

Supplementary Submission of the Australian Fair Trade and Investment Network (AFTINET) to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry on the General Agreement on Trade in Services (GATS) and a Free Trade Agreement with the United States.

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This supplementary submission is made to update the main AFTINET submission to the Senate inquiry. Since that submission was prepared, the Government has made its initial GATS offer public, and AFTINET has undertaken an analysis of the Singapore / Australia Free Trade Agreement (SAFTA), which DFAT officials have referred to as a model for the US Free Trade Agreement (USFTA). This supplementary submission briefly comments on these two matters.

1. Release of the Government's initial GATS offer

On April 1 the Government made its initial GATS offer public. As this is the first time that such offers have been publicly released, it is an important step towards transparency in trade negotiations. While AFTINET welcomes the release as a first step, it does not meet the requirements for transparency and accountability in the GATS negotiations. 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 offer is an initial offer only, subject to change at any time over the next 18 months of further negotiations. There should be commitment to a process of community consultation before any changes are made;
- the government has not released its requests to other countries. It is not possible to know, for example, whether Australia has made requests on health, education or water to other countries, including developing countries;
- There is still ambiguity in the definition of public services in the GATS. As mentioned in our main submission, all public services should be clearly excluded from these negotiations.

DFAT's explanatory paper on the offer makes a reference to the negotiations on GATS rules, which, as we noted in our main submission, was absent from DFAT's discussion paper. The explanatory paper acknowledges that proposed changes to GATS rules on regulation and proposed changes to the definition of subsidies to include funding of public services could affect the

ability of governments to regulate services and to provide and fund public services. The paper states that the government will support the right of governments 'to regulate and to fund public services and not to support any new rules which cast doubt on that outcome'. Such a commitment is welcome, however as these negotiations are also held in secret, without changes to the process the public will not know the result of these negotiations until after their completion.

In relation to the content of the offer, we welcome the fact that no new offers have been made on health, education, postal services, water for human use or audio visual services, and that there are no changes to the Foreign Investment Review Board or to the limitations on foreign investment in Telstra. The new offers or changes in existing commitments in the Australian government offers include:

Environmental services

There are several new offers under environmental services. While 'water for human use' is 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' are added to Australia's offer without limitations on either market access or national treatment.

Offers on financial, telecommunications and maritime services

Offers have been made in each of these sectors. In financial services the changes are said by the government to reflect changes to financial regulation which have already occurred in domestic law. In telecommunications the changes are to Australia's existing commitments on numbers of satellite services and foreign investment in Optus and Vodaphone, which the government again has said reflect changes in domestic regulation since the previous negotiations. In maritime services the additional offers are on port

services, including pilotage, towing and tug assistance and shore-based operational services.

New offers have an effect on regulatory capacity, regardless of whether they reflect existing practice or not, because they remove the flexibility of future governments to regulate contrary to scheduled commitments. Australia will be bound by the final offer and could expect penalties under the GATS rules if a future government wished to change them. Accordingly, new offers should not be made without prior public debate.

2. The Dangers of the Singapore Free Trade Agreement as a model for the USFTA

The government concluded negotiations on 17 February 2003 with Singapore for a Singapore/ Australia Free Trade Agreement (SAFTA). The treaty was tabled in parliament on 24 March, and is being examined by the Joint Standing Committee on Treaties (JSCOT). SAFTA is relevant to this submission because it is being used as a model for the USFTA (Joint Standing Committee on Treaties Transcript 2003 p 4).

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 GATS 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 (Joint Standing Committee on Treaties Transcript 2003 pp 4-6), which means that it goes further than the

commitments countries 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.

Investor-state dispute mechanism

In AFTINET's main submission we discussed the ways in which investor-state dispute mechanisms have operated under NAFTA to deliver excessive power to corporations to challenge government regulation and seek damages if such regulation affects their interests. SAFTA contains such an investor-state dispute mechanism in its chapter on investment. This gives additional legal powers to corporations which already exercise enormous market influence, and is an unacceptable limitation on democratic governance.

Given that SAFTA is considered a model for the USFTA by the government, the inclusion of this investor-state dispute mechanism in SAFTA is of great concern. As discussed in AFTINET's main submission, US corporations have aggressively pursued their rights under this mechanism in NAFTA, and there is no reason to think that they would not do so under a USFTA.

Ability of governments to regulate services and ambiguity regarding public services

Several elements of SAFTA raise concerns regarding the status of public services, and mean that it should not be used as a model for a USFTA. 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 Annexure 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.

Annexure 4.II(a) lists a range of service sectors as exceptions in Annexure 4.II(a). However, the extent to which listed public services are exempted from the agreement is ambiguous. The following services are claimed to be exempted, 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.

This ambiguity highlights a persistent problem in current international trade negotiations, where it is impossible to say with any precision whether agreements apply to a large number of public services. The ambiguity fuels public mistrust, which is compounded by government unwillingness to exempt public services in clear language.

As mentioned in our main submission, the threat posed to public services and government regulatory capacity from a USFTA is considerable. If SAFTA is to be used as a model for the USFTA, there is justified cause for public concern. Given the size of the US economy, such an agreement would have far more impact on essential services.

Conclusion

The government has taken an important step towards transparency by releasing the GATS offers. As discussed, however, these were released too late to allow public debate. The government should now release its requests to other countries and commit to full public consultation before any changes are made to either offers or requests. All new offers affect regulatory capacity on matters of public policy, and it is unacceptable that the public is not able to debate their content before they are made.

In relation to the USFTA, we have argued in our main submission that the negotiations should not proceed. The government has indicated that it will use SAFTA as a model, and the above analysis demonstrates why it would be dangerous to do so. The government should commit to full public consultation throughout the entire process of these negotiations and other trade negotiations, as they impact dramatically on public policy.

References

Joint Standing Committee on Treaties (2003) 'Transcript of Joint Standing Committee on Treaties', 24 March, Commonwealth of Australia, Canberra, sighted at JSCOT website 8 April 2003:

<http://www.aph.gov.au/house/committee/jsct/march2003/tor.htm>