SUBMISSION ON THE FREE TRADE AND INVESTMENT AGREEMENT BETWEEN THE GOVERNMENTS OF NEW ZEALAND AND SINGAPORE

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1. This Agreement is comprises 190 pages of complex, technical legal text. It cross-references to a range of documents within the World Trade Organisation and APEC. It invokes procedures of the International Centre for Investment Disputes. It interfaces with the Australia New Zealand Closer Economic Relations Trade Agreement and the bilateral investment agreement between New Zealand and Chile. It impacts on a wide range of domestic of legislation, regulations, policy and administrative practices at central and local government levels. And its provisions will directly or indirectly affect the lives of all New Zealanders.

2. Why, then, was there only ten days (or for those who relied on the public notices in the *NZ Herald*, seven) in which to prepare a submission?

   Some of those who did hear about the submissions process have expressed their outrage through a range of avenues.

   Others will also have heard the message that there is no point even trying to understand the text and make a submission on the substance.

   Those who would normally rely on others with the technical expertise to break down the text into a format which they can understand so they can make a submission will be left voiceless, because there was no time to do that basic groundwork.

   Yet others will have been deterred because they know the select committee has no power to propose amendments, and the Cabinet retains the right to ratify the Agreement unchanged, as it will undoubtedly do.

   Some who prepared written submissions simply cannot afford the time from work and the airfare to get to Wellington.

   A number of Maori who attended the hand-picked focus groups convened by Te Puni Kokiri, and the many more who would have been interested but were never invited to attend, view the process with even greater cynicism.

3. I do have the expertise to penetrate the legalese of the text, explore the interactions with the range of international agreement to which New Zealand is a signatory, and understand some of the implications for domestic law, policy, practice and life. I therefore felt there was no choice but to make a submission. However, this was at considerable cost to other long-standing commitments which should have taken priority, and I resent having to do so knowing the farcical nature of this exercise. Many parts of the submission identify serious questions that are raised by the text; there was simply no time to conduct the proper investigation that would have been required to answer them. Part 7 has yet to be completed, and will be forwarded separately.

4. I decided to prepare an extensive submission for five reasons:

- First, to dispel the fallacy that this Agreement is benign and will have a negligible effect on the future lives of the people of New Zealand;

- Second, to expose the gross inadequacy of the National Interest Analysis prepared by foreign affairs and trade officials to accompany the text;

- Third, to raise awareness of the potential consequences of further agreements, such as that proposed between CER and ASEAN and for which this Agreement has been described as the Trojan Horse;

- Fourth, to confront members of the select committee with their complicity in a process which is contemptuous of responsible government, informed law making and the fundamental principles of democracy; and

- Fifth, to help ensure that no such Agreement can be imposed on New Zealand and New Zealanders through such an anti-democratic process ever again.

The Consultation Process

5. The Minister has made great play of the openness of the consultative process. I have talked with a number of interested parties, including those in industry, who were, like myself, participants in those ‘consultations’. There certainly was an attempt at outreach. But this was a propaganda exercise in which very little information of any real significance was conveyed, with no commitment to genuine dialogue.

   At the meeting I attended, the response of officials to questions about the detail of the text was either vague, on the grounds that these matters were still the subject of negotiations, or dismissive of any concerns about the rationale or practical effects of what they proposed.

The consultations with Maori were especially stage-managed. Handpicked focus groups were invited to meet in different parts of the country. Most of those who had genuine concerns about such agreements and wanted the opportunity to express their views were never invited; few of those who were invited bothered to attend.

Some of those most directly affected, such as local authorities, were never 'consulted'. Indeed, Local Government New Zealand was only briefed, at their request, when negotiations were almost concluded.

A number of industry players with whom I have spoken were deeply cynical of the entire exercise, reflecting that anything they said had fallen on deaf ears.

6. Claims that interested parties were better informed than ever on the content of the Agreement through the briefing material released by the Minister are just as misleading. The information released voluntarily and through the Official Information Act was far less than the National Government felt impelled to release during the more extensive and informed debate over the Multilateral Agreement on Investment in 1997 and 1998.

7. The initial briefing paper and cost/benefit analysis was a propaganda exercise that disclosed nothing of assistance to those seeking to analyse the implications of the proposed agreement. For example, the issue of services, which was later given considerable play as a major benefit to New Zealand, barely featured. Nor did the matter of investment.

8. The second briefing document, released just before negotiations were concluded, provided equally scant information. For example, there was minimal information on the crucial issue of investment, and the dispute settlement process was simply described as being 'robust'.

9. As an expert in the field, I was left speculating on the likely content of the Agreement, but unable to make an informed and responsible analysis until I had access to the text. By that time it was too late.

The Select Committee Process

10. There are serious concerns about the manner in which this Agreement has been processed. Some of these reflect residual problems with Standing Orders. Others are the direct responsibility of the Government.

11. Contrary to the impression conveyed by the Minister, New Zealand lags seriously behind comparable jurisdictions in the degree of democratic scrutiny given to international treaty negotiations.

12. The US has an elaborate structure of advisory committees that inform all such negotiations, although these are currently the subjects of litigation regarding the

failure to comply with requirements regarding the NGO representation. The President has no authority to negotiate a take it or leave it document of the kind we are currently confronted with unless he has been voted 'fast track' authority by the Congress. This expired in 1998 and has since been withheld.

13. Australia introduced a more elaborate process for scrutiny of international treaties in 1996. It has a number of elements, including a highly informative web site which provides access to all international treaties and a range of complementary information. There is a mechanism for consultation between states and federal government, which is intended to ensure that states have some input into negotiations that impact on their jurisdictions. Most significantly, the Joint Standing Committee on Treaties, which spans the Senate and House of Representatives, has interpreted its mandate to inquire into such agreements liberally. In 1998 it conducted an extensive inquiry into the proposed Multilateral Agreement on Investment, heard submissions from throughout the country and produced both an interim and final report. It is currently undertaking a similar inquiry into the implications of the WTO agreements and any further negotiations.

14. This is in addition to its responsibilities for examining the final text of international agreements once the negotiations are complete. The review of the procedure conducted in 1998 concluded that: 'The requirement to table treaties in parliament for a minimum 15 sitting days provides a good balance between the need for adequate Parliamentary and public scrutiny and the need for timely treaty action. The existing flexibility – for shorter tabling periods in very urgent circumstances and for longer periods in particularly complex matters – has worked well'. In relation to hearings on treaties referred to the Committee the review also observed that: 'JSCOT has held as many hearings as possible at locations convenient to interested groups, and this has served to make the treaty-making process more accessible to the public'.

15. In response to growing concern in New Zealand about the international treaty process, Parliament's sessional orders were amended in May1998 to provide for the tabling and reference to the Foreign Affairs, Defence and Trade select committee of all treaties requiring ratification, acceptance or approval, accompanied by a national interest analysis. The Government would not formalise its commitment under that agreement until the committee reported or 35 calendar days elapsed, whichever occurred first.

16. A review of this procedure conducted in late 1999 recommended that 'utilising a time frame of 15 sitting days as the minimum time for a committee examination would be appropriate'**.** However, where treaties are controversial

and particularly where the committee wishes to conduct a wider inquiry, including a public submission process, committees could request the Government to give an assurance that no treaty action will be taken within a specified further time. In recognising the emerging constitutional convention that the new process is likely to be seen as representing, we believe the Government would be bound to consider seriously a request to delay a treaty action for a further set period, or until the committee makes its report, whichever is the sooner.

17. Standing Orders were amended to require the tabling in the House of all treaties subject to ratification, accession, acceptance or approval, along with a National Interest Analysis, which would stand referred to the Foreign Affairs, Defence and Trade select committee. However no time for reporting back was specified in the Standing Orders.

18. The time limit was imposed by a Cabinet decision dated 21 February 2000 (CAB (00) M5/1E(1)), which was never conveyed to the House and which I secured only after an urgent Official Information Act request to the Minister after on13 September 2000. This refers to a number of reports which are also not public documents, and the decision of Cabinet that the select committee (d.iii)'would have an opportunity to inquire into the treaty and report back to the House within15 sitting days', and that (d.iv)'the treaty would not be ratified . . . until after the select committee had reported back or has requested further time, or until 15 sitting days has elapsed after the tabling of the treaty'. The procedure then merely says that the Cabinet *may* consider a proposal on the report from the *Minister* of Foreign Affairs and Trade before the treaty is ratified, etc.

19. While d.iii indicates that the Select Committee has a maximum 15 sitting days within which to report, d.iv could be read as allowing the select committee to request more time. This would be consistent with the Australian practice and the recommendation of the review of the sessional orders. It is of major concern, therefore, that the present Select Committee failed to ask the Government for more time to allow it to conduct a genuine select committee examination of the proposed Agreement, especially as the Agreement is not due to come into effect until January 2001.

20. There is a further major concern about the status of bilateral agreements under the current standing orders. Whether they are referred to the House, and hence the select committee, is left to the Minister's discretion. Yet, as this Agreement shows, the implications can be as serious as any multilateral treaty. The fact that the bilateral investment agreement with Chile, which binds New Zealand governments for a minimum 15 years, and a further 15 years in relation to any Chilean investments existing at the time of New Zealand's withdrawal from the agreement, should be sufficient grounds for the Parliament to legislate immediately to require than any such agreement is subject not only to parliamentary vote, but secure the 75% support required of any entrenched legislation.

21. These demands will resurface in submissions to select committees on the review of Standing Orders and on International Treaties Bill, the private members bill promoted by Keith Locke MP, assuming that is referred to the select committee. The issue will not go away.

22. The following submission provides a part by part analysis of the Agreement. Many of the concerns raised are inconclusive, because there is insufficient information and time to reach an informed conclusion. Nevertheless, they indicate that there are sufficient serious issues, and contradictions with the policies of the current Government, that it would be grossly irresponsible to proceed to sign the Agreement. I urge the Committee to take its role seriously and advise the Government to cease this and all related negotiations until an informed, participatory and broad-ranging debate on such agreements and their consequences for New Zealand has taken place.

