

**Submission to the Asia Trade Task Force on the  
Australia–ASEAN–New Zealand Free Trade Agreement  
from the Australian Fair Trade & Investment Network (AFTINET)  
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## 1. Overview

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 90 organisations and many more individuals supporting fair regulation of trade consistent with human rights and environmental protection. AFTINET welcomes this opportunity to make a submission to the Asia Trade Task Force on the proposed free trade agreement between Australia, ASEAN and New Zealand ('the Agreement').

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 framework which is transparent, provides protection to weaker countries and is founded upon respect for democracy, human rights and environmental protection. In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to bilateral or regional negotiations, which tend to discriminate against other trading partners.

We believe that the following principles should underpin trading relations, and should guide Australia's approach to any joint trade agreement with ASEAN and New Zealand:

- Trade agreements should not undermine human rights, labour rights and environmental protection, based on United Nations and International Labour Organisation standards;
- Trade agreements should not undermine the ability of governments to regulate in the public interest;
- Australia's trade negotiations with developing countries should be consistent with Australia's development goals;
- Trade agreements should allow developing countries the flexibility to make laws and policies which will allow them to direct their own development;

- Trade negotiations should be undertaken through an open, democratic and transparent process which allows effective public consultation to take place regarding whether negotiations should proceed and the content of negotiations;
- Comprehensive studies of the likely impacts should be undertaken and made public for debate and consultation, before a decision is made to begin trade negotiations. The issues studied should include the impacts on:
  - human rights and labour conditions;
  - employment;
  - the environment;
  - particular demographic groups, particular regions and particular industries;
  - the ability of governments to regulate in the public interest; and
  - the ability of developing countries to direct their own development.

These principles are not adequately addressed in the Guiding Principles, which have been released by the member countries to the Agreement (*Guiding Principles for Negotiation on ASEAN – Australia and New Zealand Free Trade Area*, 2004). DFAT should produce a broader public issues paper on this Agreement, which will assess the above list of principles recommended by AFTINET and which will indicate how the Government will take these principles into account when negotiating the Agreement.

This submission is divided into four sections. The first section provides an overview. The second section addresses specific principles which should underpin the Agreement, being the need for effective community consultation, the relationship that the Agreement has with human rights and with Australia's development goals and the need for modeling the potential impact of the agreement in particular areas. The third section raises specific concerns about the content of the agreement, including the need to maintain the ability for member countries to regulate services and investment, the inclusion of principles on human rights and the environment in the Agreement and rejection of an investor-state complaints process. The fourth section lists recommendations.

This submission was prepared in consultation with AFTINET members.

## **2. Principles underlying the Agreement**

### **2.1 The need for effective community consultation processes**

The Australian government should commit to effective and transparent community consultation about trade agreements, with sufficient time frames to allow informed public debate about the impact of particular agreements before negotiations begin. Consultation is particularly important in this instance, given that this Agreement is expected to be comprehensive and will impact on a variety of regional and demographic groups in Australia and the member countries.

To facilitate effective community debate, it is important that DFAT develop a clear structure and set of principles for the consultation processes. 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 negotiations (Senate Foreign Affairs, Defence and Trade Committee, 2003 at paragraph 3.91). The key elements of these recommendations are that:

- parliament will have the responsibility of granting negotiating authority for particular trade treaties, on the basis of agreed objectives;
- parliament will only decide this question after comprehensive studies are done about the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise, and after public hearings and examination and reporting by a Parliamentary Committee; and
- parliament will be able to vote on the whole trade treaty that is negotiated, not only on the implementing legislation.

Processes such as these should be established from the outset for negotiations on this Agreement.

As this stage, AFTINET has a number of specific concerns about the community consultation process for the Agreement. Firstly, we are concerned that there was no formal community consultation process before negotiations were announced at the ASEAN – Australia – New Zealand Summit in Laos on 30 November 2004.

Secondly, we are concerned that the current public submission process does not adequately inform and involve the community, nor allow sufficient time for public consideration and debate of the issues raised by the Agreement. We note that there are no discrete terms of reference for the public submission process and that the timeline for public submissions is only two months, carrying over the Summer holiday period when many community organisations have fewer staff (DFAT, 2004a). To our knowledge, DFAT has not convened any public meetings or presentations open to the general public on the Agreement. Accordingly, more comprehensive public consultation should be conducted before negotiations begin on this Agreement.

