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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SECTION ONE

Overview

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the GATS negotiations and the US Free Trade Agreement. AFTINET is a network of 65 churches, unions, environment groups, human rights and development groups and other community organisations as well as individuals, and 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 which is transparent, provides protection to weaker countries and is founded upon respect for democracy, human rights and environmental protection.

This submission is divided into three sections. The first section contains an introduction and recommendations regarding trade agreements generally, and the GATS and USFTA negotiations specifically. The second section concerns the terms of reference for the GATS negotiations, and the third section deals with the terms of reference for the USFTA negotiations.

Introduction

Since the end of the Uruguay Round the subject matter and reach of trade agreements has extended into areas which had previously been considered the domain of domestic policy. This expansion has taken the form of a range of new multilateral agreements within the WTO, as well as an increased emphasis on bilateral and regional agreements. Significant differences exist between treaty making on a bilateral basis compared to a multilateral basis, particularly where large power imbalances are present between the parties.

AFTINET supports the concept of 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 which guarantees the interests of less powerful nations and regulates corporate influence. The current WTO framework does not meet these goals. In theory all 146 member governments are equal in WTO decision making. However scholars of the WTO processes have analysed how in practice the WTO is dominated by the most powerful trading nations, the US, Canada Europe and Japan, whose dominance of the WTO informal power structure is recognised in WTO

jargon, which dubs them 'the quad' (Braithwaite and Drahos, 2000). They initiate much WTO policy and their endorsement is required for the progress of any initiative in the WTO. They conduct 'informal' meetings with up to 30 other governments, previously known as the 'green room' process and more recently through informal 'mini-Ministerial' meetings like the one held in Sydney in November 2002. Over 100 smaller and developing countries are effectively excluded from the decision making process, and are pressured through aid and other forms of economic influence to join the consensus (Kwa, 2002).

This process means that WTO agreements often reflect the interests of the powerful. A key example is the Agreement on Agriculture, which has resulted in the opening of markets in developing countries but has not addressed the issue of subsidies in industrialised countries. Another is the impact of the Trade in Intellectual Property Rights (TRIPs) agreement on developing countries, which is discussed further below. The TRIPs agreement has been described as not a free trade agreement but one which 'extends the life of patent monopolies' to the detriment of developing countries (Braithwaite and Drahos, 2000, pp 203-4). The GATS negotiations also provide examples, which are discussed in the GATS section of the submission.

Corporate influence is also dominant in the WTO, through corporate lobbying of governments, and participation in government delegations. The most recent powerful example of this was the lobbying by US pharmaceutical companies in December 2002 which resulted in the US government blocking proposals to change the interpretation of the TRIPs agreement to make medicines more affordable to developing countries (Hamburger, 2003). This issue, which was hailed as a key gain for developing countries in the Doha round of negotiations, remains unresolved. The increasingly dominant and unilateral role of the US in the WTO has reflected its recent behaviour in the context of the United Nations and is the subject of increasing commentary (Becker, 2003).

AFTINET supports changes to the WTO framework to make it more transparent and accessible for smaller and developing countries of the kind which were put forward by developing countries in March 2002 but rejected by the 'quad', and by other key industrialised country governments, including Australia. We also support a comprehensive review of existing WTO agreements to review their social and economic impacts before any new agreements are contemplated, specifically the proposed new agreements on investment, competition policy and government procurement. Our submission to the Joint Standing Committee on Treaties inquiry on Australia's relationship with the WTO outlined these and other proposals (AFTINET 2001).

Bilateral agreements have none of the potential mitigation of power relationships provided by

multilateral agreements. This is why historically Australia as a relatively small economy in the global context has relied on multilateral rather than bilateral negotiations. In relation to the Australia-United States Free Trade Agreement, the Australian economy is only 4% of the size of the US economy. A bilateral negotiation places therefore places Australia in a very weak bargaining position.

Despite the differences between bilateral and multilateral trade treaties, certain features can be identified which should be common to Australia's negotiations in all international trade agreements. Trade negotiations should not be undertaken so as to subvert important principles of democracy and sovereignty.

Features that support principles of democracy are:
Wide consultation and public debate about the issues, including a range of non-government community-based organisations,
Transparency in the manner in which decisions are made that will affect public policies and public policy-making, and
Parliamentary debate and voting on all agreements prior to ratification.

Features that support principles of sovereignty are:
The maintenance of the capacity governments at all levels to make laws and regulate,
Australia's social and cultural policies and identity are not eroded by the effects of a trade agreement, and
Australia holds an independent foreign policy.

The processes of the negotiations and specific proposals in the GATS and USFTA negotiations could undermine both democracy and sovereignty principles. These issues are discussed in detail in Sections Two and Three of the submission.

Recommendations regarding the GATS negotiations

We welcome the release of the government's initial offers in the GATS negotiations, in response to community pressure. This is a welcome step towards greater transparency. However, this offer can be changed at any time in the negotiations.

The government should
Develop a full community consultation process before any changes are made to the initial offer which it published on April 1,
Disclose full details of its specific requests to other governments,
Support the exclusion of all public services from the GATS, including public health services,

public education services postal services and water services, and decline to make further commitments in public services,

Support the exclusion of audio-visual services from the GATS,

Oppose any proposals which would remove the right of governments to regulate levels of foreign investment in any industry,

Oppose any proposals which would open up the funding of public services to privatisation,

Oppose the inclusion of water services for human consumption in the GATS,

Oppose any proposals which would reduce the right of governments to regulate services, including the application of a 'least trade restrictive' test to regulation, and

Submit all policies on GATS to full parliamentary debate and a parliamentary vote before commitments are made.

Recommendations concerning the USFTA negotiations

The government should:

cease the current negotiations, which endanger important social policies,

commission comprehensive independent research into both social and economic impact of all proposed trade agreements, including regional impacts and publish it for public debate before negotiations begin,

ensure that essential public services like health, education and water, and health and social policies like access to medicines, food labelling and quarantine are excluded from any trade negotiations,

ensure that cultural and audio- visual services are excluded from any negotiations, and

ensure that all trade agreements are debated and decided by parliament, not just by Cabinet.

SECTION TWO - Terms of reference relating to the GATS negotiations

Australia's goals and strategy for the GATS negotiations

The Government's 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). Also within the section dealing with Australia's objectives is a statement that 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 issued with the release of the government's initial GATS offer.

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? Is it an objective of the government that public services be exempted from the GATS negotiations? Is it an objective to ensure that the capacity of all levels of government to regulate not be diminished?

The discussion paper fails to state what broader principles underpin the government's GATS negotiating position. The WTO negotiating process is one of give and take, and of trading interests against other interests. Beyond the objective of increasing export opportunities, the discussion paper gives no indication of the principles on which the GATS negotiations will be conducted by Australia. One may gain some idea of these principles from the government's recent foreign and trade policy white paper, however, which is characterised by the primacy it accords US-Australia relations in both strategic and economic spheres.

The emphasis within the discussion paper on the trade export aspects of the GATS agreement obscures the role of other public policy objectives. On a reading of the discussion paper one might ask whether the national interest is assessed purely in terms of maximising export opportunities, or whether other policy goals have importance, such as environmental sustainability, human rights, protection of marginalised groups, maintenance of Australian culture, and Australian control of Australian resources.