PREAMBLE

1. This Agreement is premised on a simplistic assertion of neoclassical trade theory which claims that global free markets will raise the standard of living and job opportunities in Singapore and New Zealand. The experience of many New Zealand people, communities, and businesses over the past fifteen years put the lie to such claims. This mirrors the experience of millions of others around the world. As a result, the ideology free trade and investment is under sustained attack. It is a tragedy that this Government has failed to see that the tide has turned and is intent on committing future New Zealand governments to continue down the failed free market path.

2. Opposing global free trade should not be confused with opposing international trade. Trade is essential, especially for a country with limited resources and productive capacity. However, the objectives of trade and trade policy need to be balanced with a range of other economic, social, cultural and environmental objectives. Likewise, opposing unregulated foreign investment is not to oppose foreign investment per se. This country has a limited domestic capacity to generate the capital investment, research and development and international linkages that are necessary to enhance existing businesses and promote new opportunities in ways that will benefit New Zealand and New Zealanders. However, the current highly liberalised foreign investment regime does not achieve that.

PART 1: OBJECTIVES AND DEFINITIONS

1.1 The statement of objectives commits New Zealand to even further liberalisation of trade in goods and services. Yet recent policy and legislative developments in New Zealand indicate a clear move away from such measures in response to growing community, industry and union pressures.

1.2 In relation to trade in goods, the sustained and multi-faceted campaign during 1998 and 1999 against proposals to eliminate tariffs on textile clothing and footwear forced the National government to adopt a more gradual approach. Subsequently, the Labour/Alliance Government halted the process altogether by freezing current tariff levels until at least 2005.

1.3 In the services arena, the Government has embraced policies that require a reversal of existing trade liberalisation commitments, notably with the introduction of local content broadcasting quotas. As the Minister of Broadcasting said in January 2000: '*New Zealand culture is more important than the agreements'*. (*New Zealand Herald,* 21 January 2000). Even the Prime Minister remarked: '*We have unilaterally disarmed ourselves on trade but very few others have been so foolish. We're now left with perfectly legitimate calls for local content and people saying 'You can't do that because of Gats". This seems a bit ridiculous so we're just working out the best way to handle it'*. (*NZ Herald,* 10 April 2000) Restoration of the nation building role of education likewise requires the Government to abandon the commitment to free trade in education services.

1.4 In relation to foreign investment, the Government intervened earlier this year to apply a stricter interpretation to the overseas investment rules in relation to the sale of Sealord Ltd than the Overseas Investment Commission had previously applied.

1.5 These examples (and there are many others) highlight the recklessness of any proposal to sign an agreement that commits this and future New Zealand governments to travel even further down the path of trade and investment liberalisation. Contradictions between legitimate domestic policy preferences and international treaty commitments are bound to become more frequent as these agreements reach further behind the border to dictate the laws and adjudicate on disputes that are the proper domain of the domestic Parliament and judiciary.

1.6 Many of the subjects covered in this Agreement, such as provision of public services, government procurement and intellectual property rights, do not belong in an international trade and investment treaty. Other provisions relating to tariffs, safeguards and anti-dumping provisions would disarm future governments by prohibiting them from using legitimate trade policy and regulatory tools in the interests of New Zealand's economic development. Likewise, it would deny future governments the right to vet foreign direct investment applications to ensure they meet objectives of creating jobs, fostering regional development, or improving New Zealand technological and skills base (although this has already been conceded to some degree under the GATS). While the present government may not wish to employ these policy options, it should not be able to entrench rules through an international agreement that would prevent a future government from delivering on its mandated policies by passing perfectly appropriate laws.

1.7 To do so without subjecting the Agreement to the full, independent and critical scrutiny required of domestic legislation, let alone that which would be appropriate for laws that seek to entrench a particular policy or law, is reckless and contemptuous of the democratic process. To exclude Maori from effective participation in the decision is a denial of tino rangatiratanga, their most fundamental right under the Treaty of Waitangi.

1.8 Of further concern is the attempt to justify this Agreement by reference to the APEC goal of a free open trade and investment by 2010. Neither this *voluntary* and *non-binding* goal, nor the WTO's objective of global economic policy making, has any parliamentary mandate or legitimacy on which the Government can credibly rely.

PART 2: COMPETITION

2.1 This Part promotes an approach to competitive markets that gives primacy to the objective of economic efficiency at the expense of other legitimate objectives, such as employment and regional economic development that most countries still recognise in their competition law regime.

2.2 Over the past 15 years New Zealand has adopted an extremely light-handed approach to competition law. The current review of this approach, prompted by Telecom's abuse of its effective monopoly under that law, highlights the risks of making commitments to continue such a regime.

2.3 Further, the reference to maximising total welfare ignores the unequal distributional consequences of this approach. The inclusion of public business activities compounds the problem by failing to recognise that there are, or should be, diverse public as well as commercial objectives in the conduct of such activities.

2.4 The wording of this Part is considerably looser than many other parts of the Agreement. Presumably this reflects a less doctrinaire approach to competition law by Singapore, although I have not had enough time to investigate this.

2.5 That wording this would enable a future New Zealand government to introduce a more balanced competition law approach, were it not constrained by the framework of the APEC Principles to Enhance Competition and Regulatory Reform. As I have not been able to download this document from the APEC website successfully, I have not been able to properly assess the implications. As with all the other APEC documents referred to in the Agreement, this has no standing in New Zealand or international law, and should not be invoked as the foundation for binding New Zealand's future law and policy.

PART 3: TRADE IN GOODS

3.1 The elimination all tariffs and promise never to reintroduce them is unprecedented, except for the CER agreement between Australia and New Zealand. In particular, the bound tariff levels at the WTO are significantly above those that operate in New Zealand today.

3.2 The Government seeks to downplay the implications of this move on the grounds that New Zealand currently applies tariffs only to textile, clothing and footwear. However, that is a very recent development. Historically, New Zealand governments have viewed, and employed, tariffs as a legitimate trade policy tool, as do the governments of almost every other country. This Agreement seeks to close the door on the right of a future government ever again to use that policy tool in relation to imports from Singapore.

3.3 This reflects an unequivocal and unwarranted faith in neoclassical trade theory. The benefits claimed for zero tariffs are based on technical modelling that focuses on allocative efficiency and benefits to consumers. Those claims were dispelled, and the downsides for economic, social and regional development spelt out, in the attached report from Professor Tim Hazledine that was presented to the select committee on the Tariff (Zero Duty) Amendment Bill in 1998. The experience that followed the removal of tariffs in the motor vehicle industry has borne out his analysis. Not only were workers and entire towns devastated by the closures that followed the collapse of the industry, but New Zealand's import bill rose rapidly with a serious impact on the balance of payments. The dramatic depreciation of the New Zealand dollar means that any price benefits that were passed on to purchasers of overseas-made cars are being rapidly neutralised.

3.4 Similar effects were predicted from the proposed removal of all tariffs on textile, clothing and footwear imports to protect jobs and businesses in an extremely fragile industry. Hence, the Labour/Alliance Government moved earlier this year to freeze tariffs on those goods at current levels. In the third reading debate on 23 May 2000, the acting Minister of Commerce Trevor Mallard announced:

> *There is to be a review of tariffs. People know there is to be a review of tariffs. Our objective is to have that review completed by the end of next year so that there is clear certainty coming out of this freeze for people. There can then be proper planning, and we will not have the sort of ad hoc decision-making that has occurred in the past with the previous National Government. We can use the motor industry as a clear example of the ad hoc approach.*

To that can now be added the removal of TCF tariffs in relation to Singapore, frustrating both the principle and the practical objectives of the proposed review.

3.5 Article 4 of this Agreement removes those tariffs in relation to Singapore. The Government claims this will have a minimal effect because Singapore currently contributes less than 1% of total New Zealand imports of such goods. However, the logic of removing tariffs is that the quantity of imports will increase. The Government has apparently conceded that two or three factories are likely to close as a result. Even that would have a devastating effect.

3.6 As submissions on the 1998 Bill made clear, there is a critical mass below which the industry cannot survive. With them will go a range of related operations, including the local fashion and textile design industry. Since that legislation, several large factories have closed, leaving the industry even more fragile.

3.7 Further factories that close are likely to located be in small towns which are heavily dependent on their few local employers for jobs and for the flow-on expenditure in their local economies. For a Government committed to regional economic development to unnecessarily provoke that situation seems quite extraordinary.

3.8 The vast majority of workers in those factories are women, especially Maori and Pacific Islands women. Their families often depend solely on their income, and they have few chances of finding new jobs in their communities. Removal of TCF tariffs can only widen the socio-economic gaps faced by those communities, in direct conflict with the Government's commitment to close them.

3.9 Cheaper production costs available to Singapore will compound the loss of competitiveness for New Zealand products. This comes especially from Singapore's investments in offshore free trade zones, notably the Indonesian territory of Batam, some of which involve the production of clothing and textiles.

3.10 This Agreement is supposed to improve the standards of living and quality of life of those whom it affects. But who will really benefit? The workforce in Batam is highly feminised. There are no unions. The minimum wage is 425,000 Indonesian rupiah monthly – even with overtime factory workers earn US$52-65 a month at most. Their dormitories and factories are usually surrounded by barbed wire. Singapore, of course, has an equally appalling record on labour rights, including threatened and actual detention without trial under the Internal Security Act for those who organise and support exploited local and migrant workers. New Zealand workers cannot, and should not be required to, compete with these wages and conditions. Until now, tariffs have provided a limited buffer against these pressures. This Agreement removes that buffer. As a result, workers in New Zealand lose out and the exploited workers in Batam are no better off.

3.11 In the Speech from the Throne, the present Government said 'legitimate issues of labour standards need to be integrated better with trade agreements'. It took this position in relation to the WTO. However, Singapore refused to have any specific language on labour standards in this Agreement. The Government now says it will 'progress' the labour standards issue through such multilateral fora as the ILO.

