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Submission of the Australian Fair Trade and Investment Network (AFTINET) to the Joint Standing Committee on Treaties regarding the Singapore-Australia Free Trade Agreement

Prepared by Dr Patricia Ranald and Louise Southalan

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Australian Fair Trade and Investment Network (AFTINET)

Public Interest Advocacy Centre

Level 1, 46-48 York St

Sydney 2000

Ph 02 92997833

Fax 02 92997855

pranald@piac.asn.au
lsouthalan@piac.asn.au

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1. Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Joint Standing Committee on Treaties (JSCOT) regarding the Singapore-Australia Free Trade Agreement (SAFTA). AFTINET is a network of 65 organisations - churches, unions, environment groups, human rights and development groups and other community organisations - as well as individuals, which conducts public education and debate about trade policy. AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules.

SAFTA is an important agreement because of its impact on Australia. In addition to its importance in its own right, it is important because it is being presented as a model for the Australia-US Free Trade Agreement and other bilateral agreements. This submission argues that the consultation surrounding SAFTA has been inadequate, and that trade agreements should be subject to parliamentary vote rather than ratification by Cabinet. The submission then examines critically several key aspects of SAFTA: the negative list approach, the impact on regulatory capacity of government, the investor-state dispute provisions, and the effects on government procurement policies.

2. Inadequate consultation and parliamentary oversight

Negotiations on SAFTA were concluded on 17 February 2003. During the period of the negotiations the level of consultation was very poor. While industry bodies may have been consulted, there was little consultation with civil society groups. There were no opportunities to make 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 even this opportunity seems to provide little scope for influencing the Government's approach. The government is proceeding, for example, with introducing SAFTA implementing legislation to remove tariffs even before the JSCOT review process has finished. The Bill was to be introduced in late March but was delayed because of the heavy legislative program. It is intended to be introduced in May, before the JSCOT review is finished (*Australian Financial Review* 28 March 2003 p 5).

As with other trade agreements, SAFTA will not be subject to parliamentary vote, but rather will go to Cabinet for final ratification. The JSCOT inquiry is the only opportunity for public input into the agreement. The marginalisation 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' (DFAT 2003 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.

3. Dangers of negative list approach for services and investment

The SAFTA agreement contains a '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. The effect is 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 structure has potentially far more impact on domestic policy than the positive list used for the World Trade Organisation's General Agreement on Trade in Services (GATS) agreement, where only those sectors listed are covered by the agreement. The negative list is the model of the Multilateral Agreement on Investment that was so decisively rejected and defeated by community opinion in 1998.

One effect of the negative list 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. SAFTA is described as a 'GATS plus' agreement by the negotiators (JSCOT 2003 pp 4-6), which means that it goes further than the commitments governments have made under GATS. If a future government were 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.

The SAFTA negative list approach is being used as a model for the USFTA (JSCOT 2003 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. However 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.

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.

DFAT's Regulation Impact Statement states that Singapore would expect that "a high percentage of trade-restrictive measures would be bound at existing levels" (DAFT 2003 p 15). If this occurred, it would mean that state governments would not be able to introduce new measures 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 because it can lead to unintentional outcomes and undue restrictions on current and future government policies.*

4. 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 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 is a barrier to trade. If the challenge were successful the government would be obliged 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 enact any new regulation which is not consistent with the agreement. The detail is set out in two Annexures – 4.I(a) and 4.II(a). The exceptions to the agreement are described as 'non-conforming measures'. The exceptions listed in Annex 4.1(a) are bound to the current levels. This means, for example, that future governments could not 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 the 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 (Annexure 4.II(a) p 6).

A matter of concern regarding 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.*

5. Investor-State dispute mechanism

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 corporations to take legal action to force changes to Australian

law if they can argue that the law is not consistent with the agreement. They could also sue the Australian government for damages. This gives additional legal powers to corporations which already exercise enormous market influence, 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.I(a)). However these exceptions are bound to the current levels of limitations on foreign investment, which means future governments 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 2002 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 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).

The investor-state dispute mechanism in NAFTA has proved to be a restriction on government regulatory capacity. It is inappropriate that the Government enter into an agreement with Singapore containing such a mechanism, far less that this be used as a model for a US Free Trade Agreement.

<u>Recommendation:</u>

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

5. Government procurement 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. Federal and State governments have 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 being 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 therefore 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.

Conclusion

The SAFTA negotiations have been characterised by poor consultation with civil society, and the Government appears to place little weight on the only opportunity provided for parliamentary involvement, the JSCOT review of the agreement.

While the exceptions for some public services are welcome, the committee should oppose the use of a negative list model, since the ambiguities about public services mean that the scope of both the agreement and the exceptions is uncertain. The negative list also has the potential to restrict the democratic regulatory powers of all levels of government. There is no justification for restrictions on the right of governments to use purchasing policy for industry and regional development. The investor-state dispute process should also be opposed, as it has resulted in negative outcomes under the NAFTA agreement and is an unreasonable restraint on democratic governance. These features of SAFTA repeat the key features of the MAI, which was decisively rejected and defeated by community opinion in 1998.

This negative list and investor-state complaints mechanism are also being used in the negotiations for a US Free Trade Agreement. The size of the US economy means, however, that their impact would be greatly magnified. We urge the committee to learn the lessons of the MAI , and not to repeat its mistakes.

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