

# **Submission to the Department of Foreign Affairs and Trade on the GATS negotiations**

Australian Fair Trade and Investment Network (AFTINET)

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## **1. INTRODUCTION**

### **1.1 Overview**

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Department of Foreign Affairs and Trade on the GATS negotiations. AFTINET is a network of 90 church groups, unions, environment groups, legal centres, social service organisations, 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. AFTINET supports the principle of multilateral trade negotiations provided these are conducted within a framework that is transparent, provides protection to weaker countries and is founded upon respect for democracy, human rights and environmental protection.

This submission is divided into two sections. The first contains recommendations and discussion of general issues regarding the GATS negotiations. The second section deals with Australia's responses to specific issues within the current GATS negotiations.

AFTINET calls on the Government to make commitments to improve the openness of its processes and to allow meaningful public and parliamentary scrutiny, debate and input before any changes are made to the existing offer. The Government should ensure that its approach to the GATS negotiations, including any second offer it may make, does not weaken the ability of governments to regulate in the public interest. The Government should integrate its trade and development goals, and support proposals to democratise the WTO.

In this submission, reference is made to the 2003 DFAT Discussion Paper, and its 2004 update. The two papers have been read together in preparing this submission.

## 1.2 Recommendations

The Government should:

- Ensure that Australia's GATS negotiation strategy is consistent with Australia's development goals.
- Submit all policies on GATS to full parliamentary debate and a parliamentary vote before commitments are made.
- Disclose full details of its specific requests to other governments and of other governments' requests to Australia.
- Make public its draft second offer before this is lodged with the WTO, with enough time for public debate and input before lodgement.
- Ensure that Mode IV negotiations are not used to undermine labour standards in Australia or elsewhere.
- Oppose any proposals which would further reduce the right of governments to regulate services, including the application of a stricter 'necessity test' to regulation, and make no change to the Government's first offer which would restrict governments' ability to regulate services.
- Support the clear exclusion of all public services from the GATS.
- Make no further offers in health services, social welfare services, education services, postal services, energy services, water services or audio-visual services.
- Support the exclusion of audio-visual services from the GATS.
- Oppose the inclusion of water services for human consumption in the GATS, whether or not it is within the category of 'environmental services'.

## **2. GENERAL ISSUES**

### **2.1 Australia's GATS objectives**

The Government's 2003 GATS discussion paper defines Australia's objective within the GATS process as being to gain an expansion of exports for service providers (at p 10). The 2004 update to the discussion paper does not make any additional comment on Australia's objectives.

The Government has failed to state what broad principles underpin its GATS negotiating position. The WTO negotiating process is one of give and take, and of trading interests against other interests. To guide Australia's approach to this process there should be a framework of principles. Beyond the objective of increasing export opportunities, the Government has given no indication of the principles that frame Australia's engagement in the GATS negotiations.

The emphasis within the DFAT discussion papers on the trade export aspects of the GATS agreement comes at the expense of other public policy objectives that one might expect in the Government's approach to such a broad-ranging agreement. These include such goals as environmental sustainability, human rights compliance and protection of marginalised groups.

The GATS negotiations have development implications, so it is important that the Government has a policy on how its approach to the GATS relates to its approach to development issues more broadly. The discussion papers do not address how Australia's approach to the GATS negotiations fits within Australia's foreign policy objectives regarding developing countries. While AusAID, as part of DFAT, formulates Australia's development policies, there is no indication that these development goals play any role in Australia's GATS negotiations.

Australia's most recent trade and foreign policy White Paper (DFAT 2003b) refers to

the objective of promoting prosperity in developing countries. If this is a serious goal, it should be reflected in the approach taken to both our multilateral and bilateral trade relations. This should include recognition of the importance of developing countries maintaining their capacity to regulate foreign investors and corporations, so as to have some control over the development process.

