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Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600,

By email: fadt.sen@aph.gov.au

Dear Committee Members,

Inquiry into the Commonwealth's treaty-making process

Thank you for your letter inviting us to make a submission to your Inquiry into the Commonwealth's treaty-making process (**the Inquiry**).ⁱ The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) is a network of community legal centres specialising in public interest environmental law. We have 30 years' experience advising Australian communities on using the law to protect the environment, including advice, casework, education and law reform.

In summary, ANEDO believes that the current process of reviewing treaties (including reservations), potential impacts and environmental considerations should be strengthened. We support a framework to ensure that treaty negotiation, approval and review processes:

- properly consider the public interest in environmental protection and compatibility of obligations, consistent with ecologically sustainable development (**ESD**) and its principles;ⁱⁱ and
- require best practice transparency and community participation in decisions that affect the environment, whether at the local, regional, national or international level.

To achieve these aims, this submission outlines options to improve environmental review and community engagement in Australia's treaty-making processes. In particular, it proposes four additional and complementary processes:

- 1) Treaties and related actions should be accompanied by Environmental Impact Statements (EIS) that are early, iterative and meaningful;**
- 2) A Statement of Environmental Compatibility should be adopted, to ensure Australia upholds its environmental obligations;**
- 3) A National Environment Commissioner should provide advice on relevant treaties;**
- 4) Greater openness, public engagement and clearer treaty-making processes are needed.**

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These recommendations, particularly around EIS and public engagement, also apply to environmental treaty reservations made by Australia.ⁱⁱⁱ Our recommendations broadly respond to Inquiry terms of reference (**TORs**) (e) to (h).^{iv} We have not addressed TOR (j) on fair trade principles and environmental standards, but would be happy to contribute further to this process in future.

Treaty making, the environment and competing national interests

Australia is involved in a wide range of bilateral and multilateral treaty-making. These treaties can have a significant influence on people's wellbeing, livelihoods, communities and environment in Australia and beyond. Public and parliamentary scrutiny is important to ensuring that treaty development and deliberations properly consider, protect and balance Australia's diverse national interests.

ANEDO notes that the power to enter into treaties is held by the Executive in Government.^v We also note the Australian Parliament's current treaty review processes, which arose from reforms in 1996. These processes include tabling treaties for 15 sitting days with the Joint Standing Committee on Treaties' (**JSCOT**); inclusion of a National Interest Analysis (**NIA**); and the JSCOT's treaty review role, including public submissions and oral hearings.^{vi} The post-1996 processes have been variously described as 'working well' with room for 'further improvement';^{vii} to perpetuating a 'democratic deficit' due to limited practical influence.^{viii}

In our view, treaty-making processes can and should provide a forum for citizens, experts and parliamentarians to articulate, influence and discuss what is meant by *the national interest*, including where there are competing interests at play, such as the nexus between trade and the environment. To be meaningful, this input must occur early and iteratively; be supported by balanced and adequate information; and be properly taken into account by the Executive (i.e. during negotiations, before treaty terms and reservations are finalised, before binding treaty action is taken, and before treaties are implemented in legislation).

Australia is a party to a large number of international environmental treaties, particularly United Nations conventions.^{ix} These and further international agreements will need to address emerging challenges and to create opportunities for achieving ESD. As the inaugural report of the National Sustainability Council notes: 'A sustainable future requires not only gains in efficiency but also the integration of environmental considerations into business and public policy decision making.'^x

In recent years, Australia has devoted considerable focus and resources to negotiating free trade or economic partnership agreements. For example, this includes bilateral agreements with the US (**AUSFTA**), Korea (**KAFTA**), Japan and China. It also includes multilateral and plurilateral agreements including via the World Trade Organisation, Asia Pacific Economic Cooperation and the proposed Trans-Pacific Partnership Agreement (**TPPA**) discussed further below. The proliferation of agreements raises questions as to how treaties can help or hinder environmental protection for present and future generations.^{xi}

Under current review processes, a NIA is laid before Parliament alongside the treaty. Broadly the NIA is to set out the reasons why Australia should enter into the treaty, including advantages and disadvantages, and 'the foreseeable economic, environmental, social and cultural effects of a treaty action'.^{xii} We could not find a more specific explanation or guidance as to how environmental impacts are considered. Our brief review of several NIAs indicates that environmental information is minimal and general.^{xiii} At times this contrasts with extensive trade and industry analysis and consultation outlined in NIAs. This suggests a need for more specific and consistent procedures to assess environmental impacts, compatibility with existing treaty obligations, and ways to best achieve multiple objectives.

