Myths of MFAT consultation and expertise disturbed in Hong Kong negotiations[1]

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On 18 July, one of the Ministry of Foreign Affairs and Trade's (MFAT's) most senior officials, Deputy Secretary John Wood, spoke to local government leaders in Wellington on "Local Government and the Hong Kong-New Zealand Closer Economic Partnership"[2].

His speech was notable for both its aggressive tone towards opponents of the agreement (some of whom were present) and the fact that it took place in the same week as the first substantive negotiations on the proposed agreement.

Wood arguably crosses the line into political debate, stating viewpoints that appear contrary to government policy.

The speech came in the midst of a "consultation" process which was the subject of much self-congratulation by the government. MFAT had begun that process with the release of an initial analysis of the proposed agreement, followed by submissions and meetings with interested parties in May and June. In contrast to the Singapore negotiations, those invited to the meetings included critics of the deal.

Many were not impressed by the process. The terms of reference allowed MFAT to listen to suggestions for improving the agreement, but not to listen to arguments that free trade and investment agreements were a bad idea. For critics, the consultations allowed them only to choose their poison.

And in any case, they were shadow boxing. The secrecy surrounding the negotiations was maintained. The negotiating texts which would allow serious analysis of what New Zealand was being committed to will remain secret until the deal is completed. Comparisons with Canada and the U.S.A., where negotiating texts of the hugely complex and controversial Free Trade Area of the Americas (FTAA) have been released to the public, fell on deaf ears.

Three Official Information requests for information on the government's negotiating position, the texts, and what happened at the first round of negotiations, have been denied.

In the process of the consultations, ministry officials assured opponents that their concerns were being taken seriously.

Yet here was Wood rejecting the main points made by opponents in no uncertain terms. What better evidence to reinforce their view that the consultations are for public show only? This is despite a third of the submissions opposing an agreement with Hong Kong

[1] This is a longer version of an article published in the *Independent* business weekly on 5 September 2001, "Debunking myths of MFAT consultation and expertise in Hong Kong negotiations".

[2] This speech was on the MFAT web site at http://www.mfat.govt.nz/speech/minspeeches/woodhk-nzcep.html. Following some critical views expressed about it, it disappeared from the public index of speeches at http://www.mft.govt.nz/speech/menu.html but is still available at the address given.

at all, and another third expressing a variety of misgivings, some very wide-ranging. Critics were not in the minority.

This view is lent further credibility by the way in which Wood's rejection of these important concerns was couched. Minimal reasons were given. The tone was belittling and patronising.

To those with slightly longer memories, it was reminiscent of the 1997-98 debate over the OECD's Multilateral Agreement on Investment (MAI). There, serious concerns raised by critics about the interpretation and ramifications of the agreement were ridiculed and denied by the government. Later, they were forced to admit that many of the concerns were valid – but only when the MAI negotiations were about to collapse.

In the case of the bilateral agreement with Hong Kong, it seems they may not concede the point until it is too late. Indeed, it may already be.

In 1995 New Zealand and Hong Kong signed an Investment Promotion and Protection Agreement (IPPA) with no consultation or publicity. It contains an "expropriation" provision similar to one under the North American Free Trade Agreement (NAFTA). This provision allows investors to claim compensation for loss of profitability or asset values, caused by government actions.

In North America, that has led to huge claims by corporations – and settlements in the tens of millions of dollars – when arbitration panels have upheld complaints that their profits have been reduced by central and local government measures that tighten or enforce environmental rules.

This development threatens to make some environmental protection unaffordable, and frighten governments off considering such improvements. It could apply equally to social and economic measures which reduce corporate profitability or asset values – such as the renationalisation of ACC, or the People's Bank.

Wood acknowledges that this possibility exists under the IPPA though in belittling tones: "The result, [opponents] say, will mean a council – or the Government – ending up in court facing an expensive claim from Hong Kong Big Business. Furthermore, a Hong Kong investor – they claim – has rights over and above a New Zealand firm to take the New Zealand Government to international arbitration, which effectively puts business on a par with a sovereign state."

This is progress. Only months ago, MFAT completely ignored the danger when it gave its initial analysis of the proposed agreement. Correspondence with the Royal Forest and Bird Protection Society (RFBPS) suggests that MFAT only began to consider the implications when prodded by the Action, Research and Education Network of Aotearoa (ARENA) and RFBPS.

Documents, released under the Official Information Act, on the negotiation of similar agreements with Chile and Argentina in 1998-99, show MFAT failed to advise the government of dangers in the expropriation provisions, even though it was by then a hot topic in the MAI controversy. The only consultations outside officialdom were with investors in Chile – some, like Carter Holt Harvey, not even New Zealand companies –

and Maori business. Officials did however show concern about the ability of foreign investors to take the New Zealand Government to international arbitration – though did not include those concerns in Cabinet papers.

Indeed, in a paper to the Cabinet Committee dealing with foreign affairs and trade, Minister of Foreign Affairs and Trade, Don McKinnon, advised "careful media handling of the issue" if the negotiations were "not to worsen the current furore over the participation of New Zealand in MAI negotiations".

Despite these admissions Wood is still dismissive: "There has been no legal action under our IPPA with Hong Kong, nor any suggestion of legal action", he told the local government leaders. This ignores the years it took for corporations to realise their power under NAFTA, and the publicity a new agreement with Hong Kong would give to these provisions. "We are still determining with Hong Kong how the existing IPPA would relate to a CEP, but the treatment of investment under a CEP will not amount to the IPPA writ large." But he doesn't point out that the enforcement mechanisms in the Singapore agreement when combined with the IPPA would make the IPPA even more dangerous, because they use a mechanism with legislative backing under the Arbitration (International Investment Disputes) Act.