Formulation and response to requests, and the transparency of the process

<u>Lack of transparency in WTO processes</u>

WTO documents make frequent reference to the need for 'transparency', but this

transparency is conceived in terms of an obligation on countries towards exporters in other countries. WTO bargaining and negotiations, on the other hand, are characterised by a lack of transparency. This hinders governments of less powerful states in developing informed policy positions on trade. It is a particular obstacle for developing countries and impedes their 'capacity to evaluate the requests submitted to them by developed country trading partners' (UNCTAD 2002 par 53). However it is also of direct relevance to Australia, as a middle power in a global trade environment dominated by the US, EU and Japan. Despite this, recent proposals by a group of developing countries to make the WTO meeting process more transparent have not been adopted.

The DFAT discussion paper presents the WTO negotiation process as one in which governments make decisions to liberalise as a self-contained process (DFAT 2003a p 6). However, the reality is that such decisions are taken as part of bargaining process in a context of great disparities in bargaining power. The lack of transparency means that the public is unable to assess whether the bargains struck are appropriate, and in fact is hardly able to ascertain what bargains have been struck at all. The small amount of information made available by governments on particular requests is presented as being unrelated to other requests and offers. There are also trade-offs with negotiations in other areas such as agriculture. This was illustrated clearly in the comments of EU Trade Commissioner Pascal Lamy in his visit to Australia last year. The Australian Financial Review reported that Mr. Lamy said that 'the EU wanted Australia to lift restrictions on foreign ownership of Telstra and the sensitive water-distribution industry in return for any concessions from Europe on barriers to agricultural trade in coming world trade talks' (Australian Financial Review 17 July 2002 pp 1,9).

The lack of transparency within the WTO process makes it difficult to participate in debates about such fundamental matters 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.

<u>Lack of transparency in the negotiation process at domestic level</u>

The secrecy at the international level is mirrored at the Australian domestic level. The GATS negotiations are being undertaken by the federal government largely in isolation from any public debate on the issues being negotiated. Decisions to make commitments will have dramatic consequences for the public, yet the public has not been adequately informed of the proposals or their implications.

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; and
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.

The content of the initial offer is discussed below.

Consultation

Under the Australian Constitution, much of the responsibility for the regulation and delivery of services falls upon state governments, and through them is delegated to local governments. Because of this it is critical that state and local governments and agencies be well informed and consulted about the implications of the GATS negotiations. The extent to which this has occurred so far, however, appears to be minimal, particularly for local government, as noted in resolutions passed by a number of councils and the National Local Government Association.

In this context the fact that DFAT produced a discussion paper and sought public comment is to be welcomed. However, there are fundamental inadequacies in the information provided in the discussion paper which mean that responses to it can only be generated from a position of ignorance of critical facts. In particular, the discussion paper summarises requests made to Australia, without disclosing which countries have made particular requests and 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 provides a description but no detailed analysis of Australia's current commitments and their implications. This reflects a broader failure within the paper to acknowledge debates about the merits of the approach to liberalisation adopted under GATS. The discussion paper refers 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).

The discussion paper deals selectively with the GATS negotiation processes. As discussed below, there is no reference within the paper to the ongoing negotiations within the WTO Working Parties on regulation and GATS rules. These are important developments which can impact significantly on Australia, yet the discussion paper proceeds on the basis that the bilateral negotiations are the only matters on which public comment need be sought. This emphasis on the bilateral negotiations tends to present the GATS requests as occurring in isolation from ongoing multilateral commitments. The obligation of WTO members to progressively higher levels of liberalisation is mentioned (at page 4 of the discussion paper), but no comment or analysis is given as to the implications of such an obligation, which effectively narrows the policy choices of future governments.

The GATS negotiations in the context of the 'development' objectives of the Doha Round

The Doha round of negotiations was heralded as the 'development round' because developing countries were persuaded to agree to it on the basis of promised benefits to them from new rules of international trade. The proposal about interpretation of the TRIPs agreement relating to the affordability of medicines was particularly claimed to offer beneficial outcomes to developing countries, and on this basis the Doha round was put in place. During the Doha round agreement on the public health provisions of TRIPs has not materialised, with the US opposing agreements which it sees as harming the commercial interests of its large pharmaceutical corporations.

The lack of progress on TRIPs makes it more important that the development outcomes of the Doha round be assessed in terms of the other WTO agreements. The GATS agreement does not even contain the promise of benefits to developing countries, but delivers benefits to industrialised countries. It has significant implications for the capacity of developing countries to control their own development, particularly via regulation and public ownership.

The discussion paper does not address the issue of how Australia's approach to the GATS negotiations fits within Australia's foreign policy objectives regarding developing countries, which is particularly striking given the effect that Australia's requests might have on these countries. Other countries have incorporated their development policies into their approach to the GATS negotiations. Canada and New Zealand, for example, both cite particular measures they have adopted within their GATS strategy to take account of the impact of GATS on least developed 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 p 5). It is unfortunate that the discussion paper indicates that these development goals do not appear to play any role in Australia's position on the GATS negotiations.

In this regard it is useful to note the consultation document on GATS prepared by the European Commission, in which, in addition to the goal of improving the conditions of access for EC services exporters, two other key objectives are identified:
'to make progressive liberalisation of trade in services not only consistent with, but also supportive of, sustainable development, while
ensuring that WTO members can adequately protect their national policy objectives' (at p 13).

In the event, the European Commission's (EC) requests to other countries, leaked in February 2003, reveal that its actions do not live up to its rhetoric. EC requests to Least Developed Countries seek the removal of these countries' capacity to regulate foreign investment and public services (European Commission 2003).

Australia's trade and foreign policy White Paper refers to an objective of promoting prosperity in developing countries. If this is a genuine goal, it should be reflected in the approach taken to our trade relations with these countries. This should include recognition of the importance of developing countries maintaining a capacity to regulate and discriminate against foreign investors and corporations, so as to have some control over the development process.

The impact of the GATS on the ability of all levels of government to regulate services and own public assets

Australia's regulation at all levels of government may be the subject of challenge by another country under the GATS Agreement. Article XXIII provides that countries may seek rulings from the WTO's Dispute Settlement Body (DSB) as to whether any measures by a country have nullified or impaired any benefit 'it could reasonably have expected to accrue to it under a specific commitment'. If the DSB determines that the measure in question (such as a local government's planning provisions, for example) do nullify or impair such an expected benefit, the member affected 'shall be entitled to a mutually satisfactory adjustment', which may include 'the modification or withdrawal of the measure'. If the parties cannot agree on a mutually satisfactory adjustment, then Article XXIII provides that Article 22 of the Dispute Settlement Understanding shall apply, which allows affected members to apply measures

against the country in question.

The effect is that great economic and political pressure can be brought to bear on Australia as to how governments should regulate. The decision about whether such regulation is 'acceptable' or not is made by a closed body of trade experts, who consider trade issues only, not the broader public policy objectives which governments must have regard to.

A further issue for regulatory capacity is that Australia will not be able to change its commitments without cost. The GATS Agreement provides that countries cannot make any change until at least three years after the commitment has entered into force, and then must enter into negotiations with affected countries as to the type and amount of 'compensatory adjustment' to be made. If agreement is not reached within the period set for negotiation, the affected countries can refer the matter for compulsory arbitration. If Australia wished to change its commitments, it could not do so until after the compensatory adjustment had been implemented. Failure to do so means that affected countries can take measures in retaliation (GATS Article XXI).

Clearly then, under the existing GATS provisions, domestic regulation is affected by the GATS rules. The effects arise not only from the direct measures that may be taken by other countries to challenge Australian regulation, but also by the more subtle impact of this on guiding the substance of law-making. The fact that such a supra-national constraint on domestic policy and law making exists, largely without the knowledge of the public, serves to undermine the democratic process, by which law and policy is developed as a product of debate and public input.