3.12 This pragmatic shift in policy shows the naivety of people who believe that inserting labour clauses in trade agreements that are negotiated and enforced by

governments will deliver ‘globalisation with a social face’. Concerns about workers are totally dispensable within negotiations that are driven by trade liberalisation imperatives, even when a government professes a commitment to such protections. As many workers organisations have pointed out in relation to the WTO, the agenda of trade and investment liberalisation is fundamentally anti-worker. Even if a labour standards clause were included, it would do nothing to address the impact of zero tariffs or the control of core public services such as education by foreign service suppliers.

3.13 The Government rejects these concerns because Singaporean exports will be required to meet the Rules of Origin in Article 5. That provides little reassurance in relation to TCF. But the ROO also have important implications for government procurement and define what goods are to receive expedited customs clearances under Part 4.

3.14 The ROO are divided into several categories. Goods wholly produced in either Singapore of New Zealand relate mainly to natural resources and primary products, although they include fish caught on boats registered or recorded with either country and products processed on those boats, but where the product and labour has little genuine national content. What ‘recorded’ means is unclear.

3.15 Goods partly manufactured in Singapore must meet two tests. First, the last process of manufacture must be performed in that country. Annex 1 states that this does not include quality control checking and testing for TCF, and cannot be *solely* the labelling, packaging, pressing and preparation for sale of any product. However, that still enables the bulk of low-cost manufacture to take place offshore.

3.16 Second, the Singaporean content of materials and labour must comprise 40% of the factory cost of the goods. This is significantly lower than the 50% standard that applies under CER. It is interesting, and relevant, to speculate what would happen if the Australian’s demanded that New Zealand treat it the same level as Singapore.

3.17 The formula is based on the proportion of factory or works cost contributed within Singapore. That disguises the highly unequal cost of inputs from Singapore and its offshore sources. Relatively minimal Singaporean content that incurs much higher relative costs for labour and overheads can easily comprise 40% of goods where the bulk of the work is carried out for minimal wages and overheads subsidised by a third country, as in Indonesian Batam. Labour costs can include the whole range of benefits, workers compensation levies, supervision and training. Overheads includes inspection and testing costs, research and development, production-related insurance, rent and mortgage costs, royalties on the production process, subscriptions to relevant industry associations, computer facilities related to production. All of these costs will be far higher in Singapore than somewhere like Batam.

3.18 This imbalance is compounded by allowing the materials component of this 40% to have, in turn, only 40% Singaporean content, provided the last process of manufacture for that material happens in Singapore.

3.19 The implications of Article 5.1.iii and Annex 1, s2.3.c which apply to goods other than TCF that do not contain any 'qualifying area content' by way of materials, labour or overheads are unclear. In this situation, the cost of checking and testing must constitute at least 50% of their factory or works value. It appears that a non-TCF product made in Thailand for 30 cents that incurs an inspection cost of 30 cents in Singapore would fall within this provision. There are other more high-tech examples. However, there is no clear indication of the purpose of this provision, or whom it is supposed to benefit.

3.20 If these rules are applied in 'inappropriate' ways the New Zealand government can only vary them with the consent of Singapore.

3.21 The vetting of these ROO rests on each country's own validation procedures. Any concerns must initially be raised with Singapore. If New Zealand remains dissatisfied it may arrange to visit the exporter, supplier or manufacturer. However, the commitment to efficiency, low transaction costs and mutual trust contained in subsequent Articles confirms the intention of adopting a light-handed approach. That is reinforced by the provision for two-yearly reviews of the ROO to 'improve trade flows', which clearly anticipates further liberalisation.

3.22 I understand that the Exporters Institute expressed similar concern in their submission to the select committee enquiry on CER earlier this year.

3.23 Article 6 applies to non-tariff barriers and has implications for all imported goods. It is unclear what restrictions on imports Singapore would consider a non-tariff barrier. As with the WTO, issues are likely to arise with labelling, testing and quarantine requirements, especially where the mutual recognition provisions of Part 7 do not apply. It would also prevent the imposition of trade sanctions on Singapore if it used the draconian Internal Security Act to crack down on unionists or social justice activists, as it did in 1987. I was the coordinator of the International Commission of Jurists/Asian Human Rights Commission mission that was the first to investigate and report on the detention and torture of the church workers and lawyers who were arrested, and who were primarily working as advocates for the rights of immigrant workers in Singapore.

3.24 If this Agreement is considered a model, it is vital to ask what happens if the Australians seek the same Rules of Origin as Singapore?

3.25 Even more significant is the potential impact of the extension these concessions to the whole of ASEAN. The lowering of rules of origin in government procurement from Australia and/or ASEAN would be equally devastating for local suppliers who were competing with those suppliers. The only way New Zealand could compete is to maintain competitiveness based through lower wages and conditions, taxes and other regulatory measures, or by sourcing more of the content from cheap sources offshore. This 'race to the bottom' is precisely the agenda which New Zealanders rejected when they voted for the Labour/Alliance Government at the 1999 election.

3.26 The scope of Article 7 on Subsidies is a matter of interpretation. New Zealand officials have long argued that any subsidy has a potentially trade-distorting effect. This text is far more contingent. This suggests that Singapore currently maintains and intends to continue using subsidies, including those which may impact on trade with New Zealand. It is impossible to tell from the Agreement and within the time available how extensive those subsidies are and what their impact may be. The absence of any such subsidies in New Zealand means the Agreement is currently weighted even further in Singapore's favour.

3.27 The safeguard and anti-dumping provisions in Articles 8 and 9 affect all goods. Safeguards and anti-dumping are legitimate trade policy measures available to a country in a time of serious economic stress to a particular industry. In New Zealand they are governed by tight restrictions and have been rarely used in recent years. Despite this, proposals by the Ministry of Commerce in 1998 to repeal the relevant parts of the Trade Remedies Act and rely solely on competition law were withdrawn after strong objections, most notably from a joint submission by Bell Gully on behalf of a number of large New Zealand companies, and supported by both the New Zealand Manufacturers Federation and the Council of Trade Unions. This Agreement seeks to move some way down that same path.

PART 4: CUSTOMS PROCEDURES

4.1 The simplification of customs procedures is laudable, provided it does not jeopardise fundamental objectives of border protection and biosecurity. That requires a very clear articulation of those objectives, and of the criteria on which decisions will be made. Part 4 provides no guidance on such matters. Instead, Article 13 differentiates between 'low risk transactions' and 'high risk goods and travellers' with no indication of how those are to be determined and by whom.

4.2 Compliance activities at the time of entry have been reduced to a norm of 10% of total customs transactions. Given New Zealand's recent experiences with imported diseases, such an arbitrary reduction apparently designed to reduce compliance and transaction costs involves unacceptable risks. That risk is likely to increase if Singapore becomes a more frequent transit point for goods originating from elsewhere in Asia as a result of this Agreement.

4.3 A reduction in customs compliance activities implies that the current level of activity is excessive or unnecessary. Yet the long history of exposés relating to wound-back clocks on second hand Japanese car imports documents the manifest inadequacy of resources currently available to customs. The current criminal investigation into the importation of cars allegedly stolen in Malaysia and shipped to New Zealand via Singapore illustrates the ease of movement of goods across Singapore's border, and raises concerns about corruption on the part of people with access to secure customs areas in both countries. The potential for Singapore to be used as an intermediary point for entry of illegal goods indicates the need for more, not less, vigilance in each country.

4.4 If the rules of origin are to be properly policed, New Zealand's biosecurity properly protected, and the integrity of the border protection regime to be maintained, New Zealand needs to invest more, rather than less, effort and resources into monitoring customs compliance.

PART 5: SERVICES

5.1 This commits New Zealand to even further liberalisation of services, despite having already bound future governments to maintain one of the most liberalised services sectors of any WTO member.

5.2 Despite reassurances of balanced rights and obligations and mutual advantage, the schedules show a massive imbalance in commitments between Singapore and New Zealand.

5.3 The reassurance of the continued right to regulate and introduce new regulations, with due respect to national policy objectives, is equally untrue.

5.4 First, any derogation from existing commitments is backed by the enforcement of the services commitments through Part 10, with the threat of retaliatory sanctions.

5.5 Second, Article 20 commits each country to review its schedule of commitments every two years with a view to progressively expanding the sectors covered, and the market access and national treatment coverage it offers, with the goal of 'free and open trade in services' by 2010. It is recognised that all service sectors and measures may not be fully liberalised by then; if that appears likely, both countries are to meet before January 2008 to list those outstanding sectors and discuss a mutually agreeable solution, including a longer time frame for implementation. Under current conditions, the entire process will be conducted by the executive, with an expectation that all services, including core public services of health and education, will come within this Agreement by 2010.

5.6 Third, although it is possible under Article 20 to propose modifications to the Annex 2 schedules, the overall level of commitments must remain the same. This means compensatory adjustment must be found somewhere else in the Agreement (not solely in relation to services). Given that New Zealand has so little to trade off,

there is little room to revoke services commitments which impede the legitimate implementation of future government policy. Failure to satisfy Singapore over such compensation may lead to retaliatory sanctions.

5.7 Fourth, Article 21 imports into this Agreement the review of domestic regulations affecting qualification requirements and procures and licensing requirements which is part of the in-built agenda for renegotiation of the GATS. This is intended to produce disciplines that ensure such requirements are non-discriminatory and are no more restrictive than is necessary to ensure quality. This would exclude the legitimate objectives, such as knowledge of local culture and customs. Until that review is complete, New Zealand is required to avoid applying any licensing or qualification requirements and technical standards that might negate the benefits of the Agreement to Singapore in the sectors it has committed (unless such changes might have been reasonably expected by Singapore).

5.8 Singapore has specifically reserved its position on recognition of qualifications in its schedule under Education. Priority areas are to be identified for recognition of a wide range of professional qualifications, with reviews every two years. While there are benefits from having mutual recognition of qualifications, there is also a loss of local control and local content. This relates to both curriculum content and training in skills, culture and ethics. The controversy over cultural safety in nursing training highlighted the paradox that a nurse could train in Australia and secure mutual recognition of her qualifications to allow her to practice in New Zealand when she had failed the cultural safety requirement here.