The issue of regulatory capacity is an area in which Australia should have clear GATS objectives, both in relation to its development goals and to Australia's sovereignty. The DFAT 2003 GATS discussion paper contained the following statement:

[The Australian Government] will not agree to any diminution of our overall right to regulate that would constrain our ability to pursue legitimate policy objectives in the regulation of services sectors, or compromise the capacity of governments to fund and maintain public services (DFAT 2003a p 10).

A similar statement is made in DFAT's explanatory paper and the Minister's media release issued with the Government's initial GATS offer. The updated discussion paper of 2004 does not deal with this issue.

As AFTINET has noted before, such a statement is welcome in principle, but raises more questions than it answers. What exactly is meant by the "overall right to regulate", and does this differ from a right to regulate in particular sectors? The Government should state explicitly that public services should be clearly exempted from the GATS negotiations and that the capacity of all levels of government to regulate should not be diminished.

These issues are dealt with further below in relation to recommended reforms to WTO and Australian processes. It is important that Australia has a response to these issues because:

- (a) as discussed above, there are development impacts of the GATS and Australia

- should have a consistent and integrated approach to development issues;
- (b) strategically Australia needs to recognise the changed international political environment that exists since the formation of the G20, whose concerns range beyond agricultural issues; and
  - (c) these issues affect Australia's sovereignty as well as that of other countries.

## **2.2 The impact of bilateral treaties**

It is important to consider Australia's approach to the GATS negotiations in the context of the numerous bilateral trade and investment treaties that Australia has negotiated recently or is negotiating currently.

Australia has accepted significant new obligations regarding services under the US Free Trade Agreement (USFTA) and the Singapore-Australia Free Trade Agreement (SAFTA). These obligations are relevant to the current round of GATS negotiations. In addition, future bilateral agreements proposed with Malaysia and China may contain commitments on services.

There are concrete problems in making commitments in bilateral agreements. In particular, after bilateral agreements are negotiated, pressure can be brought to bear on governments to multilateralise the commitments within them.

Significant differences exist between treaty-making on a bilateral basis compared to the process on a multilateral basis. In bilateral negotiations between larger and smaller economies, large economies have more bargaining power. Multilateral negotiations have the potential for some mitigation of these power inequalities. This is why historically Australia, as a relatively small economy in the global context, has relied on multilateral rather than bilateral negotiations.

Recently, Australia has embarked on a number of negotiations for bilateral agreements that have contained services commitments that go well beyond the GATS commitments. These include commitments in such areas as water, energy, audio-

visual and public transport. These are dealt with in more detail below. Once a sector is committed in a bilateral agreement, which often contain Most Favoured Nation clauses relating to subsequent bilateral agreements by the parties, there is greater pressure to then multilateralise these commitments. Such commitments, made in the unequal bargaining context of bilateral agreements, should not be included in the GATS. This is dealt with further below in relation to particular sectors.

### **2.3 Transparency, openness and democracy**

#### **(a) The WTO's GATS negotiations**

AFTINET supports the international regulation of trade through multilateral trade negotiations. In principle such negotiations have the potential to mitigate the economic power of the largest economies and the influence of transnational corporations. However, for this principal to work in practice, there must be a multilateral framework that guarantees the interests of less powerful nations and regulates corporate influence. The current WTO framework does not achieve this.

Over many years, developing countries have proposed changes to the WTO framework to make it more transparent and more accessible for smaller and developing countries. Most recently these concerns were raised during the collapse of the Cancun meeting, when the text on agriculture, for example, was presented to developing countries without adequate opportunity for them to contribute to it.

The lack of transparency within the WTO process makes it difficult for public debate about such fundamental democratic concerns as the capacity for governments to regulate, the appropriate mix of public and private control over resources and services, and principles for the expenditure of public funds. The GATS negotiations impact significantly on all of these matters.

