

**Submission of the Australian Fair Trade and Investment Network  
(AFTINET) on the policy of the Australian Government for the Fifth  
WTO Ministerial Conference to be held in Cancun, Mexico in  
September 2003.**

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## **Introduction**

The Australian Fair Trade and Investment Network (AFTINET) is a network of 73 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. This submission presents an overview of some of the main issues in the negotiations. It does not represent the detailed policy positions of all member organisations. Members of the network will be making more detailed submissions on policy areas of particular interest to them.

### **1) Transparency and community consultation in Australian Trade Negotiations**

We welcome the opportunity to make submissions on the WTO negotiations, which affect many areas of government policy. We note that a series of deadlines have been missed in the negotiations. This is in part because of divisions between the most powerful governments in the WTO (known as the "quad" (the US, Canada the European Union and Japan). It also reflects the reluctance of these governments to deal with issues of key concern to developing countries, especially in the areas of access to affordable medicines, agriculture, trade in services and proposals for new WTO agreements. These issues will be explored more fully below.

We note that there has been no evaluation of the social and economic costs and benefits to Australia of the outcomes of the previous WTO negotiations. There has been little information about the possible impacts of the current negotiations, especially the proposals for new agreements on Investment, Competition Policy and Government Procurement.

We also note that there is still a lack of public information about Australia's negotiating position in some areas. We welcome the fact that the government made its initial GATS offer public, but note that the government itself acknowledged that this was a specific response to community pressure, rather than part of a general policy

change to greater transparency. We request that all relevant information on all negotiations be made public, so that Australia's policy positions can be openly debated and publicly accountable before WTO agreements are finalised. This will enhance the democratic process and result in more effective trade policy.

We also note that, despite the tabling of trade agreements and other treaties for a limited time in Parliament, and very brief examination of them by the Joint Standing Committee on Treaties, decisions on trade agreements are made at the Cabinet level, not by parliament. The Committee can only make recommendations to Cabinet, which is not obliged to take any notice of them.

The inadequacy of this process was demonstrated again recently by the experience of the Singapore Australia Free Trade Agreement, which was examined by the committee at the same time as four other treaties. The time frame for written submissions was very short. There was only one hearing by the committee to which only the Department of Foreign Affairs and Trade was invited, and the implementing legislation for the tariff changes was introduced into the Parliament in May, well before the committee reported in June. The committee's own report expressed strong concerns about this, stating that such a process "could undermine the workings of the Committee," and that the Committee would complain formally to Ministers in writing. This experience underlines the inadequacy of a consultation process which allows for very limited public input, and has no practical influence on the outcome.

#### *Recommendations*

- *The Government should commission multi-disciplinary research to evaluate the socio-economic impact of trade liberalisation in Australia since the Uruguay Round*
- *In evaluating whether Australia should enter into any future WTO agreements, the Government should assess the likely socio-economic impacts on industry sectors and surrounding communities and whether structural adjustment measures are*

*available and appropriate to alleviate any adverse socio-economic impacts of such actions.*

- *Community consultation sessions should take place on all aspects of Australia's trade policy, not only on the WTO. They should be well publicised in advance, free of any costs, held at convenient times and locations and have time for genuine input from the community.*
- *Consultation and public debate on policy positions should take place before the development of the Australian government's policy positions and before negotiations.*
- *The Australian government's policy for negotiations should be public and all documents should be made available.*
- *There should be a specific Joint Standing Committee to deal with trade agreements and their socio-economic impacts, which should allow adequate time for consultation and public hearings, and should make recommendations to parliament before debate and decision by parliament*
- *The Government should make a commitment to full public and parliamentary debate and voting on draft trade agreements before they are signed.*

## **2) Transparency and access for developing countries to the WTO negotiating process**

Many developing countries were highly critical of the process by which draft documents were developed before the Doha meeting and of the decision-making process at the meeting. These concerns are reinforced by the lack of progress on issues of concern to developing countries.

The Indian Commerce and Industry Minister Mr Murrasoli Maran took the unusual

step of making public comment about it on behalf of developing countries to a conference of the World Economic Forum and the Confederation of Indian Industry held on December 4. *The Hindu* newspaper of December 5 reported his statements that:

"Any system which in the last minute forces many developing countries to accept texts in areas of crucial importance could not be a fair system"

and

"Only a handful of members were asked to participate in the so-called green room meeting. The remaining members had virtually no say" he said. He added that during non-stop negotiations, texts were appearing without sufficient time to be examined by the delegations. The tactics seemed to be to produce a draft in the wee hours and force others to accept."