5.9 The definition of services and modes of supply are similar to those in the General Agreement on Trade in Services (GATS). 'Measures' that are constrained by the Agreement include a law, regulation, rule, procure, decision, administrative action or other form. This includes measures which involve access to or use of services that are required to be offered to the public generally; it is not clear to me what this refers to.

5.10 New Zealand incurs two primary obligations to Singapore service suppliers under the Agreement. The first requires Singapore suppliers to receive no less favourable treatment than New Zealand suppliers in accessing New Zealand's service markets. In addition, it prohibits a number of measures which may restrict access by Singapore suppliers to New Zealand's market. These include: limiting the total number of service suppliers or service operations, imposing numerical quotas, applying an economic needs test, limiting the total persons supplying a service, specifying the legal entities for service delivery (including requirements for joint ventures), and limiting the level of foreign capital in a service venture.

5.11 The second obligation requires Singapore suppliers to receive no less favourable treatment than New Zealand suppliers.

5.12 The Agreement replicates the market access and national treatment provisions of the GATS. These have already come into conflict with the Government's policies on local content broadcast quotas and limiting the total number of New Zealand

universities. The Government should learn from this situation. Governments in the future will face the same dilemma when they seek to implement perfectly sensible and legitimate policies which they have an electoral mandate to pursue, because of the commitments this Government is making in this Agreement. It should impose a moratorium on any further commitments to liberalisation of trade in services (as in goods and investment) in the interests of democracy.

5.13 Article 23 makes it clear that subsidies are not covered, although this will be reviewed in the 2-yearly review process, especially in light of GATS negotiations on subsidies. There is provision for consultation on subsidies should a government change its practice, for example, removing access of private, and hence foreign, education providers to the tertiary tuition subsidy (UTTA). This indicates that both countries interpret the GATS Agreement as not currently covering subsidies (a matter of some contention, as the OECD and the WTO secretariat both interpret the GATS as covering subsidies). There would be very serious implications if this Agreement were extended to cover subsidies in the sectors that have been offered, and even more so if it is extended to include more services that have a public good dimension.

5.14 These obligations explicitly apply to measures adopted by central, regional or local governments, and by any non-government body delivering services through powers delegated by central or local government. The implications for regional and local government are discussed under Part 11 below. The scope of application to non-government bodies is uncertain and potentially open-ended. It might, for example, include community organisations contracted by the government to administer the provision of services. Such implications needed to be carefully examined, and groups that are potentially affected given the opportunity to make representations before any Agreement was signed.

5.15 As with the GATS, there is an exception for 'services supplied in the exercise of governmental authority'. Despite initial appearances, this does not provide an exemption for public services. The Agreement still covers any government service which has a commercial element or is supplied in competition with other service suppliers. That means almost all New Zealand public services are potentially affected. Financial services supplied in the exercise of government authority (such as social security or public retirement plans) are likewise affected if they are conducted in competition with a financial service supplier. This would include the recently revised ACC scheme, as it still involves considerable private sector competition; the market access rules would prevent the government from pulling it back further if that would reduce the overall size of the market which foreign financial service suppliers could access.

5.16 Each country's schedule sets out the services it agrees to have covered by these rules and the extent to which they shall apply to those services.

New Zealand's services schedule

5.17 *Horizontal commitments* apply to all services in the Annex. While the rules governing the presence of natural persons is the same as for GATS, those for establishing a commercial presence require compliance with the new $50 million threshold for overseas investment approval; exceptions are specified for non-urban land. As noted in relation to Part 6, this goes well beyond New Zealand's commitment under the GATS, and would prevent the introduction of a more rigorous screening regime for investments valued under $50 million unless they fell within the current very limited exceptions.

5.18 *Sectoral commitments* specify which services sectors New Zealand has offered for coverage, and any restrictions within those sectors it has maintained. Many are the same as GATS. However there are some significant extensions, including to areas that have a strong public interest component, which are unlikely to have been the subject of consultation with relevant domestic providers or unions. New sectors include:

5.19 *Health and Related Social Services*. This is new, and covers ambulance services and residential health facilities services other than hospital services. Having entered some commitments under this sector, there are risks that these will be extended through executive fiat.

5.20 *Recreation, cultural and sporting services*. This is new and covers 'archive services' (except Public Archives as defined in the Archives Act). The implications of rules on non-discrimination are unclear. Special concern exists about the influence of Singapore's repressive attitude to freedom of speech and thought on compiling, operating, maintaining, accessing and disposing of archives.

5.21 *Environmental services*: This is new and the range of services is not defined. However, they clearly include a wide range of services for which local authorities are responsible, such as waste management, water services and sewage disposal, on which local authorities have not been consulted. Market access commitments, in particular, (eg. not to limit market size through numerical restrictions) may have significant consequences.

5.22 Other new coverage includes: dental services; technical testing and analysis; management consulting, market research and public opinion polling; services incidental to manufacturing; personnel placement and supply; investigation and security services; scientific and technical consulting; maintenance and repair of equipment; photographic services; packaging; printing; convention; interior design, exhibition management; courier services; some port services; and distribution services extended to include franchising.

5.23 *Financial services:* Coverage has been reorganised from what is in the GATS schedule. This area is complicated, and there is simply not enough time to compare them with GATS and assess the consequences. Important considerations include the implications for shifts in government policy in relation to superannuation funds, accident insurance, and the establishment of a 'people's bank'. Had this Agreement been signed by the previous Government, entrenching the then status quo, the

present Government may well have found it was unable to implement some of these mandated policies. Just as it has the democratic right to implement those policies, any future government must also remain unfettered by an Agreement such as this.

5.24 *Education services*: Under sustained pressure, the Government has backed off proposals to alter the wording of current education commitments under the GATS. This is not a victory for consultation; it was achieved only after sustained pressure. However, the current GATS commitments to market access and national treatment for 'primary, secondary and tertiary education in private institutions' is already causing major problems.

Recent legislation to limit the number of universities in New Zealand to eight applied only to the establishment of public universities. Private (including foreign) entities could still apply to the NZQA for permission to use the name 'university', secure accreditation to offer degrees and access the full tuition subsidy; yet no further public universities could be established. To limit the total number of entities calling themselves universities (including private ones) would have breached the market access commitments under the GATS.

Such constraints on domestic education policy are absurd and contradict the right (referred to in Article 14) to regulate and introduce new regulations, with due respect to national policy objectives, such as restoring the nation-building role of education.

5.25 *Research and development services*: This applies specifically to R&D on social sciences and humanities, except research and development services undertaken by state-funded tertiary institutions. What is intended here is unclear.

Whatever it means, it vital to observe, there are serious questions about our use of such research emanating from Singapore. Social science and humanities are disciplines in which academic freedom is absolutely critical. Singapore has a documented international reputation and history of repressing freedom of thought and expression, and academic freedom.

At this stage the implications are limited by the exclusion of subsidies. If that changed it would mean that Singaporean companies, including those attached to universities or state research institutes, could apply for New Zealand government funding for social sciences and humanities research, provided those funds are not reserved for state-funded tertiary institutions.

There is also a serious risk that competitive tenders for research funding may be considered government procurement rather than a subsidy, and hence be covered by the Agreement. That would entitle Singapore researchers to bid for the extremely limited funding available in the Marsden Fund, where the application to funding ratio is already around 10:1. Prohibitions on market access restrictions would prevent the Fund requiring applications to involve collaboration with New Zealand researchers.

5.26 *Audio-visual.* This commitment is significant because it is more restrictive than the GATS: it applies only to motion picture projection services, rather than to 'Production, distribution, exhibition and broadcasting of audiovisual works'. Further, the exception for NZ Film Commission subsidies in the GATS schedule is not maintained here, which implies a reconsideration of the controversial issue of whether GATS applies to subsidies. The funding for Maori programming is not included either, although that would be covered by the Treaty provision in Article 74.

This alteration is clearly a response to the Government's dilemma that its policy to introduce local content broadcast quotas is inconsistent with its commitments under GATS as well as CER. If it had reiterated those commitments here, it would have compounded that problem. However, any such retreat from existing GATS commitments may require reference to the WTO Council on Services.

Singapore's services schedule

5.27 Singapore's schedule is far more restrictive.

5.28 *Horizontal commitments*: National treatment for New Zealand service suppliers in relation to commercial presence, rights of establishment and movement of juridical persons is restricted by requirements that:

- a foreigner seeking to register a business firm must have a local manager who is a Singapore citizen, permanent resident or employment pass holder;
- a company must have at least 1 locally resident director,
- all branches of a foreign company must have at least 2 locally resident directors

5.29 Market access commitments for New Zealand service providers seeking to establish a commercial presence can be denied the right to invest in corporate entities where the Singapore government is the majority shareholder or holds a special share (meaning the more than 1000 Government Linked Enterprises, discussed below).

5.30 *Sectoral commitments*: Many of these are common to the New Zealand GATS schedule, although they have significantly greater local restrictions. They include:

5.31 *Business services:* accounting and auditing, financial auditing (although at least one partner of a firm of public accountants must be effectively resident in Singapore), taxation services, architecture, engineering (although implementation must be conducted by a professional engineer physically present in Singapore); landscaping; medical (although number of new foreign doctors registered each year can be limited depending on total supply); dental; veterinary; midwives and nurses; computer consultancy and data processing; Research and Development services in natural sciences and engineering, social sciences and humanities for projects undertaken by tertiary institutions, economic and behavioural research, environmental services and interdisciplinary R&D services for projects undertaken by education institutions; real estate services (does not cover foreign ownership of private residential property below 6 levels or purchase of land for development of residential housing); advertising; market research and public opinion polls;

management consulting; technical testing and analysis; services incidental to hunting, fisheries, forestry and manufacturing; personnel placement and supply; security consultation; unarmed guard services (the company must have a Singaporean director who is certified; foreigners are not allowed to work as guards); land surveying (the company must be under control and management of a Singaporean director with a surveying certificate who holds shares in the company or partnership); equipment maintenance; building cleaning; photographic; packaging; exhibition; translation; interior design.