A range of suggested democratic reforms were presented to the WTO General Council in April 2002 by a group of developing countries (WTO 2002). The proposal

was rejected by the Quad and by the governments of other key industrialised countries, including Australia. Similar proposals were made by the African, Caribbean and Pacific Group of 77 Countries before the WTO Ministerial Meeting in Cancun (African, Caribbean and Pacific Group of Countries Declaration, 1 August 2003). Key suggestions in the proposal include:

- allowing all members to express a view before the draft agendas of meetings are drawn up;
- ensuring that draft texts include a range of views;
- allowing a sufficient time for members to consider texts before decisions are required, and circulating new drafts before they are to be decided upon;
- chairpersons remaining neutral and being selected from a meeting of all members;
- ensuring that decision-making meetings are open to all members; and
- holding the majority of meetings in one place to reduce travel expenses for developing countries.

Developing countries have continued to raise many of these issues consistently in WTO negotiations. AFTINET supports the above changes, as well as a comprehensive review of existing WTO agreements to review their social and economic impacts.

#### (b) Australia's processes

The Government's public consultation processes have improved during the course of these negotiations. However, AFTINET remains concerned that, given the great impact of the GATS agreement on regulation in important areas of social policy, the public consultation process is still inadequate. It has not been possible for public debate about the implications of the agreement to be sufficiently informed during the negotiation process because the Government has not made sufficient information public. While the Government's decision to release its initial GATS offer in April 2003 was certainly an improvement on the previous policy of not making such

documents public, there is a need for further improvement. Notably:

- The public was only able to know the content of the offer after it had been lodged with the WTO in Geneva. AFTINET sought public discussion before the offer was lodged.
- The Government has not released its requests to other countries. It is not clear, for example, whether Australia has made requests on health, education or water to other countries, including developing countries.
- There has been no commitment to public discussion of the draft second offer before it is lodged.

DFAT's production of the 2003 discussion paper and update and DFAT's regular e-mail bulletins are welcomed. However, these publications would be more useful for public discussion if they contained more information. The capacity for informed public debate about these negotiations depends to a large extent on the willingness of the Government to make key information public in time for it to be understood and considered. Because the information provided is too general and vague, public debate in response is limited.

In particular, the 2003 discussion paper and 2004 update summarise requests made to Australia, without disclosing which countries have made particular requests and / or the detail of each request. Requests made by Australia to other countries are barely mentioned at all, making it impossible to comment meaningfully on the impact of such requests on developing countries in particular. This hinders scrutiny and debate by civil society about the operation and effects of Australia's trade policy.

The discussion paper and update provide a description but no detailed analysis of Australia's current commitments and their implications. This reflects a broader failure within the papers to acknowledge existing debates about the merits of the approach to liberalisation adopted under GATS. The papers refer uncritically to potential economic benefits from the GATS processes without reference to costs associated with this process, both economic and non-economic (DFAT 2003a p4).

Other areas in which Australia's processes would benefit from improvement is the capacity of Parliament to scrutinise and review the Government's objectives for trade negotiations, and to be able to vote on trade treaties before they are signed.

The report of the Inquiry by the Senate Committee on Foreign Affairs, Defence and Trade into the GATS and USFTA negotiations of November 2003 recommended improved procedures in these areas. AFTINET recommends that the Government adopt the recommendations of the Committee for all its trade negotiations.

#### **2.4 The impact of the GATS on the ability of governments to regulate**

At the time of the release of the Government's initial offer, in April 2003, the Minister's media release stated that:

The Government is committed to upholding the right of WTO members to regulate and to fund public services, and will not support any new rules or make any offers which cast doubt on that outcome.

There are several important issues in the GATS negotiations that have an impact on the capacity of governments to regulate.

##### **(a) Continued ambiguity in the definition of public services**

Assurances are given in the discussion papers and elsewhere that the Government does not intend that public services or the Government's capacity to regulate services be diminished by the GATS negotiations. If this is the case, public services should be formally excluded from the negotiations.

