Submission to the Department of Foreign Affairs and Trade on the Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA)
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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the Department of Foreign Affairs and Trade on the Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA).

AFTINET is a network of 60 community organisations and many more individuals which advocates for fair trade based on human rights, labour rights and environmental sustainability.

We support the development of fair trading relationships with all countries and recognise the need for regulation of trade through the negotiation of international rules.

In general, we prefer non-discriminatory multilateral negotiations to preferential bilateral and regional negotiations that discriminate against other trading partners.

We advocate for all trade negotiations to be conducted within a transparent framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental sustainability.

Ongoing negotiations for the bilateral Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA) have so far been conducted in secret with little public information available.

This submission recommends greater transparency in the negotiating process. It draws upon the limited public information that is available as well as precedents set by recent trade agreements including the Trans-Pacific Partnership (TPP) and bilateral agreements with China, Korea and Japan.

This submission deals with the following aspects of the IA-CEPA:

- The need for greater transparency in the trade negotiation process
- Trade in goods and services
- Labour mobility and standardisation of qualifications
- Labour rights and environmental standards
- Product standards
- Investor rights and Investor-State Dispute Settlement provisions (ISDS)
- Intellectual property and medicines

Need for greater transparency in the trade negotiation process

We welcome the opportunity to make this submission on the IA-CEPA to the Department of Foreign Affairs and Trade (DFAT). However, a greater level of public consultation and transparency is required throughout the entire negotiation and ratification process.

The current process in Australia is that trade negotiations are conducted in secret, and the text is not made public until after it has been agreed. The decision to sign agreements occurs at the Cabinet level and it is only after agreements have been signed that they are tabled in Parliament and examined by the Joint Standing Committee on Treaties (JSCOT). Parliament only votes on the implementing legislation, not on the whole agreement.

The Senate Inquiry into the Australian trade agreement process held in 2015 summarised the faults in this secretive and undemocratic process in its report, aptly called *Blind Agreement* (Senate Committee on Foreign Affairs Defence and Trade, 2015). AFTINET made a detailed submission to this inquiry (AFTINET 2015).

There have now been four rounds of recent IA-CEPA negotiations without any consultations with non-business community organisations. However, it appears that that business organisations have had extensive consultations and were able to produce a submission in an attempt to set the agenda before other public submissions were sought (Indonesia-Australia Business Partnership Group, (IABPG) 2016).

Given that negotiations have already commenced, our recommendations for change to this process are that:

- An independent assessment of the projected costs and benefits of an IA-CEPA should be conducted and published immediately and before further negotiations take place. This assessment should consider the economic, regional, social, cultural, regulatory and environmental impacts.
- The Australian Government should release its policy proposals and discussion papers
- Draft texts should be released for public discussion, as occurs in the WTO and is now the practice in some EU negotiations.
- Before any agreement is authorised for signing, the final text should be released for public and parliamentary debate and subject to comprehensive independent studies of the economic, health and environmental costs and benefits. The current National Impact Analysis (NIA) process is inadequate, because it is done by the same department which negotiated the agreement.
- Parliament should vote on the whole text of the agreement, not just the implementing legislation.

We note that the Indonesia-Australia Business Partnership group (IABPG) submission expresses concerns about transparency in their submission on IA-CEPA and advocates for wider community consultation, including with non-business civil society groups (IABPG, 2016: 8).

Trade in goods and services

Tariff and quota removal

The IA-CEPA negotiations are taking place alongside ongoing negotiations towards a Regional Comprehensive Economic Partnership (RCEP), also involving both Indonesia and Australia.

The IABPG submission recommends the "accelerated removal of all tariffs, as rapidly as possible" without mentioning any impacts on employment or local industries (IAPBG: 26).

IA-CEPA should not be used as a tool to push both countries into an accelerated removal of both tariffs and quotas without adequate assessment of the economic and social impacts.

The removal of tariffs and quotas should be decided only after careful, independent analysis of the impacts such changes will have on industry and workers both in Indonesia and Australia, and development of comprehensive plans to deal with such impacts.

Trade in services

The promotion of increased trade in services is a primary focus of the IA-CEPA negotiations. The underlying assumption of many negotiations on trade in services is that public regulation of services should be treated as tariffs, to be progressively reduced as fast as possible, with no capacity to increase regulation in future. This ignores the special characteristics of many services ranging from water, health and education to financial services, which are essential both for individual consumers and for the economy as a whole, and must be regulated in the public interest, with flexibility to respond to changes in circumstances.

The promotion of increased trade in services by private companies for commercial purposes should not prevent governments from retaining their full capacity to regulate the provision of essential services in the public interest.

