The Victorian Greens[1]

Submission to the Joint Standing Committee on Treaties (JSCOT)

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Victorian Greens

Submission to the Joint Standing Committee

Inquiry into the Singapore-Australia Free Trade Agreement (SAFTA)

1. Introduction

1.1 The Victorian Greens welcome this opportunity to comment on the provisions and possible impact of the Singapore-Australia Free Trade Agreement (SAFTA). We recognise that foreign trade and investment can be beneficial in terms of:

1.1.1 the transferring of skills and technology not available in the domestic economy;

1.1.2 allowing the importing and exporting of goods and services necessary for the economic well-being of the Australian community;

1.1.3 encouraging innovation and the adoption of new practices and higher standards;

1.1.4 encouraging efficiency through the adoption of 'international best practice' and the importation of technology which makes the local production of goods and services possible; and

1.1.5 giving developing countries, in particular, fair opportunity to trade with developed countries.

1.2 However, the Victorian Greens are also mindful of the negative influences of poorly regulated foreign trade and investment and support a policy of a rules-based managed international trade and investment. The Victorian Greens believe that nation-states have a right and a duty to ensure that their consumption and production, including both imports and exports, are sustainable.

In addition, we believe that international trade and investment should not undermine Australia's obligations under international human rights instruments, in particular, our obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), Multilateral Environmental Agreements and International Labour Conventions.

1.3 Our comments on SAFTA are firstly guided by our views that international trade and investment should support the following objectives:

1.3.1 protecting local employment and labour conditions;

1.3.2 reducing economic and political vulnerability through economic self-reliance;

1.3.3 encouraging diversification of industry;

1.3.4 permitting and encouraging the development of local technologies and investment in cleaner technologies;

1.3.5 encouraging investment for sustainable development prioritising areas in need of revitalisation;

1.3.6 reducing the amount of energy and pollution required to power the global economy; and

1.3.7 protection of the environment.

1.4 Secondly, the Victorian Greens believe that all trade agreements should be concluded within the framework established by the United Nations High Commissioner for Human Rights. This framework states that trade negotiations should:

1.4.1 set the promotion and protection of human rights among the objectives of trade liberalization;

1.4.2 examine the effects of trade liberalization on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals and groups;

1.4.3 emphasize the role of the State in the process of liberalization – not only as negotiators of trade law and setters of trade policy, but also as primary duty bearer for the implementation of human rights;

1.4.4 seek consistency between the progressive liberalization of trade and the progressive realization of human rights;

1.4.5 require a constant examination of the impact of trade liberalization on the enjoyment of human rights; and

1.4.6 promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization.[2]

1.5 We note that in contrast to the proposed Australia-United States free trade agreement (AUSFTA), that SAFTA has no provisions relating to labour rights or environmental standards. We believe that all trade agreements should contain a chapter on each that allows parity between the enforcement mechanisms for capital and the holders of intellectual property, and labour and the environment. While most other western democracies have accepted and included labour and environment provisions in trade agreements, and indeed many developing countries such as Jordan, Cambodia, Mexico, amongst another 78 African, Caribbean and Pacific countries[3], Australia has demonstrated a shameful and belligerent attitude to the inclusion of these issues in trade agreements. For example, in 1997 Australia refused to sign a Framework Agreement on trade with the European Union because the government objected to the inclusion of a standard human rights clause in the agreement. Australia subsequently signed an agreement of lesser status, a *Joint Declaration on relations between Australia and the European Union*, which contained a perfunctory statement regarding the protection and promotion of human rights[4]. Many developing countries have accepted the basic human rights clauses found in the framework agreement. It is time that the Australian government reconsidered this issue and adopted a position befitting of a democratic country. Furthermore, it is apparent that Singapore has no objection to the inclusion of labour and environmental clauses, as the bilateral trade agreement between Singapore and the US contains comprehensive chapters on these issues, the problem clearly resides with the Australian government.