Strengthening treaty-making to promote ecologically sustainable development

1) Treaties and related actions should be subject to early and meaningful Environmental Impact Statement (EIS)

Environmental Impact Assessment (**EIA**) is a well-established way of estimating, avoiding and mitigating the harmful environmental consequences of a policy, program or activity. The results of an EIA are set out in an Environmental Impact Statement (**EIS**). ANEDO considers that a formal, substantive EIS procedure would significantly improve the Government's treaty-making, reservation and Parliament's review processes. It would also provide a point of reference to aid post-implementation reviews.

To be effective, the EIS procedure would need to:

- occur early enough in the process to influence Executive treaty-making negotiations;
- be detailed enough, and iterative, to evaluate immediate and long-term implications;
- consider whether and how Australia's participation in the treaty is consistent with promoting ESD and applying ESD principles;^{xiv}
- consider compatibility with existing or proposed environmental protection obligations (domestic and international), and consider measures to avoid or mitigate conflicts (see below);
- include interdepartmental and public consultation on impacts and alternative options;
- exclude treaty actions where they will clearly have no adverse environmental effects.

Australia's national environmental law sets out an EIS process for specified public and private sector activities that have significant impacts on listed 'matters of national environmental significance' (such as threatened species and world heritage areas).^{xv} The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) requires these 'controlled actions' to be referred to the federal Environment Minister for assessment and approval. The Act also requires agencies to report annually on how their operations promote ESD and its principles.^{xvi} However, treaties are not usually referred under the EPBC Act, and EIS procedures for treaty-making and review need not necessarily be included in the EPBC Act. The Act simply demonstrates an existing model from which relevant law or guidelines could be developed to systematically address environmental impacts of treaties.

The US provides another analogous model that the Committee may find useful. The *National Environmental Policy Act 1969* (US) (**NEPA**) requires an EIS on the short and long-term consequences of major federal actions and legislation that may significantly affect the environment. The EIS must comply with Council on Environmental Quality Regulations (**CEQ Regulations**). While NEPA only applies to government actions, it also requires consideration of the *cumulative impacts* of past, present and planned future actions (regardless of who undertakes those actions). Furthermore, 'involving the public is a principal component of the NEPA process', including notification and proactively seeking comment.^{xvii}

We understand the NEPA itself may not automatically extend to international treaty-making. Nevertheless, an Executive Order specifies similar EIS requirements to aid decision-making on major foreign policy actions.^{xviii} This approach may require inter-agency notification, exchange of environmental information, international cooperation, different scales of EIS ('generic, program or specific'), cooperative environmental studies, reviews and similar analyses.^{xix} These requirements are now reflected in internal policies of the Departments of State, Energy and Defence.^{xx} If legislation or US Government actions overseas may have significant environmental effects, the final EIS is to accompany other documentation given to

the Senate for advice and consent. Implementing legislation must also be informed by an EIS compliant with CEQ Regulations.^{xxi} The US also undertakes extensive public hearings on the environmental implications of treaties – an initiative that should be embraced by Australia.^{xxii}

Both the EPBC Act and the US NEPA and CEQ Regulations could be drawn on and adapted to Australia's treaty-making context. The US approach reflects the separation of powers in the US Constitution, under which the Senate provides a significant check on the President's treaty-making powers.^{xxiii} While Australia's situation is different, additional EIS procedures that consider the effect of treaties would provide valuable advice to Government negotiators and decision-makers, as well as transparent information to the Parliament and community.

Recommendation 1: Australia's treaty-making, reservation and review processes should adopt a formal Environmental Impact Statement (EIS) procedure. To inform decision-making, this should occur at the earliest possible stage; consider short-term, long-term and cumulative effects; be iterative; and involve public input and parliamentary scrutiny.

2) Adopt a Statement of Environmental Compatibility (informed by the EIS)

As a logical progression of the EIS procedure, Australia's treaty-making processes could adopt a 'statement of environmental compatibility'. This is analogous to existing compatibility statements on human rights.^{xxiv} Statements of environmental compatibility would refer to how the treaty will be compatible with key environmental treaty obligations and principles of ESD.