"The rare incidence of legal action under the North American Free Trade Agreement is not a precedent for any New Zealand/Hong Kong agreement", Wood continues. Not so, says Lydia Lazar, assistant dean at Chicago-Kent College of Law, who specialises in such cases.

"I would not agree that such actions are rare. I would say instead that since we cannot know how many actions there are now (as they do not need to be made public in all cases) or which may be immanent (since it is a unilateral decision by the investor that initiates such a case and such decisions are certainly made privately within the executive suites of the companies involved), the number of cases is unknown and is growing as more and more companies learn of the right to bring these actions."

One U.S. web site lists 17 such cases[3].

But then Wood moves into real quicksand. "These worst-case scenarios," he says, "overlook the safeguards. The IPPA contains an important exemption. Article 8 entitles governments to take measures that might cause economic loss to investors, so long as these measures are to protect New Zealand's 'essential interests', public health or to prevent plant and animal pests and diseases."

That appears to be wishful thinking rather than a safe interpretation of the IPPA. Lazar again:

"[Article 8] appears merely to safeguard the ability of the Contracting Parties [Hong Kong and New Zealand] to act in any manner as long as they avoid ' …arbitrary or unjustified discrimination.' It does not speak to the question of whether or not such safety,

[3] http://www.naftaclaims.com

health or environmental measures would or would not be compensable, should they result in losses to investors."

In other words, all that "safeguard" does is to allow governments to legislate – but corporations can still claim compensation if stopping them damaging the environment causes them to lose profits.

Auckland University law professor, Jane Kelsey agrees: "it permits the government to implement new measures in a non-discriminatory manner. But it does not excuse them from compensation."

MFAT's case is further weakened by the fact that a very similar "safeguard" relating to environment measures in NAFTA (Article 1114) has not prevented these cases succeeding.

Public confidence in the advice being given to government in international negotiations is severely undermined by Wood's assertions, at a time when the need for quality advice is being tested in increasing numbers of agreements of major consequence.

Wood then turns to the equally controversial issue of services. "Another concern raised in the context of local government," he says, "is what a CEP [Closer Economic Partnership – the New Zealand government terminology for these free trade and investment agreements] might mean for community and public services. This argument runs that under the GATS – the WTO agreement that governs services – New Zealand will be forced to privatise its public services, including education, R&D and health, and foreign firms will end up doing much of the work put out to tender by local councils. The critics say this CEP means there will be a sharper, more immediate focus by Hong Kong on these opportunities."

Actually, the "critics" are concerned about that and more. While the privatisation process has almost run its course in central government, there are still strongly fought areas, particularly in local government. But even where privatisation is no longer the issues, concerns centre on the way the WTO's General Agreement on Trade in Services (GATS) accelerates and locks in the commercialisation of public services. An agreement with Hong Kong would add to the list of public services at risk, as did the Singapore agreement. This is despite the rejection of commercialisation of public services by the Labour/Alliance government, many local governments, and the public. Wood's argument sounds very close to that which voters rejected in the 1999 general election:

"Let's look at the situation we have now. New Zealand already has a very open environment, including services like telecommunications and postal services that governments in many parts of the world still regard as 'core' public services. These are now competitive internationally, and are paying dividends and/or tax to fund social services, whereas for much of their history before restructuring they were a drain on the public purse. Governments in New Zealand have, however, maintained their commitment to the basic health and educational requirements of New Zealanders."

Few New Zealanders would regard the privatisation of public services like telecommunications, rail and electricity as a success. Any taxes those companies pay is small compensation for their profiteering and bad management. "Government commitment" to

basic health and education has been undermined by the commercialisation of those services, not enhanced. Indeed, the government has explicitly committed itself to getting the market out of those sectors. Wood does not address these issues: he simply restates a discredited political view.

He proceeds to the issue of government procurement. The concern for local government is that the agreement (like the Singapore one) will impede their ability to foster local development by favouring local suppliers. It forces "value for money" to be the primary determinant, neglecting wider considerations such as employment creation and economic development. Wood defends the "value for money" criterion without acknowledging that a different approach is possible, and indeed favoured by many councils.

It is only on the threat of cheap textiles, clothing and footwear that MFAT's spokesman concedes that some concerns may be justified. Those concerns are the record of fraud in passing off cheap Chinese goods as "made in Hong Kong", and the nature of the "rules of origin" which determine what is agreed to be "made in Hong Kong". Hong Kong's current rules would allow goods with minimal local content to be imported tariff-free into New Zealand under a free trade agreement, putting struggling New Zealand manufacturers out of business.

Yet even here, Wood fails to acknowledge the large body of evidence from U.S. customs authorities on the frequency of cheating – evidence that MFAT appeared to be unaware of until it was brought to their attention by ARENA. He ignores the concerns of importers, exporters and unions with experience in the area that this will undermine any rules of origin, no matter how carefully crafted – and their doubts that water-tight rules are possible.

A person experienced in local government consultation commented on one of the MFAT "consultation meetings": "I was surprised that this was called consultation. Instead of listening to views they kept on justifying the government position and argued with participants. They were really condescending about some NGOs' decision not to be there [because they considered that the consultation process was only a public relations exercise]. When I do consultations, if I hear that people are concerned about the process, I attempt to find out how I can improve it – I don't belittle the people."

John Wood's speech only confirms suspicions for many that the government's and officials' minds have already been made up and "opponents" pigeonholed. It casts doubt on MFAT's ability to examine objectively the implications of the far-reaching agreements they are negotiating. And it reinforces the need for more openness – especially the release of negotiating texts of agreements – so that there can be independent scrutiny of what New Zealanders are being committed to.

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