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Submission to the Joint Standing Committee on Treaties on the Australia-Chile Free Trade Agreement on behalf of the Australian Fair Trade and Investment Network

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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 Joint Standing Committee on Treaties regarding the Australia-Chile Free Trade Agreement (ACl FTA).

This submission addresses general principles and issues of common concern to our members. Member organisations will also make more detailed submissions in areas of particular concern.

2. 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 that 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[1]. 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;

[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.

- 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 implementation of this policy and the inclusion of social, cultural and environmental impacts into the assessment of any proposed trade agreements, including the proposed Australia-Chile FTA.

AFTINET welcomes the policy put forward by the ALP to table any trade agreements in Parliament with any implementing legislation. However, 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 Australia – Chile FTA and that the Government will have regular

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

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 Australia – Chile FTA and that Parliament should vote on the agreement as a whole, not only the implementing legislation.

3. Lack of Social, Environmental, and Cultural Impact Assessment

For governments to make informed choices about any treaty that they enter into it is important to be informed of the full spectrum of its impacts. There is yet to be any government commissioned assessment of the social, environmental, cultural or regional impacts of this proposed agreement. The agreement has been labelled as Australia's "most ambitious" yet and includes the removal of tariffs on almost all goods as well as locking in Australia and Chile's investment and service levels of liberalisation. Given the depth of this agreement it is even more important to analyse the non-economic impacts that it will have.

A clear example of this need for further assessment is demonstrated in the trade in minerals. Australian mining corporations have been announced as big 'winners' in the agreement. This is based on the removal of Chile's 6% flat-tax that is applied to all goods imported, as well as the buoyant Chilean mining industry. Australia's main export to Chile is currently coal and the removal of this tariff will see that trade increase. Unfortunately there has been no government research into what impacts this will have on the environment or communities in both countries. Whilst boosting the export of coal may have benefits for the economy, if the environmental, social, and cultural costs of those exports aren't known, then making informed decisions becomes impossible.

In response to these concerns about the lack of broader assessment, the Australian Labor Party outlined a process in its policy platform that would involve Parliament considering independent assessments of environmental, social, regional, cultural, and regulatory impacts prior to undertaking negotiations for a trade agreement. The ALP Policy states:

> "A Labor Government will also ensure that all major trade agreements into which Australia enters, bilateral and multilateral, are assessed to ensure that they are consistent with the principles of sustainable development and environmental protection for all regions of Australia" (Chapter 3, Section 22).

Given the lack of environmental assessment as well as other non-econometric assessment, it is deeply concerning that the platform taken to the election is not being upheld in the case of the proposed ACl FTA

> ***Recommendation:*** Independent assessments of the cultural, regional, social, regulatory and environmental impacts be concluded and considered prior to the signing of any trade agreement.

4. 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 agreement between Australia and Chile to thoroughly examine these issues. 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 such as ACl FTA.

Before signing any agreement there should be an analysis of the current state of compliance by both Australia and Chile 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 against women 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 Chile to ensure compliance with human rights, labour and environmental standards by investors, including effective monitoring mechanisms.

5. Protecting the Right of Governments to Regulate in the Public Interest

It is important that a 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, and secondly, by using an investor-state complaints process.

5.1 Exclusion of public services

Public services should be explicitly exempt from the ACl 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 Chile Free Trade Agreement, 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, energy and many more.

The ACl FTA has included services commitments under a 'negative list' approach. This translates to all service areas being included in the agreement except those services explicitly excluded. This commits all future service areas to immediate inclusion into the conditions of the FTA. 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.

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.

5.2 Regulation of Standards

Governments should have the right to regulate the provision of services through ensuring adequate standards as well as the role that services play in supporting domestic goals.

The ACl FTA states that "measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services." This is accomplished by such regulations being "not more burdensome than necessary to ensure the quality of the service". This definition is highly problematic as it is undefined and leaves regulation open to challenge, or open to the threat or challenge. This ambiguity surrounding the protection for regulatory measures and their

openness to be challenged can act as a chilling effect on government regulation. Governments that don't wish to face a trade disputes panel may re-think applying regulation that *may* breach the trade agreement. This undermines the right of governments to adopt regulation that they believe necessary for the provision of a service.