At the WTO General Council Meeting of May 14-15, 2002, a group of developing countries put forward proposals for changes to WTO negotiating procedures. These included: (i) making all consultations transparent and open-ended; (ii) the draft ministerial declaration should be based on consensus, and where this is not possible, differences should be fully and appropriately reflected (i.e. through square brackets); (iii) the Director-General and the Secretariat should remain impartial on the specific issues in the declaration; (iv) chairpersons at Ministerial Conferences should be identified by consensus in the preparatory process in Geneva; consultations by chairs should be only at meetings open to all Members, with meetings announced in advance (v) negotiating texts and draft decisions should be introduced only in open-ended meetings; and (vi) late night meetings and negotiating sessions should be avoided.

The Australian government and the most powerful WTO member states did not support these rather modest proposals for democracy and transparency, arguing that such processes would be too inflexible. Given the importance of WTO decisions on policies ranging from food security, health, basic services, the environment and development policy we believe these issues of democracy and transparency must be

addressed.

We note that the draft text for the Ministerial Conference in Cancun, which was released in late June, has been criticised for not reflecting accurately the concerns of developing countries and as part of a process in which developing countries are disadvantaged. Again, particular proposals for reform have been made by developing countries. The 77-member African, Caribbean and Pacific (ACP) Group of countries adopted a Declaration on 1 August 2003 which calls on WTO members to ensure the decision making process at the Cancun Ministerial is 'transparent and inclusive' through adopting procedural rules. They put forward four proposals, including that draft texts contain the views of various members, that Chairs of working groups be appointed by all members, and that all meetings be opened to all members (Declaration of African, Caribbean and Pacific Group of 77 Countries, 1 August 2003, discussed at length in Hormeku, T (2003) 'ACP Trade Ministers say there is no basis for negotiating Singapore issues; call on WTO to adopt rules for inclusive decision making in Cancun', at [www.twinside.org.sg](http://www.twinside.org.sg))

*Recommendations:*

*That the Australian government support the proposals raised by developing countries for a more transparent and democratic process including:*

- *All negotiating texts which are forwarded to or prepared in Cancun, must be produced by the membership, and all members should have the opportunity to effectively participate in the drafting, revision and approval, with differences fully reflected in the text*
- *The Secretariat should maintain neutrality during the Ministerial, and the agenda, the election of chairs and procedures should be decided by all members.*
- *The assembly of all members should be the main forum for negotiations at the Ministerial.*

- *All smaller meetings must be open, inclusive, transparent and arranged in advance.*
- *Any proposal to extend the Ministerial meeting or to amend its agenda or other ministerial processes should be decided upon by all Members*
- *Issues outside of the WTO's agenda (such as preferential access arrangements, aid, debt etc.) must not be brought into the negotiations and used by the more powerful member governments to influence outcomes.*

### **3) Doha Negotiating Issues**

#### **c) Agriculture**

The government discussion paper notes that the objectives for negotiations which have a specific impact on developing countries include the phasing out of export subsidies and the reduction of domestic subsidies in industrialised countries.

Following the WTO Agreement on Agriculture, many developing countries have reduced their import barriers to agricultural products and been flooded with cheap imports from the US and Europe which are still effectively subsidised. Local farmers cannot compete in this situation, which leads to rural unemployment, poverty, urban migration and loss of food security.

Developing countries are requesting the application of differential treatment which recognises that further reductions in their agricultural tariffs for key crops could have even more devastating impacts.

We note that the Australian government did not support developing country proposals for special consideration of crops that involve food security, livelihood and development concerns. The Australian government paper on Special Products presented at the Committee on Agriculture meetings, held June 26 to July 1, 2003, rejected this concept completely. The paper insisted that "key developed countries

have made it clear there must be increased market access for everybody or for no-one", and that failure of developing countries to agree to this would jeopardise the outcome of the negotiations. The paper proposed instead a special safeguard mechanism as a "safety net" which could only be invoked in special circumstances after developing countries had committed to increased market access (Australian Government paper on Special Products, June 2003).

We are concerned that the Australian government is acting as the spokesperson for "key developed countries" rather than addressing the needs of developing countries.

