

**Submission to the Department of Foreign Affairs and Trade
on the Negotiations of a Free Trade Agreement between
Australia and Chile 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, labour rights and environmental protection. AFTINET welcomes this opportunity to make a submission to the Department of Foreign Affairs and Trade (DFAT) on the negotiation of a Free Trade Agreement between Australia and Chile.

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 weaker 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 particularly concerned about the recent proliferation of bilateral preferential agreements pursued by the Australian Government.

AFTINET believes that the following principles should guide Australia's approach to negotiating a free trade agreement with Chile:

- 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, 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.

This submission raises AFTINET's initial concerns regarding these negotiations. Specifically, that there has been no comprehensive studies of the likely economic, social and environmental impacts of the agreement, and that a highly liberalising FTA will have a negative impact on the developing nation of Chile.

2. Issues of concern

2.1 Insufficient public consultation, information and debate

AFTINET has a number of specific concerns about the community consultation process for the Australia - Chile FTA. AFTINET is concerned that there have been no comprehensive studies of the likely economic, social and environmental impacts of the agreement, and that public submissions have been called for despite the fact that no information about the impacts of an agreement is available.

Feasibility Studies serve the purpose of analysing possible implications of a FTA to enable both countries to consider whether they will proceed to formal FTA negotiations (DFAT, 2006). It was AFTINET's understanding that a Feasibility Study would be conducted and published to allow for public scrutiny of the results before the formal announcement that negotiations would begin.

In failing to do so, the Australian Government is neglecting its duties of transparent community 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 DFAT 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 negotiations (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 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 that 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 implemented from the outset .

Recommendation: That the Government set out the principles and objectives that will guide Australia's consultation processes for the FTA and that the Government will have regular consultations with unions, community organisations and regional and demographic groups – not just industry - which may be adversely affected by the agreement.

Recommendation: That comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation.

Recommendation: That the Government establish parliamentary review processes, which give parliament the responsibility of granting negotiating authority for the proposed FTA and that Parliament should vote on the agreement as a whole, not only the implementing legislation.

2.2 Australia's negotiating targets, and the impact of these on development and poverty in Chile

We note that Australia is seeking a highly comprehensive, liberalising FTA with Chile. We also note that in the past, free market policies have subjected Chile to two major depressions twice in one decade. Despite arguments that free market economics would lead to robust growth for the nation, the radical free market period of Pinochet led to increased poverty and inequality, so that by 1990 40% of population of Chile were living below the poverty line. (Bello, 2006)

For these reasons, Chile has been sensitive in its negotiations of FTAs with other nations.

For example, Chile has been known to: exclude areas from negotiations, enter into goods only agreements, exclude certain industries in service negotiations (eg telecommunications), and include 'economic cooperation' as part of agreements.

AFTINET believes that the right of Chile to protect its developing industries should be supported, and that the Australian government should not apply pressure to Chile for a highly liberalising agreement that will result in unequal outcomes that will not deliver benefits to the majority of people.

Given the fact that DFAT confesses a Chile FTA presents limited opportunities and is not of high priority, AFTINET is concerned that substantial government resources are being invested in negotiations that will only serve to pressure a weaker county into adopting free trade policies, while failing to deliver real benefits to people.

This seems to indicate that the negotiations are an exercise in promoting an extreme ideological agenda in the region, rather than delivering any actual benefits to Australia or Chile. Moreover, as with the AUSFTA, the danger is that concessions will be made in areas like services, investments and intellectual property, which could have detrimental social and economic impacts.

2.3 The relationship between the agreement and human rights, labour and environmental standards

AFTINET is concerned that there has been no analysis of the current state of compliance by both Australia and Chile with human rights, labour and environmental standards, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work. These standards include:

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

Any proposed agreement between Australia and Chile should thoroughly examine these issues and include legally binding commitments by Australia and

Chile to ensure compliance with human rights, labour and environmental standards by investors, including effective monitoring mechanisms and penalties for non-compliance.

It seems inconsistent that the government has agreed to respect these standards in the AUSFTA agreement but would now undermine them by not requiring adherence to them in other agreements, or even investigation of these issues in a feasibility study.

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

It is important that the proposed FTA does not undermine the ability of either the Chilean or Australian Governments to regulate in the public interest. AFTINET is concerned that the Government's capacity to regulate may be compromised in two ways. Firstly, by limiting the ability of governments to regulate investment and essential services. Secondly, by using an investor-state complaints process.

- **Protecting the ability of governments to regulate investment and public services**

AFTINET understands that trade in services and investment will be a negotiating focus of the Chile FTA. 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 and investment.

Public services should be explicitly exempt from the Chile FTA. 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.

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. 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. 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 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.

Recommendation: The Chile FTA should not seek to limit the capacity of either Government to regulate foreign investment to achieve social policy.

Recommendation: Public services should be clearly and unambiguously exempted from the Chile FTA, there should be no restrictions on the right of governments to regulate services in the public interest, and, if services are included, the FTA should employ a positive list (rather than a negative list) to denote which services will be included in the Agreement.

- **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. We note that such a disputes process was not included in the AUSFTA.

Recommendation: The Chile FTA should not contain an investor-state dispute process.

References:

Bello, *Eye of the Hurricane: Milton Friedman and the Global South*, November 2006, <http://www.zmag.org/content/showarticle.cfm?ItemID=11491>

DFAT, *Joint Study for Enhancing Economic Relations between Japan and Australia, including the Feasibility of a Free Trade Agreement*, December 2006.