

INTERIM ENVIRONMENTAL REVIEW OF THE U.S.- AUSTRALIA FREE TRADE AGREEMENT December 2003

Executive Summary

Pursuant to authority delegated by the President in Executive Order 13277 (November 19, 2002), the United States Trade Representative (USTR) submits this Interim Environmental Review of the prospective U.S.-Australia Free Trade Agreement (FTA), as provided for under section 2102(c)(4) of the Trade Act of 2002 (Trade Act).

On October 1, 2002, in accordance with section 2104(a) of the Trade Act, U.S. Trade Representative Robert B. Zoellick notified the Congress of the President's intent to enter into negotiations for a free trade agreement (FTA) with Australia. The negotiations are scheduled to conclude by early 2004.

Following the guidelines for environmental reviews (65 Fed. Reg. 79,442), this Interim Review identifies possible environmental effects that may be associated with the FTA. In identifying the possible environmental effects, the Administration drew on public comments submitted in response to a notice in the *Federal Register* (68 Fed. Reg. 12149), and supplemented public advice on scope by seeking the advice of all agencies with relevant expertise. In preparing this Interim Review, the Administration relied on the expertise of these agencies as well as a variety of other sources of information, including published reports.

This interim review provides provisional conclusions and identifies areas for further attention in the course of the ongoing negotiations and in the review of the final agreement. The Administration welcomes public comment on these preliminary conclusions:

- Based on existing patterns of trade and changes likely to result from provisions of the FTA, the impact of the FTA on total U.S. production through changes in U.S. exports appears likely to be small. As a result, the FTA is not expected to have significant direct effects on the U.S. environment.
- Based on an analysis of comparable provisions of previous FTAs, the FTA is not expected to have a negative impact on the ability of U.S. government authorities to enforce or maintain U.S. environmental laws or regulations.
- The FTA is not expected to lead to significant transboundary environmental effects.

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| | Exe | cutive Summary | <i>i</i> |
|------|-----------------------------------|--|----------|
| I. | Legal and Policy Framework | | 1 |
| | A. | The Trade Act of 2002 | |
| | В. | Environmental Review Process | 2 |
| II. | Bac | kground | 3 |
| | A. | U.S Australia Trade | 3 |
| | B. | U.S. Objectives in the Proposed Free Trade Agreement | |
| III. | Scope of the Environmental Review | | 9 |
| | A. | Public and Advisory Committee Outreach and Comments | 9 |
| | В. | Potential Economically-driven Environmental Impacts | |
| | C. | Transboundary and Global Issues | |
| | D. | Potential Regulatory Impacts | |
| IV. | Environmental Cooperation | | 12 |
| Anne | ex | | |
| List | of Cont | tributors of Public Comments on Scope | 13 |

I. LEGAL AND POLICY FRAMEWORK

A. The Trade Act of 2002

The Trade Act of 2002 (Trade Act) establishes a number of negotiating objectives and other priorities relating to the environment. As relevant here, the Trade Act contains three sets of objectives: (i) overall trade negotiating objectives; (ii) principal trade negotiating objectives; and (iii) promotion of certain priorities, including associated requirements to report to Congress.

Overall environment-related trade negotiating objectives include:

- (1) ensuring that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources (section 2102(a)(5)); and
- (2) seeking provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade (section 2102(a)(7)).

In addition, the Trade Act establishes the following environment-related principal trade negotiating objectives:

- (1) ensuring that a party to a trade agreement with the United States does not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, while recognizing a party's right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to prioritize allocation of resources for environmental law enforcement (sections 2102(b)(11)(A)&(B));
- (2) strengthening the capacity of U.S. trading partners to protect the environment through the promotion of sustainable development (section 2102(b)(11)(D));
- (3) reducing or eliminating government practices or policies that unduly threaten sustainable development (section 2102(b)(11)(E));
- (4) seeking market access, through the elimination of tariffs and non-tariff barriers, for U.S. environmental technologies, goods and services (section 2102(b)(11)(F)); and
- (5) ensuring that environmental, health or safety policies and practices of parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against U.S. exports or serve as disguised barriers to trade (section 2102(b)(11)(G)).

