Submission
by the Campaign Against Foreign Control of Aotearoa
to the Foreign Affairs, Defence and Trade Committee
on the International Treaties Bill

March 2001

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1. Introduction

1.1. We welcome the International Treaties Bill. Such legislation is long overdue.

1.2. The time has long passed (if it ever existed) when international agreements could be regarded simply as affairs of state which had little impact on anything but defence and international relations. The controversies over the WTO, MAI, APEC, the Singapore "Closer Economic Partnership", and similar agreements elsewhere is precisely because they have an impact on almost every aspect of our lives.

1.3. We submit that they should therefore be treated at least as rigorously and openly as legislation with similar impacts. In fact there is an argument that many should be treated more rigorously. That is because reversing the ratification of a treaty (or equivalent actions) can have much wider implications, such as for our international political and economic relationships, than domestic legislation. It is therefore more difficult to do in practice.

1.4. It can also be more difficult to do in international law. Investment Promotion and Protection Agreements New Zealand has in force with China and Hong Kong1, and similar agreements it has signed with Chile and Argentina but which have yet to come into force, have 15 year terms (10 years in the case of Argentina) plus an equal term for any investment in place if the agreement is terminated. They therefore have a life of at least 30 years.

1.5. Such agreements are therefore akin to entrenched legislation. Policy options are closed off to future elected governments, and they cannot be regained without either paying potentially crippling compensation, facing equally crippling economic sanctions, negotiation with a foreign government or the extreme and unlikely step of abrogation of an agreement. They therefore require if anything more testing processes than normal legislation.

2. Recent experience

2.1. The process used for the Singapore agreement was an improvement on what happened previously, but was still a farce. No substantive information – most particu-

[1] The Hong Kong agreement (NZTS 1995, No 14) was signed by Don McKinnon in 1995 and entered into force that year. The very similar agreement with China was signed by David Lange in 1988, and came into force in 1989 for a minimum of 15 years (NZTS 1988, No.10).

larly, drafts of the agreement – was given to the public before the agreement had been signed. By the time it had been signed, the government made clear it had such a commitment to the agreement that no submissions were likely to have any effect, even in making minor amendments, let alone reversing the process. Indeed this committee, in its report to the House, made it clear that its hearing on the agreement was not part of the consultation process (p.11). As the report said: "By the time a treaty is presented to the House, it will normally have already been adopted by the States Parties and will often have been signed by the New Zealand Government as well." The process of public consultation therefore remained profoundly undemocratic.

2.2. Both the New Zealand and the Singapore governments had refused to release drafts prior to its initialling. Yet this was a 192 page, highly complex, document whose implications could not be fully understood without reference to even more complex documents, such as those under the WTO, CER and APEC, as well as our own and Singapore's body of law, and with far-reaching implications for our domestic policies and international relationships. It was released to the public for comment only 14 days before submissions to this Select Committee formally closed.

2.3. That meant that any discussion and debate until that point was largely shadow-boxing. Assurances by MFAT officials could not be examined because the wording of the agreement was not available. "Consultations" – most of them by invitation only – were one-sided affairs, with officials declining to give information that would enlighten debate, because the Agreement was still under negotiation. This was confirmed at hearings on the Singapore agreement before this committee, even from parties otherwise guardedly in favour of the agreement, such as the Manufacturers Federation. A number of local governments (including Dunedin, Christchurch, Horowhenua, Manukau) as well as Local Government New Zealand expressed strong concerns about both the lack of consultation and the nature of the agreement.

2.4. In such circumstances, the public is in a Catch 22 situation. If they show concern they are (and were) given bland assurances and told they should wait to see the agreement. Too often (such as during the GATT Uruguay Round and the MAI negotiations) are told they are misinformed and scare mongering. In the Singapore case, having waited for the text of the agreement to be released, the public finds it is a done deal, with a totally impractical timetable to examine it properly to discover its implications.

2.5. We have yet to hear a credible explanation for the secrecy in which negotiating drafts are held, except perhaps where a proposed agreement involves defence (and not always then either). Both parties will, by definition have seen the draft, so releasing it will not reveal any secrets. The only risk is that a third country might benefit from knowing of progress. That would be most unusual.

2.6. Indeed the most credible explanation for the secrecy is to avoid public controversy. In the case of the Investment Promotion and Protection Agreements negotiated in the late 1990's with Chile and Argentina, that was explicitly the case. In one confidential document (ARG/NZ 1/1/2 – March 1998, second draft, released under the Official Information Act) from Don McKinnon, Minister of Foreign Affairs and Trade, to the relevant Cabinet Committee, it was stated that

> "the negotiation of an IPPA with Argentina or any other country will not be a popular subject with the public at this time. Careful media handling of the issue will be needed if the bilateral investment promotion and protection negotiations are not to worsen the current furore over the participation of New Zealand in MAI negotiations."

