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Submission to the Joint Standing Committee on Treaties Inquiry into The Thai Australia Free Trade Agreement (TAFTA)

June 2004

Australian Fair Trade and Investment Network (AFTINET)

Written by Dr. Patricia Ranald and Louise Southalan

AFTINET

Level 1, 46-48 York Street

Sydney NSW 2000

Phone: (02) 9299 7833

Fax: (02) 9299 7855

lsouthalan@piac.asn.au

Summary

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 87 organisations and many more individuals supporting fair regulation of trade consistent with human rights and environmental protection. AFTINET welcomes this opportunity to make a submission to the Joint Standing Committee on Treaties on the Thai Free Trade Agreement (TAFTA).

The text of TAFTA was released on May 12, 2004, six months after the two governments announced it in October last year. CIE economic consultants were engaged to model some of the impacts of the agreement, and their study predicts that additional economic growth resulting from the agreement will be negligible - between 0.01% and 0.03% of GDP after 10 years.

Our primary issues of concern regarding this agreement are the lack of community consultation, the agreement's impact on regulatory capacity, and the lack of attention paid to the impacts on Thailand as a developing country, as well as on regional areas in Australia. JSCOT should not recommend in favour of this agreement until sufficient information on its effects has been prepared.

This submission contains the following:

1. Comments on DFAT's Regulation Impact Statement and National Interest Analysis, prepared for the Joint Standing Committee on Treaties, and
2. Comments on particular aspects of TAFTA

1. Comments on DFATS's Regulation Impact Statement and National Interest Analysis

(a) Lack of consideration of development impacts on Thailand

The emphasis within the RIS and NIA on the trade export aspects of the TAFTA agreement obscures the question of what, if any, other public policy objectives also played a role in these negotiations. The RIS and NIA do not address the issue of how Australia's approach to these negotiations fits within Australia's foreign policy objectives regarding developing countries.

DFAT does formulate and disseminate development policies as a function of AusAID's work. AusAID defines its objectives as 'advancing Australia's interests by assisting developing countries to reduce poverty and achieve sustainable development' (AusAID (2001) 'AusAID Strategic Plan: Improving effectiveness in a changing environment', AusAID, Canberra).

It is notable that there is no discussion in the DFAT and Ministerial documents of how this trade agreement will promote or otherwise affect these development goals. Accordingly, it is difficult to know whether the goals are more than mere rhetoric when it comes to trade negotiations with developing countries. If JSCOT is not presented with any information on this issue it will not be able to make a properly informed recommendation. It is also important for the public to be able to assess whether Australia's trade and development policies are complementing or undermining each other.

Other countries have incorporated their development goals into their trade policies. For example Canada and New Zealand have adopted particular measures within their GATS strategies to take account of the impact of trade negotiations on least developed countries. Such an approach offers a more

internally consistent approach to foreign policy, and ensures that development issues are not confined to questions of aid provision.

Recommendation:

When Australia is negotiating trade agreements with developing countries, the negotiations should be consistent with the development goals within Australia's foreign and trade policy. DFAT's RIS and NIA should include an analysis of the impacts of trade agreements on these development goals.

(b) Important omissions from the RIS and NIA

The RIS and NIA omit to make mention of the investor-state dispute process which is included in TAFTA. Such a process gives investors significantly increased rights to directly bring challenges to laws and policies of the other country. These disputes are arbitrated by panels of trade law experts, although the questions raised by them frequently impact on public policy questions. The dispute panels are not open to the public, unlike the domestic court processes of a country.

The RIS, NIA and the study by CIE consultants all fail to consider the impacts of this agreements on regional areas in Australia. Manufacturing, TCF and agriculture are the sectors of most significance in this agreement, and these sectors are particularly important in regional areas. The impacts of trade agreements on regional areas should be examined publicly before negotiations are finalised, to allow an informed decision to be made, and to enable regional communities to have the opportunity to give input into the process. This has been a consistent omission in DFAT's analyses of trade agreements, and continues with the TAFTA agreement.

2. Comments on particular aspects of TAFTA

(a) Tariffs on industrial goods

Australia has very low remaining tariff barriers averaging 5%, except in the vehicle industry and the clothing, footwear and textile industries, which vary from 5-15 %. There are various staged schedules for reduction of tariffs on Thai imports, with 47% of total Thai import tariffs reduced to zero immediately. Vehicle industry tariffs are reduced zero by 2010, and TCF tariffs reduced to zero by 2015. Both of these industries employ large numbers of non-English speaking background workers in regional areas of high unemployment. Regional employment studies are needed to show the impact of these tariff reductions, which could be the biggest impact of the agreement in Australia.