## **2.2 The relationship between the agreement and human rights, labour rights and environmental standards**

It should be a prerequisite of Australia pursuing trade agreements that all member countries abide by international standards on human rights, labour rights and environmental sustainability, as defined by the UN and the International Labour Organisation (ILO), and that trade agreements should not undermine these standards.

Accordingly, before negotiations begin on this Agreement, there should be an analysis of the current state of compliance by member countries with the relevant international conventions. Of particular note is the level of compliance by ASEAN member countries with the *ILO Declaration on Fundamental Principles and Rights at Work*. Across all ASEAN countries, there are numerous reports of abuses of the core labour rights in the ILO Declaration and many of these abuses occur in export-oriented industries. Some examples follow.

- **The right of workers and employers to freedom of association and the effective right to collective bargaining** (conventions 87 and 98): In Vietnam, workers are not free to join and form the unions of their choosing and strikes are prohibited in public services. In Vietnam's export processing zones, only about 10% of workers have long-term employment contracts and the remaining workers are on short contracts, which enables employers to avoid the legal requirement to set up a union in enterprises with 10 or more employees (International Confederation of Free Trade Unions, 2004b, p222). In Malaysia, investors in the electronics sector are effectively 'carved out' from national labour regulation. There is no national union to represent workers in the electronics industry and investors granted 'pioneer status' by the Malaysian may not grant conditions in employment agreements that are more favourable than the legal minimums (Human Rights First, 2003).
- **The elimination of all forms of forced or compulsory labour** (conventions 29 and 105): Thailand has ratified ILO conventions 29 and 105 however forced labour remains prevalent in the informal economy and in particular there are reports of forced labour and exploitation of workers from Burma, Cambodia and Laos in sweatshops producing garments for export. Bonded labour also exists in Thailand. In September 2003, Thailand's central labour court awarded back wages amounting to 2 million baht to a group of 33 Burmese migrant women and girls who were held in indentured servitude. The group of migrants had been transported 2 years earlier from Burma to a clothing factory in Bangkok where they were physically confined and subjected to forced labour (International Confederation of Free Trade Unions, 2003). In Burma, it is estimated that over 800 000 people are conscripted to work with little or no pay. Richard Horsey, the ILO's liaison officer in Burma notes that "forced labour remains a very serious problem ... [i]t is a practice that continues across the country particularly on local infrastructure projects (Macan-Markar, 2004).
- **The abolition of child labour** (conventions 138 and 182): Child labour is also prevalent in many ASEAN countries. Thailand has not ratified the Convention on Minimum Age and the ICFTU estimate that 173 400 children between 13 – 14

years and almost 2 million children between 15 – 19 years were economically active in 2000. Most underage workers in urban areas work in the services sector, in particular petrol stations, restaurants and the tourism industry (International Confederation of Free Trade Unions, 2003).

- **The elimination of discrimination in respect of employment and occupation** (conventions 100 and 111): Women earn significantly less than their male counterparts in most ASEAN countries. For example, Singapore has not ratified the Convention on discrimination and many women work in low-wage, low-skilled sectors and earn less than their male counterparts (International Confederation of Free Trade Unions, 2004a).

There should also be an analysis of the current state of compliance by member countries with environmental protection legislation, particularly as it relates to export-oriented industries. For example, waste from export manufacturing plants is a massive human and environmental health problem in many ASEAN member countries. Similarly, in the South East Asia region, the entire Mekong River system is under enormous stress from the demands of industry. In the Philippines, hundreds of people have died as a result of over-logging which has led to landslides and in Indonesia, the over-logging of tropical rainforests and subsequent burn-offs has created an environmental disaster. We note that there was no environmental assessment included in the study on a potential AFTA – CER Free Trade Area by the Centre for International Economics (Centre for International Economics, 2000). It is important to assess the current environmental standards in member countries and to project potential impacts of the Agreement before a decision to negotiate is undertaken.

Beyond the issue of labour rights and environmental protection in export-related industries, there are numerous reports of human rights abuses in ASEAN countries. For example, a recent report produced by Human Rights Watch details violations of civil and political rights in Burma, Cambodia, Indonesia, Malaysia, Thailand and Vietnam (Human Rights Watch, 2005). Particular concerns have been raised by community groups about entering a preferential trade agreement with Burma and Burma's military rulers have

recently extended the house arrest of prominent political prisoner, Aung San Suu Kyi (Lyll, 2004).