The Trade Act also provides for the promotion of certain environment-related priorities and associated reporting requirements, including:

- (1) seeking to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science and reporting to the Committee on Ways and Means and the Committee on Finance ("Committees") on the control and operation of such mechanisms (section 2102(c)(3));
- (2) conducting environmental reviews of future trade and investment agreements consistent with Executive Order 13141 and its relevant guidelines, and reporting to the Committees on the results of such reviews (section 2102(c)(4)); and
- (3) continuing to promote consideration of multilateral environmental agreements and consult with parties to such agreements regarding the consistency of any such agreement that includes trade measures with existing exceptions under Article XX of the GATT 1994 (section 2102(c)(10)).

B. The Environmental Review Process

The framework for conducting environmental reviews of trade agreements under the Trade Act is provided by Executive Order 13141 – *Environmental Review of Trade Agreements* (64 Fed. Reg. 63,169) and the associated Guidelines (65 Fed. Reg. 79,442). The Order and Guidelines are available on USTR's website at http://www.ustr.gov/environment/environmental.shtml.

The purpose of environmental reviews is to ensure that policymakers and the public are informed about reasonably foreseeable environmental impacts of trade agreements (both positive and negative), identify complementarities between trade and environmental objectives and help shape appropriate responses if environmental impacts are identified. Section 5(b) of Executive Order 13141 provides that "as a general matter, the focus of environmental reviews will be impacts in the United States," but "[a]s appropriate and prudent, reviews may also examine global and transboundary impacts." Reviews are intended to be one tool, among others, for integrating environmental information and analysis into the fluid, dynamic process of trade negotiations. USTR and the Council on Environmental Quality (CEQ) jointly oversee implementation of the Order and Guidelines. USTR, through the Trade Policy Staff Committee (TPSC), is responsible for conducting the individual reviews.

The environmental review process provides opportunities for public involvement, including an early and open process for determining the scope of the environmental review ("scoping"). Through the scoping process, potentially significant issues are identified for in-depth analysis, while issues that are less significant – or that have been adequately addressed in earlier reviews – are eliminated from detailed study.

The Guidelines recognize that the approach adopted in individual reviews will vary from case to case, given the wide variety of trade agreements and negotiating timetables. Generally, however, reviews address two types of questions: (i) the extent to which positive and negative environmental impacts may flow from economic changes estimated to result from the prospective agreement; and (ii) the extent to which proposed agreement provisions may affect U.S. environmental laws and regulations (including, as appropriate, the ability of state, local and tribal authorities to regulate with respect to environmental matters).

II. BACKGROUND

Australia is a high-income, developed country on an island continent located in the southern hemisphere between the Indian Ocean and the South Pacific Ocean. The land area is slightly smaller than that of the contiguous 48 states of the United States and includes both temperate and tropical regions. Australia has a population of about 20 million.

Australia has well-established institutions and laws for protecting the environment, including procedures for considering the possible environmental consequences of government policies. Environmental issues also are among the topics addressed in the process of Australian Cabinet-level and Parliamentary consideration of proposed trade agreements.

Both the United States and Australia seek to ensure that trade and environment policies are mutually supportive and contribute to their respective abilities to protect the environment and meet international environmental obligations. In addition, the United States and Australia have a long history of cooperation to achieve environmental objectives (see section IV).

A. U.S. - Australia Trade

The United States and Australia are among the most open economies in the world. Average tariffs on goods trade are low in both countries, and a high proportion of tariffs for both countries are bound at low rates under the WTO. Nevertheless, barriers to trade exist for some commodities, as well as for some services.

In 2002, two-way trade between the United States and Australia was nearly \$20 billion; trade with Australia accounted for less than 1 percent of U.S. imports and slightly less than 2 percent of U.S. exports. U.S. exports to Australia were \$13.1 billion in 2002, an increase of nearly 20 percent over 2001. The United States supplies about 18 percent of Australia's total imports and is the destination for about 10 percent of Australia's exports. Major categories of U.S. exports to Australia include machinery, aircraft, automobiles and manufactured goods. Australian exports to the United States totaled \$6.5 billion in 2002, largely unchanged from 2001. In 2002, the largest categories of U.S. imports from Australia were beef, minerals and machinery. The

United States had a trade surplus with Australia in 2002 of \$6.6 billion.