Policies and laws relating to essential service provision should be decided through transparent democratic parliamentary processes, not through secret trade negotiations which bind governments into rigid rules which could prevent them from responding to future changes like market failure, financial crises and climate change.

The IA-CEPA's trade in services rules must not restrict either the Australian or Indonesian governments' ability to regulate, provide or fund essential services, now or in the future. Governments must retain their ability to ensure high standards and equitable access to water, health and education and to establish quality standards in areas like childcare and aged care.

One example of the importance of policy flexibility is the recent creation of a "competitive market" in vocational education services provided by private companies in Australia without adequate regulatory safeguards. While some companies made enormous profits, this was a spectacular market failure for students and government revenue, which resulted in fraudulent advertising, failure to provide courses to students and the misuse of government funds. The system is currently being reviewed by government (Branley, 2016, Knott, 2016). In these circumstances, there

must be sufficient flexibility for governments to re-regulate and if necessary resume public provision of services.

It is disturbing that the IABC submission makes no reference to this experience of market failure in Australia and appears to perceive Indonesia simply as a market opportunity for Australian vocational education companies, without mentioning the need for regulation to protect the public interest. It advocates for a "public-private VET network which presents significant opportunities for the industry." (IABC: 50)

AFTINET has no problem with greater cooperation between Australian and Indonesian public vocational education providers to improve the quality of vocational education. But it is extraordinary that vocational education can be presented mainly as a market opportunity for Australian private vocational education companies without any mention of the very recent negative experience in Australia, and its impacts on students and communities.

Retaining regulatory flexibility in this context is particularly important for Indonesia, a developing nation which faces unique challenges in ensuring the provision of quality essential services to all, especially remote populations.

Private investment in essential services and infrastructure

There has been a continuing debate in Australia about the merits of privatisation of public infrastructure and public services. The strongest pressures for privatisation come from global firms and industries which wish to invest in these sectors with the aim of profitable returns to shareholders. They have also promised cost savings to government and consumers through private provision which have not been delivered.

However, most public infrastructure and services have developed as public entities historically because they have special characteristics which mean that there can be conflicts of interest between effective and equitable service provision and profitability for shareholders. Some are natural monopolies, and others like health and education require extensive government regulation to ensure they are affordable and accessible to everyone. The negative impacts of market failure of the privatisation of vocational education have already been explained above.

This debate was summarised recently by Mr Rod Sims, the Chair of the Australian Competition and Consumer Commission, who claimed that privatisation of public monopolies like ports, electricity generation and transmission facilities has created "unregulated monopolies that exercise their market power to raise prices for consumers, hurt productivity and damage the economy" (Hatch, 2016).

Given this robust debate, it is disappointing that the IABPG submission advocates for increased private investment in Indonesian education, health care and public monopolies like railways, ports and electricity simply as market opportunities for Australian companies (IAPBPG: 50, 52 and 55). There is no recognition of the possible negative consequences for consumers and costs to the economy as a whole.

Labour mobility and recognition of qualifications

Temporary movement of workers

AFTINET opposes the inclusion of temporary movement of workers in trade agreements. Workers are not commodities, and trade agreements cannot deal with the complexity of issues experienced by temporary workers who are vulnerable to exploitation.

If such agreements are needed, they should be separate government to government agreements which can be made in the context of overall migration policy and deal with the whole range of issues which arise, including regulation of migration agents, regulation of employers and protection of workers' rights to prevent exploitation.

Academic studies comparing various recent trade agreements have demonstrated that a range of governments are using temporary work visas without local labour market testing as a means of deregulating labour markets. Such arrangements create groups of workers with less bargaining power who are more vulnerable to exploitation because loss of their employment can lead to deportation (Rosewarne 2015, Howe 2015).

Recent Australian studies have provided more evidence of the exploitation of temporary workers. A Fair Work Ombudsman investigation revealed that that up to 20 per cent of Visa 457 workers were being underpaid or incorrectly employed. The Fair Work Ombudsman reported that temporary visa holders accounted for one in 10 complaints to the agency in 2015. In the three years from 2012, the agency dealt with 6000 complaints and recovered more than $4 million in outstanding wages (Toscano 2015).

A study by Monash University which interviewed workers on 457 and other temporary visa programs had similar findings (Schneiders and Millar 2015).

The evidence of violations of Australian minimum work standards included failure to pay even minimum wages, long hours of work, and lack of health and safety training leading to workplace injuries.

The recently-concluded China-Australia Free Trade Agreement (ChAFTA) expanded temporary work visas without testing the labour market for Australian workers. There are already examples of Chinese workers being brought to Australia without English-language skills or health and safety training, and being paid less than the minimum wage. (Howe, 2016).

