Submission to the Department of Foreign Affairs and Trade on a possible Free Trade Agreement between Australia and Indonesia 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 Indonesia.

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 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 a feasibility study for a possible trade agreement with Indonesia:

- 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.

1.2 Background to the proposed Indonesia-Australia free trade agreement and whether the agreement should proceed in the light of the Minister's trade review

The feasibility study for the proposed Indonesia-Australia free trade agreement was done in 2008, using economic data from previous years, some of which is now somewhat dated[1].

The negotiations were announced, but not begun, in November 2010 by the Prime Ministers of both countries. This announcement took place before the Final Report of the Productivity Commission on Bilateral and Regional Trade Agreements in December, 2010, and before the Trade Minister announced a review of Australia's trade policy, based partly on the Productivity Commission report.

The Productivity Commission Report found that the claimed economic benefits of many bilateral and regional trade agreements have been oversold, and are in fact not significant. The Report recommends against the use of optimistic econometric feasibility studies based on unrealistic assumptions of complete liberalisation to justify entering into negotiations. The Report recommends that

[1] DFAT and Ministry of Trade Indonesia **Australia-Indonesia Free Trade Agreement joint feasibility study**, Canberra 2008.

bilateral and regional agreements should only be pursued if there are clear economic benefits for Australia[2].

These findings were supported in the Minister's speech, in which he adopted a series of principles on which Australia's trade policy should be based. One of these principles is that trade agreements should not be pursued unless they are likely to deliver clear economic benefits for Australia[3].

Unfortunately, the econometric modelling done for the Indonesia FTA feasibility study is an example of a study based on unrealistic assumptions of complete liberalisation. Even with these unrealistic assumptions, the results of the study show only a tiny increase in Australian GDP by 2030 of .02% or $160 million per year[4].

The application of the recommendations of the Productivity Commission Report and the principles announced in the Minister's speech, that trade agreements should not be pursued unless they are likely to deliver clear economic benefits for Australia, would cast doubt on whether the Australian Government should proceed with a bilateral trade agreement with Indonesia.

> **Recommendation:** That the issue of whether a bilateral trade agreement with Indonesia should proceed be reviewed in the light of the principle contained in the Minister's review of trade policy, that trade agreements should not be pursued unless they are likely to deliver clear economic benefits for Australia.

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

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[2] Productivity Commission, **Report on Australia's Bilateral and Regional Trade Agreements**, Canberra 2010, p.p. xxxv and xxxvii.
[3] Craig Emerson, Minister for Trade **The future of trade policy in an uncertain world**, Address to the Lowy Institute, Sydney, 10 December 2010.
[4] DFAT and Ministry of Trade Republic of Indonesia, **Australia-Indonesia free trade agreement joint feasibility study**, p.p 54-5.

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 negotiations[5].

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 commission and publish 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[6].

> ***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, as occurs in WTO negotiations.

[5] 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.
[6] Productivity Commission report, 2010, p.p. 309 -10.

Recommendation: after completion of negotiations, but before the signing of any trade agreement, the government should commission and publish 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.

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

If the negotiations proceed, the main stated purpose of the separate FTA with Indonesia is to gain greater Australian market access in agriculture, and more access for Australian investors in sectors like mining, than was negotiated in the ASEAN Australia New Zealand FTA (AANZFTA).

At the time of writing, the Indonesian government had not yet ratified the AANZFTA. This is in part because of the social impact of the full implementation of the ASEAN-China free trade agreement, which was fully implemented in 2010. This resulted in a large increase in imports of Chinese horticultural and agricultural products which compete with local products, causing employment losses.

As a developing country, still suffering from the aftermath of the global financial crisis, and entitled to special and differential treatment under WTO rules, the Indonesian government may well need to consider the employment and development impacts of further agricultural liberalisation.

It is unlikely that, in this context, the Indonesian government will agree to greater market access for agricultural Australian products than has already been achieved in the AANZFTA.

The development of democratic government in Indonesia since the fall of the Suharto regime has led to new laws which seek to give more voice to local communities in development issues. For example, the new laws concerning mining in Indonesia have clarified some uncertainty for investors as well as handing more control to the local provinces. With more authority the Provincial Governments can now take a more direct role in deciding a royalty scheme for any mining projects and how this can aid any developmental goals they have[7]. The Mining Advocacy Network (JATAM) has stated that "...from the national point of interest, the permit model will benefit the country when problems arise that are caused by the company, and the government must take firm action to address the problem as a regulator[8]. Australian interests in mining in Indonesia should respect the new regulatory regime and not seek to reduce this under a proposed FTA.

> **Recommendation:** If the negotiations proceed the Australian government should not pursue changes to Indonesian law which would have a detrimental effect on development or democratic governance in Indonesia.

2.3 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. It would therefore be consistent with this for any proposed agreement between Australia and Indonesia to include these issues, which were not examined in the feasibility study. There is increasing concern in the community about the inconsistency of the policy which allowed these issues to be included in the AUSFTA but not in other bilateral agreements.

If the negotiations proceed, the Australian government should seek for the

[7] Carder, R. "New Laws Won't Solve Indonesia Mining Investment Woes", Dow Jones International News, 30th January 2007.
[8] JATAM, "Rio Tinto Undermines Indonesian Law", JATAM Press Release 6th February 2007.

agreement to include 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).

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.

2.4 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 Indonesian or Australian Governments to regulate in the public interest.

If negotiations proceed, the Australian government has 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.

AFTINET does not support a “GATS plus” approach to trade in services. 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 providers of those services. Governments should maintain the right to regulate to ensure equitable access to essential services 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.

2.5 No Investor-State dispute process

If negotiations proceed, the agreement should not remove the right of Governments to regulate foreign investment to achieve social policy goals**.**

There should be no investor-state dispute process giving corporations the right to complain to an international trade tribunal and seek millions of dollars in damages if a government law or policy harms their investments. AFTINET has consistently opposed this process, as the evidence shows it gives corporations unreasonable legal powers to challenge the laws and policies of another government. There is now a large body of academic studies which demonstrate that investment disputes arbitrated by panels of trade law experts which are not open to the public do not deal adequately with public policy considerations[9]. Indonesian civil society groups have noted that:

> "In the past, the Indonesian government has failed to take firm [regulatory] action when required for fear the mining companies will sue the government for breaching their contract in international arbitration suits."[10]

[9] See Kyla Tienhaara, **The expropriation of environmental governance: protecting foreign investors at the expense of public policy**, Cambridge University Press 2009.
[10] JATAM, "Rio Tinto Undermines Indonesian Law", JATAM Press Release 6th February 2007.

We note that such a disputes process was **not** included in the AUSFTA, and that the Productivity Commission Report recommended against its inclusion in future trade agreements[11].

> ***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.

2.6 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. The fact that these workers are temporary, and that their visa applies only to employment with a particular employer, that they often lack English language skills and have little information about their rights, and that they are afraid they will be dismissed and deported if they complain, leaves them 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

[11] Productivity Commission Report, 2010 p xxxviii.

protection for these workers, including regulation of employers who sponsor their employment. It is as yet too early to say how effective this will be, 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 disputes 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.