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Australian Fair Trade
& Investment Network Ltd

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1. Free trade clause would be a dangerous weakening of the law

Don Henry, Executive Director, Australian Conservation Foundation.
Sydney Morning Herald October 27 2003

Flash forward to the future. It is 2006. A US waste management company is operating a waste treatment plant on the outskirts of Sydney. Nearby residents begin to complain of severe headaches and other strange illnesses. Investigations soon trace the cause to toxins treated at the plant. The NSW Environment Protection Authority immediately shuts the plant. All states ban the treatment of the toxins that were processed at the US plant.

The Australian public is relieved but the US company is less than impressed. Based on a free-trade agreement (FTA) signed by the US and Australian governments two years before, the US company sues the Australian government for \$US300 million in compensation for potential lost earnings.

Rather than have the case heard in a drawn-out court hearing in Australia, the company chooses to take the dispute to a special international tribunal which deals with FTA investment disputes. After a brief, secret hearing, the tribunal decides in favour of the US company. It finds the Australian government is in breach of obligations under the FTA that require it to pay compensation to US investors if their profits are affected by government laws. The compensation award, \$US70 million, is not quite as much as it had wanted but it is sizeable. The Australian government is shocked but there is little it can do because the tribunal's decision is binding and there is no mechanism for appeal.

Sound far-fetched? Australia is negotiating an FTA with the US which could result in such a scenario. Early indications from the secret trade negotiations suggest the Australia-US FTA is set to include an investment chapter based on the infamous Chapter 11 of the North American Free Trade Agreement (NAFTA). An Australian US FTA incorporating a NAFTA style investment chapter will provide US corporations with unprecedented rights to seek millions, or possibly billions, of dollars in compensation should Australian laws breach FTA rules protecting their investments.

Ordinarily, only government parties to an international agreement have the right to enforce the agreement, but US corporations may soon have the right to sue Australian governments directly. US corporations are not afraid of using these new rights to protect their investments, particularly from laws designed to protect the environment and public health. For example, in 1997, the Canadian Government imposed a ban on the import and interstate transport of MMT, a fuel additive containing manganese. The ban was imposed because of public health concerns. Ethyl Corporation, a US chemical company which produces MMT, sued the Canadian Government, arguing the ban was an expropriation of its investments and was therefore illegal under NAFTA. The claim was for \$US251 million in compensation. The Government eventually settled the case by reversing its ban on MMT and paying \$US13 million in legal fees and compensation to Ethyl Corporation.

It is highly likely the Australian-US FTA will include an investment chapter that would permit US companies to bring similar legal actions against the Australian Government. The US Government is pushing for the inclusion of a NAFTA style investment chapter, and the Australian Government has quietly slipped a similar investment chapter into the recently signed Australian Singapore FTA.

These new rights for US corporations go far beyond those enjoyed by Australians. In most cases, Australian law recognises the right to compensation only when property is taken by government. The FTA will extend the right to compensation for US companies when an Australian law seeks merely to regulate the use of property. This is a dramatic departure from a legal principle that was designed to protect private property interests from unjust government acquisitions, while also balancing the need of Australian governments to freely regulate the use of property in the public interest. The FTA rules threaten this balance.

Also of concern is the fact that Australian courts are not likely to be the forum in which the FTA compensation claims are heard. Instead, disputes would probably be heard by an international arbitration tribunal. Under international trade arbitration rules judges are appointed by the parties, with huge potential for bias. The hearings are often closed to the public and there is no mechanism for appeal. This is hardly the kind of decision-making body that should be granted the power to override matters of Australian public policy and make compensation awards for millions of dollars of taxpayers' money.

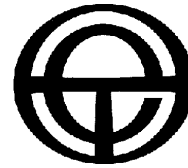
Fortunately, the FTA with the US has not been finalised. The Australian Government still has the opportunity to say no to an NAFTA style investment chapter being included.

2. Letter to Trade Minister from environmental organisations regarding USFTA

The following letter has been sent to the Trade Minister from the environmental groups listed below.