Further to this is the removal of regulation that can ensure local content is included in foreign services investment. The article on Services Market Access (9.5) outlines that there can be no limitations imposed on investment through the provision of numerical quotas for the number of domestic workers employed in order to provide the service. This removes the ability of governments to ensure that local workers benefit from the increased investment in the services industry. Article 9.5 further outlines the restrictions on requiring joint-ventures for the provision of services. Whilst joint ventures may not be appropriate in every case, the removal of the policy space for governments to be able to require them restricts future governments from ensuring that domestic firms have access to technologies and investment opportunities.

5.3 Investor-State Disputes Process

All trade agreements contain State – to – State dispute processes to resolve disagreements arising between the countries involved. Investor-State disputes processes are additional disputes processes which allow investors to directly challenge government actions and sue for damages if they believe their investments have been harmed. Both the Thailand/Australia FTA and the Singapore/Australia FTA include such a clause. Investor-State dispute processes in other agreements like the North America Free Trade Agreement (NAFTA) have seen a range of government regulation aimed at protecting public health and the environment overturned in the interests of trade[3]. This allows unaccountable investors to challenge the democratic powers of governments to enact legislation that is in the public interest.

[3] See Public Citizen's Report on all the cases included under the Investor-State Disputes Process in NAFTA at http://www.citizen.org/documents/Ch11cases_chart.pdf

Whilst such a mechanism exists in Australia's trade agreements with Singapore and Thailand it was not included in the agreement with the United States, in part because of strong public opposition in both Australia and the United States.

> ***Recommendation:*** Public services should be clearly and unambiguously exempted from trade agreements, including the ACl FTA and there should be no restrictions on the right of governments to regulate services in the public interest.

> ***Recommendation:*** If Australia is to include services in a trade agreements like the ACl FTA that it be done only as a "positive list".

> ***Recommendation:*** Australia should continue with the example set by the AUSFTA and not include investor-state dispute processes in the ACl FTA.

6. Ensuring Governments can Regulate Investment in the Public Interest

Chapter 10 on Investment outlines the commitments that both countries are making to open up domestic markets for investment. This chapter aims to facilitate investment in both countries by removing barriers or restrictions that may prevent individuals or companies from investing.

The chapter outlines the provision of both "National Treatment" and "Most-Favoured Nation Treatment". National Treatment ensures that Chilean companies are offered the same treatment as Australian companies in regard to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in Australia, and vice versa for Australian companies in Chile. Most-Favoured Nation Treatment ensures that any conditions granted to other countries that are more favourable are also granted to the countries under this agreement.

Under this chapter Australia is signing away its ability to ensure that foreign investment can be regulated in the public interest. Article 10.7 on Performance Requirements ensures that governments cannot specify that investment meet certain domestic goals. These include:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or

(g) to supply exclusively from the territory of the Party the goods that it produces or the services that it supplies to a specific regional market or to the world market.

AFTINET is particularly concerned about sections (b) and (c) and the constraints that this places on governments ensuring that foreign investment supports domestic policy goals. These goals include the hiring of domestic workers, leaving Australian workers vulnerable to losing the opportunity to benefit from the investment.

There is a clause that allows for governments to not be constrained by the above in relation to implementing environmental measures. These environmental measures must not be applied in an arbitrary or *unjustifiable* manner or constitute a disguised restriction to trade. The exception clause covers measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

Whilst this provides some flexibility for governments to ensure that environmental measures won't be over ridden it is still far from certain. The term *unjustifiable* is yet to be defined and leaves itself open to broad interpretation. As has been mentioned above, there has also been a long history within the North American Free Trade Agreement (NAFTA) of exception clauses similar to the above being overruled by trade tribunals. Of the eleven times that the exception clause has been used within the NAFTA it has been upheld only twice[4].