U.S. exports of private commercial services to Australia were \$5.2 billion in 2002, and U.S. imports of services were \$2.9 billion. The stock of U.S. foreign direct investment in Australia was \$36.3 billion in 2002, largely concentrated in finance, manufacturing and petroleum. The stock of Australian investment in the United States was \$24.5 billion in 2002, largely concentrated in manufacturing, real estate and finance.

B. U.S. Objectives in the Proposed Free Trade Agreement

We plan to use our negotiations with Australia to strengthen existing commercial ties and address barriers that U.S. exports face. The increased access to Australia's market that an FTA would provide would contribute to trade in both goods and services and enhance employment opportunities in both countries. An FTA also would encourage additional foreign investment between the United States and Australia, adding to the many jobs that the significant investment flows between the two countries currently support. In addition, an FTA would result in greater business integration, especially in the information technology sector, increasing efficiency and the competitiveness of U.S. industry.

FTA negotiations with Australia will further deepen the already close cooperation between the United States and Australia in advancing our objectives for the multilateral negotiations currently underway in the World Trade Organization (WTO). We believe that an FTA would further unite and strengthen the alliance of countries leading the effort toward global trade liberalization.

Our specific objectives for negotiations with Australia are as follows:

- Trade in Industrial Goods and Agriculture:
 - Seek to eliminate tariffs and other duties and charges on trade between Australia and the United States on the broadest possible basis, subject to reasonable adjustment periods for import-sensitive products.
 - Seek elimination of Australian government export monopoly arrangements for wheat, barley, sugar and rice. In particular, by requiring Australia to eliminate exclusive export rights for its state-trading enterprises (STEs), end any special financing privileges for these enterprises, provide more information on the activities of and special rights or privileges they accord to STEs and to require STEs to provide information on their operations.
 - Seek to eliminate Australian government practices that adversely affect U.S. exports of perishable or cyclical agricultural products, while improving U.S. import relief mechanisms as appropriate.

- Coordinate with Australia so as to support achieving the U.S. objective in the WTO negotiations of eliminating all export subsidies on agricultural products, while maintaining the right to provide *bona fide* food aid and preserving U.S. agricultural market development and export credit programs.
- Pursue fully reciprocal access to Australia's market for U.S. textile and apparel products.
- Customs Matters, Rules of Origin, and Enforcement Cooperation:
 - Seek rules to require that Australia's customs operations are conducted with transparency, efficiency, and predictability and customs laws, regulations, decisions, and rulings are not applied in a manner that would create unwarranted procedural obstacles to international trade.
 - Seek rules of origin, procedures for applying these rules, and provisions to address circumvention matters that will ensure that preferential duty rates under the FTA with Australia apply only to goods eligible to receive such treatment, without creating unnecessary obstacles to trade.
- Sanitary and Phytosanitary (SPS) Measures:
 - Seek to have Australia reaffirm its WTO commitments on SPS measures and eliminate any unjustified SPS restrictions.
 - Seek to strengthen cooperation between U.S. and Australian SPS authorities.
 - Seek to strengthen collaboration with Australia in implementing the WTO SPS
 Agreement and to enhance cooperation with Australia in relevant international
 bodies on developing international SPS standards, guidelines, and
 recommendations.

Technical Barriers to Trade (TBT):

- Seek to have Australia reaffirm its WTO TBT commitments, including those relating to labeling requirements on U.S. food and agricultural products produced through biotechnology, and eliminate any unjustified TBT measures.
- Seek to strengthen collaboration with Australia on implementation of the WTO TBT Agreement and create a procedure for exchanging information with Australia on TBT-related issues.

Intellectual Property Rights:

- Seek Australia's ratification of the World Intellectual Property Organization
 (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.
- Seek to establish standards that build on the foundations established in the WTO
 Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement)
 and other international intellectual property agreements, such as the WIPO
 Copyright Treaty and Performances and Phonograms Treaty.
- Seek to enhance the level of Australia's protection for intellectual property rights beyond TRIPS in new areas of technology, such as internet service provider liability.
- In other areas, such as patent protection and protection of undisclosed test data and other information, seek to have Australia apply levels of protection and practices more in line with U.S. law and practices, including appropriate flexibility.
- Seek to strengthen Australia's domestic enforcement procedures, such as increasing criminal penalties so that they are sufficient to have a deterrent effect on piracy and counterfeiting.