In addition to the effects of the current GATS rules, regulatory capacity is significantly impacted upon by proposed changes to the rules. These proposed changes are proceeding through the Working Parties on GATS rules and on Domestic Regulation.

The Working Party on Domestic Regulation was established under GATS Article VI.4 to develop 'any necessary disciplines to ensure that measures relating to qualification, requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services'. This envisages a mechanism for determining whether government regulation should be required to be recast in other ways so as to be least trade restrictive. As part of these negotiations the Australian government has supported a necessity test for domestic regulation. This would allow regulation to be challenged on the basis that another measure is reasonably available, 'taking into account technical and economic feasibility, that achieves a legitimate policy objective and is significantly less restrictive to trade' (DFAT 2001c p1).

Such an idea seeks to fit public policy making, which involves a range of non-economic as well as economic values, within criteria that require that particular economic characteristics (the quality of being 'least trade restrictive') be preferred. The Australian government should reject this.

The agenda of the Working Party on GATS rules includes the definition of 'subsidies'. One proposal is to include government funding of public services in the definition of 'subsidies'. This would mean that 'national treatment' and 'equal access' rules would be applied to government funding of services. Foreign corporations could argue for equal access to these funds through compulsory competitive tendering. The effect would be the privatisation of public services. This is discussed further below in relation to particular sectors.

The DFAT discussion paper fails to make any mention of any of these issues, or the Australian government's position regarding the proposed changes. This is a serious omission. Combined with the lack of information on offers and requests and their implications, it seriously undermines the public consultation process.

The DFAT explanatory paper which accompanied the release of the government's initial GATS offers does refer to the negotiations on GATS rules, acknowledging that the proposed changes 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. A commitment to a transparent process would be an important improvement.

Regarding the content of the government's initial GATS 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 currently there are no changes to the Foreign Investment Review Board or to the limitations on foreign investment in Telstra.

Under the government's initial offer commitments have been offered in environmental, financial, telecomunications and maritime sectors. The environmental sector is discussed further below. 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 pilatage, 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.

Investment

A particularly important regulatory function is the general capacity to control the nature of foreign control of Australian land, resources, projects and culture. Controls on investment are a cornerstone of this function.

The discussion paper states that requests have sought the elimination of Australia's horizontal commitments regarding investment. The EC requests reveal that it has explicitly targeted restrictions that Australia has placed on previous GATS commitments which allow government to set overall economic policy by, for example, controlling foreign investment. It has requested, for example, that the foreign investment policy guidelines and the Foreign Acquisitions and Takeovers Act, which allow for the rejection of foreign investment on the basis of national interest considerations and for discriminatory treatment of foreign-owned and controlled enterprises after establishment, be removed. It has also requested that the requirement that at least two of the directors of a public company have Australian residency be removed.

Removal of Australia's horizontal commitments would involve the abolition of the Foreign Investment Review Board, and the abolition of any requirements for minimum Australian ownership in any industries. These regulations are a means of implementing policies of controlling foreign influence in strategic industries like the media, telecommunications, airlines and banking. The Foreign Investment Review Board has the power to review foreign investment in the national interest. Its discretion is very seldom exercised, but it is a power which the Australian government should retain. Investment in telecommunications is a particular target of the EC, which has requested that limits on foreign equity in Telstra and foreign investment in Optus be removed.

If these few remaining restrictions on foreign investment in Australia were to be weakened,

all of these industries would be vulnerable to foreign takeover. The discussion paper contains no discussion of what these requests entail and the implications of acceding to them. The government should oppose these requests.

The impact of the GATS on the provision of, and access to, public services provided by government, such as health, education and water

Assurances are given in the discussion paper and elsewhere that the government does not intend that public services or government's capacity to regulate services be diminished by the GATS negotiations. If this is the case, public services should be formally exempted from the negotiations (DFAT 2003a pp 6, 10). The European Commission has stated in its draft responses to GATS that it will not make further undertakings regarding health, education and audio-visual services, in response to public concerns (European Commission 2003 p 1).

It is particularly important that public services be clearly exempted in light of the ambiguity about GATS Article 1 (3). This Article states that all services are covered by GATS except those supplied in the exercise of governmental authority, i.e. those 'supplied neither on a commercial basis, nor in competition with one or more service suppliers'. 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. The discussion paper asserts that public services will not be caught by GATS under this clause, and draws a distinction, by way of example, between public education services and private education services. However no argument is presented as to why these should be seen as qualitatively different under the GATS agreement. It is legitimate to ask whether, for example, there is any guarantee that public TAFE will not be subject to GATS, as it is operating in an increasingly competitive national vocational education and training market. 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, quoted in Ellis-Jones & Hardstaff 2002 at p 25).

The likely resolution of this ambiguity will be through rulings of WTO Dispute Panels, deciding on challenges by a member state to the public service arrangements of another member state. The panels may well adopt interpretations similar to that offered by the WTO Secretariat, which would bring many services currently considered to be public services under the coverage of the GATS agreement. Other governments have taken steps to protect themselves from such an outcome through horizontal limitations. For example, the EU has made a horizontal commitment stating that 'services considered as public utilities at a

national or local level may be subject to public monopolies'. In contrast, Australia has made no such horizontal commitment, and so is dependent on an interpretation of Article 1 (3) which finds that public services are not subject to the GATS unless specific commitments have been made.

In the context of such ambiguity, the government should make an explicit statement that public services are exempt from Australia's GATS negotiations, and should decline to make further commitments in public services.

Education services

The discussion paper states that requests have been made for full commitments in all sub-sectors of education. Acceding to such requests would allow foreign education service providers to operate with a commercial presence in Australia. The outcome of the current negotiations of the Working Party on GATS rules would be of particular relevance. If, as has been discussed in the Working Party, the definition of 'subsidy' is broadened to include government funding of services, then such foreign education service providers would be able to require the right to tender for government funding on an equal basis with government schools, universities and TAFE colleges, on the basis of the national treatment obligation under GATS.

This would lead to privatisation of public education services. Decisions about funding and provision of education services should be made democratically after public debate by elected governments, not through trade negotiations.

The implications of responding to requests for further commitments in the education sector illustrate the need to exempt public education, and all public services, from the negotiations.

Health services

Australia's scheduled commitments are limited to podiatry, chiropody and dental services (although dental services are listed under professional services, not under health services). Dental services have no limitations on modes 1-3. Currently public dental services are limited, but the effect of these commitments is that if governments decided to introduce public dental services in the future, foreign corporations could seek access to the public funds under the national treatment obligation.

As with education, health services are currently provided by the states on a commercial basis, and it may be argued that this is done in competition with one or more service providers. Again, the implications under GATS Article 1 (3) are significant, as has been specifically

noted by the WTO Secretariat: '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 1998b, quoted in Ellis-Jones & Hardstaff 2002 p 42). In view of the risk, if not the likelihood, of such an interpretation being adopted by a WTO Trade Dispute Panel, there is a clear need to exempt public health from the negotiations.

The impact of the National Treatment rule on public health services, particularly if the proposed re-definition of the meaning of 'subsidy' occurs, would presumably have an effect similar to that predicted for public education. That is, the public health system would be privatised. In a market-dominated field the poor would be particularly at risk of not being able to access health care, with the safeguards offered by a public health system being undermined. Such a scenario does not seem unrealistic when one considers that the WTO has asked members to 'ensure that ongoing reforms in national health systems are mutually supportive and, wherever relevant, market-based' (Ellis-Jones & Hardstaff 2002 p 67).

