

**Submission to the Department of Foreign Affairs and Trade on a possible
Free Trade Agreement between Australia and India from the Australian Fair
Trade & Investment Network (AFTINET)**

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1.1 Overview

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 organisations and many more individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental protection. AFTINET welcomes this opportunity to make a submission to the Department of Foreign Affairs and Trade (DFAT) on issues to be considered in the possible negotiation of a Free Trade Agreement between Australia and India.

AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent framework that provides protection to less powerful countries and is founded upon respect for democracy, human rights, labour standards and environmental protection. In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to bilateral negotiations that discriminate against other trading partners. AFTINET is concerned about the continued proliferation of bilateral preferential agreements.

AFTINET believes that the following principles should guide Australia's approach to a feasibility study for a possible trade agreement with India:

- Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective public consultation to take place about whether negotiations should proceed and the content of negotiations.
- Before an agreement is signed, the text should be published for public and Parliamentary debate. Comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation.

- Trade agreements should not undermine human rights, labour rights and environmental protection, based on United Nations and International Labour Organisation instruments.
- Trade agreements should not undermine the ability of governments to regulate in the public interest.

1.2 The 2010 Productivity Commission report and 2011 new Australian trade policy

The Productivity Commission Report of December 2010 found that the claimed economic benefits of many bilateral and regional trade agreements have been overestimated, and are in fact often not significant. The overestimation of benefits has often been based on unrealistic assumptions that all trade barriers will be immediately removed upon the agreement coming into force. In practice, the outcomes of trade negotiation do not deliver immediate removal of all trade barriers and economic benefits based on these assumptions are seldom delivered. The Report criticises the use of optimistic econometric feasibility studies based on unrealistic assumptions of complete liberalisation to justify entering into negotiations¹.

The feasibility study for the Australia-India free trade agreement unfortunately falls into the category of a study which uses modelling based on the unrealistic assumptions identified by the Productivity Commission. The description of the economic modelling done by the Centre for International Economics used in the Australia-India joint feasibility study states that ‘the modelling was based on the hypothetical scenario where all barriers to bilateral trade and investment between

¹ Productivity Commission, 2010, **Report on Bilateral and Regional Trade Agreements**, Canberra, December, p. xxviii.

Australia and India were removed immediately on commencement of an agreement².

Even with these highly optimistic assumptions, the predicted benefits were extremely modest. It estimated that, ten years after the hypothetical FTA came into force, Australia's GDP could be 0.23% higher in net terms than without an FTA. India's GDP could be 0.15% higher³.

The modelling carried out for the feasibility study by India's Research and Information System for Developing Countries assumed full tariff liberalisation on manufactured products, and import augmenting technical change denoting trade facilitation affects. This modelling predicted a 1.14% of GDP welfare gain for India and a 1.17% of GDP welfare gain for Australia⁴.

The variation in results of these two different modelling exercises is explained by the different assumptions made by the models. This underlines the pitfalls of this kind of modelling identified by the Productivity Commission. The outcomes of this modelling cannot be regarded as a justification for claiming that there will be significant benefits for Australia and India from a free trade agreement.

The new Australian trade policy announced by the Trade Minister on April 12 2011 adopted many of the recommendations of the Productivity Commission. The policy sets out a series of principles on which Australia's trade policy should be based, and makes a strong argument for the pursuit of multilateral trade negotiations as Australia's major priority⁵.

² Department of Foreign Affairs and Trade, Australian Government, and Ministry of Commerce and Industry, Department of Commerce, 2010, Government of India, **Australia-India Joint Free Trade Agreement Feasibility Study**, Commonwealth of Australia, Canberra, pages 102.

³ Ibid, p. 102.

⁴ Ibid, p. 103.

⁵ Craig Emerson, "Trading our way to more jobs and prosperity" Canberra, Department of Foreign Affairs and Trade, April 12, pp 14 to 17.

The recommendations of the Productivity Commission report and the new Australian trade policy raise questions about whether a bilateral trade agreement with India is consistent with the Productivity Commission Report and with the new trade policy.