5.32 *Communications:* courier services (including express letters which are 3 times above Singapore Post's ordinary letter rate and subject to tight delivery requirements); telecommunications (licenses are limited by physical constraints of spectrum), internet service based operations; motion picture promotion, advertising, production, distribution and projection (does not include services licensed and regulated under the Singapore Broadcasting Authority Act);

5.33 *Construction and engineering* services.

5.34 *Distribution services* (except for goods subject to import limits (presumably magazines, chewing gum, etc); pharmaceutical and medical goods; motor vehicles.

5.35 *Education services:* Commitments to secondary and post-secondary vocational and technical education services; other higher education services (degree institutions); adult education services; short term English language courses. However, this shall not be construed to apply to recognition of university degrees for the purposes of admission, registration and qualification for professional practice in Singapore. Those matters are addressed in Part 7 on mutual recognition.

5.36 *Environmental services*: Singapore excluded sewage and 'new' environmental services.

5.37 *Health services*: This covers ambulance, acute care hospitals and nursing services that are run as private hospitals on a commercial basis (but are also subject to the horizontal restrictions). A range of social services for residential institutions for elderly, children and disabled, child care facilities, vocational rehabilitation, non-institutional welfare services, other social services; and youth guidance and counselling services, although the total number of facilities and operations by non-profit suppliers and part-funded by government for all these activities is determined by a government master plan.

5.38 *Tourism and travel services*. Recreation, culture and sport: library services; archives, except natural heritage; parks, except national parks; sports and recreation services, except gambling and betting.

5.39 *Transport*: Air, maritime (except cabotage), road transport; parking services.

5.40 *Financial services*: insurance (except Motor Third Party and Workmen's Compensation, which can be purchased only from licensed companies in

Singapore); intermediation and broking (with restrictions on unregistered insurers); banking services, lending institutions, financial traders, asset management, clearing services, financial data processing (all of which face strong local restrictions).

5.41 In addition to measures included in each country's schedules, each country can negotiate commitments on other aspects of services, including recognition of qualifications, standards or licensing. However, there is no guarantee that anyone, including Parliament, will get to know what is proposed, until such negotiations are concluded.

PART 6: INVESTMENT

6.1 The definition of investment under Article 27 is as broad as in the failed Multilateral Agreement on Investment, including: claims to money under contract, intellectual property rights, land and concessions conferred under contract or by licence, including forestry cutting rights, fisheries quotas, land leases and mining concessions.

6.2 The definition of investor is equally wide: it extends to a body, with or without legal personality, established or registered under the applicable laws of either country. There is an obvious risk that companies from third parties will establish a Singapore branch to take advantage of the Agreement. Companies like *Cerebos* (fruit juices and drinks) and *Sitel Corp* (teleservices marketing) already do this; *Universal Homes* (27% Chinese-owned but listed in Singapore) is also active in rental subdivisions. Singapore should be equally concerned, given the ease with which a foreign company can establish an operation in New Zealand and gain access to Singapore under the Agreement. Again, there is not enough time to investigate the implications of this properly.

6.3 The range of investment activities covered is also extensive: establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer, protection and expropriation (including compensation).

6.4 Articles 28 and 29 require most favoured nation status and national treatment to be accorded to all these investment activities in relation to both goods and services. In principle, Singapore investors must have rights to establish and operate their investment that are no less favourable than those available to New Zealand investors.

6.5 National treatment also means that foreign investors must have the same protections against expropriation and be entitled to the same compensation as domestic investors. That risk is heightened by the failure to define expropriation.

It is not clear what would happen where only a Singaporean company was affected by a measure and there was no local investor against whom it could benchmark its treatment. It may well be possible to challenge a measures on the basis that its amounts to an expropriation and claim the Singaporean investor should not be

disadvantaged by the absence of any local counterpart. A broad interpretation (consistent with the APEC goals) could prevent a future central or local government from adopting a regulatory measure that significantly reduced the value of a Singaporean investment.

Such interpretations under NAFTA have been applied to government measures that restrict sales of various toxic products or close down foreign owned operations for environmental and health reasons. Damages have been awarded to companies affected by such measures and legislation has been repealed as a result. Even threats to lodge a dispute have had a chilling effect on government decisions.

6.6 Article 31 would prevent New Zealand from introducing new controls on short-term capital movements in and out of the country as used in Chile and Malaysia in recent years. It is now widely conceded that such measures offer effective and appropriate strategies to limit a country's exposure to financial speculation. Indeed, the Chilean/New Zealand bilateral investment agreement explicitly states that: 'In the case of the Republic of Chile, the capital invested can only be transferred one year after it has entered the territory of that Contracting Party, unless its legislation provides for a more favourable treatment'. For the Government to lock the door against New Zealand's use of such measures is short sighted and irresponsible.

6.7 Article 32 sets out a number of limitations on the application of national treatment, most favoured nation and standards of treatment provisions, and include the limitations listed in Annex 3.

6.8 New Zealand's schedule is far more liberalised than Singapore. In promising not to introduce any further restrictions, it makes commitments that extend far beyond any that New Zealand has entered in any other international agreement. Investment is not covered by CER, except for rights of establishment in relation to services. Likewise, investment is dealt with incidentally in the WTO via specific commitments on the right to establish a commercial presence in relation to specific services under the General Agreement on Trade in Services, and certain restrictions on trade-related investment measures in the GATT Agreement. Both bind New Zealand at the $10 million threshold that applied in 1994. New Zealand entered a bilateral investment agreement with Chile in 1999 (discussed below), but this focuses on national treatment, MFN and expropriation and does not specify a threshold.

6.9 This Agreement proposes to lock in the current threshold of $50 million at which foreign investments require Overseas Investment Commission approval, introduced by the previous government just before the 1999 general election. This Agreement would make it impossible for a future government to lower that threshold, at least in relation to investors or investments from Singapore, without Singapore's consent or the termination of the Agreement.

6.10 The fact that this threshold was introduced without any effective scrutiny or debate makes this attempt to lock it in a matter of grave concern. It was introduced through the back door in the context of discussions between the Australian and New

Zealand about investment during1999. Despite the fact that CER does not formally cover investment, both governments were keen to liberalise the thresholds at which foreign investors would require approval from their respective regulatory agencies. They informally negotiated an agreed outcome, which was then multilateralised to apply to foreign investors from all countries.

Predictably, Australia maintained far more restrictive criteria and thresholds than New Zealand, although in practice few applications are declined in Australia either. New Zealand lifted the threshold for investments requiring permission from the Overseas Investment Commission (OIC) from $10 million to $50 million when buying an asset or commencing or acquiring a business, or when seeking to acquire or control 25 percent or more of voting power of a commercial entity.

The move received minimal publicity and there was no parliamentary scrutiny. Documents secured under the Official Information Act suggest that officials and ministers consciously used the cover of CER to achieve much wider liberalisation with minimal debate.

6.11 The level at which a controlling interest is defined – 25 percent or more of voting power of a commercial entity – is also very high by international standards and would mean that many major deals would be permanently excluded from scrutiny. For example, when Singaporean and other East Asian investors bought a controlling 20% share of Brierley Investments Ltd in 1999 they escaped any OIC scrutiny. New Zealand would be unable to tighten the rules to prevent this happening again.

6.12 New Zealand has reserved a small number of exceptions to this threshold. Singaporean investors would still require approval in relation to the purchase of fisheries quotas, land outside urban areas over 5 hectares or land worth over $10 million, scenic reserves, offshore islands. Requirements to seek approval for foreign ownership of land were minimally extended in the 1998 amendment to the Overseas Investment Act; that would not have been permissible under this Agreement, unless Singapore agreed (although it appears that, for some reason, this Act has yet to come into effect)

6.13 Other foreign ownership restrictions are retained in relation to producer and marketing boards and fisheries vessels. While the right to give preference to New Zealanders is retained if existing State enterprises are privatised, few of these remain.

6.14 The New Zealand schedule also notes that the current screening regime (as opposed to the threshold and categories of exemptions) may be adjusted or replaced by legislation, regulation or policy setting. This appears to enable future governments to introduce a more specific national interest test than currently applies. However, any change would still be constrained by the threshold, meaning tighter vetting could only occur for most investments when they involved more than $50 million, and in the case of shares, a 25% or greater interest in the company. Further, the 1995 amendment shifted the criteria for vetting investment from regulations into

the legislation, making it more difficult for a New Zealand government to reinstate a more rigorous national interest test under domestic law.

6.15 Singapore has retained far more restrictions than New Zealand. Non-citizens cannot own land, or landed or residential property less than 6 stories, and there are restrictions on owning Housing and Development Board flats.

6.16 Local banks cannot lend Singapore currency to foreigners to buy residential property, and those with permanent residency can only secure one such loan for premises that must be owner occupied. Banks are not allowed to lend Singapore currency to foreigners to speculate in the currency or interest rates or to engage in external financial activities, and they need permission to lend to foreigners above certain amounts.

6.17 Foreign investors seeking to establish a commercial presence or set up a business in Singapore must meet Companies Act requirements that they have a local manager and at least one locally resident director, plus 2 locally resident agents in the case of a locally registered branch of any foreign company.

6.18 Singapore retains the right to apply more restrictive rules in relation to printing and publishing, which reflects its tight political and moral censorship laws. Statutory licensing requirements are retained on a range of metal products, chewing gum, cigarettes, firecrackers.

6.19 The most significant reservation withholds MFN and national treatment requirements from investment in any corporate entities in which the Singapore government is the majority shareholder or has a special share (similar to the Kiwi share, but more extensive). In such cases, Singapore can limit participation of foreign capital. This effectively protects the Singapore Government's extensive intervention in its economy through Government Linked Companies (GLC). As of 1996, over 1000 GLCs straddled all sectors of the economy and employed an estimated 10% of Singapore's labour force. Thirteen of the 50 most profitable companies in Singapore in 1995 were GLCs. Temasak Holdings, a private limited company wholly-owned by the Minister of Finance, Inc, has a controlling stake (typically 30% or more) in the main GLCs. Many of these, including Singapore Telecom, DBS Bank and Singapore Airlines, are publicly listed companies. Many own or control a number of subsidiaries.