Trade in Services:

- Pursue disciplines to address discriminatory and other barriers to trade in Australia's services market. Pursue a comprehensive approach to market access, including enhanced access for U.S. services firms to telecommunications and any other appropriate services sectors in Australia's market.
- Seek improved transparency and predictability of Australia's regulatory procedures, specialized disciplines for financial services, and additional disciplines for telecommunications services and other sectors as necessary.

• Investment:

Seek to establish rules that reduce or eliminate artificial or trade-distorting barriers to U.S. investment in Australia, including investment screening by the Australian Government, while ensuring that Australian investors in the United States are not accorded greater substantive rights with respect to investment protections than U.S. investors in the United States, and to secure for U.S.

- investors in Australia important rights comparable to those that would be available under U.S. legal principles and practice.
- Seek to ensure that U.S. investors receive treatment as favorable as that accorded to domestic or other foreign investors in Australia and to address unjustified barriers to the establishment and operation of U.S. investments. Provide procedures to resolve disputes between U.S. and Australian investors that are in keeping with the goals of making such procedures expeditious, fair and transparent.

• Electronic Commerce:

- Seek to affirm that Australia will allow goods and services to be delivered electronically on terms that promote the development and growth of electronic commerce.
- Seek to ensure that Australia does not apply customs duties in connection with digital products or unjustifiably discriminate among products delivered electronically.

• Government Procurement:

- Seek to establish rules requiring that Australia's procurement practices be fair, transparent, and predictable for suppliers of U.S. goods and services who seek to do business with the Australian government.
- Seek to expand access for U.S. goods and services to Australian government procurement markets.

• Transparency/Anti-Corruption/Regulatory Reform:

- Seek to ensure that Australia's procedures for administering trade-related measures are fair and transparent, including by ensuring that interested parties can have timely access to information on measures and Australia's procedures for administering them.
- Seek to ensure that Australia applies high standards prohibiting corrupt practices affecting international trade and enforces such prohibitions

Competition:

Address issues of anticompetitive business conduct, state monopolies, and state

enterprises.

 Seek cooperation and consultation provisions that foster cooperation on competition law and policy, and that provide for consultations on specific problems that may arise.

• Trade Remedies:

- Provide a bilateral safeguard mechanism during the transition period.
- Make no changes to U.S. antidumping and countervailing duty laws.

· Labor, including Child Labor:

- Seek an appropriate commitment by Australia to the effective enforcement of its labor laws.
- Establish that Australia will strive to ensure that it will not, as an encouragement for trade or investment, weaken or reduce the protections provided for in its labor laws.
- Establish procedures for consultations and cooperative activities with Australia to strengthen its capacity to promote respect for core labor standards, including compliance with ILO Convention 182 on the worst forms of child labor.

· Environment:

- Seek to promote trade and environment policies that are mutually supportive.
- Seek an appropriate commitment by Australia regarding the effective enforcement of its environmental laws.
- Establish that Australia will strive to ensure that it will not, as an encouragement for trade or investment, weaken or reduce the protections provided for in its environmental laws.
- Seek to develop ways to work with Australia, including through consultative mechanisms, to address environmental issues of mutual interest.

• State-to-State Dispute Settlement:

– Encourage the early identification and settlement of disputes through consultation.

 Seek to establish fair, transparent, timely, and effective procedures to settle disputes arising under the agreement.

In addition, the FTA will take into account other legitimate U.S. objectives including, but not limited to, the protection of legitimate health or safety, essential security and consumer interests.

III. SCOPE OF THE ENVIRONMENTAL REVIEW

To determine the scope of this review, the Administration considered information provided by the public, advice of USTR's advisory committee on trade and environment issues, the Trade and Environment Policy Committee (TEPAC), and input from environmental, trade and investment experts within federal agencies. In addition to providing guidance on the scope of the environmental review, any information, analysis, and insights available from these sources are being taken into account throughout the negotiating process and are considered in developing U.S. negotiating positions. As envisaged by the guidelines, environmental reviews are an ongoing process to examine environmental issues and inform the negotiating process. This document describes the results of this process at this interim stage.