2.1 Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective public consultation

The Australian Government should commit to effective and transparent community consultation about proposed trade agreements, with sufficient time frames to allow informed public debate about the impact of particular agreements.

To facilitate effective community debate, it is important that the Government develop a clear structure and principles for consultation processes that can be applied to all proposed trade agreements. The Senate Foreign Affairs, Defence and Trade Committee made detailed recommendations for legislative change in its November 2003 report, *Voting on Trade*, which, if adopted, would significantly improve the consultation, transparency and review processes of trade negotiations⁶.

The 2010 Productivity Commission report also made a recommendation which would be a step forward for transparency and accountability. This recommendation is that after completion of negotiations, but before the signing of any trade agreement, the government should publish the text of the agreement with an independent assessment of the costs and benefits of the agreement,

⁶ Senate Foreign Affairs, Defence and Trade Committee, 'Voting on Trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement', 26 November 2003, paragraph 3.91.

which would be debated publicly and in parliament before the decision about signing was made⁷.

There is increasing public support for the demand that texts of trade agreement should be published for full public and Parliamentary debate before decisions are made about signing or ratification.

The World Trade Organisation publishes draft texts on its website. The draft text of the anti counterfeiting trade agreement (ACTA) was also recently published

Recommendation: That if negotiations proceed, the Government set out the principles and objectives that will guide Australia's consultation processes for the FTA, which should be published and debated by Parliament. There should be regular public consultations with all stakeholders, including release of draft texts.

Recommendation: After completion of negotiations, but before the signing of any trade agreement, the Government should publish the final draft text to allow an independent assessment of the costs and benefits of the agreement, which would be debated publicly and in Parliament before the decision about signing was made.

3. Labour and environmental standards

We note that the Australia-US Free Trade Agreement contains labour and environmental chapters that refer to ILO and UN standards on labour rights and the environment. The Chile-Australia Free Trade Agreement refers to co-operation on these issues. We welcome the fact that the recent new Australian

⁷ Productivity Commission report, 2010, p.p. 309 -10.

trade policy supported the concept of including labour and environmental provisions in trade agreements⁸. It would therefore be consistent with this for any proposed agreement between Australia and India to include these issues, which were not examined in the feasibility study.

If the negotiations proceed, the Australian government should ensure that the agreement includes commitments by both governments to implement agreed international standards on labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work. These include:

- the right of workers to freedom of association and the effective right to collective bargaining (ILO conventions 87 and 98),
- the elimination of all forms of forced or compulsory labour (ILO conventions 29 and 105),
- the effective abolition of child labour (ILO conventions 138 and 182), and
- the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111).

Failure to implement these basic rights should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation: If negotiations proceed, any agreement should contain commitments by both governments to implement agreed international standards on labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work, and to implement United Nations environmental agreements. Failure to implement these basic rights should be enforced through the government-to-government dispute processes contained in the agreement.

⁸ Emerson, p. 20.

4. Trade agreements should not undermine the ability of governments to regulate services in the public interest

It is important that a proposed FTA does not undermine the ability of either the Indian or Australian Governments to regulate in the public interest.

If negotiations proceed, both governments have identified trade in services as a key area for improved market access. It is important that trade agreements do not undermine a government's capacity to make laws and policies in the public interest, particularly in regard to essential services like health, education, social services, water and energy.

To the extent that services are included in any trade agreement, a positive list rather than a negative list system should be used. Positive lists are used in the GATS and AANZFTA agreements. A positive list allows parties and the community to know clearly what is included in the agreement, and therefore subject to the limitations on government regulation under trade law. It also avoids the problem of inadvertently including in the agreement future service areas which are yet to be developed. A positive list means that only that which is specifically intended to be included is included.