6.20 Given the size and significance of the GLCs and other state operations, privatisation would offer a major investment opportunity, if New Zealand investors had the funds to invest in offshore operations of this size. However, Singapore's schedule contains a similar privatisation clause to New Zealand's and would severely limit any such opportunities. By contrast, New Zealand's extensive privatisation programme has already transferred most of the significant state enterprises and assets to the private sector in which Singapore investors have virtual free rein.

6.21 Both countries retain the right to give more favourable treatment to individuals, being nationals or permanent residents, through 'incentives or other programmes to help develop local entrepreneurs and assist local companies to expand and upgrade their operations.' Despite promises of a major new regional economic development initiative, New Zealand currently has very few such measures. It is impossible in the time available to identify how extensive Singapore's incentives and local development assistance programmes are, but given the strong state involvement historically in Singapore's economic development they are likely to be significant.

6.22 Given the serious imbalance of commitments, future New Zealand governments are more likely to want to tighten our laws than is Singapore. Yet Article 32 says that any new limitation must not affect the overall level of commitments on investment. Any change must therefore be accompanied by a comparable new concession. But there is not much more New Zealand can concede. Indeed, it would be illogical to talk of compensatory offsets if, for example, a future government had an electoral mandate to impose a national interest test which gives priority to greenfield investments that would create genuine jobs, as many other countries do, and apply that test to investments below the $50 million and 25% control thresholds. This suggests that any significant attempt to exercise more direction over foreign direct investment would be considered a breach of the Agreement, with the prospect of retaliatory sanctions.

6.23 These limitations are to be reviewed at least every two years with a view to reducing them further. Singapore would want a quid pro quo for any liberalisation it makes; what would New Zealand offer? Article 33.3 also allows the government to remove limitations unilaterally at any time. There is no indication of the domestic process the Government would follow, and whether New Zealand people, and the Parliament, would be informed and have an opportunity to debate the issue. The standing orders are not explicit about the tabling of amendments in the House, and the reference of a bilateral agreement to the select committee is at the Minister's discretion. Given the manner in which the threshold was raised to $50 million by regulation in late1999, this could well be done by executive fiat.

6.24 That danger is intensified by the introduction of investor/state dispute settlement mechanisms, which are unprecedented except in the bilateral investment agreement with Chile. This is discussed in Part 10: Dispute Settlement below.

6.25 Consideration should also be given to the implications of the most favoured nation provision. Article 28 promises to give Singaporean investors treatment no less favourable than New Zealand accords to investors and investments of any other state or separate customs territory which is not a party to this Agreement. Article 81 says New Zealand is not obliged to provide the benefit of any other international agreement to Singapore. However, the New Zealand government could decide to do so unilaterally.

6.26 New Zealand and Chile entered into a bilateral investment agreement in July 1999, although it has yet to come into effect. That agreement also says New Zealand is not obliged to extend to Chile the benefits resulting from any free trade area -

although there is nothing to stop New Zealand from doing so unilaterally. Even though that Agreement has potentially serious implications it was not, I understand, even referred to the select committee by the Minister under the (then) sessional orders. It appears that Cabinet will decide whether and when it comes into effect.

6.27 The fact that the Minister is not obliged to submit such Agreements to the select committee under Standing Orders means that the extension of MFN coverage could be done by Executive fiat. Singaporean investors would then be entitled to any better treatment provided to Chilean investors under the Chile/New Zealand Agreement than is provided to Singaporean investors in the Singapore/New Zealand Agreement. Some aspects of the Singapore Agreement provide a greater degree of investment liberalisation. However, the Chile Agreement has a strong clause on expropriation very similar to NAFTA and proposed for the MAI, which is not included in the Singapore Agreement. *It also has a minimum period of 15 years within in which neither party can withdraw from the Agreement and would require New Zealand to continue applying the Agreement to any Chilean investments that existing at the time of withdrawal for another 15 years*!

6.28 It is totally untenable for this Agreement to be signed without a clear understanding of the present, and intended, relationship between these Agreements (and any other investment agreements of which I am not aware) and a careful, public examination of the potential downstream consequences.

6.29 The Agreement simply assumes that greater investment liberalisation is beneficial to New Zealand. The National Interest Analysis therefore fails to ask why New Zealand wants more Singaporean investment and whether the benefits it creates for New Zealand outweigh the risks.

6.30 Levels of Singaporean investment in New Zealand have fluctuated significantly in response to external pressures, as well as the profitability of their New Zealand investments. Singapore direct investment in New Zealand as at March 1999 was $1163 million in March 1999; in 1996 it was $3227 million. When things got tough after the Asia crisis, Singaporean investors withdrew $1.1 billion in a single year. Greater Singapore investment would leave New Zealand even more vulnerable to the priorities and strategies of investors from Singapore.

6.31 By contrast, New Zealand's direct investment in Singapore was just $274 million at March 1999. Under the terms of this Agreement, it is unlikely to increase significantly, even of New Zealand had the investment capacity required to take advantage of any significant opportunities that did emerge in Singapore.

6.32 I would not deny the urgent need for investment in New Zealand. However, that needs to be real investment that creates new opportunities, rather than speculative investment in shares and property or the purchase and often downsizing of existing businesses. That cannot be achieved under the current foreign investment rules. The Government should be encouraging New Zealand investors to invest locally. That is, in part, the intention behind the Government's superannuation policy, which makes the approach in this Agreement seem especially counter-productive.

6.33 The current net investment imbalance and the resulting net outflow of investment earnings is also a major contributor to the external current account deficit. Under this Agreement, that problem will intensify.

6.34 The investment issues relating to the rights to establish a commercial presence for services suppliers are addressed under the Part 5: Services.

PART 7: TECHNICAL, SANITARY AND PHYTOSANITARY REGULATIONS AND STANDARDS

Not yet analysed.

PART 8: GOVERNMENT PROCUREMENT

8.1 This Part purports to formalise APEC's Non-binding Principles on Government Procurement – a document also negotiated in secret and endorsed by the Minister which has never been publicly debated nor examined or voted on by the New Zealand Parliament.

8.2 The move to establish a single government procurement market in goods and services, stated in Article 46, makes commitments that are unprecedented for New Zealand. New Zealand is not a signatory to the WTO Agreement on Government Procurement. Although government procurement is covered by CER in relation to trade and goods, it is explicitly excluded for trade in services. There must have been a reason for New Zealand maintaining restrictions on its procurement commitments. There is no indication of why that no longer applies in relation to Singapore.

8.3 This commitment would prevent future governments from restoring a more active Buy New Zealand policy, at least in relation to Singapore-based companies. Yet the Finance and Expenditure Select Committee endorsed precisely such a policy in August this year. All parties are represented on that committee. Its report on the Vote: Economic Development Estimates for 2000/001 recommended, without dissent, that 'the government implement a buy New Zealand Campaign which requires that Government departments and agencies purchase New Zealand made products and services where it is practical and cost effective to do so.'

8.4 The rules of origin that allow Singapore to source a substantial part of their product from nearby free trade zones, and the ease of access for service suppliers from third countries to use Singapore as an intermediary, could have serious consequences for the competitiveness of New Zealand producers and suppliers. Both central and local government would be prevented from adopted a preferential purchasing strategy to counteract this effect. There is no evidence that the Government has attempted to assess the implications of extending the scope and scale of government procurement commitments in this way and not time to do so independently.

8.5 I understand that the Industrial Supplies Office of the Ministry of Economic Development commissioned research from BERL which shows that for every $1,000,000 of imported goods New Zealand substitutes with local product it would save almost 16 jobs, reduce welfare payments by $159,000, receive an extra $118,000 in tax and boost spending power by $259,000.

8.6 Concern about the potential for lost opportunities is reinforced by the prohibition on offsets in Article 53. Those are defined as measures to encourage local development or improve the balance of payments by requiring domestic content, licensing of technology, among others. Given the Government's commitment to regional economic development, and the crisis dimensions of our external current account deficit, this seems extraordinary.

8.7 These provisions apply to purchases worth, at current exchange rates, approximately NZ$125,000. There is no information about what proportion of central and local government purchasing is at that level and what proportion of that is currently secured by New Zealand suppliers. Without that information, and knowledge about the informal, as well as formal, purchasing practices of such agencies, the potential impact of this provision is impossible to assess.

8.8 Procurement applies to competitive tendering and out-sourcing of services, as well as conventional purchasing. That involves a wide range of public, social and educational services, consultancy services to government and delivery of information technology and data services. Removing the ability of central and local government to prefer local providers of such services perpetuates the priority placed by former governments on economic efficiency and market opportunities over social, cultural, Treaty and democratic considerations.

8.9 The definition of 'government procurement' explicitly excludes 'procurement by any body corporate or other legal entity that has power to contract, except where the Parties exercise their discretion to determine that this Part shall apply'. This suggests that state-owned enterprises and Government Linked Corporations are not required to apply these rules – effectively disqualifying a very large part of Singapore's government operations, as well as New Zealand's few remaining SOEs.

8.10 This, combined with the huge difference in the relative capacities of the two economies, makes nonsense of claims under Article 46 that New Zealand and Singapore producers of goods and services will compete on an equal and transparent basis.

8.11 Formal equality is further belied by the far more restrictive coverage of services under Singapore's Annex 2 (discussed under Part 5). Certain categories of procurement are also excluded *per se* under Article 55. These include 'internal procurement by a government from its own bodies where no other supplier has been asked to tender'. New Zealand's agencies are effectively required to tender almost every major purchase, with government agencies bidding against each other

and/or private suppliers. There is simply not enough time to discover what specific practices the Singapore government follows, but they are known to be far less contestable than New Zealand's. It is therefore extremely likely that Singapore can and will exclude very significant levels of government procurement by simply not calling for tenders.

8.12 Article 55 also lists categories which governments can seek exemptions from coverage of this Part of the Agreement. This includes bodies funded by special levies on particular industries, as well as by community groups and public donations. That would cover New Zealand's producer and marketing boards, but it is impossible to determine what that may cover in Singapore.