The requests for full commitments on modes 1-3 should be refused, and health, as with other public services, exempted from the GATS negotiations.

Water services

The discussion paper notes 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'. Australia has supported this EU proposal (DFAT 2001b p 1). The effect 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 the rules of GATS, which operate on a market basis. This change is sought to be made in a global context in which 10 major water multinational corporations dominate the market and exercise great influence.

The supply of water in Australia, as elsewhere, involves the weighing of public policy objectives, including the need to ensure access to all and the need to conserve the resource.

Currently in Australia a robust public debate is underway as to the appropriate and fair means of regulating water supply, particularly with the drought affecting eastern and southern Australia. 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. This would seem to make it more likely that public water supply services by public utilities would be targeted by the EU or US, whose multinationals exercise such market dominance. Indeed, the leaked EC requests show that the EC wishes Australia to extend sectoral coverage to include water for human use and wastewater management.

A challenge to public water services would involve a complaint by the US or the EU, for example, that a particular mechanism by which one of the Australian states or local governments supplies water to the public operates contrary to the GATS obligations and is in fact a restriction on trade. The capacity of Australian governments to regulate in this area would be constrained by the need to avoid Dispute Panel rulings to pay compensation to affected countries.

Such important public policy issues should be democratically decided by governments after public debate, not negotiated in trade agreements. On this basis alone the government should oppose the reclassification of environmental services to include water for human use.

Under the initial offer several new commitments are proposed 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.

Postal and courier services

The discussion paper refers to a number of requests for commitments in express delivery and postal services, without giving any indication of what these requests are. It also mentions that a request has been received for full commitments for 'a combined classification of postal and courier services'. No information is provided in the discussion paper about this proposed reclassification, although the EC request invites Australia to frame its offer in accordance

with this proposal.

The leaked EC requests confirm that the EC is targeting Australia Post under the GATS negotiations. These requests specifically state that 'postal items' refers to items handled by any type of commercial operator, whether public or private, and include the standard letter. The EC is seeking full commitments in all modes relating to all postal and courier services. If these requests were met, competition would be introduced for postal services relating to the standard letter. The 50 cent cost for the standard letter to be sent anywhere in Australia makes postal services affordable for Australians living in rural, regional and remote areas. Such services might operate with commercial competitiveness in large urban areas, but rural, regional and remote areas rely on cross-subsidisation in order for a common postal rate to be applied for all standard letters in Australia. The important public policy goal of providing for a common postal rate across Australia is currently met through regulation and a monopoly service. Again, this should be democratically decided.

Audio-visual services

Australia currently has made no commitments in the audio-visual sector, and has put in place an MFN exemption for co-production arrangements. This allows Australia to treat the nationals of other member states differently from each other in the area of audio-visual co-production. Under the GATS agreement such MFN exemptions should in principle not exceed a period of ten years, and are subject to negotiation in subsequent trade liberalising rounds (Annex on Article II exemptions, s 5). In 2004 ten years will have elapsed since Australia entered into the GATS agreement. The discussion paper makes no mention of these issues.

The Trade Minister has acknowledged that audio-visual services play an 'integral role in developing and reflecting a sense of national and cultural identity within Australia's multicultural society [and] provide opportunities for almost universal access by Australians to their own experiences and narratives' (DFAT 2001a p 1).

The strength of the US audio-visual and media corporations means that this issue is also particularly important in the negotiations regarding the USFTA. In regards to GATS, though, the DFAT discussion paper states that requests have been made for the removal of the MFN exemption and for full commitments to National Treatment and Market Access. Accession to these requests would impact dramatically on Australian broadcasting and the capacity to express and reflect Australian culture. Specific issues arising from such bilateral requests are discussed below, however it should be borne in mind that in addition to the bilateral process, the negotiations taking place within the WTO Working Parties on GATS rules and

government regulation have particular significance for public broadcasting in Australia.

Australian content and ownership

Australian regulations currently require minimum levels of Australian content in audio-visual services, including advertising. Full commitments to Market Access and National Treatment would require the removal of such regulations. Australian content rules are a vital pillar of Australia's cultural identity and diversity which ensure that Australian voices are heard and Australian stories are told, specifically in relation to music, drama, documentaries, children's programs and pre-school programs. Their removal would threaten Australian culture and the Australian film and television industry.

A related impact of commitments to National Treatment and Market Access would be severe damage to the local film and television industry. The current local content regulations foster a local skills base which enables quality films and television programs to be made in Australia. The removal of these rules would not only be an attack on Australia's culture, but would also destroy a vital and growing industry.

As the Media Entertainment and Arts Alliance has noted, the rapid pace of technological change in the audio-visual sector means that government needs to retain full power to regulate in order to respond to and pre-empt changes in the sector. Government regulatory capacity is particularly important in areas which are not easily reducible to economic criteria (MEAA 2002). The Disputes Panels of the WTO decide whether government regulations are contrary to WTO obligations on the basis of trade concerns, not broader social policy objectives such as the preservation of cultural identity. Social policy objectives do not always translate into measurable economic categories, and this is particularly the case with cultural and artistic areas. Accordingly, it is crucial that government retain full capacity to regulate in the audio-visual sector

Another implication of making commitments to national treatment relates to subsidies. Currently Australian governments support the film industry through tax concessions and financial support via such bodies as the Film Finance Corporation. These are means of subsidising Australian film makers. If national treatment commitments were made it seems almost certain that these subsidies would be the subject of challenge by other countries with competing film industries, notably the US.

GATS requests have also been made to Australia by the EC in the advertising sector. This sector is closely linked to broadcasting, film and media, due to the frequent cross-over by the workforce. In many ways a local advertising industry allows a local film and television workforce to be viable. Australia's category of 'Other Business Services' currently does not

include the 'advertising' sub-sector. The leaked EC document requests that Australia bind this sub-sector in the same way as the rest of the sector – that is, with no restrictions except on Mode 4 as indicated in the horizontal section. The effect would be to remove restrictions on foreign corporations in providing advertising services in Australia, which would be likely to have a severely detrimental effect on the local industry. The Australian Government should reject any requests to change audio-visual content policy.

Australia also has specific restrictions on foreign investment in news media and television which are intended to prevent total domination of a relatively small market by global corporations. This is a legitimate public policy goal which should not be traded away in the GATS negotiations. Requests to remove Australia's horizontal commitment allowing for limits on foreign investment pose a significant threat to diversity in the media. This was discussed above in relation to foreign investment more generally.

Public broadcasting

The ABC and SBS carry out important roles as Australia's public broadcasters, providing a mechanism by which a diversity of material is made freely accessible to the population. Universal access to information is important for a range of reasons, not least its importance to the healthy functioning of democracies. Commercial media operates within a market structure, seeking ultimately to gain maximum revenue. In contrast, public broadcasting is able to operate with broader social policy goals, including fostering local and untested artists and arts, and catering for non-mainstream audiences such as particular ethnic and language groups. Commercial and public broadcasting clearly fulfil quite distinct roles, and it should not be assumed that the role of public broadcasters could or should be filled by commercial interests (MEAA 2002).