Under this framework, EIS documentation and the statement of environmental compatibility could accompany the NIA during treaty tabling, to inform the JSCOT review. The JSCOT and interested community members could then evaluate and interrogate these documents, and request further information or advice where appropriate. The EIS and compatibility statement should later be updated for bills or instruments proposed to implement the treaty.

Recommendation 2: A 'statement of environmental compatibility' should accompany treaty-making proposals laid before Parliament, alongside the National Interest Analysis, iterative EIS documentation and implementing legislation. The statement should be informed by the EIS procedure, environmental treaties and ESD outcomes.

3) A National Environment Commissioner should advise on treaty-making

Additional oversight by an independent National Environment Commissioner would improve data quality, decision-making and public confidence in Australia's environmental laws and procedures for entry into international treaties.

In 2009, the *Independent review of the EPBC Act (Hawke Review)*^{xxv} recommended the establishment of a National Environment Commission. Canvassing various options, the Commission was to play a strategic, arms-length role that encompassed advice, review and oversight of decisions affecting Australia's environment. In 2013 the Senate Environment and Communications Committee reiterated the call for this independent Commission.^{xxvi}

ANEDO strongly supports the establishment of a National Environment Commission, one or more statutory commissioners and an independent staff or departmental secretariat. The Commission could:

- report directly to Parliament on treaty-making processes that affect the environment;
- oversee national and international environmental performance and compliance; and

- conduct environmental performance audits and review environmental outcomes.

New Zealand's Parliamentary Commissioner for the Environment (**PCE**) provides a starting point for an independent statutory body.^{xxvii} However, to date we are not aware of any consideration by the PCE of New Zealand's treaty-making processes – nor indeed anything preventing this. The new Commission would be different to (broader than) Australia's National Environment Protection Council, which consists of federal, state and territory environment ministers.^{xxviii} It would also differ to the US Council on Environmental Quality, which oversees NEPA and develops, evaluates and researches US environmental policy.^{xxix}

Recommendation 3: A National Environmental Commissioner should advise the Parliament and Government on the environmental effects of treaties and the adequacy of assessments. This could include review of National Interest Analyses, Environmental Impact Statements and Statements of Environmental Compatibility.

4) Greater openness, public engagement and clearer processes for treaty-making

The Inquiry has been asked to consider, under TOR (h), 'the current processes for public and stakeholder consultation and opportunities for greater openness, transparency and accountability in negotiating treaties'.

Since the 1996 treaty-making reforms there have been significant efforts to improve transparency and open government in Australia. This includes a 2008 'Declaration of Open Government'.^{xxx} The extent to which open government has infused the treaty-making arena is unclear. Nevertheless, ANEDO agrees that a proactive 'culture of engagement', additional scrutiny and better public access to information 'will enhance the processes of government and improve the outcomes sought'.^{xxxi}

We note that Australia's treaty-making processes, including the 15 sitting-day tabling period, are administrative rather than legislative. These processes could be made clearer and more certain by setting out procedures, criteria and timeframes for treaty-making, consultation and review in legislation. Legislation was envisaged for the 1996 reforms, but this did not occur.^{xxxii} By contrast, the UK has recently enacted parliamentary scrutiny of treaties in legislation.^{xxxiii}

We make three further points on earlier timing and clearer timeframes for scrutiny of treaties:

- First, the Committee should consider how to resolve the criticism that JSCOT reviews occur too late to influence the content of treaty negotiations and decision-making. For example, the JSCOT made 23 recommendations on the AUSFTA. However, as the terms of agreement had already been settled by the Australian and US Governments, it has been argued that the recommendations were 'effectively futile'.^{xxxiv}
- Second, our brief survey of the UK, Canada, New Zealand found similar parliamentary review and advisory processes. Notably though, the UK and Canada require a longer, 21 sitting-day tabling period, compared with 15 sitting-days in Australia and NZ.^{xxxv}
- Third, while NZ requires the Government to respond to parliamentary recommendations within 90 days, Australia has no fixed timeframe.^{xxxvi} This diminishes the clarity, certainty and accountability of treaty reviews.

The Committee should specifically consider how greater openness, accountability and more consultative processes on *trade-related treaties* can be adopted, given their recent proliferation. Although they are aimed at favourable international trade conditions (such as

lower tariffs for Australian exports), trade agreements have often been the cause of legitimate public concern and debate. For example, environmental and other public policy concerns continue to be raised about Investor-State Dispute Settlement (**ISDS**) provisions, including in the context of ongoing TPPA negotiations. These provisions provide new ways for corporations to directly sue local, state and federal governments in private forums, instead of relying on more conventional state-to-state dispute resolution.

