Submission of the Australian Fair Trade and Investment Network (AFTINET) to the Department of Foreign Affairs and Trade on the proposed Australia United States Free Trade Agreement

Prepared by Dr Patricia Ranald and Louise Southalan
Australian Fair Trade and Investment Network (AFTINET)
Public Interest Advocacy Centre
Level 1, 46-48 York St
Sydney 2000
Ph 02 92997833
Fax 02 92997855
pranald@piac.asn.au

Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a network of 59 churches, unions, environment groups, human rights and development groups and other community organisations and individuals which conducts public education and debate about trade policy.

AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. We welcome the call for public submissions on the proposed Australia-US Free Trade Agreement. However, we note that the call for public submissions was made late in November and that the deadline is mid-January, a period which includes the Christmas and summer holiday period for most Australians, and so effectively shortens the time available. Consequently our submission will summarise our general concerns. Members of our network will make more detailed submissions on areas of particular concern to them.

Overview

This submission begins by addressing the general issues of Australia's bargaining position relative to the US in negotiations for a Free Trade Agreement (FTA), and then argues that the explicit linking of trade and security is inadvisable. It is argued that the economic gains predicted to flow to Australia from an FTA are highly contingent on assumptions, including that all trade barriers will be removed, which are not realistic. The costs of entering into an FTA are then discussed, with particular emphasis given to the significance of the investment provisions sought by the US, and the influence that this would grant US corporations over Australian public policy and regulation. The policy issues particularly targeted by the US trade negotiators are then briefly reviewed. It is concluded that Australia should not enter into an FTA with the US. AFTINET supports the concept of multilateral trade negotiations, where these are conducted within a framework that guarantees the interests of less powerful nations and regulates corporate influence.

1. Relative size of the Australian and US Economies and Australia's weak bargaining position

The Australian APEC Study Centre notes that Australia's national output is only 4% of that of the United States, and notes in a breathtaking understatement that for the US, "an FTA is thus a much less significant national economic decision than for Australia" (Australian APEC Study Centre 2001 p 48).

The econometric study conducted for DFAT notes that Australian exports to the US are 11% of our total exports while US exports to Australia are only 1.6% of total US exports. (Centre for International Economics 2001 summary p 2).

The APEC Study Centre study 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. Australia's lack of negotiating leverage arises not only from the relative smallness of its economy but also from its openness, with relatively little to offer by way of bilateral market access in goods. The main targets in the negotiations are issues of public 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.

Most Australians strongly support these policies and see them as expressions of Australia's economic, political and cultural independence. Most Australians would not welcome an agreement which even its strongest advocates admit could reduce Australia to the economic status of merely another state of the US. Australia, like most other relatively small economies, has in the past not mainly 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.

2. Linking of trade policy with security alliances

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 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 (recently illustrated by different policies regarding the International Criminal Court, for example). Australia's role within the Cairns Group could be compromised if a 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 region.

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. Claimed economic gains from the US-Australia FTA

The economic gains from the FTA predicted by 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 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 $US 9 billion over a 20-year period, and that the GDP increase in 2010 could be US$ 2 billion or A$ 4 billion. (Centre for International Economics, summary p1). However the study then concedes that gains would be proportionately less if not all trade barriers were removed. (Centre for International Economics, summary p 2). This figure of $A4 billion gain in GDP has been widely quoted with much more certainty than it deserves. . The Australian APEC Study Centre study 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 goes on to quote the $A4 billion GDP gain without the qualification that it would be reduced if not all trade barriers were removed. 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 same 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. Ross Gittens, for example argues that "bilateral FTAs …do more to shift our trade to the favoured country and away from our other trading partners than to increase our trade overall" (Gittens 2002 p 29).

The Australian APEC Study Centre study stresses the dynamic benefits that would flow to Australia from exposure to US corporate practices and culture through competitive pressures arising from an FTA (Australian APEC Study Centre 2001 pp 61-9). However, recent high-profile cases such as Enron and World Com have shown that market forces alone cannot be relied upon to ensure best practice, and that enormous costs can flow from a culture of insufficient corporate regulation. One should not assume that additional exposure to US corporate practices and culture will be unambigously positive.

4. Agriculture

An FTA with the US is frequently characterised as promising great benefits to Australia through increased agricultural trade. The claims for the economic impact on Australia of an FTA 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 dairy and sugar (CIE 2001 pp 21-24). However the Australian

APEC Study Centre study 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). Recent US legislation to maintain high levels of agricultural subsidies makes the removal of these barriers extremely unlikely and 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).

Even if some of these dubious economic gains were achieved, however, they would not be worth the price of trading off the vital Australian economic and social policies which the US government has listed as its targets in the negotiations. These targeted policies are discussed below.

5. Australian Policies which are US targets in the Negotiations

The US government has noted a number of matters for FTA negotiations which it regards as barriers to trade. These have been listed most recently by United States Trade Representative Robert Zoellick (Zoellick 2002).

a) **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 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.

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:

(a) the Canadian ban amounted to a NAFTA-forbidden expropriation of its assets,
(b) 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
(c) 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:

(i) 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)

(ii) 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

(iii) 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.

b) 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 them 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.

c) Removal 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 are a vital pillar of Australia’s cultural identity and diversity which ensures that Australian voices are heard and Australian stories are told, specifically 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.

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 Australian government should oppose any proposals to change media ownership or audio visual content policy.

d)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 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 Centre for International Economics study (Centre for International Economics, 2001, p 74) .

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 could be raised in negotiations. This is a vital health and social equity policy which should not be the subject of negotiations in a trade agreement.

e) 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.

f) 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

g) 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 .

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 would be seen as another state of the US. The predicted economic gains from such an agreement are extremely dubious and unlikely to be realised. 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 specific Australian social policies . This is unacceptable and would endanger Australia's economic independence, culture, access to essential services and health and safety.

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