The ambiguity that surrounds other public services under the GATS agreement also affects public broadcasting. The ABC and SBS deliver many of their services on a commercial basis and in competition with one or more private service providers. Accordingly, it seems that public broadcasting may already be considered as falling within the scope of the GATS agreement. If so, then the market access and national treatment obligations within the GATS will apply to public broadcasting services, except to the extent limited by Australia's horizontal commitments. This takes on a particular significance in view of the negotiations within the WTO Working Party on GATS rules. If 'subsidy' is defined as including support by government for public agencies like the ABC and SBS, then the national treatment obligation would allow foreign media and broadcast corporations to demand equal rights to receive such support, probably through competitive tendering, leading to privatisation.

Conclusion

We welcome the release of the government's initial offers in the negotiations, However the GATS negotiations could still have an adverse impact on existing social policies as well as the policy and law-making capacity of governments at all levels. Public services are at risk of privatisation. The GATS negotiations particularly disadvantage developing countries, and form part of the Doha round, which to date shows little prospect of delivering promised benefits to developing countries.

The government should

Develop a full community consultation process before any changes are made to the initial offer which it published on April 1,

Disclose full details of the specific requests made by it by other governments,

Support the exclusion of all public services from the GATS, including public health services, public education services postal services and water services, and decline to make further commitments in public services,

Support the exclusion of audio-visual services from the GATS,

Oppose any proposals which would remove the right of government to regulate levels of foreign investment in any industry,

Oppose any proposals which would open up the funding of public services to privatisation,

Oppose the inclusion of water services for human consumption in the GATS,

Oppose any proposals which would reduce the right of governments to regulate services, including the application of a ‘least trade restrictive’ test to regulation, and

Submit all policies on GATS to full parliamentary debate and a parliamentary vote before commitments are made.

SECTION THREE - Terms of reference concerning the Australia-United States Free Trade Agreement

a) The economic, regional, social, cultural, environmental and policy impact of such an agreement

1. Economic impacts of an Australia-US Free Trade Agreement: not gains but losses for Australia

The size of the US economy relative to the Australian economy places Australia in a very weak bargaining position in bilateral negotiations.

The government's background paper from the Australian APEC Study Centre based on econometric data from the Centre for International Economics notes that Australia's national output is only 4% of that of the United States (Australian APEC Study Centre 2001 p 48). The APEC Study Centre underlines just how weak is Australia's bargaining position by the following statement: "A way of viewing the economic association from the US perspective is to see it as the addition of another medium sized state roughly equivalent in GDP to that of Pennsylvania" (Australian APEC Study Centre 2001 p 48).

The US is thus in a position to maximise its demands on Australia without being under pressure to make concessions.

The economic gains from the FTA for Australia predicted in the study by the Centre for International Economics are extremely modest, and are hedged with the many qualifications shared by all such econometric modelling (see, for example, Quiggin 1996). The study asserts that there would be no substantial trade diversion effects as a result of such a bilateral agreement, an assertion not supported by many other economists (Gittens 2002 p 29). The estimated gains are based on a number of assumptions which are uncertain at best. The study predicts that, if all trade barriers were removed, there could be net benefits of $US 9 billion over a 20-year period, and that the GDP increase in 2010 could be 0.33% or US$2 billion (A$4 billion). However the study then concedes that gains would be proportionately less if not all trade barriers were removed (Centre for International Economics, summary p 1 and 2). This figure of $A4 billion gain in GDP has been widely quoted with much more certainty than it deserves. The APEC Study Centre does concede that there will be strong resistance by the US to removal of all trade barriers, particularly in agriculture (Australian APEC Study Centre 2001 p xi). However, it then rather misleadingly quotes the $A4 billion GDP gain without any qualification (p xii). Perhaps because of this omission, it then stresses the "dynamic benefits " of closer ties with the US economy, which are not measurable through

economic modelling (Australian APEC Study Centre 2001 p xii).

The econometric results of the CIE and APEC Study Centre are convincingly challenged by the report prepared by ACIL Consulting for the Rural Industries Research and Development Corporation (ACIL Consulting, 2003). This study find that there would be losses, not gains from an FTA, resulting in a decrease in GDP in 2010 of 0.2% (ACIL Consultants, 2003, p 38).

The study notes that one of the major reasons for the different econometric results is that the government study assumed that free trade would result in a productivity increase in Australia's service sector through the adoption of US managerial methods. The ACIL study notes that there is no evidence for this assumption and that it appears to be " a matter of opinion" (ACIL Consultants, 2003, p 41). In any event, the pattern of recent US corporate fraud and collapse of prominent US companies raises questions about the uncritical acceptance of US corporate practice.

Another major factor in the ACIL study is the negative impact of trade diversion. Increased trade with the US would be offset by losses from other markets, especially in the Asia Pacific, which currently receives 55% of Australian exports. A third factor is the absence of many gains to Australia from reducing its own (already low) protection. The study concludes:

"Our analysis indicates that there is room for doubt that a free trade agreement (covering all protection and all products) with the US would be of any benefit to Australia at all. We find that an FTA with the US would have a small negative impact on the three most used Australian welfare indicators- GDP, GNP and consumption" (p 37).

This negative result assumes that free trade in agriculture could be achieved. The ACIL study, like the APEC study, concedes this outcome is highly unlikely, given current levels of US agricultural protections and subsidies, and the strength of the US farm lobby. If free trade in agriculture were not achieved, the results would be even more negative (ACIL Consulting, 2003, 48).

The claims about economic benefits made by the Centre for International Economics assume that access to US agricultural markets would be a major source of any economic gains for Australia, and bases its calculation of economic benefits on increased Australian exports, especially sugar and dairy (CIE 2001 pp 21-24). However the Australian APEC Study Centre concedes that “agriculture is likely to be the thorniest issue, with US barriers very high on particular products, such as sugar and dairy products” (Australian APEC Study Centre 2001 p xi). Apart from quotas and tariff barriers, the recent US legislation to maintain

high levels of agricultural subsidies further undermines claims of economic gains for Australia.

The US is the world's largest single agricultural exporting country, and has a strong interest in expanding its exports, as its domestic demand is unlikely to increase greatly (Roberts & Jotzo 2001 p 88). Its substantial agricultural support is concentrated in a few major commodities, those that receive most support representing about 28% of the value of US agricultural production. These same commodities constitute 37% of Australian agriculture, and Australian producers export a far larger proportion of their output of these products than do US producers (Roberts & Jotzo 2001 p 5). Australia's agricultural exports are therefore bound up to a significant extent with the system of US agricultural subsidies.

These high levels of subsidies for US agriculture are unlikely to change because of the power of the US farm lobby. As Roberts and Jotzo have pointed out, US agricultural support is "self-perpetuating and locked in for political reasons". It has become capitalised into the value of land, as purchasers of land pay for expected streams of earnings from both the market and government support. The political power of farm group interests is significant, particularly in terms of campaign funding for political candidates. Perhaps more significantly, however, the support systems that have been constructed over time have become part of the environment of US policy development (Roberts & Jotzo 2001 pp 8-9).

Given the relative size of the Australian and US economies, and the history of Australia's inability to influence US policy makers in trade matters, significant changes in US agricultural policy towards Australia are improbable. Professor Ann Capling asks pertinently: "We already know from our past record of bilateral dealings with the United States that Australia is unlikely to get much by way of improved access for our agricultural products. The only time we have secured significant improvements in access to the United States market have come in the context of multilateral negotiations. Are we likely to do any better now?" (Capling 2001b p 182).

This view was recently reinforced by Gary Haufbauer, senior fellow at Washington's Institute for International Economics. He told the *Sydney Morning Herald* on March 13 that the most important industries to Australian farmers-dairy and sugar- would remain in the too-hard basket for "decades rather than years" because Australia does not have the leverage to defeat powerful US farm lobbies (Wade and Garnaut, 2003, p6).