As AFTINET has stated in other submissions, it is particularly important that public services be clearly excluded in light of the ambiguity about GATS Article 1.3. Along with many other organisations and some governments, AFTINET remains concerned about the ambiguity of the definition in this Article of those services excluded from

the GATS: services carried out in exercise of governmental authority and provided neither 'on a commercial basis nor in competition with a service provider'.

Australia, as with many other countries, has many commercial elements within local, state or commonwealth provision of public services. The implications under GATS Article 1.3 are significant, and this has been specifically noted by the WTO Secretariat. For example:

The co-existence of private and public hospitals may raise questions, however, concerning their competitive relationship and the applicability of the GATS: in particular, can public hospitals nevertheless be deemed to fall under Article 1.3? ... The hospital sector in many countries ... 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 ... 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. In scheduled sectors, this suggests that subsidies and any similar economic benefits conferred on one group would be subject to the national treatment obligation under Article XVII. (WTO 1998, quoted in Ellis-Jones & Hardstaff, 2002, p 42).

In view of the prospect of such an interpretation being adopted by a WTO Trade Dispute Panel, there is a clear need for Australia to explicitly exclude its public services from the GATS negotiations.

We note that the Brazilian Government is exploring a proposal to clarify this definition. The Australian Government should not support any change to the definition that would endanger public services, and should support a re-wording that explicitly exempts essential public services from the GATS.

(b) Negotiations over domestic regulation: concerns about the necessity test

Negotiations within the GATS Working Group on Domestic Regulation continue, including discussion of how a ‘necessity test’ could be applied to licensing, qualifications and service standards. That is, that under a challenge from another WTO member, a government could be required to show that a particular law is no more regulatory than necessary to achieve the particular objective of the law.

We are concerned about the proposed necessity test because of the constraint it would place on the freedom of governments to regulate in the public interest. If legislation and policy are required by GATS rules to fit within a framework that prioritises trade interests above all other interests, then governments will be unable to govern in the public interest.

The Government should not support an application of the necessity test that would restrict governments’ ability to regulate.

### **3. AUSTRALIA’S RESPONSES TO SPECIFIC ISSUES**

#### **3.1 Mode IV**

The issue of the movement of people is a critical one in the GATS negotiations. A number of developing countries have expressed frustration at the emphasis within the GATS negotiations on freeing the movement of capital rather than the movement of people, particularly people from developing countries. The Doha ‘Development Round’ was launched amidst claims that it offered development opportunities for the poorest countries. Developing countries are supporting increased mobility for temporary service providers under Mode IV. Transnational corporations are also supporting increased mobility, in some cases in order to reduce wages and working conditions. Mode IV should not be used to enable workers’ rights and conditions to be reduced.

AFTINET expects that Australia has received or will receive requests from a number of developing countries to make an offer on Mode IV. Australia's response should be developed through a process of informed public discussion. The key principles for Australia's response to Mode IV requests should be:

- responses should be consistent with Australia's development goals;
- temporary service providers should not be a substitute for investment in the training and skills of the local workforce; and
- temporary service providers in Australia should have the same rights, working conditions and salary levels as Australian workers under Australian law.

### **3.2 Investment in services**

Australia has a number of laws that regulate investment in services. These exist at both a horizontal level, ie across-the-board regulations, such as the Foreign Investment Review Board (FIRB), and at a sectoral level, such as requirements for minimum numbers of Australian directors of companies investing in sensitive sectors like telecommunications.

Under the USFTA and SAFTA Australia has committed to raising the threshold at which FIRB can review US and Singaporean investment in services, with some exceptions for sensitive sectors.

This is an area in which the pressure on Australia to multilateralise its bilateral commitments is likely to be very high. We note that the EC has requested removal of Australia's capacity to maintain both horizontal and sectoral investment regulations. Presumably other countries have made similar requests to Australia.

If Australia multilateralised its commitments in the USFTA and SAFTA, it would remove the ability in most cases of FIRB to review all but the largest investments.