The inclusion of essential services, like health, water and education, in trade agreements limits the ability of governments to regulate these services by granting full 'market access' and 'national treatment' to transnational service providers of those services. This means that governments cannot specify any levels of local ownership or management, and there can be no regulation regarding numbers of services, location of services, employment and training of local people, transfer of technology or relationships with local industry. Governments should maintain the right to regulate to ensure equitable access to

essential services, local employment and industry development and to meet social and environmental goals.

Public services should be clearly exempted from trade agreements. This requires that public services are defined clearly. AFTINET is critical of the definition of public services in many trade agreements which defines a public service as “a service supplied in the exercise of governmental authority ... which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.” This definition results in ambiguity about which services are covered by the exemption. In Australia, as in many other countries, some public and private services are provided side by side.

Even when essential services are not publicly provided, governments need to regulate them to ensure equitable access to them, and to meet other social and environmental goals.

Recommendation: If negotiations proceed, and if services are included, a positive list should be used to identify which services will be included in an Agreement.

Recommendation: Public services should be clearly and unambiguously exempted, and there should be no restrictions on the right of governments to regulate services in the public interest.

5. No Investor-State dispute process

AFTINET has long advocated against investor-state dispute settlement processes (ISDS), on the grounds that they have enabled individual corporations to sue governments for millions of dollars in response to legitimate public interest legislation on health and the environment. Tobacco company Philip Morris

recently launched legal action under a 1993 Australian-Hong Kong bilateral investment treaty, against the Australian Government's proposed legislation on plain packaging of tobacco. The legal action will probably not succeed, but is designed to intimidate the government and to delay the legislation. This example illustrates perfectly the dangers of such processes.

There is now a large body of academic studies which demonstrate that investment disputes launched by corporations and arbitrated by panels of trade law experts which are not open to the public do not deal adequately with public policy considerations⁹. We note that such a disputes process was **not** included in the AUSFTA. The Productivity Commission Report found no evidence that these processes resulted in greater inflows of foreign direct investment. It also found no evidence for some of the key arguments used to justify investor-state dispute processes. For example, it found no evidence of market failure resulting from political risk to foreign investors, and no evidence that regulation is systematically biased against foreign investors. On the contrary, the report concluded that that 'experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions'. The report recommended against inclusion of investor-state dispute settlement processes in future trade agreements¹⁰.

We welcome Australia's new trade policy on investor-state dispute settlement which states:

'The government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses... In the past, Australian governments have sought the inclusion of Investor-State dispute resolution procedures in trade and agreements with developing countries at the behest of Australian

⁹ See Kyla Tienhaara, **The expropriation of environmental governance: protecting foreign investors at the expense of public policy**, Cambridge University Press 2009.

¹⁰ Productivity Commission Report, 2010, pp. 267-9, p. 274 and p xxxviii.

businesses. The Gillard government will discontinue this practice... The government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme¹¹.

Recommendation: If negotiations proceed, governments should retain the right to regulate investment in the public interest and the agreement should not contain an investor-state dispute process.

6. Intellectual property rights

Intellectual property law should maintain a balance between the rights of patent and copyright holders and the rights of consumers to have access to products and services at reasonable cost, particularly access to essential products like medicines. It should also prevent patenting of life forms and of traditional knowledge and artefacts.

A cautious approach to the extension of intellectual property rights was supported by the Productivity Commission Report. The report concluded that, since Australia is a net importer of patented and copyrighted products, the extensions of patents and copyright in the AUSFTA imposed net costs on the Australian economy¹². The Commission also concluded that extension of patent and copyright can also impose net costs on most of Australia's trading partners, especially for developing countries in areas like access to medicines:

'The Commission is not convinced, however, that the approach adopted by Australia in relation to IP in trade agreements has always been in the best interests of either Australia or (most of) its trading partners. Among

¹¹ Craig Emerson, "Trading our way to more jobs and prosperity" Canberra, Department of Foreign Affairs and Trade, April 12, p.20.

