Submission on behalf of the Australian Fair Trade and Investment Network (AFTINET) to the Joint Standing Committee on Treaties review of the Treaties Ratification Bill 2012

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of organisations and 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 Review of the Treaties Ratification Bill. We apologise for missing the deadline for submissions, and thank the committee for agreeing to accept our submission.

We are aware that the Joint Standing Committee on Treaties and the Review of the Treaties Ratification Bill deal with all treaties, not only trade agreements. However, our comments will deal with trade agreements because this is the focus of our activity.

AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. But we believe trading agreement processes need to be far more transparent, democratic and exposed to public and Parliamentary debate than they are at present.

Current Process for decision-making about trade agreements

The current process for decision-making about trade agreements in Australia is the Cabinet process, which is essentially secret. Cabinet decides whether to enter into negotiations, determines the objectives of the negotiations and receives reports on the progress and text of the negotiations.

There is consultation with community groups, but only in general terms, as the text of the agreement is secret and cannot be discussed in detail.

At the end of the negotiations, Cabinet decides whether to sign the completed agreement. Once signed, the agreement is very difficult to change.

Only after this process is the text of the trade agreement tabled in Parliament and examined by the Joint Standing Committee on Treaties, which frequently has several treaties to examine at the same time. The committee reports to Parliament but recommendations of the committee are not binding on Cabinet.

After this process is complete, Parliament does not vote on the whole text of the trade agreement, but only on the legislation required to implement it. This means that Parliament does not debate all of the implications of the agreement, since it may contain commitments which will be implemented through future policy changes or by administrative means not requiring legislation. The final ratification of the agreement occurs after the implementing legislation is passed.

Why the process should be transparent and decided by Parliament

Trade agreements are legally binding instruments with government-to-government dispute processes which have the legal authority to apply trade sanctions if agreements are violated. In some cases trade agreements also contain separate investor-state dispute processes, which allow a single investor to sue a government for damages if a government law or policy 'harms' their investment.

The most powerful influences on trade agreement processes are transnational corporations, and national and international business organisations with considerable resources. Institutional studies of trade agreement decision-making processes show that they play a strong role and are often closely involved in drafting trade agreements. Their main focus is understandably to create global regulation favourable for their business, without necessarily having regard to public interest considerations[1].

However, over the last 20 years, multilateral, regional and bilateral trade agreements have expanded in scope beyond traditional trade concerns of tariff reductions on goods and agricultural products to include many areas of public policy which are normally decided through open public debate and Parliamentary decision-making.

Trade agreements can now govern the regulation of essential services like health, education and water services, trade-related intellectual property rights, regulation of medicine prices, the regulation of investment, including the right of single foreign investors to sue governments for damages, the regulation of financial services, regulation of local content in audio–visual media, government procurement, quarantine and food labelling standards. Unless trade agreements are subjected to democratic scrutiny, including public and Parliamentary debate, before they are signed, there is a danger that they can restrict the right of current and future governments to regulate in many of these areas.

There has been a trend in trade agreement practice to treat all government regulation as if it were a tariff, to be placed at standstill and then reduced over time. The short-sightedness of this approach has now been revealed by experience of the global financial crisis. US governments successively deregulated many of the activities of banking and financial institutions, which grew into large global institutions presiding over unregulated trading in secondary mortgage and other derivative markets and unregulated global flows of capital. Most commentators agree that excessive deregulation contributed to the sub-prime mortgage market crisis, which was then exported to the rest of the world. Intergovernmental bodies like the G20 and the International Monetary Fund are now recommending that governments rebuild and retain the ability to regulate international financial flows and national financial

[1] John Braithwaite and Peter Drahos, *Global business regulation*, Cambridge University press, Cambridge 2000 , p.p. 200 - 4

institutions[2]. Despite this, some trade negotiations like the Trans-Pacific Partnership Agreement are still considering forms of financial deregulation which could prevent governments from regulating in these areas[3].

Regional and bilateral trade agreements are increasingly based on a 'negative list' structure, which includes everything unless it is explicitly excluded, and requires governments to make extremely detailed and exhaustive exclusions if they wish to retain regulatory powers in particular areas.