The capacity to regulate and review foreign investment allows Australians, through their governments now and into the future, to have the power to exercise some level of control over the impact of this investment in Australia. To retain this capacity does not mean that foreign investments are necessarily restricted or reviewed in an overly cumbersome manner. It has been very rare for FIRB, for example, to recommend against a particular investment proposal by a foreign investor. However, by retaining the capacity for review and regulation, Australians have some ability to direct the way in which economic development takes place now and into the future. This can maximise the local development benefits for Australian communities and industries.

### **3.3 Water services**

It is not surprising that that US specifically sought that water services not be excluded from the USFTA. What is surprising is that Australia agreed to this request, given the importance and scarcity of water in Australia. It seems likely that this bilateral commitment will be of great interest to the EC, whose transnational corporations exercise significant global dominance. Indeed, the EC requests that were leaked in 2003 show that the EC wants Australia to make an offer to include water for human use and waste water management.

The EC is pushing for 'environmental' services to be reclassified. As AFTINET has noted before, the 2003 discussion paper states that there is 'broad support for the adoption of a broader classification scheme for environmental services', but provides virtually no information on what this in fact means, and the implications of such reclassification. The proposal includes defining 'environmental services' so widely that it includes the provision of, among other things, 'water for human use'. The 2004 update does not give any additional information on this issue.

Australia has supported this EC proposal, the effect of which would be that supply of water - a substance essential to human life, and which is in crisis globally and within

Australia - would become subject to GATS' rules which operate on a market basis. This change is sought to be made in a global context in which ten major water transnational corporations dominate the market and exercise enormous influence.

The supply of water in Australia, as elsewhere, involves the balancing of public policy objectives, including the need to ensure access to all, and the need to conserve the resource. A broadening of the definition of environmental services to bring water for human use within GATS would dramatically change the balance of interests in this important area without public debate as to the merits of such a change. The consequences of making supply of water subject to GATS are that the horizontal obligations of market access and national treatment would be applied, subject to any horizontal commitment by Australia limiting its obligations to liberalise.

Under Australia's initial offer several new commitments were proposed under environmental services. While 'water for human use' was not included in the offer, water is significant for a number of the newly-added services, notably 'remediation and cleanup of soil and water' and 'protection of biodiversity and landscape'. These services, together with 'protection of ambient air and climate' and 'noise and vibration abatement' have been added to Australia's offer without limitations on either market access or national treatment.

After the release of the first offer, the Minister's media release stated that 'Australia will not be making any offers in the areas [involving] the ownership of water'. This is welcomed, but unfortunately leaves unclear the status of the management of water distribution and treatment services. Management and ownership of water sources, water distribution and water treatment are very important issues in Australia. AFTINET is seeking a commitment from the Government that Australia will not make any offers in this area.

The impacts of the USFTA on Australia's water systems, particularly when combined with the proposed markets in water rights, are yet to be properly understood. The

Government should certainly not be making further commitments in this area in this round of the GATS. Such important public policy issues should be democratically decided by governments after public debate, not in closed-door trade negotiations. On this basis alone, the Government should oppose the reclassification of environmental services to include water for human use.

### **3.4 Public utilities, transport and energy**

Neither public transport services nor energy services were excluded from the USFTA. This will increase the pressure on Australia to multilateralise its commitments in these sectors by making a GATS offer.

It is important that the Government retain full capacity to regulate these essential services. Currently Australia has GATS commitments in road passenger transport, excluding urban bus services, and in business services incidental to energy distribution. The Government should not make any further commitments in these areas.

### **3.5 Audio-visual services**

This is another sector in which commitments were made in the USFTA, despite significant public concern about the impact on Australia's cultural diversity and the viability of Australia's audio-visual industry. It is likely that Australia's commitments under the USFTA will increase pressure for Australia to make a GATS offer in audio-visual services. Commitments by governments in this area have an impact on the important issue of the freedom of countries to determine their cultural policies and thereby protect cultural diversity, heritage and values.