1.6 Before turning to specific concerns relating to the provisions of SAFTA, the Victorian Greens have some concerns about the process of this inquiry. On 17 February 2003, the Minister for Trade, Mark Vaile issued a press release announcing the "signing of the Singapore-Australia Free Trade Agreement". The Victorian Greens are of the view that any process that initiates a public inquiry after the signing of the agreement is fundamentally flawed and somewhat farcical. Despite this fundamental oversight, in the event that public hearings are held, the Victorian Greens wish to appear before JSCOT.

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[2]United Nations – Economic and Social Council, 'Economic, Social and Cultural Rights: Liberalisation of Trade in Services and Human Rights', Report of the High Commissioner, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fourth Session, E/CN.4/Sub.2/2002/9 25 June 2002

[3] see the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, and the European Union, also many developing countries have also accepted the inclusion of human rights/labour rights clauses under both the US and EU Generalised System of Preferences.

[4] See EU Bilateral Trade Relations, Australia, http://europa.eu.int/comm/trade/bilateral/australia/australia.htm

Should JSCOT not hold public meetings, we wish to obtain some clarification on this process.

1.7 We believe that the signing of trade agreements, which unlike international human rights instruments and multilateral environmental agreements, have binding dispute mechanisms, require more parliamentary oversight. An appropriate process would wait until JSCOT published its report and recommendations, to be followed by its tabling in parliament, parliament should then be given adequate time to debate the report, suggest amendments if so required and only then should the agreement be signed. If such a procedure is too cumbersome then some version of the US system where power is shared between the executive and the parliament should be considered. The current practice in Australia is totally unaccountable, and the executive government should not be able to override the treaty reform process which the government itself instituted with much fanfare about making the process more transparent and accountable.

1.8 In addition, the Senate Foreign Affairs, Defence and Trade References Committee is currently undertaking an inquiry on the General Agreement on Trade in Services (GATS) and AUSFTA alongside the JSCOT inquiry. There has been considerable concern expressed by Non-Government Organisations (NGOs), and many public service suppliers, about the future provision of public services under the ambiguous and ill-crafted Article 1.3(b) and (c) of the GATS agreement, yet identical language appears in Chapter 7, Article 1(a) of SAFTA. This has occurred before the Senate inquiry has an opportunity to make an evaluation or recommendations as a result of the inquiry into the GATS agreement.

Likewise, some of the provisions in SAFTA, appear to mirror the provisions in the North American Free Trade Agreement (NAFTA), in particular, the Chapter 11 expropriation provisions which have engendered much controversy amongst the NAFTA countries, causing Canada to request that those provisions not be included in the proposed Free Trade Agreement of the Americas (FTAA). Little has been learnt from experiences overseas and a mere transposing of bits of other bilateral and multilateral agreements has occurred with little thought given to concerns raised in other jurisdictions, whether by lawyers, academics, unionists or NGOs. Business groups appear to have been consulted over SAFTA while NGOs and others were excluded from the process. This needs to be remedied.

2. SAFTA – Chapter 7, Article 1(a) – Trade in Services

2.1 Article 1(a) of SAFTA is identical to Article 1.3(b) of GATS. It states that:

(a) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis nor in competition with other service suppliers.

In the Victorian Greens submission to the Senate Foreign Affairs, Defence and Trade References Committee on GATS, we pointed out that this definition was highly problematic and would not protect public services from a challenge in the WTO dispute panel. As the provision on 'governmental authority in SAFTA is identical to GATS, our section on the "governmental authority" exclusion in the GATS submission is reproduced here for the benefit of the JSCOT committee.

2.2 From a legal perspective, the critical terms are "commercial" and "competition". Neither is defined and will be largely determined by the interpretation given by a WTO dispute settlement panel. *'Commercial'* generally means 'engaged in commerce', 'pertaining to commerce and trade', 'the buying and selling of goods for money or its equivalent' and 'trading or exchange of merchandise'. Almost all public services in Australia are supplied through an admixture of public and private suppliers, which often, particularly since the ongoing economic restructuring of the 1980s, include commercial aspects. Tertiary

education and many health services, though nominally public, are supplied on a fee-for-service basis whether via a prolonged HECS system or through a publicly funded medicare system, - one could easily argue that they are essentially commercial transactions or contain commercial aspects. Thus they would fall outside the exclusion in GATS Article 1.3(b) and hence SAFTA Article 1(a).