2.7. Yet the government was at the same time consulting closely with corporations which would benefit from this agreement, according to this and other official documents.

2.8. In the case of the IPPA with Chile, corporations consulted included Carter Holt Harvey, Fletcher Challenge, the New Zealand Dairy Board and the New Zealand Apple and Pear Marketing Board. A document from Lockwood Smith, Minister for International Trade, to the Chair of the Cabinet Economic Committee (undated, Annex to ECO (99) 67, 15/6/99, released under the Official Information Act) stated that those corporations were "comfortable with the recommendations" (that is, the government's negotiating position). In fact

> "Some suggestions, especially by Carter Holt Harvey, were incorporated into the negotiated text."

2.9. The government clearly had double standards. Such agreements were kept secret from the public who elected it, who might object to the agreements. But they were negotiated with input from corporations whose vested interests would make privileged disclosure considerably more problematic than full public disclosure.

2.10. It should also be noted that Carter Holt Harvey was then (as now) an overseas company, 51% owned by International Paper Company Ltd of the U.S.A., and has since divested from Chile. This raises a further question as to whom the government was representing in these negotiations.

3. National Interest Analysis

3.1. We also held grave concerns at the shallowness and one-sided nature of the National Interest Analysis (NIA) of the Singapore agreement. It failed to give more than a token cost-benefit analysis, and addressed only glibly the concerns that this agreement will raise. It was little more than a self-justifying marketing exercise for the agreement, rather than a genuine assessment of its long-term effects on New Zealand society and whether it should proceed in its final form.

3.2. This is more than a concern about the quality of the analysis – though it is that. It is also a concern that the analysis is the result of a particular political and theoretical stance taken by the authors. As Asia 2000 head, and former MFAT Principal Economic Adviser and chief trade negotiator, Tim Groser put it in the Asia 2000 submission on the Singapore agreement (paragraph 52):

> "It is, however, well known that there is a fundamental division of opinion over terminology on 'costs' of trade agreements, and this is not dealt with explicitly in the National Interest Analysis. One perspective views any limitation on NZ's ability to re-create high barriers to imports and inward investment as a 'cost' of such agreements; the other perspective is to see this, not as a cost at all, but a 'benefit'."

3.3. In other words, the National Interest Analysis presented by MFAT treated what most New Zealanders would regard as "costs" as "benefits". It did not even ac-

knowledge there was a dispute over this interpretation, let alone summarise the different sides of the case.

3.4. We submit that this indicates a lack of objectivity which is predictable from an organisation intimately involved in the negotiation of an agreement, and thoroughly in sympathy with its outcome. It is predictable, but, we would also submit, not excusable for a ministry whose role is to give dispassionate advice to the government of the day, whatever its political colour.

3.5. This Select Committee also concluded in its report to the House that "we agree that future NIAs could benefit from more substantive analysis" (p.12).

3.6. We conclude that National Interest Analyses should be compiled by bodies independent from the Government, and taking into account public consultation and independent expert advice. It should include a summary of the views expressed in the public consultation, and a commentary on how these have been or should be taken into account (if at all) in the conclusions of the National Interest Analysis and in any negotiations. It should cover the widest economic impact of the proposal (not simply the immediate effects), including impacts on workers (their employment, wages and conditions), on Maori (including Treaty of Waitangi obligations), on New Zealand's social, cultural and physical environment, and on local and central government legislation, regulations and policy.

3.7. If it is to inform the debate along the way, an analysis should not occur solely at the end of the process, when it is generally too late to make changes. Negotiating many such arrangements is a major undertaking which has a momentum of its own once started. We submit that an initial National Interest Analysis should be compiled (by an independent body) before a commitment to negotiations has been made, based on the proposed outcome.

4. Process

4.1. To summarise, we believe the process of proposing, negotiating and ratifying an international arrangement should have the following ingredients:

- Prior to negotiations (including exploratory talks) beginning, an independent National Interest Analysis of the proposal, accompanied by and reflecting consultation with interested members of the public. This should include release of any models of the agreement that are likely to form the basis for negotiations (such as a model IPPA that was used for the Chile and Argentina agreements mentioned above).

- During negotiations, real consultation (not just one-way "information" and assurances to invited parties) informed by periodic releases of negotiating drafts of agreements. That should be accompanied by the New Zealand government's negotiating position. Precedent for that has occurred in December 2000 in the case of the Free Trade Area of the Americas (FTAA) negotiations, where Canada publicly released its written submissions to FTAA negotiating groups.

- Another independent National Interest Analysis after completion of negotiations, release of the final text, and normally several months for public debate, submissions to a Select Committee, and binding vote by Parliament, taking into account public submissions. No binding action should be taken by the government until this approval has been gained.