In the context of these reported abuses of human rights, labour rights and environmental standards, the Australian government should at the very least conduct a thorough and public study, before any negotiations are commenced, into what the current standards are and what impact a trade agreement may have on human rights, the conditions of workers and the environment in all member countries. This study should also examine how the trade agreement may impact on the ability of governments to ensure compliance with human rights, labour and environmental standards by investors, including effective monitoring mechanisms.

### **2.3 Ensuring consistency between Australia's development goals and trade goals**

This Agreement is complex because it involves a mix of countries at various stages of development. Indeed, 8 of the 10 ASEAN countries are classified as developing countries, according to the Minister for Foreign Affairs (AusAID, 2004b). In addition, parts of Thailand and Indonesia have been devastated by the recent Tsunami. Entire local economies have been destroyed and will need specific recovery programs. These economies should not be prematurely exposed to trade liberalisation measures.

Australia's trade negotiations with developing countries should be consistent with the development goals of Australia's foreign and trade policy. DFAT formulates and disseminates development policies as a function of AusAID's work. AusAID defines its objectives as to 'advance Australia's national interest by assisting developing countries to reduce poverty and achieve sustainable development' (AusAID, 2004a, p7).

The Guiding Principles for this Agreement recognise that there are different levels of development among member countries. In particular, AFTINET welcomes Guiding Principles (d) and (e) which together make provision for flexibility, special and differential treatment, technical assistance and capacity building for developing countries.

We query however how these provisions will be implemented. In the current ASEAN free trade area, the primary means of accommodating developing countries is to allow time extensions for tariff reductions. Relying on time extensions for developing countries to comply with liberalisation quotas is insufficient for sustainable development. For Australia's trade policy to be consistent with development goals, the Agreement should include measures that ensure that developing countries have the flexibility to make laws and policies that allow them to direct their own development. For example, developing countries should be allowed to maintain the capacity to regulate foreign investment to ensure that it delivers benefits, supports local industries and ensures food security.

#### **2.4 Ensuring that there are sufficient modeling and impact studies on regional areas and particular demographic groups**

It is critical that any decision to commence negotiations be based on comprehensive studies on the potential impact of the Agreement and that those studies include input from particular regional and demographic groups in Australia, New Zealand and ASEAN countries which may be affected by the Agreement. These studies should track potential impacts on the environment, human rights, regulatory powers of government, and any restrictions on the ability of future governments at all levels to take action in the public interest.

In this instance, there should be modeling to gauge the impact of the Agreement on employment in regional areas of Australia. In the brochure, *Securing Prosperity Together*, DFAT identifies the significant industries which are likely to experience increased imports from trade liberalisation (DFAT, 2004b). These industries include manufacturing, textiles and vehicles. In Australia, these industries employ large numbers of non-English speaking background workers in regional areas of high unemployment. Regional employment studies are needed to show the impact of tariff reductions.

In previous agreements, such as the Thai-Australia Free Trade Agreement, DFAT's Regulatory Impact Statement made extensive mention of DFAT's efforts to ascertain the views of industry bodies and manufacturers throughout the negotiations. Any modeling and impacts studies should enable regional communities and unions to input into the process regarding the impacts of the agreement and regional employment studies should be publicly available in time for effective input by members of the public.

### **3. Content of the Agreement**

#### **3.1 Protecting the ability of member countries to regulate investment and public services**

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 public services and investment.

Developing countries have consistently argued that it is critical for them to be able to maintain the capacity to regulate foreign investment to ensure that it delivers development benefits. This is important for all countries, but particularly developing countries. The Government should support the right of developing member countries to continue to have such regulations, and not seek to limit this capacity.

Public services should be exempt from any trade agreement. To clearly and unambiguously exempt public services, it is important that public services are defined clearly. AFTINET is highly critical of the definition of public services used in the Thai Free Trade Agreement, the US Free Trade Agreement and the WTO's agreement on trade in services (GATS), 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, public and private services are provided side by

side. This includes education, health, water, prisons, telecommunications, energy and many more.