2. Policy Impacts of linking of trade policy with security policy

Given the lack of economic benefits for Australians there seems little reason for an FTA.

However, both governments have stressed the link between trade and security policy as a key rationale.

The letter of US Trade Representative Robert Zoellick to the US Senate dated 13 November 2002 refers to "strengthening the foundation of our security alliance" and "promotion of common values so we can work together more effectively with third countries". This reflects the tendency of the US to seek bilateral and regional agreements in a way that ties access to US markets to accession to US demands in other areas (Hartcher, 2001).

The Government's White Paper on Foreign and Trade Policy says that the USFTA is "a powerful opportunity to put our economic relationship on a parallel footing with our political relationship" (p xv1).

The Australian APEC Study Centre report states that the US perceives Australia in economic terms as equivalent to "a medium sized state" of the US. Australia needs to ensure that its national interests are not compromised in relation to other countries by being perceived in such a way. Australia has built up positive trade and cultural relationships with many countries in our region. This is in part because we are **not** seen as an economic or cultural appendage of the US, but as an independent country with its own trade and foreign policy, which has in the past differed with the US on some key issues. Australia's role within the Cairns Group could be compromised if an US-Australia FTA goes ahead. In addition, the preferential access such an agreement would offer US exporters and investors could have negative implications for Australia's trade within the Asia Pacific region, as the ACIL study shows.

Professor Capling has noted "growing concern that Canberra's overriding objective in a trade deal is to deepen its strategic ties with the United States…many Australians would question the need for this and whether it is in Australia's regional interests" (Capling 2001b p 184).

The linking of security and trade issues in the context of this proposed agreement is a serious mistake and could be detrimental to Australia's independence in both foreign policy and trade policy.

3. Social and Cultural Policy Impacts

Australia's lack of negotiating leverage in a bilateral agreement with the US arises not only from the relative smallness of our economy but also from its openness, with relatively little to offer by way of bilateral market access in goods. The main US targets in the negotiations are issues of social policy which the US government defines as barriers to trade. It is seeking to challenge policies which regulate investment in strategic industries, access to essential services and medicines, and which foster Australian culture and health and safety. These have

been identified by US Corporations and business lobby groups and by United States Trade Representative Robert Zoellick in his letter to the Senate in November 2002 (Zoellick 2002).

The Pharmaceutical Benefits Scheme

The Pharmaceutical Benefits Scheme (PBS) makes medicines more affordable to most Australians, especially those on low incomes. The Australian government uses bulk purchasing and reference pricing of medicines to achieve this. US pharmaceutical companies object to it because it means that the price of medicine is much lower in Australia than in the United States.

The PBS is not specifically mentioned in the Zoellick letter. However, the PBS and the Pharmaceutical Industries Investment Program, which provides for pharmaceutical production in Australia, is identified as a barrier to trade for the US by the CIEL study (Centre for International Economics, 2001, p 74).

Joe Damond, Associate Vice President of the Pharmaceutical Research and Manufacturers of America (PhRMA) gave evidence to hearings of the Office of the US Trade Representative about the Australia-US Free Trade Agreement on January 16, 2003. He said that the PBS reference pricing system, which helps make medicines affordable in Australia, was regarded by his organisation as a barrier to trade. He quoted US trade legislation which seeks the elimination of "government measures such as price controls and reference pricing which deny full market access for United States products" (Pharmaceutical Research and Manufacturers of America, 2003, p3).

The US has been zealously advancing the interests of its pharmaceutical companies in other international trade negotiations, notably on the WTO TRIPS Agreement, so it is likely that this issue will be pursued strongly in the negotiations

The Trade Minister Mark Vaile conceded that this issue will be negotiated in an interview on the ABC Business Breakfast program on 18/3/03 (ABC, 2003). When asked if he would categorically rule out price rises as result of negotiations he replied:

"We are prepared to argue that case in these negotiations to ensure that we maintain the ability of the Australian public to afford the drugs that we need to get to people at all socio-economic levels throughout our community".

The choice of words is interesting. There is no direct ruling out of price rises. Instead the government is prepared to "argue the case".

This is not good enough. The PBS is a vital health and social equity policy which should not be on the table in trade negotiations.

Removal of all controls on Foreign Investment

While the proposed agreement is described as a free trade agreement, the investment provisions sought by the US mean that it could as accurately be described as an investment treaty. US Trade Representative Robert Zoellick has indicated that the US is seeking investment provisions "comparable to those that would be available under US legal principles and practice" (Zoellick, 2002, p 5). The model for this is the North American Free Trade Agreement (NAFTA). NAFTA itself has been characterised as more an investment treaty than a trade treaty because of the significance of its investor rights regime. Investor rights in NAFTA have been enforced against governments by powerful multinational corporations, particularly in the past seven years. If an Australia-US Free Trade Agreement is to include provisions similar to those of NAFTA, the almost inevitable outcome will be a reduction in the capacity of all levels of Australian government to regulate.

The US is seeking the abolition of the Foreign Investment Review Board, and the abolition of any requirements for minimum Australian ownership in any industries. Australia has such requirements through legislation in only a few strategic industries like the media, telecommunications, airlines and banking. The Foreign Investment Review Board has the power to review other foreign investment in the national interest. Its discretion is very seldom exercised, but it is a power which the Australian government should retain. If these few remaining restrictions were to be weakened, all of these industries would be vulnerable to US takeover.

Investor-state complaints mechanism

The US is also seeking a complaints mechanism for investors which is likely to be modelled on the NAFTA disputes procedure. This would enable US corporations to take legal action to force changes in Australian law if they could argue that the law was not consistent with the agreement. They could also sue the Australian government for damages. US corporations have used NAFTA rules to sue Mexican and Canadian governments for hundreds of millions of dollars.

A number of lessons may be learned from the experience of the NAFTA investor rights regime. Chapter 11 of NAFTA defines ‘investors’ widely and grants them broad rights. Only the parties - that is, the governments - to NAFTA may be sued, but they may be sued by investors, that is, corporations. The government ‘measures’ which can be challenged as infringing on investors’ rights include ‘any law, regulation, procedure, requirement or

practice' at all levels of government. Disputes are 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.

The most remarkable feature of NAFTA is this right of private enforcement granted to foreign corporations to enforce the constraints the agreements impose on government policy and regulation. This differs significantly from the WTO agreements, in which actions may only be brought be member states, which have reciprocal obligations. In investment treaties such as NAFTA, such reciprocity is absent - foreign investors have no obligations under the treaties that they may enforce (Shrybman 2002 p 10). Since NAFTA was signed numerous investor-to-state cases have been brought, challenging a variety of national, state and local laws and regulations. Several studies have been made of these cases, which include the following examples:

Metalclad v Municipality of Guadalcazar. The US Metalclad Corporation was awarded US $16.7 million (later reduced to $15.6 million), because it was refused permission by a 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.

The site had previously been managed by a Mexican company which Metalclad had then bought. Metalclad applied for a permit to operate a toxic waste processing plant and landfill, which had previously been refused by the local municipality. After local protests, the Governor declared the site part of a special ecological zone. Metalclad sued the government of Mexico under NAFTA, claiming that the actions of the municipal government amounted to expropriation without compensation. The ICSID tribunal found that the creation of an ecological reserve amounted to 'indirect' expropriations in violation of NAFTA Chapter 11. Mexico appealed this finding, which was upheld (Shrybman 2002 p 56).

