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Submission 4.

From: (REPS) on behalf of Committee, Treaties (REPS)
Sent: Thursday, 10 April 2003 8:46 AM
To: (REPS); Sidley, Kristine (REPS)
Subject: FW: SAFTA - comments

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From: rosie or robyn [mailto:r.fortescue@bigpond.com]
Sent: Wednesday, 9 April 2003 8:20 PM
To: Committee, Treaties (REPS)
Subject: SAFTA - comments

Dear SAFTA

1 . Inadequate consultation and parliamentary oversight

The process of consultation regarding the SAFTA negotiations has been very poor. There may have been consultation with industry bodies, but there was little with civil society groups. There were no opportunities to give submissions prior to the negotiation of the agreement, and no disclosure of what the government was negotiating, including the "negative list" approach, until after the agreement was finalised.

The JSCOT review of SAFTA is the only opportunity for public input and parliamentary scrutiny of the agreement.

However the government is proceeding with implementation legislation to remove tariffs before the review process has finished. The Australian Financial Review reported on 28 March 2003 that the government is trying to pass the SAFTA tariff implementation legislation prior to the review of SAFTA by JSCOT (p 5). The bill was to be introduced in late March but was delayed because of the heavy legislative program. It will be introduced in May, before the JSCOT review is finished.

The ignoring of the JSCOT review by government reinforces the need for all trade agreements to be debated and voted on by parliament.

SAFTA is to be reviewed after its first year. However the neglect of community consultation is reflected in the approach foreshadowed by DFAT to the first review of SAFTA: 'The Australian delegation will take into account the views of stakeholders such as industry and relevant government departments for the first review' (Regulatory Impact Statement p 18).

Groups other than business and industry bodies are affected by this agreement, and should have input into the process of their negotiation and review, especially since many government services and policies will be affected by the review (see below).

Recommendations:
(a) That no legislation relating to SAFTA be introduced or passed by Parliament until after the JSCOT review is completed.

(b) That there be a public community consultation process leading up to the review of the agreement.

2. Dangers of negative list approach for services and investment

The SAFTA agreement takes the 'negative list' approach for both investment and services. This means that

unless sectors, laws or policies are specifically excluded, they are included under the SAFTA obligations. This means that all foreign investors and all service providers must be treated as if they were local, and have market access in all areas (SAFTA Chapters 7 and 8).

This is worse than the positive list used for the GATS agreement, where only those sectors listed are covered by the agreement. SAFTA is described as a "GATS plus" agreement by the negotiators (JSCOT transcript March 24, pages 4- 6), which means that it goes further than the commitments countries have made under GATS. This is the model of the Multilateral Agreement on Investment that was so decisively rejected and defeated by community opinion in 1998.

The SAFTA "negative list approach" is being used as a model for the USFTA (JSCOT Transcript, p 4). Given the size of the US economy, such an approach would have far more impact on essential services. Any additional outcomes achieved in the US FTA would also be extended to the SAFTA agreement.(Article 15.1, p 57).

The services chapter claims it does not apply to public services, which are defined as "services applied in the exercise of governmental authority neither on a commercial basis nor in competition with one or more service providers (Chapter 7, Article 1, p 43).

This is the GATS definition. But its meaning is unclear because many public services are now supplied on a commercial basis or in competition with other service providers. The health, education and postal sectors provide examples of public services being provided partially by private providers in Australia.

The services chapter of the agreement does not apply to government subsidies or grants (Chapter 7, Article 2.2a) . This should mean that foreign service providers would not be able to claim access to government funding of public services.

One effect of the negative lists for services and investment is that unintended omissions from the list, or sectors that develop in the future but are not currently listed, will be subject to SAFTA.

If a future government was elected with different policies, it would not be able to implement any policy contrary to the agreement without facing a complaint under the disputes procedure, and facing the payment of penalties or compensatory measures under that procedure.

The negative list means that it is harder to know the limits of the agreement than would be the case if a positive list were used. It also underscores the need for extensive community consultation because of the potentially far-reaching effects of agreements which employ a negative list.