2.3 *'Competition'* means 'rivalry in the market', 'striving for custom between those who have the same commodities' and the 'act of competing or contending with others'. Universities, whether public or private, compete for students as do medical services for patients. Thus they would not necessarily be excluded under GATS Article 1.3(b) and SAFTA Article 1(a). Further, the use of the word "nor" suggests that in order to exclude or protect public services one has to demonstrate that *neither* 'commercial' *nor* 'competition' applies to any given service.

2.4 The EC Treaty has a similar exclusion provision, Article 55 of the Treaty states that:

> *The provisions shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.*

It has been noted by a number of commentators that the European Court of Justice has taken a restrictive interpretation of the scope of the Article. In fact there have been no decisions in which the Court found that an activity was excluded under Article 55[5]. This indicates that the interpretation taken by courts and tribunals/panels is likely to be unduly narrow. Further indication that the scope of GATS Article 1.3(b) and SAFTA Article 1(a) will be narrowly construed is supplied by the *obiter* in the Bananas Case (Regime for the Importation, Sale and Distribution pf Bananas, Apellate Body Report, WT/DS27/AB/R, 9 September 1997), which stated in paragraph 220:

> *220 ... we note that Article 1.1 of the GATS provides that "[t]his Agreement applies to measures by Members affecting trade in services". In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing". We also note that Article 1.3(b) of the GATS provides that " includes* any service *in* any sector *except services supplied in the exercise of governmental authority", and that Article XXVIII(b) of the GATS provides that the "supply of a service includes the production, distribution, marketing, sale and delivery of a service". **There is nothing at all in these provisions to suggest a limited scope of application for the GATS..."** *[emphasis added].*

2.5 In addition, on the coexistence of government owned and private hospitals, a Background Note by the Secretariat states that:[6]

> *...concerning their competitive relationship and the applicability of the GATS: in particular, can public hospitals nevertheless be deemed to fall under Article 1.3? - that the hospital sector in many countries, however, is made up of government and privately-owned entities which both operate on a commercial basis, charging the patient, or his insurance for the treatment provided. Supplementary subsidies may be granted for social, regional and similar policy purposes. It seems unrealistic in such cases to argue for continued application of Article 1.3 and/or maintain that no competitive relationship exists between the two groups of suppliers or services.*

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[5] Education International (2001) *GATS and Public Service Systems: the GATS 'governmental authority' exclusion',* http://members.iinet.net.au/~jenks/GATS_BC2001.html p7

[6] Health and Social Services, Background Note by the Secretariat, 18/9/98, S/C/W/50

2.6 Another Secretariat Note, in this instance referring to Environmental Services states:

> *... if services were deemed to be supplied on a commercial basis, then regardless of whether ownership was in public or private hands, the sector would be subject to the main GATS disciplines and to the negotiation of commitments under Articles XVI and XVII. A different issue arises in situations in which the government has privatized certain services as local monopolies and the private firms receive payment from the government rather than individual users. One view could be that these are still services supplied in the exercise of government authority, as defined by GATS Article 1.3 - since they are not supplied on a commercial basis to individual users and they continue to be (local) monopolies - and, therefore, do not fall within the scope of GATS disciplines. Another view could be that these services are being procured by the government and, therefore, the manner of purchase* per se *would fall within the scope of GATS Article XIII and any future disciplines on procurement.*[7]

2.7 The conclusion to be drawn from these examples is that Article 1.3(b) and its identical twin, SAFTA Article 1(a), will have a very narrow application and will not protect public services. Given this above discussion, the Victorian Greens are concerned about the continuing maintenance of public services and believe they will be threatened by both SAFTA and GATS.