We briefly note four concerns about ISDS relating to environment protection and public participation:

- First, notwithstanding assurances of ‘appropriate protections’,^{xxxvii} ISDS proceedings may seek (and have sought) to invalidate government policy measures aimed at improving environmental standards and protections.^{xxxviii}
- Second, while government policy measures may be defensible, the threat of lengthy and expensive ISDS disputes is no less real. This may have a ‘chilling effect’ on future government policies to improve environmental standards or address emerging public policy challenges.
- Third, evidence suggests that the number and cost of ISDS disputes has increased rapidly.^{xxxix} Rulings and settlements often involve multi-million dollar transfers from developing country governments to multinational corporations. This raises questions of intragenerational and intergenerational equity.
- Finally, ISDS cases are often conducted in private, so the outcomes of disputes and even the parties involved may not be publicised or scrutinised. This can erode transparency, accountability and public confidence in the legitimacy of international trade agreements.

Overall, the complex issues surrounding ISDS provisions demonstrate the need for greater transparency, scrutiny and public debate of the environmental and other consequences of treaty-making provisions.

Recommendation 4: Improve the openness, accountability and consultation opportunities in treaty-making, reservation and review processes, by:

- **fostering a proactive government culture of engagement earlier in the process;**
- **setting out scrutiny procedures, criteria, exceptions and timeframes for consultation and review in legislation;**
- **reviewing the adequacy of current timing and minimum periods for parliamentary review, and setting clear timeframes for government responses; and**
- **engaging transparently with public concerns about trade treaties (such as ISDS).**

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Yours sincerely,

Australian Network of EDOS



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ⁱ Inquiry details at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process.

ⁱⁱ ESD means: 'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.' See further COAG, *National Strategy for ESD* (1992); and *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), ss 3-3A.

ⁱⁱⁱ For example, at the time of writing Australia has proposed a reservation to the Convention on Migratory Species to exclude Australia from obligations in relation to five newly-listed shark species with 'unfavourable conservation status'. See: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/10_February_2015. The national interest analysis noted consultations and existing fishery management but did not include an EIS.

^{iv} In summary these Inquiry TORs relate to:

(e) including additional measures, such as EIS, in national interest analyses (**NIA**);

(f) independent assessment of treaties before they are ratified;

(g) post-implementation reviews; and

(h) consultation opportunities and greater openness and accountability in the negotiation phase.

^v In accordance with s. 61 of the Australian Constitution. See further: <http://www.dfat.gov.au/international-relations/treaties/treaty-making-process/pages/treaty-making-process.aspx>.

^{vi} See: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee.

^{vii} Commonwealth of Australia, *Review of the Treaty-Making Process* (August 1999), 'Executive summary'.

^{viii} M. Chiam, 'Evaluating Australia's Treaty-making process' (2004) 15 *Public Law Review* 265, 265-269.

^{ix} See for example: <http://www.dfat.gov.au/international-relations/themes/environment-sea-law/Pages/environment-and-sea-law.aspx>.

^x Australian Government, *Sustainable Australia Report 2013*, p 83:

<http://www.environment.gov.au/sustainability/publications/sustainable-australia-report-2013-conversations-future>.

^{xi} See for example J Mathews, 'Trans-Pacific Partnership threatens a green trade deal' (2013) *The Conversation*.

^{xii} *Australia International Treaty Making Information Kit*, www.austlii.edu.au/au/other/dfat/reports/infokit.html.

^{xiii} For example, the KAFTA NIA only mentions the environment four times in the short 14-page assessment.

^{xiv} For example, does the treaty require the integration of environmental, social, economic and equitable factors in decision-making, precautionary measures against serious environmental harm, protection of biodiversity, consideration of equity within and between generations, and the proper valuation of environmental costs and benefits of goods, services and activities? See also Australian Government, *Criteria for Determining ESD Relevance*, June 2003 (updated 2013).

^{xv} See for example, *EPBC Act 1999* (Cth), s 28 on approval of federal agencies' activities with significant impacts.

^{xvi} *EPBC Act 1999* (Cth), s. 516A(6).