Sun Belt v British Columbia. 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).

United Parcel Service v Canadian Postal Service. The US company United Parcel Service (UPS) is the world's largest express carrier and package delivery company. In 1981 the

Canadian postal system was transformed from a government department to a publicly owned corporation called Canada Post, which has been delegated by the Canadian government as the universal provider of postal services. In 1993 Canada Post bought an overnight courier company. The joint entity makes the postal system the fifth largest employer in Canada. In April 1999 UPS filed a suit under NAFTA Chapter 11 for $160 million, claiming that Canada Post 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. Freedom of Information requests by the NGO Public Citizen to the US government for information about the case were refused on national security grounds. UPS "seems to be claiming that the very existence of Canada Post, a public sector competitor, violates its rights under NAFTA" (Public Citizen 2001 p 32).

Ethyl Corporation v Canada. Ethyl Corporation is a US chemical company which produces a fuel additive called MMT containing manganese - a known human neurotoxin. In 1997 MMT was banned from use in unleaded fuel by the US Environmental Protection Agency and the state of California due to environmental and public health concerns. 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. "Although the potential hazards to human health were not fully known, Canada acted in a precautionary manner until more information was available as had the state of California and the US E.P.A." (Public Citizen 2001 pp 8-9).

On September 10, 1996, while the prospective ban was being debated in the Canadian Parliament, Ethyl Corporation notified the government of Canada that it would sue for compensation under NAFTA's investment chapter if restrictions were placed on MMT. The Parliament continued to debate and then pass the ban in April 1997, when in the same month Ethyl filed a NAFTA Chapter 11 investor-to-state claim against the Canadian government for $251 million in damages at the UN Commission for International Trade and Law (UNCITRAL). Ethyl argued that:

- the Canadian ban amounted to a NAFTA-forbidden expropriation of its assets,
- the ban was a violation of NAFTA rules requiring national treatment for foreign investors, because it banned imports, but not local production of MMT, and
- the ban was a 'performance requirement' forbidden under NAFTA, because it would effectively require Ethyl to build a factory in every Canadian province to comply with the transport ban and make an MMT investment in Canada.

A NAFTA panel was constituted at UNCITRAL. Canada's objections to the case - on the

grounds that the MMT was not a 'measure' covered by NAFTA Chapter 11, and that Ethyl Corporation had not waited the requisite six months after the ban was implemented before filing a suit - were rejected. The case was set to move forward when Canada settled with Ethyl. It reversed its ban on MMT and paid $13 million in legal fees and damages to Ethyl and issued a statement for Ethyl's use in advertising declaring that 'current scientific information did not demonstrate MMT's toxicity'.

The case is significant because of Ethyl's claim that restrictions on MMT 'expropriated' the company's investment. This effectively discourages environmental or public health regulation by forcing governments to pay a corporation that imports the substance which is being regulated. The fact that Ethyl threatened to initiate a NAFTA suit before a law was passed may be viewed as an intimidation of legislators, and allowed NAFTA to be used to undercut a public interest protection based on the precautionary principle. While the long-term studies needed to better understand the dangers posed by MMT are now being undertaken, Canadians are being exposed to the potentially dangerous compound (Public Citizen 2001 pp 8-10).

Several key lessons should be drawn from these and other NAFTA investor cases:

Serious environmental implications flow from the strong investor rights regime, particularly in the context of the permissive nature of the environmental protection clause in NAFTA (Public Citizen 2001 p 4)

There has been a tendency by corporations to seek government compensation in instances where their actual investment in the country being sued is not readily apparent (Public Citizen 2001 p viii), and

Corporations have used the NAFTA investment provisions to improve their market share.

A NAFTA-modelled FTA would grant broad powers to US corporations to challenge government regulation at local, state and commonwealth levels. This represents a threat to government's capacity to regulate and should be opposed by the Australian government.

The range of these investment demands raise the spectre of the 1998 draft OECD Multilateral Agreement on Investment, which sought to remove the power of governments to regulate foreign investment, and which was defeated by overwhelming community opposition. The Australian government should oppose any such proposals, and should act to ensure that foreign investor regulation is the subject of informed community debate.

Treating essential services as traded goods and reducing the right of governments to regulate to ensure equitable access to them

Mr Zoellick's letter seeks "enhanced access for US services firms to telecommunications and

any other appropriate services sectors" (Zoellick 2002 p 5). US firms already have access to commercial services in Australia. The targets here are essential services like telecommunications, health, education and water. The aim is to treat services as traded commercial goods, ignoring the fact that societies have often made the democratic decision that public regulation and often public provision of these services is required to ensure that there is equitable access to high quality essential services. Decisions about these issues are a matter of social policy and should not be signed away in a trade agreement.

The Zoellick letter also refers to Australia's regulation of services. Again the agenda is to reduce the right of national, state and local governments to regulate to ensure that there is equitable access to high quality services.

These issues are also being debated in the WTO negotiations on the General Agreement on Trade in Services (GATS). There is strong community opposition to any proposals which seek to include essential public services in a trade agreement or which reduce the right of governments to regulate essential services and the Australian government should not agree to such proposals. The GATS section of this submission explores these issues in more detail.

Removal or reduction of Australian regulation of media ownership and local content rules for audio- visual services

Australia has specific restrictions on foreign investment in newspapers and television which are intended to prevent total domination of a relatively small market by global corporations. This is a legitimate public policy goal which should not be negotiated in a trade agreement.

Australian content rules in film, television and music are a vital pillar of Australia's cultural identity and diversity which ensures that Australian voices are heard and Australian stories are told, especially in relation to music, drama, documentaries, children's programs and pre-school programs. They foster a local skills base which enables quality films and television programs to be made here. The removal of these rules would be an attack on Australia's culture and would also destroy a vital and growing industry. This issue is discussed in more detail in Section Two of this submission.

The fact that Australia is an English-speaking country renders it particularly vulnerable to cultural and media domination by the US, which already has a large share of the Australian market. The size of the US market provides US production and media agencies with economies of scale that would overwhelm Australian content if not for the protection of local content rules. The recent comment by US Trade Representative Robert Zoellick that 'there is no industry in the world that defines a world without borders like the American entertainment industry' is telling (Japan Times 15 March 2003). The Australian government should oppose

any proposals to change media ownership or audio visual content policy.

Abolition of regulation and food labelling for food containing Genetically Modified Organisms (GMOs)

The US is the largest producer of food containing GMOs and lobbying by agribusiness companies has ensured that there is no US requirement for labelling to show GMO content in food. Australia and Europe have labelling requirements and a regulatory regime for GMO crops because there is an overwhelming desire by consumers to know whether food contains GMOs, and to ensure that non-GMO food remains available so that they can make an informed choice.

The US has threatened to take action in the World Trade Organisation against the European labelling and regulatory regime for GMOs on the grounds that it is a barrier to US products containing GMOs. Zoellick's letter specifically mentions the elimination of Australian "unjustified measures" relating to "food and agricultural products produced through biotechnology", meaning GMOs. This would challenge the regulatory regime which was the result of extensive public debate. This is an attempt to remove the democratic right of informed choice from consumers and should be rejected.