The RIS makes extensive mention of DFAT's efforts to ascertain the views of industry bodies and manufacturers throughout the negotiations. It is important to recognise that workers also have legitimate interests in negotiations such as these, and that their representative bodies should be entitled to an equal level of consultation. There is little mention within the RIS of efforts made by DFAT to consult with unions during or after the negotiations regarding the impacts of the agreement.

(b) Services

The TAFTA agreement has a "positive list" for services. This means that it only includes those sectors and areas of regulation which each government agrees to list in the agreement. This structure is an improvement on the "negative list" approach, which includes all services unless they are listed as exceptions, and which places much greater limits on the ability of governments to regulate services.

We understand that the agreement has a positive list only because the Thai government refused a negative list structure. Presumably this was because the Thai government wished to retain some ability to continue to regulate services, and did not want to go beyond the WTO GATS framework, which is a positive list structure.

The Australian government sought a negative list as in the Singapore Australia FTA and the Australia US FTA, and Australian negotiators have indicated they will pursue this issue when the agreement is reviewed after five years. Given the very broad reach of a negative list structure, and the limits it imposes on regulatory capacity, we submit that the negative list approach should be rejected. A positive list allows greater certainty of the limits of the agreement, and allows greater ability to regulate in the public interest and to give priority to local development.

The Australian commitments on services are similar to its existing commitments under the GATS agreement, and its initial offer in the current GATS negotiations. The fact that most essential and public services are not listed is welcomed. However TAFTA contains the same flawed definition of "public services" used in the GATS agreement. This is discussed below.

The services listed include business and professional services, communications, construction, distribution, financial, tourism, recreation and transport services. There are exceptions which note government majority ownership of Telstra, limits on foreign ownership of Telstra, and regulation of Australian coastal shipping.

There are also commitments on private secondary, vocational and tertiary education services, but not on public education services. Health services commitments appear to be limited to private podiatry and chiropody services.

As with GATS, the commitments on environmental services include wastewater management, but not water for human use.

Flawed definition of public services means there is no clear exemption

The TAFTA agreement contains the same flawed definition of public services as the GATS agreement. Article 803 clause 2 of TAFTA provides that the services chapter shall not apply to "a service supplied in the exercise of governmental authority...which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'. This mirrors GATS Article 1 (3).

Ambiguity arises about which services are covered by this exemption because in Australia, as in many other countries, public and private services are provided side by side. This includes education, health, water, prisons, telecommunications, energy and many more.

However in past discussion papers relating to GATS, DFAT has asserted that public services will not be caught under such a definition, and it has drawn a distinction, by way of example, between public education services and private education services. However no argument has been presented as to why these should be seen as qualitatively different within the definition used. Comments by the WTO Secretariat do not offer support for the government's assertion, and, rather, suggest a narrow interpretation of Article 1.3 (WTO (1998a) Report of meeting held on 14 October 1998, note by the Secretariat, Council for Trade in Services, WTO, 12 November 1998, S/C/M.30).

The government has given assurances that it does not intend that public services or government's capacity to regulate services be diminished. If this is the case, public services should be formally and unambiguously exempted from trade agreements, including TAFTA. If not, the likely resolution of this

ambiguity will be through rulings of Dispute Panels, deciding on a challenges by a government or an investor to a government's public service arrangements.

In light of this ambiguity, the Committee should recommend against the TAFTA unless there is an explicit exemption of public services.

(c) Investor State complaints process

There is an investor-state complaints process which gives corporations the right to complain to a trade tribunal and seek damages if their investments are harmed by a government law or policy. The trade tribunal to be used is UNICITRAL, run by the UN Commission on International Trade. The UNCITRAL processes are not open and transparent. As discussed above, AFTINET has consistently opposed this process, as it gives corporations unreasonable legal powers to challenge government law and policy.

(d) No core labour and environment standards

TAFTA does not make reference to labour and environment standards. Trade agreements should not undermine labour and environmental standards and that governments should abide by UN and ILO agreements on the environment and labour rights.

Conclusion

JSCOT needs to make properly informed decisions about trade agreements, which can only be arrived at based on sufficient information as to their likely impacts. In this case the information supplied is inadequate in the following areas:

- Impacts on the development goals within Australia's foreign and trade policy
- Likely regional impacts of the agreement
- Impacts of the investor-state dispute process

- Ambiguity in the definition of public services
- Lack of protection of labour and environmental standards

Recommendation

In the absence of the above information, JSCOT should not recommend in favour of this agreement.