2.8 Following Marcus Krajewski's suggestion[8], we submit that the Chapter 7, Article 1(a) of SAFTA be amended as follows:

> *'services' includes any service in any sector except services supplied in the exercise of governmental authority* as determined by the national laws and regulations of each Member;

2.9 Another fundamental flaw with SAFTA, which makes it worse than GATS, is that it takes a 'negative listing' approach in respect of services and investment. In the Regulation Impact Statement on the JSCOT website it states that the gains achieved under SAFTA were:

> [M]uch faster than would be possible under the WTO. Furthermore, the framework of SAFTA ensures that commitments are far more reaching than those under GATS. For example, where GATS follows a positive list approach and does not cover all sectors in Singapore, SAFTA uses a negative list approach under which market access and national treatment obligations apply to all service trade, except for measures or sectors specified in annexed lists of reservations. This approach has a liberalising and *transparent* thrust in that all exceptions must be specifically reserved, or they are deemed to be liberalised (emphasis added).

2.10 One may well ask transparent for whom? This essentially means that all service sectors that are not included in the exceptions are subject to the SAFTA provisions, including service sectors that may require regulation in the future but unknown or not necessary in the present. This may well be suited to the business sector but services are not just commodities, many services are essential services and are considered as fundamental human rights recognised under the International Covenant on Economic, Social and Cultural Rights. Transparency is not just a concept by which rules and regulations are constituted in a way that makes the conduct of business quicker and easier; it also applies to motives and qualities of a person, body, institute or government, in that the process is easily understood, frank and open, and the motives may be easily discerned, evident and obvious; it is intrinsically interlinked with accountability. At no point has there been any broad public discussion on these provisions, nor is it well understood by the public and

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[7] Environmental Services, Background Note by the Secretariat, 6 July 1998, S/C/W/46

[8] Marcus Krajewski, (2001) *Public Services and the Scope of the General Agreement on Trade in Services (GATS)* Centre for International Environmental Law (CIEL), Geneva.

many essential or social service suppliers what 'negative listing' means. It will also mean that more regulations relating to service provisions will be brought within the scope of the dispute panel process. The Victorian Greens believe that services should not be negatively listed, and that this will compound the problems discussed above regarding the protection of public services. We believe there should be a delay in the signing of SAFTA until a broader public discussion of the implications of the services provisions in SAFTA is undertaken and understood.

3. SAFTA – Chapter 8 Investment

3.1 As mentioned above, the investment provisions in SAFTA and the dispute settlement process relating to investment are based upon the NAFTA and the discredited Multilateral Agreement on Investments (MAI). These provisions have been much discussed in legal academic journals and have caused much controversy in the NAFTA countries. All three NAFTA signatory countries are re-examining the expropriation provisions in NAFTA due to the fact that, as demonstrated by the evolving legal cases, the interpretation of expropriation and the compensation paid is far in excess of that found under the domestic laws of Canada, Mexico or the US. Expropriation should be defined in these agreements and not left open to interpretation by ad-hoc tribunals.

3.2 In addition, the lack of clarification with respect to the meaning of expropriation, the definition of 'measures' is too broad. It includes "any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form," and includes such 'measures as taken by federal, state, local government, or non-government bodies with a delegated exercise of power. This absurdly broad definition has seen expropriation extend beyond its traditional meaning in international law, where governments unilaterally took possession of tangible property or ownership of an enterprise, to include bona-fide regulatory measures pertaining to health, the environment or industrial relations, a definition that would not have occurred prior to the broad scope established by NAFTA.[9]

3.3 In fact, the interpretation under the NAFTA agreement has seen the Tribunal discuss the possibility as to whether judicial decisions can constitute an expropriation. We quote from Liberty Victoria's AUSFTA submission on this issue:

> Vicki Been, Professor of Law at New York University, and Joel C Beauvais, Postdoctoral Research Fellow, Center for Environmental and Land Use Law at New York University, have recently pointed out that the definition of measure as interpreted by the dispute Tribunal has included "not only legislative and administrative actions, but court decisions as well"[10]. They state that the US Supreme Court has rejected the argument that a judicial decision could ever constitute a taking, one can apply to a court to determine whether a government action constitutes expropriation and in the event that the court rules in favour of the complainant, seek compensation. However, it has never been accepted in any jurisdiction that should that court rule against the complainant that that judicial decision in itself constitutes a form of expropriation. Nonetheless, the *obiter dicta*

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[9] For a comprehensive legal account of the expropriation provisions and their impact see Liberty Victoria's submission to the Senate Foreign Affairs, Defence and Trade References Committee on the proposed Australia-US free trade agreement – the submission is attainable from that committee.