Within the United Nations Educational, Scientific and Cultural Organisation (UNESCO) an International Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions is being negotiated. When finished, the Convention

will set out a range of protections for cultural policies and cultural diversity (UNESCO 2004).

AFTINET understands that the WTO secretariat is currently formally consulting with the WTO's specialised councils and the General Council regarding a response to the question of the primacy of the proposed UNESCO Convention over GATS (International Network for Cultural Diversity 2004).

AFTINET seeks a statement from the Government on its position on this question, as well as a commitment that it will not make any offer in the area of audio-visual services. We welcome the Minister's statement of 1 April 2003 that:

the Government will ensure that the outcomes of negotiations will not impair Australia's ability to deliver fundamental policy objectives in relation to social and cultural goals.

However, AFTINET would welcome confirmation that the Government does not intend to make any offers in audio-visual services. Culture should not be treated as an economic commodities.

### **3.6 Postal and courier services**

The EC has requested that Australia make offers in the area of postal and courier services. We expect that other countries such as the US would also have made such requests, because of the interests of their transnational delivery service suppliers.

AFTINET understands that the Government is considering making an offer in this area, which would be likely to exempt the reserved service. The reserved service sets a common price for the delivery of standard letters throughout Australia.

The reserved service should certainly be explicitly excluded from GATS. But we

argue that any offer on postal or courier services could undermine the ability of Australia Post to continue to provide services on an equitable national basis, especially in rural and regional areas. Private competitors are able to ‘cream skim’ the most lucrative urban markets without the obligation to provide other services. The Government should not forfeit the ability to both regulate and provide equitable access to postal services by including them in the GATS.

The level of interest in postal services is demonstrated, for example, by the case of *UPS v Canada Post* under the NAFTA agreement. In this case, a large US postal company is arguing that Canada Post’s public network unfairly subsidises its postal and courier services. While NAFTA is a different agreement to GATS, some of the issues in that case could be of relevance to Australia Post if Australia makes commitments on postal and courier services.

### **3.7 Education services**

The Government has made commitments in education under GATS in private secondary and tertiary education services, and English language tuition services. Nothing was added to this in the 2003 initial offer.

The Minister’s 2003 media release and the discussion papers seek to draw a distinction between an offer on public education services and one on private education services. However, the ambiguous definition in Article 1.3 remains, and it is legitimate to ask whether, for example, there is any guarantee that public technical education services will not be subject to GATS, as public technical education is operating in an increasingly competitive national vocational education and training market. As discussed above, comments by the WTO Secretariat do not offer support for the Government’s assertion, and, rather, suggest a narrow interpretation of Article 1.3.

The discussion paper states that requests have been made for full commitments in all

sub-sectors of education. AFTINET submits that the Government should not accede to these requests, even solely in the area of private education. The ambiguity of the definition within Article 1.3 means that any commitment would put public education at risk.

### **3.8 Health services**

Australia's current scheduled health commitments are limited to podiatry, chiropody and dental services. As with education, some health services are currently provided by the states and territories on a commercial basis, and it may be argued that this is done in competition with one or more service providers.

The discussion paper states that Australia has received requests for full commitments on modes 1-3 in health services. These should be refused, and health, along with other essential public services, clearly exempted by the Government from its GATS negotiations. The Government should not make any further offers in this area.

## **4. CONCLUSION**

Negotiations about trade in services are qualitatively different from those about trade in goods because of the ways in which regulation of services affects access and equity within society. For this reason it is important that the Government give central importance to maintaining the ability for Australian Governments now and in the future to be able to make the laws and policies required to protect the public interest.

This is important for our own citizens and for those in other countries, particularly in developing countries. A clear statement of this by the Government would be a useful way to frame Australia's future GATS negotiations, and would aid public understanding of the Government's intentions.

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