¹² Productivity Commission Report p. 259, 260.

other things, there does not appear to have been any economic analysis of the specific provisions in AUSFTA undertaken prior to the finalisation of negotiations, nor incorporated in the government's supporting documentation to the parliament. As noted above, the AUSFTA changes to copyright imposed net costs on Australia, and extending these changes to other countries would be expected to impose net costs on them, principally to the benefit of third parties.

Concerns have also been raised about the effects of IP provisions in some other trade agreements that Australia has supported. For example, Australia supported the 1994 TRIPS agreement — which was included in the Uruguay Round single undertaking — and saw Australia extend the term of protection for patents from 16 years to 20 years. Subsequent analysis by Commission staff found that the extension of rights to existing patents could result in a large net cost to Australia.

Some economists have also argued that implementation of TRIPS by developing countries would result in significant net costs to them, costs not offset by the other provisions in the Uruguay agreement ... To the extent that 'emerging international standards' would extend IP rights further, requiring developing countries to adhere to these standards could do them further harm, again principally to the benefit of business interests in the United States and Europe'¹³.

Based on this evidence, the Productivity Commission Report recommended that 'the Australian government should avoid the inclusion of intellectual property matters as an ordinary matter of course in future bilateral and regional trade

¹³ Productivity Commission Report, p.263.

agreements'¹⁴. This recommendation was supported by the Australian government in its new trade policy statement¹⁵.

India is a leading producer of generic medicines, and has been involved in many international debates about balancing patent rights on medicines with the need to ensure access to affordable medicines for the vast majority of people in developing countries. The feasibility study notes that the Indian government agrees with a cautious approach to the extension of intellectual property rights. The Indian government has taken action to prevent the granting of copyright, patents or trademarks on traditional medical practices, medicinal preparations and other traditional knowledge and artefacts¹⁶.

In the feasibility study, the comments from the Indian government indicate that there is already cooperation between Australia and India through other in international bodies which deal with intellectual property rights. They indicate that intellectual property aspects of any agreement should be limited to issues of capacity building, human resource development and public awareness.¹⁷

AFTINET supports an evidence-based cautious approach to intellectual property rights, and does not support demands for intellectual property rights in trade agreements.

Recommendation: The Australian government should follow the recommendation of the Productivity Commission Report, which is supported by Australia's new trade policy, and should not include intellectual property rights in the proposed Australian-India free trade agreement.

¹⁴ Productivity Commission Report, p. xxxviii.

¹⁵ Emerson, p. 26.

¹⁶ Feasibility Study, p.95.

¹⁷ Feasibility Study, p.95.

7. Movement of natural persons

AFTINET does not support the inclusion of the temporary movement of workers other than executives and senior management in trade agreements. This is because their labour market position is different from that of executives and senior management, and there is overwhelming evidence that they are in a far weaker bargaining position which leaves them vulnerable to exploitation as temporary migrant workers.

AFTINET raised concerns about the exploitation of temporary workers under the previous government's Visa 457 regulations, including exploitation by migration agents and employers, low pay and unacceptable working conditions, and poor health and safety conditions leading to injury and death in some cases. These workers are temporary, and their visas apply only to employment with a particular employer, they often lack English language skills and have little information about their rights, and they are afraid they will be dismissed and deported if they complain. These factors leave them far more vulnerable to exploitation than other workers. Many of these issues were documented by the Deegan Report commissioned by the ALP government in 2008.

The *Migration Legislation Amendment (Worker Protection) Act 2008* (the Worker Protection Act) implemented in September 2009 seeks to provide better protection for these workers, including regulation of employers who sponsor their employment. It is as yet too early to say how effective this has been, and whether further legislation will be required.

It is clear that workers are not commodities and the movement of temporary migrant workers requires comprehensive specific regulation to protect them from exploitation. Governments must be free to change the regulatory framework to improve protections as required.

The inclusion of these categories of workers in trade agreements would “lock in” existing regulatory frameworks and make it difficult for governments to change the regulatory framework as required, because they could be subject to trade dispute action by other governments.

Recommendation: That if negotiations proceed, the agreement should not include provisions for the temporary movement of non-executive and non-senior management workers.