The IABPG submission advocates a vast expansion of both temporary skilled and semiskilled workers, through use of seasonal worker schemes and Enterprise Migration Agreements (IABPG: 33). This is unacceptable in the face of the evidence of widespread exploitation of current temporary migrant workers.

Recognition of qualifications and language skills

The IAPGB submission argues for moves towards common understanding between Indonesia and Australia on what are considered acceptable qualifications for workers, and identifies as a barrier that "Australia's definition of skilled workers based on possessing a recognised qualification" (IAPGB, 2016:28).

Moves towards “common understandings” on acceptable qualifications must not undermine Australia’s current standards for professional and technical qualifications, which are essential to maintain both health and safety standards in the workplace and product and service standards for consumers.

The IAPG submission also makes the comment that "there is an unnecessarily high level of English competency” required for Indonesian temporary migrant workers in services industries, including nurses (IAPGP, 2016:33)

Language skills are in fact necessary for health and safety reasons as well as to maintain the quality of the service.

Australia’s current standards for professional and technical qualifications and language skills should not be undermined through trade negotiations.

Labour rights and environmental sustainability

The IA-CEPA is an opportunity to create enforceable standards for the protection of labour rights and the environment between Indonesia and Australia.

Unfortunately, the Australian Government does not have a positive track record on ensuring trade agreements contain enforceable mechanisms to protect and raise labour rights and environment standards.

For example, the recently-concluded (but not yet ratified) Trans-Pacific Partnership (TPP) contains only weak environmental and labour rights standards. It fails to include an enforceable ban on products of forced and child labour (AFTINET, 2016) Those provisions which are legally binding are extremely qualified, lengthy and convoluted. These processes have not proven effective in other agreements (International Trade Union Confederation 2015).

The TPP’s environmental standards are also weak and mostly unenforceable, and have been heavily criticised by environmental law experts (Sierra Club 2016, Terry 2015).

The recent agreement with China fails to contain any provisions for the environment or workers’ rights.

There appear to be no proposals to include legally binding, enforceable labour rights and environmental in the IA-CEPA.

Labour rights should be based on and contain reference to detailed International Labour Organisation Conventions. In particular, there must be an effective enforcement provision for violations of ILO provisions on forced labour, including child labour.

According to the ILO, child labour is still a problem in a number of industries in Indonesia, including in seafood processing, mining and quarrying, rubber and sugar-cane plantations, entertainment and other services (ILO, 2016).

Environmental standards should be based on UN international environment agreements and should also contain strong, enforceable provisions. Specific mention should be made of climate change and its threat to both Indonesia and Australia, and policy space should be retained by both countries to deal with this evolving challenge.

Product standards

Australia has phyto-sanitary, quarantine and product standards to protect our health, safety and environment. It is essential that these are not eroded through trade agreements and that future governments retain the right to improve them over time. While industry groups may seek to streamline these standards for their own cost-reduction purposes, this may not be in the public interest.

One example given by business groups of a product standard that they consider trade-restrictive is Australia's tobacco plain packaging legislation, which Indonesia and some other governments are still challenging in the WTO (IABPG, 2016: 27). This completely ignores the fact that plain packaging has been recommended by the World Health Organisation and has been widely accepted as an effective public health measure.

Another example of the need for strong regulation is in the implementation of Australia's long-standing ban on products containing asbestos, which is the result of overwhelming evidence of its lethal effects. Even small amounts of asbestos can result in deadly disease, and the removal of asbestos from buildings has been a long-term and costly exercise (Safe Work Australia, 2016).

The recent discovery of asbestos in imported materials used in a new Perth hospital and other buildings (Turner, 2016) was linked to increased imports from China, now expanding in volume because of the free trade agreement. This has led to calls for more effective standards in trade agreements and more effective implementation of Australia's ban on imported products containing asbestos (Donellan 2016).

Goods containing asbestos are still manufactured in Indonesia (Palmer and Anthonysz, 2016). The Australian government should ensure that there is no undermining of capacity to maintain and improve the effectiveness of the Australian ban on asbestos products.

Investor rights

Regulation of Foreign Investment

Most governments retain some rights to regulate foreign investment in the national interest. Australia does this through the Foreign Investment Review Board and also through specific regulation in particular industry sectors considered to be of national or strategic significance.

Indonesia, as a developing country, is seeking to encourage foreign investment where it is needed and also to encourage local investment and local industry development. One example is the 2009 Mining Law, which limits foreign investment in mining ventures. There are also proposals to encourage processing of raw minerals before export. Indonesia also regulates foreign investment in other industries and sectors through listing those industries and sectors are not open to foreign investment, those which are open to foreign investment with specified conditions, and those which are open to foreign investment without conditions (Badam Koordinasi Penanaman Modal (BBKM) (2016).