> ***Recommendation:*** There should be no restrictions on the right of governments to regulate investment in the public interest

> ***Recommendation:*** Measures taken to protect the environment should unequivocally take priority over measures taken to promote trade.

7. Government Procurement

The commitments for government procurement in the ACI FTA apply to all levels of government, federal, state and local. These commitments will severely limit the policy space that governments have in their procurement decisions and how these impact domestic policy goals.

The chapter outlines the prohibition of governments adopting 'offsets' in their procurement policies. Offsets are defined as:

> any condition or undertaking that encourages local development or improves a Party's balance of payments accounts such as the use of

[4] See Public Citizen's Report on all the cases included under the Investor-State Disputes Process in NAFTA at http://www.citizen.org/documents/Ch11cases_chart.pdf

domestic content, the licensing of technology, investment, counter-trade and similar actions or requirements;

This removes the ability of governments to support domestic capacity by offering preferential contracts to domestic suppliers. This removal of policy space constrains future actions by governments that may be looking to further domestic goals. Such policies that would be restricted include nurturing the development of infant industry or promoting the purchase of local goods to reduce greenhouse gas emissions from transport.

The technical standards included in the chapter on Government Procurement preclude governments from adopting or applying any technical standard with the purpose or effect of creating “unnecessary obstacles to trade”. The adoption of a technical standard must be based on relevant international standards unless these provide a greater burden than a national standard. This would prevent governments from adopting a policy that gave preference to goods or services that were produced using more climate friendly mechanisms over similar ones produced in more polluting ways. Since there is currently no international standard that could support this, such an environmental technical standard would be ruled “unnecessary”.

In its current form the chapter on Government Procurement is excessive in its restriction on the space open to governments to act to achieve domestic or global policy goals.

> ***Recommendation:*** Government procurement policy should retain the right to act in the public interest.

8. Inclusion of subclass 457 visa

Australia has committed to extending the provisions for long and short term entry under the current subclass 456 and 457 visas to Chile under this agreement. The subclass 457 visas (known as Visa 457) have attracted widespread controversy following the abuse of workers by employers under the scheme.

AFTINET raised concerns about the exploitation of temporary workers under the previous government's visa 457 regulations, especially the lack of protection of their basic rights, low pay and unacceptable working conditions, including 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, means that they are rightly afraid they will be dismissed and deported if they complain, and are more vulnerable to exploitation than other workers.

We submit that the Visa 457 arrangements differ from the movement of executives and senior management arrangements that have been included in this proposed trade agreement, because the labour market position of such workers makes them vulnerable to exploitation unless their rights are protected through specific arrangements.

Further, we question whether such labour supply arrangements should be part of trade agreements which operate under trade law that has no current jurisdiction to ensure that workers rights are protected. Workers are not commodities and the current rules that govern trade in goods and services are not adequate to protect their rights.

The inclusion of such arrangements in trade agreements, which do not include any protections for basic rights, also means they are effectively 'locked in", and extremely difficult for future governments to change. If, for example, such arrangements were included in the ACl FTA, and a future government did make changes, Australia might have to compensate other trading partners or could be subject to legal action under the WTO disputes process, resulting in trade sanctions. Similar action could be taken under the disputes provisions of FTAs.

AFTINET advocates that any arrangements about the temporary movement of workers whose labour market position means they are vulnerable to exploitation, should not be part of trade agreements, but should be completely

separate arrangements. This would enable such arrangements to include the range of safeguards of labour rights and other rights that the terms of reference of the review indicate are necessary. It would also enable them to be changed as circumstances change.

The Government has announced a review of Visa 457 conditions, including employment conditions, protection from exploitation, health and safety, and English language requirements. This is being done by Industrial Relations Commissioner Barbara Deegan and will report to the Minister for Immigration and Citizenship by October 1 2008.

Recommendation: In general the movement of temporary workers who are vulnerable to exploitation should not be included in trade agreements.

Recommendation: There should be no inclusion of current Visa 457 arrangements in trade agreements before the conclusion and consideration of the Deegan review of the current Visa 457 arrangements.