State and Local Government services
The laws and regulations of state governments on investment and services will be covered by the agreement after the review, to take place one year after the agreement comes into operation. This means that state governments have one year to list all their exceptions to the agreement. After this, anything not listed as an exception will be included. There has been no community discussion of the implications for state government services.

The Regulation Impact Statement says that Singapore would expect that "a high percentage of trade-restrictive measures would be bound at existing levels" (p 15). This would mean that state governments would not be able to introduce new measures that were more restrictive than the existing measures.

Recommendation:
(c)The Committee should not support a "negative list" model for services and investment in trade agreements, as it has been decisively rejected by the community as it can lead to unintentional outcomes and undue restrictions on current and future government policies.

3. Restriction of the right of governments to regulate services

SAFTA uses the same language as GATS to restrict the right of governments to regulate services. The regulation of services on must not be "more burdensome than necessary" and must not be a "barrier to trade". The two governments have agreed to include the outcome of the GATS negotiations on services regulation in the agreement (Chapter 7, article 11, p 50). This means that the Singapore government could use the general disputes process to challenge regulation of services which are not listed as exceptions on the grounds that such regulation was a barrier to trade.

If the challenge was successful the government would have to change the law, lose access to markets under the agreement or pay compensation (SAFTA Chapter 16, Article 10, p 113).

SAFTA also restricts the ability of future governments to have any new regulation which is not consistent with the agreement.

The exceptions to the agreement are described as "nonconforming measures." The exceptions listed in Annex 4.1(a) are bound to the current levels. This means, for example, that a future government cannot change those regulations to make them more restrictive.

Australia has listed as exceptions in this Annexure, Australia Post's delivery of standard letters (currently at 50c to anywhere in Australia), Comcare, the government owned provider of Workers' Compensation Insurance for Commonwealth employees, and Air Services Australia, the government owned air safety authority.

The exceptions listed in Annexure 4.II(a) are not bound to current levels and can be changed in future. Australia has listed the Migration Act, all measures relating to Indigenous people and investment and services, restrictions on media ownership, agricultural marketing authorities like the Wheat Board, audio visual services, creative arts and cultural heritage, tobacco and alcohol marketing, requirements for Australian coastal shipping to have local crews (cabotage), and regulation of airports.

The following services are also listed as exceptions in Annexure 4.II(a), but only to the extent that they are "social services established for a public purpose":
"Public law enforcement and correctional services, income security or insurance, social welfare, public education, public training, health, child care, public utilities and public transport" (p 6).

The worrying thing about the definition of social services is that it implies that other public services could be subject to the agreement. It also reflects the ambiguity of the definition of public services, which does not regard as public services those which operate on a commercial basis or in competition with other service providers.

State and local Government regulation of services

As discussed above, state and local government regulation of services is covered by SAFTA. States have only one year to list their exceptions. There has been no community consultation about the implications of this for state government services. This is an unacceptable restriction on the ability of state governments to regulate and provide essential services .

Existing local government regulations are not included, but any future new measures by local government would be covered by the agreement.

Recommendation:
(d) The Committee should oppose the restriction of the ability of governments at all levels to regulate essential services and investment.

4. Investment disputes process allows corporations to sue governments

SAFTA has two enforcement processes, a specific one for investment, and a general one for the rest of the agreement. The investment process uses the NAFTA/MAI model, which enables a corporation to take legal action to force changes to Australian law if they can argue that the law was not consistent with the agreement. They could also sue the Australian government for damages. This gives additional legal powers to corporations which already have enormous market powers and is an unacceptable limitation on democratic governance.

Australia has listed as exceptions to the agreement the Foreign Investment and Takeovers Act, and restrictions on foreign ownership of Telstra and Qantas (annexure 4.1a). These exceptions are bound to the current levels of limitations on foreign investment. This means a future government cannot make them any more restrictive.