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GIF decompressor
are needed to see this pic



TOTAL ENVIRONMENT CENTRE

Thursday 9th October 2003

Mark Vaile, Federal Minister for Trade
Australian Parliament House
Canberra ACT 2600

Cc John Anderson, Deputy Prime Minister
Bob Carr, NSW Premier
Craig Knowles, Minister for Infrastructure, Planning and Natural Resources

Dear Minister

NECESSARY EXCLUSION OF WATER & WATER-RELATED SERVICES FROM THE AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT

The undersigned environment groups wish to express their grave concern that neither drinking water nor water-related services and infrastructure have been specifically excluded from negotiations for the Australia-US Free Trade Agreement ('the AUSFTA').

Water-related services that should be excluded from the AUSFTA include water 'in its natural state' (ie rivers and lakes); water collection, purification and distribution services and infrastructure; waste water management; and recycling/ re-use treatment and distribution services and infrastructure.

As you know, the AUSFTA uses a negative list system. That is, unless particular sectors are explicitly excluded from the agreement, they will be subject to its provisions. Even services normally provided by government will fall under the terms of the AUSFTA if in some regions they are provided on a commercial basis or in competition with public service providers.

In Australia, water is supplied on a partially commercial basis by many states, and accordingly, unless it is explicitly excluded from the AUSFTA it is likely to be subject to the services and investment provisions of the AUSFTA.

In order to be certain that the AUSFTA's trade and investment provisions will not apply to water and water-related services, we therefore require their explicit exclusion from the AUSFTA negotiations.

Should water not be explicitly excluded from the AUSFTA, the trade and investment provisions will undermine the ability of all levels of Australian government to regulate water access licenses and distribution services. The AUSFTA will effectively 'freeze' levels of regulation in sectors that are not excluded. Further, public regulation and provision of water services could be challenged as barriers to trade. This would evidently threaten Australia's ability to manage its scarce water resources, and jeopardise the success of the National Water Initiative (whose negotiations will be concluded after the signing of the AUSFTA).

Under the North American Free Trade Agreement, the US corporation Sun Belt Inc. has brought an action against the Canadian government seeking US\$10.5 billion for loss of expected profits following British Columbia's decision to ban the bulk export of water. Even though Sun Belt has never actually exported water from Canada, it claims that the ban has reduced its future profits. It is imperative that we do not expose Australian water regulators and service providers to this kind of financial uncertainty.

Australian governments must maintain the prerogative to manage our precious water resources within a national water regulatory framework that improves the security of water access entitlements and delivers environmental flows to our over-allocated inland river systems.

We therefore urge you to explicitly exclude water and all related services and infrastructure from the AUSFTA. Please advise us what action you will take to ensure this result. Please direct correspondence to Georgia Miller, Environment Liaison Officer, 9279 2466, elo@nccnsw.org.au, Level 5, 362 Kent St Sydney NSW 2000.

Yours sincerely,

Brooke Flanagan
Executive Officer for Nature Conservation Council NSW, on behalf of:

Nature Conservation Council NSW
Australian Conservation Foundation (Australia)
Greenpeace (Australia Pacific)
The Wilderness Society (Australia)
Total Environment Centre
National Parks Association

3. Environmental study predicts link between USFTA and greater water use

A report released yesterday by OzProspect investigates environmental impacts of the USFTA. It is called "An Environmental Impact Assessment (EIA) of the US Free Trade Agreement" and is available at <http://www.OzProspect.org>

4. US Free Trade Agreement Teach In: Sydney 5 November

ATTAC, The Greens, The Media Entertainment and Arts Alliance (MEAA) and AFTINET are holding a teach in on the USFTA.

When: 6 to 9pm, Wednesday 5 November

Where: Newtown Neighbourhood Centre, King St. Newtown, Opposite Newtown Station

Come along to hear about the threat this agreement poses to democracy, services, culture and the environment, and be part of the campaign opposing it.