not be undermined.

Since the commencement of NAFTA, foreign investors have utilized the investor-state dispute settlement mechanism contained in Chapter 11 to challenge the environmental laws and social policies of the U.S., Canadian and Mexican governments. These cases have involved claims for as much as a billion dollars in compensation. The Sierra Club does not support the inclusion of investor-state clauses within any FTA, whether it is between so called 'developed' countries or involves countries with developing economies. The resolution of disputes should remain between the parties to the trade agreement, the signatory states, and not non-party private investors.

### *Services Chapter*

The new rules on "trade in services" contained in AUSFTA could also force our respective governments to weaken environmental standards for risky industries, such as logging, off-shore oil and gas extraction, mining, water supply, energy and more. Of particular concern is the new FTA requirement that Australian and U.S. domestic regulations must not be more burdensome than necessary to ensure the quality of the service. For example, to comply with NAFTA's rules on trade in services, the Bush administration recently ignored U.S. clean air standards in order to allow trucks based in Mexico to haul freight on US highways. This could increase air pollution in the U.S. as the aging Mexican truck fleet pollutes more than similar U.S. trucks, and are not required to adhere to our stricter emission standards.

### *Environmental Review*

We are disappointed to learn that the Australian government has not yet undertaken an environmental review of the AUSFTA and has no intention of doing so. This stands in contrast to the legislative environmental review process into the FTA currently underway in the U.S., which was commenced in March of last year.

Without an environmental review, citizens of Australia will not be in a position to assess the environmental impacts arising from this trade agreement. Accordingly, the issues surrounding the impact AUSFTA's investment and services chapter will have on environmental regulations in Australia will remain unassessed. Nor will other potential environmental impacts arising from the FTA, such as those associated with the projected increase in agricultural production (e.g. land clearing and water use) and the projected increases in greenhouse gases.

### *Environmental Chapter*

In the *Trade Act of 2002*, the U.S. Congress made the environment a principal negotiating objective for trade agreements. However, while the AUSFTA includes an environment chapter, most of the articles in this chapter remain vague and unenforceable. The chapter also includes a troubling article (article 19.4) which appears to encourage the Parties to use voluntary measures, as opposed to regulatory instruments, to achieve and maintain high levels of environmental protection. We believe that voluntary measures are not a viable substitute for environmental regulation.

We thank the Members of the Committee for requesting the view of the Sierra Club on these important matters.

Sincerely,



Stephen L. Mills  
Director, International Programs