The Australia-US Free Trade Agreement (AUSFTA) exemplified many of the trends described above. The US Trade Representative and US corporate submissions were quite explicit in their view that many forms of democratically decided regulation in Australia were trade barriers which should be changed or removed through trade negotiations. These included the Pharmaceutical Benefits Scheme, Australian copyright law, the Foreign Investment Review Board, Australian content regulation for audio-visual media, Australian content regulation in government procurement, the labelling of genetically engineered food, and some quarantine regulations. Australian community organisations learned of these US targets, not from the Australian government, but because the US Trade Representative was required to report publicly to the US Congress about what the US objectives were in trade negotiations[4]. Community organisations campaigned consistently for public discussion of these issues despite the secrecy of the negotiations. The text of the agreement, which did contain changes to many of these important social policies, was only revealed after Cabinet had signed it, and the critical recommendations of both the Joint Standing Committee on Treaties and the Senate enquiry were not legally binding on the government. The Productivity Commission has since criticised this process and concluded that the AUSFTA produced negligible economic benefits for Australia.[5]

The expansion of scope of trade agreements, their strong enforcement procedures and their ability to change current and future laws mean that without publicly accountable processes and public scrutiny they undermine democratic parliamentary processes. Trade agreements should be subject to transparency, accountability, public and Parliamentary debate in the same way as other forms of lawmaking.

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[2] Joseph Stiglitz, 2010*, Free Fall, America, free markets and the sinking of the global economy*, W.W. Norton, New York, chapters 1 to 3.

[3] Kevin Gallagher, 2012, "Tired of waiting for 21st-century trade agreement: developing countries, the TPP and regulating cross-border finance", June 13 found at http://triplecrisis.com/tired-of-waiting-for-a-21st-century-trade-agreement-developing-countries-the-tpp-and-regulating-cross-border-finance/

[4] Robert Zoellick, 2002, Letter to the Us Congress, 13 November, found athttp://www.ustr.gov/Document_Library/Letters_to_Congress/2002/USTR_Zoellick_Notifies_Congress_of_Intent_To_Initiate_Free_Trade_Negotiations_With_Australia.html [accessed 1 September 2004].

[5] Productivity Commission, 2010, *Final Report on Regional and Bilateral Trade Agreements*, Canberra, xxxv-xxxvi.

Recommendations for change by Parliamentary committees and the Productivity Commission

It is widely recognised that consultation, transparency and the democratic process have been neglected in the area of trade policy. For example the Former Director General of the World Trade Organisation (WTO), Pascal Lamy, identified political legitimacy and representation of people as the most serious issues facing the WTO and the governance of trade[6].

To facilitate effective community debate, it is important that there is a clear structure and principles for consultation processes that can be applied to all proposed trade agreements.

Such processes have been recommended by a succession of Parliamentary Committees and other bodies since 2003.

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[7]. The key elements of these recommendations are that:

- Parliament should 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;

- Parliament will be able to vote on the whole trade treaty that is negotiated before it is signed, not only on the implementing legislation.

Transparency and accountability issues were also recognised by the Joint Standing Committee on Treaties (JSCOT) in its support for transparency mechanisms following its 2008 examination of the Australia/Chile FTA:

"The Committee recommends that, prior to commencing negotiations for bilateral or regional trade agreements, the Government table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of

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[6] Pascal Lamy, 'Speech given at Bocconi University', 9th November 2009, available at: http://www.wto.org/english/news_e/sppl_e/sppl142_e.htm

[7] Senate Foreign Affairs, Defence and Trade Committee, 2003,*Voting on Trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement*, 26 November, paragraph 3.91.

the costs and benefits. Such assessments should consider the economic, regional, social, cultural, regulatory, and environmental impacts which are expected to arise."[8]

The December 2010 report of the Productivity Commission on bilateral and regional trade agreements recommended that:

"The Australian Government should improve the scrutiny of potential impacts of prospective trade agreements, and opportunities to reduce barriers to trade and investment more generally.

a) It should prepare a trade policy strategy which identifies impediments to trade and investment and available opportunities for liberalisation, and includes a priority list of trading partners. This trade policy strategy should be reviewed by Cabinet on an annual basis, and be prepared before the pursuit of any further BRTAs. A public version of the Cabinet determined strategy should be released.

b) Before entering negotiations with any particular prospective partner, it should undertake a transparent analysis of potential impacts of the options for advancing trade policy objectives with the partner. All quantitative analysis and modelling should be overseen by an independent body.

c) It should commission and publish an independent and transparent assessment of the final text of the agreement, at the conclusion of negotiations, but before an agreement is signed."[9]

Conclusion

In conclusion, AFTINET believes that the following recommendations of these bodies should be adopted:

- Trade negotiations should be undertaken through open, democratic and transparent processes that allow effective Parliamentary and public consultation to take place about whether negotiations should proceed and the content of negotiations.

- There should be regular public and parliamentary consultations throughout the negotiations, and where possible, negotiating texts should be released. There is a precedent for this in WTO negotiations, where position papers and draft texts are released on the WTO website

[8] Joint Standing Committee on Treaties *Report 95*, 2008, p 35.

[9] Productivity Commission, 2010, *Final Report on Regional and Bilateral Trade Agreements*, Canberra, p. 312.

- 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.

- Parliament should then debate and vote on the full text of trade agreements before the decision is made to sign them.