[10] Vicki Been & Joel Beauvais, *The Global Fifth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine'*, (2002) Working Paper#CLB-02-06, New York University Center for Law and Business, http://papers.ssrn.com/abstract=337480 - to be published in the April 2003 edition of the New York University Law Review

in two NAFTA cases suggest that the judiciary in signatory states can be held to expropriate property under the investor-state dispute process[11].

For instance, in *Azinian v Mexico*, a Mexican corporation with US shareholders sought compensation for expropriation after a decision to cancel the corporation's contract for collection and treatment of solid waste. The Tribunal found no expropriation but in the *dicta* suggested that NAFTA Tribunals "can question whether a national court's decision effected "a denial of justice or a pretence of form to achieve an internationally unlawful end", they did not define "a pretence of form" but indicated that it would have to be shown "that the national court's finding "was so insubstantial, or so bereft of a basis in law, that the judgments were in affect arbitrary or malicious," they could not prevail"[12]. Whilst this is only *dicta*, it points to a potentially serious problem, that of an ad hoc Tribunal placing itself in a position to judge a court implemented under a constitution of a nation state and subject to the rule of law.

Likewise in *Loewen Group Inc v United States*, Loewen alleged that in a prior Mississippi civil trial - in which emotional and punitive damages of $500 million were entered against Loewen by a jury verdict – it had received different treatment in the judicial process than an American defendant would have received. Loewen alleged, that the Judge allowed the plaintiff's attorney to appeal to "anti-Canadian, racial and class biases" in violation of the national treatment rules in NAFTA Article 1102. Loewen claimed that continued reference to the foreign status of the company amounted to a denial of justice and inequitable treatment. The US government argued in response, that comments by a private lawyer in a private contract dispute did not constitute a government "measure" in order to bring it within the ambit of the NAFTA rules. Loewen is the first case under NAFTA to directly challenge a jury decision or to challenge the judicial system as constituting a "measure" tantamount to expropriation. In an interim decision in 2001, the NAFTA Tribunal rejected the US argument that private contract litigation did not constitute a "measure" under the NAFTA rules.

Should such a development be permitted under a trade agreement, it means that a non-tenured ad hoc Tribunal whose procedures are not open to the public, are non-transparent and non-accountable, would have appellate jurisdiction over domestic courts. This would be an absurd proposition in direct conflict with the principles of the rule of law. Decisions by courts should not be reviewable by essentially secretive and unaccountable Tribunals. Adding further concern regarding the judiciary and/or judicial decisions, an explanatory report for Congress by Baucus, from the Congressional Committee on Finance states that trade barriers and distortions or non-tariff trading barriers "consist of informal policies and practices that may not be as easy to identify as a written law that violates an international trade agreement. Further, this objective is directed at barriers regardless of the branch of government in which they occur (e.g. executive, legislative, or judicial)[13]" [emphasis added]. Does this mean that a judicial decision may possibly be construed as a non-tariff trading barrier?

3.4 Traditionally expropriation could not be construed to cover public interest, environmental or industrial legislation, let alone judicial decisions. The hundreds of cases involving the United States and Iran after the revolution, where the regime nationalised many enterprises and industries make it quite clear how international law defines expropriation. When provisions of trade agreements threaten to impact so heavily on government regulatory powers as has occurred under NAFTA, some education on the law is required

[11] ibid p 49
[12] ibid pp49-50
[13] Baucus, (2002) *Bipartisan Trade Promotion Authority Act of 2002,* Calendar No 319, 107th Congress, Report, Senate, 2d Session, p 8

for trade negotiators in Canberra, and indeed politicians, before the final drafting of international trade treaties. The current investment provisions in SAFTA need to be re-drafted to avoid the problems occurring under NAFTA and to bring them in line with international law on expropriation. Furthermore, the negative listing approach that applies to services under SAFTA also applies to investment. As stated above, the Victorian Greens believe this is fundamentally flawed and should be deleted from the agreement.