8.13 Additional exemptions under Article 55 can only be added by mutual agreement. While this may be seen to benefit New Zealand by restricting Singapore's options, the reality is that that New Zealand has a much more open regime and is therefore more likely to need to restore some preference in the future than Singapore.

8.14 Footnote 10 says Singapore will not discriminate in relation to services covered by Annex 2 by favouring purchases from its Government Linked Enterprises (discussed in Part 6). However, this only has effect within the overall constraints of Singapore's commitments to procurement and its listed exemptions.

8.15 While there is a specific process for disputes over government procurement in Article 54, these can still end up in a formal arbitration process and culminate in retaliatory sanctions where procurement by central government is concerned.

8.16 The government procurement rules in relation to local and regional government are not enforceable in the same way. However, Article 48(e) says the 'Parties shall use their best endeavours to encourage wider application of this Part, consistent with good commercial practice, to procurement by all such governments, authorities and bodies'. The Government may adopt measures ranging from consultation to legislation to ensure compliance with this Article.

PART 9: INTELLECTUAL PROPERTY

9.1 This imports the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) into this Agreement. That includes commitments to review the coverage of the TRIPS agreement in areas affecting biodiversity and the patenting of life forms. Many poorer WTO member countries are currently demanding a review of the existing TRIPS Agreement with a view to winding back some of its restrictions. Given this sensitivity and controversy, it seems irresponsible to reiterate TRIPS in this Agreement, especially when there is no comparable commitment in CER.

9.2 Maori have been consistent and trenchant critics of the TRIPS agreement in general, and the patenting of biodiversity and genetic material in particular.

These concerns form part of the WAI-262 claim currently before the Waitangi Tribunal, hearings on which have been stalled due to the Tribunal's lack of resources. The Government should impose a moratorium on any further commitments on intellectual property rights, including the reiteration of existing WTO commitments, until this claim has been heard and the recommendations acted upon. To do otherwise shows bad faith on the part of the Treaty partner, as it would in practice circumscribe the options available to the Tribunal and the Government to give practical effect to tino rangatiratanga over taonga in respect of which intellectual property claims might be made.

Although it may be possible for the Government to invoke Article 74 on the Treaty of Waitangi to override Part 9, Singapore could be expected to protest that this was a disguised trade sanction and draw the issue into the inappropriate arena of an arbitral panel (discussed below)

9.3 The relationship between Part 9 and Part 6, where intellectual property rights are defined as an investment, is extremely unclear. Protections for investments under part 6 relate to their establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer (or other disposition) and expropriation. What this means for intellectual property rights is extremely difficult to predict. However, in the area of generic pharmaceuticals or parallel importing the protections against expropriation could have important limiting effects beyond TRIPS, especially given the potential for investor initiated disputes. Such commitments may also pre-empt the options available to the Royal Commission on Genetic Engineering and their implementation.

PART 10. DISPUTE SETTTLEMENT

10.1 The provision of an explicit dispute settlement process, including the potential for retaliatory sanctions, ties this Government and future governments to a free market agenda that is both enforceable, and subject to extra-territorial adjudication through panels that will comprise predominantly of former trade officials and trade lawyers.

10.2 This Agreement goes beyond CER in many respects, and CER has no enforcement provisions. It also goes well beyond currently enforceable commitments at the WTO by locking in zero tariffs, setting low thresholds for rules of origin, reducing customs and compliance requirements, and including coverage of government procurement and foreign investment, and provides for investor enforcement which is not available under the WTO.

The Singapore Agreement is therefore more extensive and more enforceable than any previous international economic agreement. Yet the material released during negotiations merely stated that dispute settlement would be 'robust', and provided no information on which a responsible and informed debate could take place before the Agreement was signed.

It is the height of recklessness for any government to enter such an Agreement without the fullest possible investigation of its consequences, informed public

debate and select committee examination, and parliamentary debate - even more so when it is intended as a precedent for other agreements which may have an even greater impact.

10.3 The Part 10 dispute settlement procedures mirror the controversial model adopted by the WTO. Complaints from poorer countries and people's organisations and NGOs about secrecy, bias towards free trade objectives, and exclusion of other considerations and perspectives have become so intense and sustained that even senior trade negotiators and WTO officials concede that the system faces a crisis of legitimacy.

10.4 Article 63 proposes a dispute process that takes place in secret. Citizens have no right to know what their government proposes to or has argued, and may not even know an arbitration panel has been constituted.

10.5 People or organisations with particular interest or expertise in the issue under dispute have no access to the proceedings, and hence no right to present alternative perspectives, arguments or evidence to the tribunal. Hence, local or regional governments whose actions may be the subject of the dispute are excluded. So is any hapu or Maori organisation whose interests are affected by a dispute, including a dispute arising under Article 74. Environmental groups are excluded for disputes involving conservation, environmental regulation, food labelling, testing and standards issues. Unions would have no say in disputes that affect their members' jobs or professional responsibilities. There is not even any provision for the Tribunal to accept unsolicited *amicus curiae* briefs, (although recent precedents at the WTO might allow this to be read into the Agreement, if an arbitral panel was so inclined).

10.6 A further major complaint about the WTO process, replicated here, is the primacy given to free trade and investment objectives over more important domestic policy considerations, including those relating to employment, nation building, economic development, social policy, culture, environment and public services. Article 58 requires interpretations of the Agreement to be consistent with the objectives stated in Article1 – the APEC goal of achieving a free trade and investment regime by 2010 and extending the current coverage of the WTO – neither of which have been adequately examined and debated by the New Zealand public and Parliament.

10.7 This bias is reinforced by specifying the indicative membership of the arbitral tribunals in Article 62 to include specialists in international trade law and policy, when disputes will involve a wide range of competing considerations in which they have no expertise. The WTO experience indicates that the reference to appointing panel members who have appropriate specialist knowledge is limited to the economic and technical aspects of a dispute.

10.8 Under Article 65 the New Zealand government is required to implement an adverse finding, including passage of primary legislation, within a maximum period of 15 months. This is a direct assault on the authority of Parliament and the principles of democracy. It sets the interests and rights of Singaporeans and Singapore-based

companies, specified in this Agreement, ahead of those of New Zealand and New Zealanders that are represented in the 'offending' policy or legislation. In some countries, such as India, similar requirements have produced a standoff where the national Parliament has simply refused to pass such legislation, despite the prospect of potentially crippling sanctions.

10.9 These concerns about state/state enforcement are compounded by the provision for investor enforcement through Article 34 of the Part 6: Investment. This is unprecedented, except for the bilateral investment agreement with Chile which contains a similar provision; as noted earlier, that was signed without any reference to the select committee, meaning most people are unaware of its existence, even though it applies for a minimum 15 years. New Zealand has other no binding commitments of this kind that are enforceable in this way (the rights of establishment for foreign services providers under the GATS are not enforceable by investors).

10.10 The procedure involves the submission of disputes to the International Centre for the Settlement of Investment Disputes (ICSID) which operates under the auspices of the World Bank. States belonging to ICSID are required to pass domestic legislation that enables all ISCID awards to be directly enforced against them in their domestic courts. In New Zealand that is currently provided through the Arbitration (International Investment Disputes) Act 1979.

10.11 Under Article 34 of this Agreement, the government retains the ability to decline arbitration at ICSID (pursuant to Article 25 of the Convention on the International Settlement of Investment Disputes). However, recent experience shows how easily the government capitulates to criticism that policy or legislation is damaging to investor confidence; the refusal to consent to ICSID jurisdiction over an investor complaint is likely to provoke just such criticism. Just the chilling effect of this on government policy would be considerable.

10.12 The application of Article 25 of the Convention could also be amended or withdrawn in subsequent reviews without full public disclosure or parliamentary consideration. Indeed, the attempt to introduce investor enforcement through ICSID, and remove the right of member governments to withhold disputes from its jurisdiction, was a major reason behind the international mobilisation against the Multilateral Agreement on Investment.

10.13 Investor enforcement has also proved a major point of controversy under NAFTA, producing quite extraordinary decisions that have seen governments compensating investors for the closure of toxic waste dumps and settlements and apologies for attempts to introduce environmental health regulations that adversely affect an investor's profitability. This Agreement does not provide the same level of guarantees for investors against expropriation. However, there is plenty of basis for investors to challenge a proposed or actual measure, and hence have a substantial chilling effect on New Zealand's regulatory and policy options.

PART 11: GENERAL PROVISIONS

Local Government

11.1 Article 67 makes it clear that this Agreement applies to regional and local government. Yet local authorities were not consulted at any stage of negotiations, and Local Government New Zealand was only briefed (not consulted), at its request, shortly before negotiations were concluded. This lack of prior knowledge, combined with the short time frame for submissions, means that few, if any, regional or local authorities will have the opportunity to scrutinise the text in sufficient depth to assess its implications for their responsibilities, let alone to prepare a considered submission and process it through the appropriate decision-making bodies.

11.2 *Part 3: Trade in Goods*. The removal of tariffs on TCF will impact severely on a number of regions where small towns still depend on the fragile industry.

11.3 *Part 4*: *Customs*. The impact of lax customs procedures on areas that depend on agriculture and horticulture could be significant.

11.4 *Part 5: Services***:** The requirement not to discriminate in favour of New Zealand service suppliers in all scheduled services (including environmental and transport services) will make it difficult for small local suppliers to compete with those from Singapore.

11.5 The obligation not to limit the access of Singapore service providers to the market for their services by imposing numerical limitations on the size of the market for those services will, for example, prevent regional and local authorities from imposing limits on the number of waste disposal services or transport providers to the extent they are covered by the schedules.

11.6 *Part 6: Investment.* Local and regional governments will be required to treat Singaporean investors the same as local ones in a wide range of investment activities: establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer, protection and expropriation (including compensation).

11.7 Investment includes important resource-related activities, such as mining, fishing, land use, forestry, and will allow companies from other countries to take advantage of this Agreement by establishing a corporate presence in Singapore.

11.8 Councils could not act ‘discriminately’ on legitimate concerns about the track record of transnationals in such industries by requiring certain companies to post bonds or reinvest their profits, that were not required of local companies.