Section III.A describes the process used to solicit comments and advice on the scope of the environmental review, including a summary of the comments received. Section III.B discusses the possible direct impacts of the FTA on the U.S. environment resulting from changes in the U.S. economy. Section III.C describes environmental issues associated with possible transboundary effects of the FTA. Although possible domestic impacts are the primary concern of this environmental review, global and transboundary impacts are to be considered as appropriate and prudent. Section III.D considers the extent to which the FTA might affect U.S. environmental laws, regulations and policies.

A. Public and Advisory Committee Outreach and Comments

This review was formally initiated by publication of a notice in the *Federal Register*, which requested public comment on the scope of the review (see 68 Fed. Reg. 12149; March 13, 2003). The Administration also requested public comments on all aspects of the negotiations and held a public hearing to discuss issues raised in connection with the FTA, including environmental issues (see 67 Fed. Reg. 76431; December 12, 2002). Comments and testimony addressing environmental issues received in response to that notice were taken into account in the preparation of this Interim Review.

Public comments on the scope for the environmental review identified a number of topics to be considered in connection with the proposed FTA. These included: invasive species and

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¹ See section I.B. above.

associated sanitary and phytosanitary measures; cooperation to protect endangered species; cooperation to promote eco-tourism and sustainable tourism; the benefits of animal-friendly and environmentally-friendly agriculture; and the possible effects of investment provisions on environmental policy and regulation. A list of organizations that provided comments is included in the annex.

B. Potential Economically-Driven Environmental Impacts

Although Australia represents an important market for some U.S. producers and exporters, the impact of the FTA on total U.S. production resulting from changes in U.S. exports appears likely to be very small. Exports to Australia currently account for less than 2 percent of total U.S. exports and a very small portion of total U.S. production. The FTA is expected to provide improved market access for some products, but substantial increases in U.S. exports and production are not expected. Although small changes in production and exports in environmentally-sensitive sectors could provide a basis for concern regarding the FTA's direct environmental effects in the United States, no such concerns were identified in public comments or in interagency analysis. The Administration welcomes public comment on this preliminary conclusion of *de minimus* direct impacts of the FTA on the U.S. environment.

C. Transboundary and Global Issues

While the environmental impacts of expected economic changes in the United States attributable to the FTA are expected to be minimal, the Administration examined a variety of environmental issues with potential global and transboundary impacts in determining the scope of this review. Some of these issues were raised through public comments (see section III.A); other issues were provisionally identified through an open-ended scoping process among agencies with environment, trade and economic expertise. We subsequently eliminated topics from further analysis based on initial findings that there was no identifiable link to the FTA. The following issue warranted further consideration.

Invasive Species³

Public comments and government agencies identified invasive species as a potential environmental concern related to the FTA. Without appropriate mitigation measures, commodity trade may provide pathways for invasive species, and the introduction of exotic species may

² A general equilibrium analysis of the possible economic effects of the U.S.-Australia FTA estimated that the agreement would increase U.S. GDP by 0.02 percent. See: Centre for International Economics, "Economic Impacts of an Australia-United States Free Trade Area," June, 2001; available at http://www.intecon.com.au.

³ An "invasive species" is defined as a species that is 1) non-native (or alien) to the ecosystem under consideration and 2) whose introduction causes or is likely to cause economic or environmental harm or harm to human health (for further information, see: http://www.invasivespecies.gov/).

result in harmful effects on the environment and economy of the importing country. Both the United States and Australia face and recognize risks associated with invasive species.⁴

The United States and Australia contain areas with similar ecological conditions in which species from one country can thrive in and have impacts on the other. As an example, Southern Australia and California both contain areas with similar climate conditions and this increases the risk of favorable conditions under which outbreaks of species introduced from the other country might occur.

Pathways for invasive species include commodity trade as well as the movement of people (migration and tourism) and present varying degrees of risk of environmental impact. Trade-related pathways that involve a risk of invasive introductions include the movement of vehicles used in transporting commodities (e.g., ballast water in ships), or the transport of products and packaging that contain potentially invasive organisms (e.g., grains that contains weed seeds). Some invasive species also may be introduced on ornamental plants, fruits, aquarium fish, and through other commonly-traded products.

Both the United States and Australia maintain import regulations designed to minimize the risk of entry of invasive species. As two examples, Animal and Plant Health Inspection Service (APHIS) regulations protect U.S. agricultural commodities from invasive species and Coast Guard regulations provide standards for management of ballast water from ships to reduce risks associated with aquatic invasive species. The FTA will not alter standards or the ability to enforce U.S. regulations addressing the introduction of invasive species. Our negotiating objectives seek to ensure that both countries continue to use scientific evidence and risk assessments to make decisions about imports for the purpose of protecting plant and animal health (see section II.C).