The government 'measures' which can be challenged as infringing on investors' rights, include 'any law, regulation, rule, procedure, decision, administrative action, or any other form" taken by "central, regional or

local governments" (Chapter 8, Article 1e), p 59). Disputes can be taken either to national courts or decided in one of two international arbitration panels originally set up for the resolution of disputes between private, rather than public, bodies. These bodies ? UNCITRAL and ICSID ? do not provide the levels of openness of national courts. While investors sue governments seeking public money and seeking rulings on the appropriateness of public policy decisions, members of the public are not informed of the disputes or afforded the opportunity to be heard.

US corporations have used NAFTA rules to sue Mexican and Canadian governments for hundreds of millions of dollars. Examples include the following:

- The US Metalclad Corporation was awarded US $16.7 million (later reduced to $15.6 million), because it was refused permission by a Mexican local municipality to build a 650,000-ton/annum hazardous waste facility on land already so contaminated by toxic wastes that local groundwater was compromised (Shrybman, S. (2002) Thirst For Control, Council of Canadians, Toronto p 57)

- Ethyl Corporation, a US chemical company which produces a fuel additive called MMT containing manganese, a known human neurotoxin, succesfuly sued the Canadian government when it tried to ban the MMT. In April 1997 the Canadian Parliament imposed a ban on the import and inter-provincial of MMT in 1997, on grounds of public health as well as to reduce air pollution and greenhouse gas emissions. Ethyl Corporation successfully sued the Canadian Government, which was forced to settle the suit by reversing its ban on MMT and paying $13 million in legal fees and damages to Ethyl Corporation (Public Citizen (2001) NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy: Lessons for Fast Track and the Free Trade Area of the Americas, Public Citizen, Washington pp 8-9)..
- The U.S.-based Sun Belt Water Inc. is suing Canada for US$ 10.5 billion because the Canadian province of British Columbia interfered with its plans to export water to California. Even though Sun Belt has never actually exported water from Canada, it claims that the ban reduced its future profits. This case reinforces the concerns of many Canadians that NAFTA rules treat an essential service like water as a traded commodity (Shrybman 2002 p 57).
- The US company United Parcel Service (UPS), the world's largest express carrier and package delivery company. is suing the publicly owned company Canada Post. UPS argued that Canada Post's monopoly on standard letter delivery was in violation of NAFTA's provisions on competition policy, monopolies and state-run enterprises. UPS is arguing, among other things, that Canada Post abuses its special monopoly status by utilising its infrastructure to cross-subsidise its parcel and courier services. The availability of affordable postal services is a public policy issue in Canada. (Public Citizen 2001 p 32)

Recommendation:
(e) That the committee should not support an investor state complaints mechanism as it is an unreasonable restriction on democratic governance.

5. Government procurement (purchasing) policy

Government procurement policies form part of industry and regional development strategies, and serve to promote and develop local suppliers, especially important in regional areas. Both federal and state government have some policies which encourage local industry or which require foreign suppliers to develop relationships with local industries. These policies have been developed to support local industries, skills and employment. However they are not consistent with "national treatment" rules in trade agreements which forbid any favouring of local industry or any requirements to be placed on foreign suppliers. The Australian government did not sign the voluntary WTO Government Procurement Agreement precisely because it wished to keep these rights to have local industry development policies.

It is therefor inconsistent for Australia to sign away these rights in SAFTA, which require changes to federal government procurement policies so as to apply national treatment to Singaporean bidders for Commonwealth contracts (with some exceptions for small to medium enterprises and indigenous contractors). This means that, subject to these exceptions, the Australian government could not favour Australian contractors over Singaporean contractors when awarding government contracts.

These provisions do not apply to state and territory governments for the first year of the agreement. However, the Federal government has 'undertaken' to 'encourage' the states and territories to include government

procurement after the first year. This could prevent them from using state government procurement for industry development.

Recommendation:
(f) The committee should not support any restrictions on the right of governments to use purchasing policy for industry and regional development.

Yours sincerely

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