^{xvii} J. T. Ensminger, L. N. McCold, J. W. Webb, 'Environmental Impact Assessment Under the National Environmental Policy Act and the Protocol on Environmental Protection to the Antarctic Treaty', *Environmental Management*, Vol. 24, No. 1, pp 13–23, at 20-21; Council on Environmental Quality Regulations, s. 1506.6.

^{xviii} *Ibid*.

^{xix} See US Executive Order 12114, 'Environmental effects abroad of major Federal actions', 1979,

<<http://www.archives.gov/federal-register/codification/executive-order/12114.html>>:

^{xx} See for example, US Code of Federal Regulations, Title 22, Vol. 1, s. 161.5,

<http://www.state.gov/documents/organization/22979.doc>.

^{xxi} Council on Environmental Quality Regulations, s. 1506.8, <https://ceq.doe.gov/nepa/regs/ceq/1506.htm>.

^{xxii} See for example, 'Environmental implications of NAFTA', Committee on Merchant Marine and Fisheries, US House of Rep, 103d Cong., 1st Sess. 10 Nov 1993 at http://archive.org/stream/environmentalimp00unit/environmentalimp00unit_djvu.txt.

^{xxiii} Advice, consent and two-thirds majority ratification: United States Constitution, Article II, section 2, clause 2.

^{xxiv} The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires that Members of Parliament proposing bills, and rule-makers proposing legislative instruments, prepare a statement of compatibility to validate a bill's compliance with various human rights treaties (see ss. 3, 8 and 9).

^{xxv} A. Hawke et al., *Report of the Independent review of the EPBC Act 1999*, Oct. 2009, recommendation 71.

^{xxvi} Senate Environment and Communications Committee, *Report of Inquiry into the EPBC Amendment (Retaining Federal Approval Powers) Bill 2012* (March 2013), recommendation 4. The Productivity Commission has proposed comparable environmental governance reforms in its report on *Major project development assessment processes* (September 2013), pp 166-168.

^{xxvii} Established under the *Environment Act 1986* (New Zealand). See: <http://www.pce.parliament.nz/>.

^{xxviii} NEPC's role is to develop and evaluate National Environment Protection Measures for a range of pollution.

^{xxix} See <http://www.epa.gov/compliance/basics/nepa.html>; and Title II, s. 204 of the NEPA 1969 (US).

^{xxx} Australian Government, *Declaration of Open Government* (2008). See <http://www.finance.gov.au/e-government/strategy-and-governance/gov2/declaration-of-open-government.html>.

^{xxxi} *Ibid*.

^{xxxii} See for example, *Government Response To The Senate Legal And Constitutional References Committee Report "Trick Or Treaty? Commonwealth Power To Make And Implement Treaties"*, 'Introduction', at <http://www.austlii.edu.au/au/other/dfat/reports/infokit.html>.

^{xxxiii} *Constitutional Reform and Governance Act 2010* (UK), Part 2. See further A. Thorp, *Parliament's new statutory role in ratifying treaties* (2011), at www.parliament.uk/briefing-papers/sn05855.pdf.

^{xxxiv} M. Chiam, 'Evaluating Australia's Treaty-making process' (2004) 15 *Public Law Review* 265, 267.

^{xxxv} See, for example, UK www.parliament.uk/briefing-papers/sn05855.pdf; Canada <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2008-45-e.htm>; and NZ <http://mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/index.php>.

^{xxxvi} <http://mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/index.php>; cf Chiam (2004) 268.

^{xxxvii} For example, the KAFTA NIA notes in very brief terms:
KAFTA includes an investor-state dispute settlement mechanism [in the Investment Chapter (Chapter 11)] with appropriate protections in areas such as public welfare, health, culture, environment and foreign investment screening.

^{xxxviii} In *Vattenfall I v Germany*, €1.4 billion claims forced the City of Hamburg to drop environmental standards for a foreign owned coal-fired power plant on the Elbe River (see: <http://www.foeeurope.org/isds>). In *Ethyl v Canada*, a US corporation forced Canada to reverse a ban on toxic chemicals and pay a \$13 million settlement (see: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ethyl-08.pdf>).

^{xxxix} 2012 saw the highest number of new ISDS cases (58). A further 57 cases commenced in 2013. This brings the total number of known ISDS cases to 568. Two-thirds have been brought against developing or transitional countries. See UNCTAD, *Recent developments in Investor-State Dispute Settlement (ISDS)*, 2013 and 2014, at <http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx>.