Reduction in quarantine standards

The Zoellick letter mentions "serious concerns" that Australia's quarantine standards are used as a "means of restricting trade". Australia has relatively high quarantine standards because as an island country we are disease-free in some areas, and the impact of such diseases would be devastating. The government should not compromise these standards in trade negotiations

Abolition of local preferences in government purchasing

The Zoellick letter demands increased access for US goods and services to government purchasing markets. There are some Federal and state government purchasing arrangements which ensure that smaller local firms have access to purchasing contracts, or require transnational companies with government purchasing contracts to develop relationships with local firms. These arrangements contribute to local jobs and economic development and should not be negotiated away in a trade agreement.

Dangers of the Singapore Free Trade Agreement Model

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 (DFAT 2003d, 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

We have discussed above 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 above, 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 (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.

If SAFTA is to be used as a model for the USFTA, there is justified cause for public concern

about its impact on the regulatory capacity of gvoernemnts . Given the size of the US economy, such an agreement would have far more impact on essential services.

Regional Impacts

Regions reflect Australia's diversity and are characterised by association with particular industries which have developed under the influence of geography, climate, history and current industry policies. A US FTA could have a much greater impact on some regions than others. For example, particular agricultural crops, the vehicle industry and the clothing and textile industry are all concentrated in particular regional areas, so any negative impacts will also be concentrated in those areas.

Many of the social policies described above are especially relevant to Australians living in rural and regional areas and changes would also have different impacts in different regions. For example, access through the PBS to affordable medicines is especially relevant for people in rural areas who may already have greater expenses to travel long distances to get access both to medical treatment and to medicines.

Access to many essential services like health, education and water services is made possible in Australia through public regulation and often public provision of these services. If these services were opened up to private investment and provided on a purely commercial basis, prices in rural and regional areas would rise. Some services simply could not be provided in rural areas on a commercial basis.

Quarantine law is especially relevant to rural and regional communities which depend on forms of agriculture which could be severely affected by introduced pests or diseases.

The labelling of genetically engineered food and the regulatory regime for genetically engineered crops is also extremely important for many agricultural producers in rural and regional areas who do not grow such crops and want to be able to offer choice to consumers.

Government purchasing policy is also important for state governments and regional areas where such policy may ensure that local firms have access to purchasing contracts, or require transnational companies with government purchasing contracts to develop relationships with local firms

Australia’s goals and strategy for negotiations including the formulation of our mandate, the transparency of the process and

government accountability

The process for the negotiations of the FTA has not been transparent. The government announced its intention to pursue the agreement in 2001, without any consultation or public debate, and published the CIE and APEC Study Centre papers. It confirmed in November 2002 that negotiations would commence, then asked for written submissions in December 2002, with a closing date of January 15 2003. Since this was the Christmas holiday period, this made it very difficult for community organisations and the general public to make submissions.

The slight economic gains of the FTA as predicted by CIE and the APEC Study Centre have been quoted and promoted by the government with much more certainty than they deserve. The publication of the ACIL study which predicted economic losses was delayed by the government and only released after it was leaked to the media in February 2003. This shows a lack of transparency, reluctance to publish critical evidence and unwillingness to debate the issues. In fact, the ACIL study undermines the whole economic case for an FTA.

This experience shows the need for independent studies of both the social and economic impacts of trade agreements and public debate of them well before the decision to start negotiations.

The government finally published objectives for the negotiations on March 3, only two weeks before negotiations were due to start. The objectives are couched in very general terms, which makes it difficult to determine their exact meaning. The document begins by stating that "Free trade leads to higher economic growth, better living standards and more and better job opportunities." (Vaile 2003, p1) These assertions have been undermined by the ACIL study.

The objectives also state that the FTA negotiations "would not impair the ability of both the US and Australia to achieve fundamental social policy objectives in health care, education, consumer protection, cultural policy, quarantine and environmental policy" (Vaile 2003, p 2). However the objectives confirm that all of these issues are still on the negotiating table, and that the government is prepared to discuss them. It is difficult to see how these policies can be the subject of a negotiation which defines them as trade barriers while preserving their fundamental objectives. For example, it is clear from the evidence given by the pharmaceutical companies to the office of the US Trade Representative that the companies are seeking higher prices for medicines in Australia. Since the fundamental policy objective of the PBS is to keep the price of medicines affordable for Australians, it is difficult to see how there is room to negotiate higher prices without contradicting this objective.

A similar point can be made about the labelling of genetically modified food, which the US regards as a trade barrier but here is seen as a matter of consumer choice. The labelling regime was the outcome of public debate and legislation, and any negotiation to reduce its effect or remove it would contradict the objectives of consumer information and choice. Australian content rules in film, television and music establish minimum content requirements in a media content market where US products are already very influential. Reduction or abolition of these rules would again contradict the fundamental objective.

It is unclear what, if any, consultation processes will be followed as negotiations proceed. Originally the government hinted at a timetable for outcomes by November 2004. However, in a media briefing given on 14/3/03 the Australian chief negotiator, Stephen Deady, said that much informal discussion about the framework of the agreement had already taken place. He added "I think the Minister has made it clear that we see the prospect of moving the negotiations ahead to conclusion some time next year, early in 2004" (DFAT 2003c). Since then the Prime Minister and President Bush have said the negotiations could be completed by the end of 2003. This shortening of the negotiating period is alarming, and would curtail meaningful community consultation.

c) The impact of the US FTA on multilateral negotiations in the WTO

Australia, like most other relatively small economies, has in the past not focussed on bilateral negotiations of this kind precisely because of the unequal bargaining position which inevitably results. Australia has relied rather on multilateral trade negotiations and on multilateral agreements through the United Nations which have some prospects of providing counterweights to the economic power of the strongest economies.

AFTINET supports the concept of international regulation of trade through multilateral trade negotiations. Such negotiations have in theory the potential to restrain the power of the largest economies and the influence of transnational corporations. However, such restraint requires a multilateral framework which guarantees the interests of less powerful nations and regulates corporate influence. The current WTO framework does not meet these goals, for the reasons outlined at the beginning of this submission. We support changes to the WTO framework to make it more transparent and accessible for smaller and developing countries. We also support a comprehensive review of existing WTO agreements to review their social and economic impacts before any new agreements are negotiated.

The negotiation of a bilateral trade agreement with the US carries the danger of undermining Australia's policy support for, and credibility in, multilateral negotiations.

Conclusion

Australia should not negotiate a Free Trade Agreement with the US. The overwhelming size and strength of the US economy places Australia in an extremely weak bargaining position, which is reflected in the admission by even the advocates of such an agreement that Australia is perceived in economic terms as another state of the US. The government's own study showed that economic gains from such an agreement were extremely low and unlikely to be realised as removal of all trade barriers was unlikely. An independent study has shown predicted economic losses, not gains, thus undermining the whole rationale for such an agreement. The linking of trade and security issues undermines our independence on both trade and security issues, and is likely to harm our relationships with other countries. The investment provisions sought by the US would deliver a degree of influence to US corporations that would undermine Australian governments' sovereignty and threaten democratic public policy making. Finally, the US is challenging a wide range of specific Australian social policies. This is unacceptable and would endanger Australia's economic independence, culture, access to essential services and health and safety. We urge the government to observe the following principles in all proposed trade negotiations:

cease any negotiations which could endanger important social policies,

commission comprehensive independent research into both social and economic impact of all proposed trade agreements, including regional impacts and publish it for public debate before negotiations begin,

ensure that essential public services like health, education and water, and health and social policies like access to medicines, food labelling and quarantine are excluded from all trade negotiations,

ensure that cultural and audio- visual services are excluded from all trade negotiations, and

ensure that all trade agreements are debated and decided by parliament, not just by Cabinet**.**

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