*Recommendations:*

- *The Australian government should support the right of developing countries to special and differential treatment in agriculture, to address food security, rural development and livelihood issues.*

**b) Services**

Regulatory capacity, public services and democracy undermined

The Government has stated in its Discussion Paper that it "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 service sectors, or compromise the ability and capacity of governments to fund and maintain public services" (Discussion Paper p 3).

Such a statement is welcome. However neither in this Discussion Paper nor in the explanatory memorandum accompanying the Government's initial GATS offers, where it also appeared, is there any suggestion of what, if any, principles will be applied in pursuing these goals. It might be expected that a commitment to transparency and public debate of these important issues would accompany such a statement. This would enable the public to have input into the development of the guiding principles.



The Government's initial GATS offer was not disclosed to the public until its lodgement with the WTO. We seek a commitment to informed public debate of any changes to the initial offer before they are made.

In any event, there are serious doubts as to the Government's capacity to fulfil its stated goals, because of the nature of the GATS agreement. The impacts of the GATS agreement on regulatory capacity and public services have been dealt with at length elsewhere by AFTINET in previous submissions (available on the AFTINET website: [www.aftinet.org.au](http://www.aftinet.org.au)), but will be briefly addressed below.

#### Capacity to regulate restricted

The GATS agreement is wide-reaching and has dramatic implications for governments' regulatory capacity. Under existing GATS provisions, domestic regulation is affected by the GATS rules not only by the direct measures that may be taken by other countries to challenge Australia's regulation, but also by the more subtle impact of this on guiding the direction of law-making. Once made, commitments may not be changed without 'compensatory adjustment', and even then not until three years have passed since the commitment entered into force.

Under the government's initial offer new commitments have been offered in environmental, financial, telecommunications and maritime sectors. DFAT has described many of these as simply reflecting existing practice. Regardless of the state of existing practice, any new offer has an effect on regulatory capacity because it removes the flexibility of future governments to regulate contrary to scheduled commitments.

Under proposals within the WTO Working Groups, a 'least trade restrictive' test for domestic regulation has been proposed, and supported by Australia. If adopted, this proposal would further reduce the policy and regulatory options available to governments. This Discussion Paper, unlike the previous Discussion Paper relating to GATS, does at least mention the existence of WTO Working Parties. However no information is provided as to the Government's position in relation to this or other

proposals that impact on regulatory capacity. It is unclear how the public are expected to be able to judge whether Australia's position within the negotiations matches the Government's statement quoted above.

### GATS and public services

One of the reasons for the broad scope of the agreement is the ambiguity that exists regarding which public services are covered. The ambiguity arises from the wording of Article 1.3, which states that all services are covered 'except those supplied in the exercise of governmental authority, [ie those] supplied neither on a commercial basis nor in competition with one or more service suppliers'.

Services in Australia, as in many other countries, are in general delivered by both public and private providers. Article 1.3 does not remove public services from the Agreement. The Article has not been judicially interpreted, and so its scope is uncertain.

Clarity is needed as to the scope of the GATS agreement, not only to address the ambiguity but to allay the legitimate fears of community organisations and members of the public. The Government's statement does not provide reassurance because no information is provided as to how this ambiguity will be addressed. If the Government does not intend to address it, by making a commitment to explicitly exempt public services from all future commitments, it should make the reasoning for such a decision public and allow it to be debated.

An additional risk to public services lies in proposals within the WTO Working Party on GATS rules to re-define 'subsidy' so as to include government funding. As has been argued at length elsewhere, the effect of this would be to privatise public services. The Government's position on such a proposal is not discussed in the Discussion Paper, although consistency with its statement would presumably require it to be rejected. These are serious issues for Australia, but are of even greater significance for developing countries.

## Recommendations

*The Government should:*

- *Make a commitment to informed public debate of any changes to the initial offer before they are made.*
- *Explicitly exempt public services from all future commitments*
- *Disclose the Government's position in relation to proposals in the WTO Working Party on Domestic Regulation that impact on regulatory capacity,*
- *Reject a 'least trade restrictive test' for government regulation on qualification requirements and procedures, technical standards and licensing requirements*
- *Reject a definition of subsidies that includes government funding.*

### **c) The Singapore Issues: Investment, Government Procurement and Competition Policy**

We note that the DFAT paper states that "negotiations in these areas would take place on the basis of a decision on the modalities of the negotiations at the Fifth Ministerial Conference in 2003."