The IABPG submission lists all of these regulations as investment restrictions, and states that the agreement "needs to address liberalisation of investment regulations as a priority" (IABPG: 34).

AFTINET believes that governments should have the right to regulate foreign investment in the national interest as Australia continues to do in some sectors, and through the Foreign Investment Review Board. The WTO recognises that developing countries have special and differential interests and rights to develop local industries and employment. The right to regulate foreign investment should be recognised by both parties in the negotiations.

Investor-State Dispute Settlement (ISDS)

We note that the Indonesia-Australia Business Partnership Group has advocated for ISDS to be included in the IA-CEPA, with no exclusions for any goods or services, which appears to be a reference to the tobacco exclusion in the TPP (IABPG, 2016: 43).

AFTINET is opposed to ISDS, which gives additional special rights to foreign investors to bypass national courts and sue governments for compensation in an international tribunal if they can argue that a change in law or policy has harmed their investment.

There are many examples of ISDS cases against health and environmental laws and policy. The US pharmaceutical company Eli Lilly is currently suing the Canadian Government over a court decision which refused a patent for a medicine which was not sufficiently more medically effective than an existing medicine (Gray 2012). The US Lone Pine mining company is suing the Canadian Government because the Québec provincial government conducted a review of environmental regulation of gas mining (CBC 2012). The French Veolia Company is suing the Egyptian Government over a contract dispute in which it is claiming compensation for a rise in the minimum wage (Breville and Bulard 2014).

Many experts including Australia's High Court Chief Justice French and the Productivity Commission have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen from a pool of investment lawyers who can continue to practice as investment law advocates. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest (Kahale 2014, French 2014, Productivity Commission 2010).

ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider, and appeal mechanisms to ensure consistency of decisions.

An OECD study found ISDS cases last for 3 to 5 years and the average cost is US$8 million per case, with some cases costing up to US$30 million (Gaukrodger and Gordon 2012). Even if a government wins the case, defending it can take years and cost tens of millions of dollars.

The Australian Government recently won an ISDS case brought by the US Philip Morris tobacco company over its plain packaging laws. The case took over four years and reportedly cost $A50 million (Tienhaara 2015). It also had a freezing effect

on other governments' introduction of plain packaging legislation, with the New Zealand Government delaying its own legislation pending the tribunal decision (Johnston 2015). In the end, the substantive issue of whether the company deserved billions of dollars of compensation because of the legislation was not tested since the case was won on the issue of jurisdiction.

In September 2015, United Nations Human Rights independent expert Alfred de Zayas launched a damning report which argued strongly that trade agreements should not include ISDS.

The report says ISDS is incompatible with human rights principles because it "encroaches on the regulatory space of states and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability" (de Zayas 2015).

It is clear that the ISDS system is costly, unnecessary and undermines democratic decision-making. It should not be included in the IA-CEPA.

Intellectual Property and access to medicines

AFTINET opposes the inclusion of TPP-style extensions on intellectual property rights for corporations at the expense of consumers, and has made a detailed submission on such proposals in the TPP. Although intellectual property rights are not reported to be on the immediate priority list for IA-CEPA, they are mentioned in the IABP submission as a possible area for negotiations.

AFTINET sees no justification for the inclusion of TRIPS-plus intellectual property rights in the IA-CEPA.

In particular, we are concerned about the possible extension of monopoly rights on medicines for pharmaceutical companies, which already have 20 years of patent monopolies. Any extension of patents or data exclusivity rights will delay the entry of generic or more affordable versions into the market. This would be costly for the Australian health system but would have the even more severe impacts in Indonesia (AFTINET 2016).

Government Procurement

Government procurement is not reported to be on the immediate priority list for IA-CEPA, but is mentioned in the IABPG submission as a possible area for negotiations.

A recent study by the Australia Institute provided evidence that all successful manufacturing nations have used procurement and other active government policies to develop globally competitive industries. It also showed that Australia's free trade agreements with the US and China have been unbalanced in trading off essential government levers like the use of government procurement to support local manufacturing industry. These deals have allowed others to keep local procurement arrangements like the "buy America" scheme, while Australia has conceded far more (Australia Institute, 2016: 10).

The Australia Institute study cites a poll showing 70 per cent of Australians support local content in government purchasing in areas like the defence and steel industries (Australia Institute, 2016: 13).

The Government has recently responded to community views and has acted to ensure some Australian content in the defence shipbuilding and steel industries.

AFTINET believes that both the Indonesian and Australian governments should retain the flexibility to use government procurement for industry development purposes. There is no justification for including government procurement in the IACEPA.

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