

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

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Prepared for the Australian Fair Trade and Investment Network by
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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 Feasibility Study into a possible 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 for developing 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 previous 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.

This submission raises AFTINET's initial concerns and alerts DFAT to potential concerns that may arise if negotiations proceed. Specifically, this submission raises the need for effective community consultation and transparent negotiations, the impact on balanced economic development and food security in Indonesia, and the potential for the FTA to undermine the ability of governments to regulate in the public interest.

2. Issues of concern

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 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 negotiations¹. 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.

We welcome the Australian Labor Party policy platform on increased transparency in the process of undertaking talks regarding a trade agreement.

We are encouraged by the platform that states:

“...prior to commencing negotiations for bilateral or regional trade agreements, a document will be tabled in both Houses setting out the Labor Government’s priorities and objectives, including independent assessments of the costs and benefits of any proposals that may be negotiated. This assessment should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.”²

AFTINET eagerly anticipates the adoption of this policy and the inclusion of social, cultural and environmental impacts into the assessment of any proposed trade agreements.

AFTINET welcomes the policy put forward by the ALP to table any trade agreements in Parliament with any implementing legislation. However,

¹ 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.

² Australian Labor Party National Platform and Constitution 2007, Section 3.26.

AFTINET still believes that to properly increase transparency and democracy the Parliament should be the body that decides on whether or not to approve a trade agreement, not just its implementing legislation.

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 which may be adversely affected by the agreement.

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 Indonesia.

There are a number of areas that are being identified as targets by Australian industries in relation to a proposed FTA.

The Indonesian agricultural sector will no doubt be a target for Australian farmers who are seeking market access to the equivalent of ASEAN members. The Indonesian Operasi Pasar Khusus (OPK) is a special market operation that is aimed at providing food security for the poor and involves not only price stabilization but also restrictions on imports. Such non-tariff barriers are vital to not only protect Indonesian producers but to support poverty eradication activities by ensuring access to staple foods by the population.

The new laws surrounding mining in Indonesia have clarified some uncertainty for investors as well as handing more control to the provinces. With more authority the Provincial Governments can now take a more direct role in deciding

a royalty scheme for any mining project and how this can aid any developmental goals they have³. 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. In the past, the Indonesian government has failed to take such firm action when required for fear the mining companies will sue the government for breaching their contract in international arbitration suits”⁴.

Australian interests in mining in Indonesia must respect the new regulatory regime and not seek additional rights for mining companies under a proposed FTA.

The issue of movement of natural persons has been raised as an issue by Australia and Indonesia. Both governments need to commit to ensuring that labour standards are respected for migrant labour and that they are afforded rights that follow ILO standards. Currently Australia’s Visa 457 process does not provide guest workers with these rights. AFTINET welcomes the ALP’s current policy position on skilled migration particularly ensuring that wages and rights for migrants are equivalent with domestic conditions, the provisions for migrants to seek other employers and the creation of an inspectorate service. Such positions should be part of Australian domestic law and not negotiated within a trade agreement.

2.3 The relationship between the agreement and human rights, 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

³ Carder, R. *New Laws Won't Solve Indonesia Mining Investment Woes*, Dow Jones International News, 30th January 2007.

⁴ JATAM, *Rio Tinto Undermines Indonesian Law*, JATAM Press Release 6th February 2007.

agreement between Australia and Indonesia to thoroughly examine these issues as part of 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. We note, for example, that the Senate Foreign Affairs and Trade Committee conducted an Inquiry into Australia's relationship with China in 2005. The Inquiry received many submissions from unions and other community groups about violations of human rights and labour rights in China. The Inquiry Report, supported by both Government and Opposition members of the committee, used these submissions to document widespread human rights and labour rights abuses in China, and stated that "the Australian government should take every opportunity, including negotiations for a Free Trade Agreement, to raise Australia's concerns about violations of human rights and labour standards in China"⁵.

The feasibility study should include analysis of the current state of compliance by both Australia and Indonesia with human rights, labour and environment 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).

This should include an analysis of how the trade agreement would impact on the ability of Australia and Indonesia to ensure compliance with human rights, labour

⁵ Senate Committee on Foreign affairs, Defence and Trade, *Opportunities and challenges: Australia's relationship with China*, November 2005: xxx.

and environmental standards by investors, including effective monitoring mechanisms.

2.4 Trade agreements should not undermine the ability of governments to regulate 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. 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 Indonesian 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.

GATS plus

Essential services should be exempt from an Indonesian FTA. 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. Governments should maintain the right to regulate to ensure equitable access to essential services and to meet social and environmental goals. More specifically, public services should also be exempt from an Indonesian FTA.

AFTINET is particularly concerned about the 'GATS plus' commitment outlined in the recent Australia/Japan Free Trade Agreement Feasibility Study - "The (Feasibility) study group concluded it would be important that an FTA be 'GATS plus'. An ambitious, GATS plus outcome on services would send a strong message to the region and be a model for future trade and economic agreements in the region".

Public services should be explicitly exempt from the Indonesian 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 Indonesian 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 Indonesian 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 an Agreement.

- **No Investor-State disputes process**

There should be no investor-state disputes 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 disputes 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 an investor-state disputes process was not included in the AUSFTA.

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