4. Dispute Settlement Processes

4.1 As with the investment provisions the dispute settlement processes under bilateral agreements have also been the subject of much criticism. Article 14 of SAFTA outlines three processes for dispute settlement. The first is the courts or administrative tribunals of the disputing party, the second is the International Centre for Settlement of Disputes (ICSID), and the third is the United Nations Commission on International Trade Law (UNCITRAL). The Victorian Greens support the first process, the national courts of the parties, which are open to the public and are established under Constitutions that have clear and publicly known procedures and processes. We are confused as to the listing of administrative appeals, as these are normally bodies who review government decisions not the provisions of international trade agreements. Administrative appeals bodies generally cover jurisdictions such as social security, veterans affairs, immigration and deportation, planning, etc. They can review decisions on customs and tariffs but this has traditionally applied to Australian companies challenging Australian government decisions. It is not clear how an established administrative tribunal would operate in respect of trade agreements. Clarification of this process is required.

4.2 We find the listing of ICSID and UNCITRAL highly problematic. These bodies were initially established to adjudicate commercial matters between private actors. They are not open to the public, public notice of arbitration is not mandatory but subject to approval by the parties, and the decision of the tribunal does not have to been made public. Alongside this, the constitution of the tribunal is questionable. As Been and Beauvais point out:

> The decision-makers in disputes involving NAFTA's investor protections are not independent judges, insulated by life tenure from political pressures and insulated by prohibitions on conflict of interest from the pressures generated by friendships, reputational interests and the need for future employment. Further, arbitrators chosen by the parties do not necessarily have either the background or the training to balance investor rights, or the importance of free trade, against environmental or land use protections, or about broader concerns about public welfare: indeed, some assert that the international law and trade-oriented focus of those who tend to serve as arbitrators mean that the panels apply their own version of the "precautionary principle:" if in doubt, trade wins out.

4.3 It is no longer possible to assert that trade agreements have no impact on policy areas outside of trade. Since the development of case law under the WTO and NAFTA, the inclusion of the service sector under the GATS agreement, and in bilaterals such as SAFTA, it is clear that most of the agreements impinge upon government regulatory powers, as nearly all cases under NAFTA have been over environmental regulations, and under GATS they will impact on the provision of public services. As such, any dispute settlement process must involve the public. This is now recognised by the United States who have included a more open process in the *Bipartisan Trade Promotion Authority Act of 2000 (TPA).*

4.4 Under TPA the dispute panel process must ensure that all requests for dispute settlement are promptly made public; that all proceedings, submissions, findings, and decisions are promptly made public; that all hearings are open to the public; and that a mechanism must

be established for acceptance of *amicus curiae* submissions from business, unions and non-government organisations. The Victorian Greens believe that there is an array of different perspectives on issues relating to trade rules; that there is legitimate concern about their impact on government regulatory powers, and indeed an impact on the admixture of economic and social policy which underpins Australian society. We believe that ICSID and UNCITRAL should not be used in any dispute where one Party is a government. Governments are not private actors but representatives of the whole of society; as such, the public should not be excluded from the dispute process. If the government are being sued by a foreign investor, it is the people who pay compensation via government revenues, thus all stages of the process should be open and, as recognised under TPA amicus briefs, must be allowed.

5. Conclusion

5.1 Finally, another point about the inquiry process. SAFTA is a large agreement that requires some legal knowledge to understand its provisions. A three week timeline for submissions alongside another committee inquiry into the GATS and AUSFTA agreements is totally inappropriate. We have further concerns about SAFTA but given the timeline and the fact that we wished to provide a submission to both inquiries, it was impossible to examine all the provisions of this agreement in any substantive fashion. This cannot be construed as a properly conducted public consultation process. In future more time needs to be given for the submission process and the government should not be signing agreements until the Senate committee process is completed. Due to the haste with which this submission process was undertaken the Victorian Greens request that when the public hearings occur in Melbourne we wish to appear before the Committee.

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attached is a submission on SAFTA from the Victorian Greens.

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