In past discussion papers relating to GATS, DFAT has asserted that public services will not be caught under such a definition, and it has drawn a distinction, by way of example, between public education services and private education services. However no argument has been presented as to why these should be seen as qualitatively different within the definition used. Comments by the WTO Secretariat do not offer support for the Government's assertion, and, rather, suggest a narrow interpretation of the GATS definition of public services (WTO, 1998). The Government has given assurances in other negotiations that it does not intend that public services or the capacity of governments' to regulate services be diminished. If this is the case, public services should be formally and unambiguously exempted from this Agreement.

To the extent that services and investment are included in any trade agreement, it should be under a positive list rather than a negative list. We note that the Australia – New Zealand Closer Economic Relations Trade Agreement has a negative list in contrast to the positive list in the ASEAN Framework Agreement on Services (AFAS). A positive list allows parties and the community to know clearly what is included in the agreement. It also avoids the problem of inadvertently including in the Agreement future service or investment areas which are yet to be developed. A positive list means that only that which is specifically intended to be included is included.

### **3.2 Provisions on labour and the environment**

We note that the Joint Declaration issued by the member countries on 30 November 2004 (*Joint Declaration of the Leaders at the ASEAN – Australia and New Zealand Commemorative Summit, 2004, p1*) reaffirms “adherence to the principles enshrined in the Charter of the United Nations”. The preamble to the *UN Charter* affirms “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” If the Joint Declaration is to

be more than rhetoric, such sentiments should be implied in the Guiding Principles and explicitly contained in the Agreement.

Given the reported abuses of human rights, labour rights and environmental standards in the member countries (see section 2.2 of this submission), there should be specific provisions on labour and the environment in the Agreement. Although such provisions were not included in the Singapore – Australia Free Trade Agreement or the Thai – Australia Free Trade Agreement, a precedent for using these provisions has been set in the Australia – US Free Trade Agreement.

### **3.3 No Investor-State complaints process**

There should be no investor-state complaints process giving corporations the right to complain to a trade tribunal and seek damages if a government law or policy harms their investments. AFTINET has consistently opposed this process, as it gives corporations unreasonable legal powers to challenge the laws and policies of another country. Furthermore, AFTINET opposes a complaints process model that allows disputes to be arbitrated by panels of trade law experts which are not open to the public and which do not reference public policy considerations

## **4. Recommendations**

- 4.1 DFAT should produce a broader public issues paper which gives an assessment of the issues raised in this submission and indicates how the government will take them into account in considering whether to begin negotiations and pursuing negotiations.
- 4.2 The DFAT public issues paper should include an analysis of:
  - a) the current state of compliance by member countries with human rights, labour and environment standards, including the ILO's Declaration on Fundamental Principles and Rights at Work;

- b) the impact of the Agreement on the ability of member countries to ensure compliance with human rights, labour and environmental standards by investors, including effective monitoring mechanisms;
  - c) the impact of the Agreement on the regulatory powers of government, and any restrictions on the ability of future governments at any level to take actions in the public interest;
  - d) the impact on particular regional and demographic groups which will be affected by the Agreement, involving input from those groups; and
  - e) what mechanisms the Agreement will include to take account of different levels of development among the Member Countries .
- 4.3 The Government should set out the principles and objectives that will guide Australia's consultation processes for this Agreement, and should have regular consultations with unions, community organisations and regional and demographic groups which may be adversely affected by the Agreement.
- 4.4 The Government should establish parliamentary review processes, which give parliament the responsibility of granting negotiating authority this Agreement and that parliament will only grant authority after comprehensive studies on the economic, regional, social, cultural, regulatory and environmental impacts of the Agreement and after public hearings and reporting by a Parliamentary Committee. Parliament should vote on the Agreement as a whole, not only the implementing legislation.
- 4.5 The Government should not continue negotiations so long as there are abuses of labour rights and environmental standards in member countries.
- 4.6 The Government should ensure that trade negotiations are congruent with Australia's development goals and that developing countries have the flexibility to make laws and policies that allow them to direct their own development.
- 4.7 The Agreement should not seek to limit the capacity of Member Countries to regulate foreign investment to achieve social policy.
- 4.8 Public services should be clearly and unambiguously exempted from the Agreement and, if services are included, the Agreement should employ a positive

list (rather than a negative list) to denote which services will be included in the Agreement.

- 4.9 The Agreement should contain specific provisions protecting labour rights and environmental standards in member countries.
- 4.10 The Agreement should not contain an investor-state dispute process.

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