11.9 Councils could not act towards such companies in ways that amounted to an expropriation of their investment. As noted earlier, there is no clear definition of expropriation, and experience under NAFTA has included the imposition of regulations that lower their profitability. While the wording requires those

companies to receive the same treatment as a domestic company in a like situation, it is unclear whether they could claim compensation if there was no comparable local company.

11.10 Local and regional governments must also avoid any measures which might directly or indirectly discriminate in favour of New Zealand investors in the establishment, operation, disposal, etc of their investments, for example in setting specifications that it would be easier for local investors to meet.

11.11 This means that Singaporean investors could not be required to employ a certain number or proportion of local workers or use a certain amount of local content unless the same requirements were imposed on local investors, and these requirements did not operate as disguised discrimination to benefit local investors.

11.12 It would be impossible to introduce new foreign investment criteria that promote regional economic interests, employment and other regional development objectives for investments below the thresholds of $50 million and a 25% controlling interest, unless they fell into a currently exempted category. While the changes to rules on foreshores and offshore islands, supported by a number of local authorities in 1998 (but not yet implemented) will be brought into effect and protected under the Agreement, they could not be tightened any further.

11.13 Local and regional government actions that allegedly breach Part 6 are subject to the dispute settlement process. Singapore could lodge a dispute against the New Zealand government, alleging a breach of the Agreement by a regional or local government or authority (or a non-government body delivering services on governmental authority). If the Government was held in breach, it would be required to 'take such reasonable measures as may be available to it to ensure' the observance of the ruling of an arbitral tribunal. Failure to secure compliance could see retaliatory sanctions imposed. Should a local or regional authority resist the government's request to comply, it would be likely to legislate. Where compensation was awarded, it is likely that the government would directly or indirectly secure those funds from the local or regional authority concerned.

11.14 While investor/state disputes at ICSID require the government's consent (which it may be unwilling to withhold), the local or regional authority whose actions are the subject of the complaint would have no right to participate in that process. The outcome of ICSID arbitration would be enforceable against the government in the New Zealand courts.

11.15 *Part 8: Government Procurement*. Local and regional government are covered by this Part, requiring non-discrimination against Singapore exporters and suppliers when purchasing goods and services by tender that are valued at over $125,000. Singaporean goods are defined by the weak rules of origin, allowing use of low-cost inputs from offshore which will make it difficult for local businesses and producers to compete. Singaporean service providers may likewise include foreign firms that use Singapore as an intermediary, and are required only to conduct substantive business from Singapore (may prove circular).

11.16 While the government procurement provisions are not directly enforceable against local or regional government (or non-government bodies exercising powers delegated by government), they are still expected to comply with the commitment to national treatment and MFN status for Singaporean goods and services. Whilst the Government is not required to secure compliance (as it is, under threat of sanctions, with investment), it may still decide to do so using persuasive techniques that range from consultation to legislation.

11.17 This situation is almost identical to that which caused an international furore among local governments in relation to the MAI. In reality, the government will force the local authority to comply, either by legislation or regulation or indirect financial and political pressure. New Zealand does not have the constitutional buffers that exist for states within federal systems such as Australia or the US. Effectively, therefore, this Agreement is as enforceable against local and regional government as it is against central government. But they have had no say in its negotiation and would have no direct role to play in the legal proceedings should any dispute arise.

The Treaty of Waitangi

11.18 Under Article 74 the government retains the right to give more favourable treatment to Maori in respect to anything covered in the Agreement, including in fulfilling its Treaty obligations. However, the government is not required to take such steps. Rather, the government, as one Treaty partner, will decide when such moves are justified, and what its Treaty obligations are. There is no role for Maori, as the other Treaty partner, in this process.

11.19 On its face, this provision does nothing to address the real impacts for Maori from this Agreement. These lie in the substantive provisions on tariffs that will lead to more Maori women losing their jobs in the clothing and textile industry; increased foreign ownership of New Zealand assets and resources by investors from Singapore; embedding of intellectual property rights which commodify nature and seek to control biodiversity and genetic material; and rules on services and procurement which prevent cultural, employment and iwi development concerns being given priority.

11.20 There is a risk that this Article could be purely symbolic. However, it could be very potent if the Government was prepared to interpret it literally. Indeed, it could justify the non-performance of each of the above provisions. For example, the Government could cite Article 74 as grounds for not applying zero tariffs in TCF, or giving preference to iwi in tendering for major government contracts. It could also be used to justify the introduction of a Treaty of Waitangi test for investments under the $50m and 25% control threshold. Despite the negative implications of this Agreement for its ‘closing the gaps’ policy, the Government is most unlikely to intervene in this way.

11.21 If it did, Singapore might well lodge a dispute. The same wording applies here as for other restrictions - it must not be used as arbitrary or unjustified discrimination or be a disguised restriction on trade in goods, services or investment. While Singapore cannot challenge the New Zealand government's interpretation of the Treaty, it can question whether the measures adopted under Article 74 comply with these requirements. That would be left to an arbitral panel of trade lawyers and former trade officials to decide.

11.22 The outcry over this provision was a disgraceful display of political opportunism that pandered to the lowest common denominator of racism. It also obscured the more interesting contradiction. Article 74 is an implicit recognition that not everyone benefits from trade and investment liberalisation, and that some special measures may be justified for the least disadvantaged. This seriously erodes the philosophy of free trade ideology, as set out in the preamble, and should open the door to recognising that special treatment may be justified for other sectors of the society too.

General exceptions

11.23 The over-arching exceptions provided in Article 71 suffer from the same problems as the comparable provisions in the WTO.

11.24 The wording in the proviso that such measures '*are not used as a means* of arbitrary or unjustified discrimination or as a disguised restriction on trade in goods and services or investment' differs from the WTO wording that such measures '*are not applied in a manner that would constitute* arbitrary or unjustified discrimination . . .' This may imply a stronger requirement of an element of intention to use those measures in that way. This is significant, as environmental or quarantine measures have been struck down at the WTO even when these effects were incidental, and not the motivation for the measure. It is not clear whether interpretative notes have been developed during negotiations that indicate both parties' understanding of the text; if so, we have no access to them, and their status should any dispute arise would be contestable.

11.25 More significantly, such measures must also be *necessary* to achieve the stated objectives, such as protection of public order, morality, safety, animal or plant life or health. That has consistently been interpreted as prohibiting the application of the precautionary principle, and requiring the measure adopted to be the least trade restrictive option, even if it is not the policy of preference of the government for other legitimate reasons. Other considerations and objectives are therefore subordinated to those of trade.

11.26 That restriction would apply equally to the new provision relating to 'national works, items or specific sites of historical or archaeological value, or to support creative arts of national value'. The meaning of this para will also be open to disputed interpretation. While it refers to support for the creative arts, including film and video, it would not seem to extend to promotion of local content in broadcasting. The Government would have to rely on the limited offer in the

services schedule to exclude local content quotas from this Agreement. If they did so, they would create anomalies with both CER and GATS, and have to report the latter to the WTO Council on Trade in Services.

11.27 It is notable that para (e) relating to exhaustible natural resources is not conditioned by the word 'necessary'. There is no indication why governments should have more options here than for human health or protecting national heritage.

11.28 Measures to safeguard balance of payments are likewise constrained by the term 'necessary', as well as many other WTO-based restrictions.

Review Procedures

11.29 Article 68 requires regular reviews of this Agreement**,** first in 2001 and then at least every two years, with a general review in 2005. Given the overriding objectives as set out in Article 1, such reviews are clearly intended to liberalise trade in goods and services, and investment, even further. For the substantive reasons outlined above, I believe this would be disastrous for New Zealand.

11.30 That concern is heightened by the absence of any clear democratic process attaching to those reviews. The standing orders make no reference to the amendment or extension of existing treaties. Moreover, tabling of bilateral treaties in the House is at the Minister's discretion. This Agreement could therefore be extended significantly, for example by extending services commitments to include subsidies or removing the right of the government to object to ICSID jurisdiction over investor/state disputes, without anyone outside Cabinet knowing until it was done.

Relationship to other Agreements

11.31 This Agreement is open to accession by other States or separate customs territories. In the words of former trade official and current executive director of the Asia 2000 Foundation, Tim Groser, '*Stated bluntly, the Singapore/NZ FTA is a Trojan Horse for the real negotiating end-game: a possible new trade bloc encompassing all of South East Asia and Australia and NZ'*.

11.32 All the concerns expressed in this submission therefore need to be raised and answered with specific reference to each ASEAN member: Malaysia, Thailand, Philippines, Indonesia, Brunei, Vietnam, Laos and Burma.

11.33 Questions of process also need to be addressed. If other countries can accede to this Agreement, what is the New Zealand government required to do, and what degree of scrutiny would such an accession be subjected to? This is unclear from the standing orders, which only refer to New Zealand's entry into a new agreement.

11.34 Similar questions arise in relation to Australia, should it wish to adopt the Singapore Agreement or aspects not covered by CER, such as investment and the

dispute settlement mechanism. Would this involve an amendment to CER, and if so what process of national interest analysis, select committee scrutiny and public debate would that involve?

11.35 What if Chile wishes to accede, and import its stronger investor protection provisions, and the effective period of application for 30 years?

11.36 Current proposals for a South Pacific free trade agreement, bringing together the Pacific Forum countries and CER, would have huge ramifications, especially if linked then to this Agreement. What process would be followed in that situation? What are the prospects of members of the South Pacific Regional Trade and Economic Agreement (SPARTECA) seeking an extension to them of the concessions in the Singapore Agreement and what would the consequences be?

11.37 Seen in these terms, the present process constitutes a frontal attack on both democracy and sovereignty, and a grave abrogation of responsibility on the part of those who are entrusted with the government of this nation on behalf of its peoples.

11.38 The only saving grace is that, in theory, a New Zealand government can withdraw from this Agreement at 180 days notice. In reality, however, New Zealand's extensive exposure to Singapore means any such would carry major risks of capital flight and be costly in political terms. Ultimately, however, the overall impact and desirability of such a move would need to be weighed against the anticipated benefits.

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