We note that the text of the Ministerial statement also contains the words "on the basis of a decision taken by explicit consensus." The inclusion of these issues in the Doha statement was hotly contested and there is disagreement amongst WTO members about the interpretation of this decision. The Chair of the meeting was asked to clarify the meaning of "explicit consensus" and answered that it meant that the negotiations would not proceed if one or more members did not agree that they should. There is strong opposition to these issues from many developing countries. We note, for example, that the African, Caribbean and Pacific Group of 77 nations have stated clearly that there is no basis for the commencement of negotiations on the new issues (Declaration of African, Caribbean and Pacific Group of 77 Countries, 1 August 2003, discussed at length in Hormeku, T (2003) 'ACP Trade Ministers say there is no basis for negotiating Singapore issues; call on WTO to adopt rules for inclusive decision making in Cancun', at [www.twinside.org.sg](http://www.twinside.org.sg)).

## Investment

AFTINET is strongly opposed to any agreements or measures on investment which seek to remove or weaken national government powers to regulate transnational investment.

This opposition arises from our experience of the draft Multilateral Agreement on Investment. This agreement would have prevented limits on foreign investment in general, or in particular industries, prevented requirements on foreign investors to use local products or train local staff and prevented the use of government purchasing to develop local industry. It also contained provisions to give transnational investors the right to compete for government funding for services like education and health.

The MAI also proposed an investor-state complaints mechanisms through which investors would have been able to sue governments for damages if they could argue that government regulation was a barrier to trade. This was a fundamental affront to democratic governance. It was modelled on the North American Free Trade Agreement (NAFTA) under which corporations have successfully challenged legislation and sued governments by arguing that health and environmental legislation were barriers to investment. Some examples are:

- The US company United Parcel Service (UPS), the world's largest express carrier and package delivery company is suing the publicly owned Canada Post. UPS argued that Canada Post's monopoly on standard letter delivery was in violation of provisions on competition policy, monopolies and state-run enterprises. UPS is arguing, among other things, that Canada Post uses its public infrastructure to cross-subsidise its parcel and courier services. The public postal service enables all Canadians access to affordable postal services wherever they live. Australia Post provides a similar service/
- The US Metalclad Corporation was awarded US\$15.6 million, because it was refused permission by a Mexican local municipality to build a hazardous waste

facility on land already so contaminated by toxic waste that local groundwater was compromised.

- Ethyl Corporation, a US chemical company which produces a fuel additive called MMT containing manganese, hazardous to human health, successfully sued the Canadian government when it tried to ban MMT. In April 1997 the Canadian Parliament imposed a ban on the import of MMT, on grounds of public health as well as to reduce air pollution and greenhouse gas emissions. Ethyl Corporation successfully sued the Canadian Government, which was forced to settle the suit by reversing its ban on MMT and paying \$13 million in legal fees and damages to Ethyl Corporation.
- 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, S (2002) *Thirst For Control*, Council of Canadians, Toronto, [www.canadians.org](http://www.canadians.org), Public Citizen (2001) *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy: Lessons for Fast Track and the Free Trade Area of the Americas*, Public Citizen, Washington, [www.citizen.org](http://www.citizen.org)).

The draft MAI met with fierce opposition when it became public precisely because it impinged on so many areas of national public policy and regulation which are seen as essential for social, cultural and environmental development. The negotiations eventually collapsed in 1998. However in March this year the International Chamber of Commerce proposed a model for the WTO Investment Agreement which virtually replicates the MAI.

Investment liberalisation can challenge domestic policies on industry development, preservation of national culture, environmental protection and national investment in strategic industries. For these reasons there is continuing strong community

opposition to investment liberalisation. Developing country governments are also strongly opposed to such an Investment agreement, as they need to be able to regulate foreign investment to ensure that it contributes to local development. The group of Least Developed Countries have demanded that before such negotiations are considered the WTO should address the development promises made at Doha that remain unmet.