4.2. From the outset, the process should also include a role for Maori as the Treaty of Waitangi partner.

4.3. There should also be a responsibility to consult unions, just as governments appear to take on to themselves a responsibility to consult business.

4.4. To the extent that some of these requirements appear too prescriptive for the legislation itself, they should be achieved by regulation or Parliamentary Standing Orders. The release of such information "from time to time" (as specified in Section 6 (1)(d) is insufficiently specific. Standing Orders or regulation should ensure that a regular flow of information is made public sufficient for citizens to be able to follow the progress of negotiations in detail and make informed comment on events.

5. Which agreements?

5.1. Finally, with regard to Section 4 of the Bill, we submit that the above process should apply to amendments, extensions and changes in commitments to arrangements as well as to new ones. For example, an agreement to include public education or health under the schedules of the WTO's General Agreement on Trade in Services (GATS) or the Singapore agreement's services provisions would be of significance at least as great as many fully-fledged agreements. It should also apply to bilateral agreements and any international arrangement that impacts on local and central government legislation, regulations or policy. Under the latter we would include, for example, the exchanges of letters between Australian and New Zealand ministerial counterparts that lead to changes of this nature. An example is the agreement which resulted in the change in Overseas Investment Regulations gazetted on 11 November 1999 which raised the threshold at which non-land investments require consent under the regulations from $10 million to $50 million.

6. Summary

6.1. To summarise our submissions, and relate them directly to the Bill as proposed:

6.1.1. We support the general principles of the Bill insofar as it improves public involvement and parliamentary oversight of New Zealand's international agreements.

6.1.2. We submit that the negotiation and acceptance of such agreements should be treated at least as rigorously and openly as legislation, because of their wide and increasing impacts, the constraints they place on current and future governments, their frequently long term (in some cases 30 years) and the difficulty with which they can be reversed. Such agreements are therefore akin to entrenched legislation.

6.1.3. In **Sections 4**, **Interpretation**, and **6**, **Crown to refer treaties to Parliament**, we submit that the definition of "treaty' and the process the Crown must follow should ensure that the Bill applies to amendments, extensions and changes in commitments to arrangements (such as to the schedules to the GATS and Annexes to the Singapore agreement) as well as to new ones. It should also apply to bilateral agreements and any international arrangement that impacts on local and central government legislation, regulations or policy.

6.1.4. With reference to the **National Interest Analysis**, we support the list of matters it should address, as described in **Section 8**, but submit that it should also cover in (d) the widest economic impact of the proposal (not simply the immediate effects), in (g) the impact on both local and central government legislation, regulations and policy, and in (h) the statement of consultations should include a summary of the views expressed in the public consultation, and a commentary on how these have been or should be taken into account (if at all).

6.1.5. In addition to the National Interest Analysis at the conclusion of the negotiations, as specified in **6(1)(b)**, we submit a similar analysis should be prepared before a commitment to negotiations has been made, based on the proposed outcome.

6.1.6. We further submit that both National Interest Analyses should be carried out by bodies independent from the Government, taking into account public consultation and independent expert advice.

6.1.7. With regard to the release of information, we submit that the initial National Interest Analysis before negotiations are committed to should include the release of any models of the agreement that are likely to form the basis for negotiations; and while we support the release of the text of draft treaties that are under negotiation as specified in **6(1)(d)**, we submit that those releases should be accompanied by a statement of the New Zealand government's current negotiating position.

6.1.8. We also submit that the release of such information "from time to time" is insufficiently specific. Parliamentary Standing Orders or regulation should be used to ensure that a regular flow of information is made public sufficient for citizens to be able to follow the progress of negotiations in detail and make informed comment on events. Standing Orders or regulation should also cover details of the National Interest Analyses and the process that are too specific to be included in the legislation.

6.1.9. From the outset of the process, it should also include a role for Maori as the Treaty of Waitangi partner, and a requirement to consult unions.

7. Campaign Against Foreign Control of Aotearoa (CAFCA)

7.1. CAFCA has been in existence for over twenty-five years. It concerns itself with all aspects of New Zealand's sovereignty, whether political, economic, military or cultural. It opposes foreign control of New Zealand by other States or by corporations, but welcomes interaction with people of other countries on the basis of equality. It is anti-racist and internationalist in outlook and has wide networks with other groups and individuals in New Zealand and overseas.

7.2. Our members include a number of institutions and libraries, journalists, politicians from most political parties, public figures, trade unionists, environmentalists, and other researchers in the area. Members receive a magazine, *Foreign Control Watchdog*, approximately three times a year. It is acknowledged as a unique and well-researched source in this area, where hard information is difficult to come by. CAFCA also researches, publishes, and organises public meetings and other events.