The Administration welcomes further public comments on invasive species and related issues in the context of the U.S.-Australia FTA.

D. Potential Regulatory Impacts

Consistent with EO 13141 and its Guidelines, this review includes consideration of the extent to which the FTA might affect U.S. environmental laws, regulations, policies and/or international commitments. FTA negotiators are aware of the need to preserve the U.S. government's ability to maintain strong environmental laws and regulations and an effective process for enforcing them. As the FTA negotiations proceed, negotiators will continue to focus on this important objective.

⁴ For the United States, Executive Order 13112 (February 3, 1999) established the Invasive Species Council and commits federal agencies to conduct research on invasive species issues, take reasonable actions to discourage the introduction of these species into the United States and elsewhere and to undertake international cooperation aimed at addressing this issue.

Within the range of FTA obligations, those related to investment, services, SPS measures and TBT can have particular significance for domestic regulatory practices concerning the environment, health and safety. Previous environmental reviews, including the preliminary and final reviews for the Jordan, Chile and Singapore FTAs, have considered potential impacts on the U.S. regulatory regime with respect to all of these obligations and have found that the respective trade agreements were not anticipated to have a negative impact on U.S. legal or regulatory authority or practices. Further, the reviews noted the potentially positive impact that the FTAs could have on the U.S. environmental regulatory regime as a result of FTA commitments to effectively enforce U.S. environmental laws, not to weaken U.S. environmental laws to attract trade or investment and to ensure that U.S. environmental laws and policies provide for high levels of environmental protection.

Based on this previous analysis, and assuming that the core obligations in these areas will be similar to those undertaken in the previous FTAs⁵, the Administration does not expect that the FTA will have a negative impact on the ability of U.S. government authorities to enforce or maintain U.S. environmental laws or regulations. We welcome comments on this preliminary finding.

For a more in depth analysis of general FTA commitments and their potential regulatory impacts in the United States, please see the preliminary and final reviews for Jordan, Chile and Singapore FTAs at http://www.ustr.gov/environment/environmental.shtml.

IV. ENVIRONMENTAL COOPERATION

The Trade Act of 2002 establishes that a principal negotiating objective of the United States is to strengthen the capacity of our trading partners to protect the environment through the promotion of sustainable development. In addition, the Trade Act instructs negotiators to seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of U.S. trading partners to develop and implement standards for the protection of the environment and human health based on sound science. Environmental cooperation is expected to be an important complement to the environmental provisions of the FTA.

The United States and Australia share common concerns and similar responsibilities for protecting and conserving the environment in their respective nations. The two governments have a common interest in promoting global environmental improvement and protection and in using science and technology to address environmental challenges. Australia and the United States have a long and productive history of bilateral cooperation, for example through the U.S.-Australia Climate Action Partnership and in areas such as botanic gardens, endangered species,

⁵ For information on FTAs, see the USTR website at http://www.ustr.gov/new/fta/.

meteorological and oceanographic research and management, whaling and ozone protection. The United States and Australia also have contributed to regional environmental cooperation in the South Pacific region in an effort to build capacity in the region to protect the environment. Both governments are members of the South Pacific Regional Environmental Program, the Asia-Pacific Economic Cooperation Forum and the Secretariat of the Pacific Community.

The United States and Australia also recognize the importance of multilateral environmental activities and the benefits of close cooperation between the two countries in preparing for and participating in international environmental meetings and conferences. Subjects of recent cooperation include endangered species, Antarctica, ocean affairs, chemicals and hazardous wastes, and biological diversity. Meetings of the Commission on Sustainable Development and the WTO Committee Trade and Environment provided further opportunities for close cooperation between the two countries.

Through a Joint Statement on Environmental Cooperation, the United States and Australia expect to express their recognition of the importance of these bilateral, regional and multilateral efforts and their intent to consult regularly both on the direction of ongoing cooperative activities and on areas for future cooperative efforts.

ANNEX —List of Organizations Providing Comments on Scope for the Environmental Review

Humane Society of the United States Consumer Alert