(See, for example, comments by Ambassador Toufik Ali of Bangladesh, on behalf of the group of Least Developed Countries, speaking at the WTO consultations of the Trade Negotiations Committee, reported in Hormeku, T (2003) 'Progress in WTO negotiations cannot be at our expense, say developing countries' in African Trade Agenda, No. 7, March 2003, Third World Network-Africa, available at <http://www.twnafrica.org/agenda/ata-en7.pdf?twID=303>

Oxfam International (2003) 'Briefing Paper 46 -The Emperor's New Clothes: Why rich countries want a WTO investment agreement', available at <http://www.oxfam.org.uk/policy/papers/46emperors/46emperors.html>).

#### Recommendations:

- *The Australian government should be aware that there is strong community opposition to the removal of the right of governments to regulate transnational investment and should not support any proposals on investment rules or agreements in the WTO which would limit those rights .*
- *The Australian Government should not support the development of an investment agreement in the WTO.*
- *The Australian government should oppose any proposals in the WTO for investor-state complaints mechanisms.*

#### Government Procurement

Australia has not signed the voluntary agreement on government procurement which emerged from the Uruguay Round. There are sound reasons for this, since the agreement would prevent any use of government purchasing policy to assist local industry development. Australia still has some industry development policies linked to government procurement at both national and state levels, and should retain the option to develop such policies.

Such policies should indeed be debated and determined democratically at the national and local level, not through trade agreements. Many developing country governments also oppose such an agreement as they wish to retain the option of linking government procurement to industry and local development policies .

The limitation of the proposed negotiations to "transparency aspects" and the claim that such an agreement would not restrict the scope for countries to give preference to domestic supplies and suppliers lack credibility. The whole purpose of such an agreement would be to give access to transnational suppliers through the application of "national treatment" principles.

### Recommendation

*The Australian government should not support the development of a government procurement agreement in the WTO and should oppose any proposals which would remove the right of governments to use government procurement to promote local industry development.*

### Competition Policy

A WTO agreement on competition policy is being promoted on the grounds that it would use anti monopoly provisions to curb the power of transnational corporations where one or a few dominate the market in particular industries.

But our experience of competition policy in Australia is that the anti-monopoly provisions are relatively weak and have been used rarely against private corporations.

The strongest parts of the legislation are aimed at public enterprises and services, like electricity and water to create "competitive neutrality" between them and private companies. This means they may put commercial goals and profitability above service quality and access for low income customers. This has led to a debate in the community about the social impacts of competition policy and the need for regulation to ensure equitable access to essential services.

The commercialisation of public services also paves the way for them to be treated as traded goods under the GATS, as the GATS exclusion of public services applies only to those not provided on a commercial basis or in competition with other services.

These issues need to be debated and determined democratically at the national and local level, not through trade agreements. Developing countries are also opposed to such an agreement because they require the opportunity to develop anti-trust and competition policy which suits their conditions.

#### Recommendation

*That the Australian Government should not support the development of a competition Agreement in the WTO.*

#### **d) Trade Related Intellectual Property Rights (TRIPS) and Access to Medicines.**

The TRIPS agreement extends the intellectual property rights on patents for inventions to all forms of technology, including medicines, and means that royalties must be paid for 20 years.

The Doha statement on TRIPS and Public Health acknowledged that the TRIPS agreement was intended to enable governments to ensure access to pharmaceuticals through compulsory licensing to manufacture essential medicines at affordable prices to treat serious health problems. Before the Doha meeting companies and governments had used the threat of legal action under TRIPS to challenge these actions by governments.



There is still an unresolved issue about how countries without manufacturing capacity can get access to affordable medicines through imports, as Article 31(f) of the TRIPs Agreement, requires that production under compulsory licensing must be primarily for the supply of the domestic market.

A draft exception to the TRIPs rules was negotiated and put forward by TRIPs Council Chair Ambassador Perez Motta in December 2002, but consensus was blocked by the US government after pharmaceutical companies objected that the scope of disease coverage was too broad.

More recently US pharmaceutical companies have reportedly called on the US government to limit the range of developing countries which might have access and have argued that access should be given only to the very poorest.

The suggestion to limit the number of eligible countries, or differentiate between developing countries, is not new and has in the past been strongly opposed by all developing countries. Developing countries have repeatedly stressed that the Motta resolution is a compromise for them. They would only be willing to accept the draft in its current form, and once the text was re-opened on disease coverage or eligibility, they would also demand changes to other parts of the draft.

#### Recommendation

*The Australian government should support the right of developing countries to access to affordable medicines. The Motta resolution already represents a compromise and the Australian Government should not support any further compromises on the rights of developing countries.*