



Australian Council of Trade Unions

SUBMISSION TO THE JOINT STANDING COMMITTEE ON TREATIES ON THE MALAYSIA–AUSTRALIA FREE TRADE AGREEMENT

14 September 2012

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D No. 59/2012

Introduction

The ACTU welcomes the opportunity to provide comments to the Joint Standing Committee on Treaties in its review of the Malaysia-Australia Free Trade Agreement (MAFTA).

Our comments are informed by a strong belief that the primary objective of all trade negotiations should be to raise living standards and make a positive difference in the lives of working people in accordance with the principles of sustainable development. Reducing barriers to trade and investment, and increasing economic cooperation and integration, are possible *means* of achieving this.

This requires trade negotiations that are underpinned by a commitment to human rights and a decent work lens. A decent work lens is an approach which asks how decisions at the negotiating table contribute to a coordinated strategy for the promotion of high-quality jobs and sustainable economic development that benefits all workers.

History has demonstrated that the benefits of international trade and investment are not evenly distributed. International labour rights are important for distributing the benefits of trade to workers. It is essential, therefore, that trading partners uphold the fundamental rights of workers – including freedom of association and the right to collectively bargain – because it is consistent with a commitment to ensuring the benefits of trade are fairly shared with workers. Respect for fundamental labour rights is also a responsibility of ILO membership and as signatories to the UN Declaration on Human Rights.

Furthermore, adherence to international labour rights by trading partners reduces the risk of a race to the bottom on labour rights as countries lower (or fail to increase) labour rights in order to attract foreign investment and promote exports.

Therefore, it has been the long-held position of the ACTU that all bilateral and regional trade agreements negotiated by Australia include an enforceable labour rights chapter that requires trading partners to adopt and effectively enforce international labour rights. At a minimum, the labour rights chapter should:

- Clearly demonstrate that commitment to implement fundamental labour rights, as articulated in core ILO conventions on rights at work, is a fundamental and integrated part of the agreement;
- Include a commitment by parties to not weaken but to improve labour rights;

- Provide for this obligation on labour rights to be monitored and enforced, including a role for trade unions; and
- Include procedures for alleged breaches of core labour rights and settling disputes.

Labour Rights and the Malaysia-Australia FTA

MAFTA does not include a labour chapter. Instead side letters on labour rights have been signed by both trade ministers. In these letters, both countries note that labour rights are being addressed in the current Trans Pacific Partnership (TPP) negotiations so agreed to not make further commitments on labour rights in MAFTA beyond affirming:

- Their commitments as members of the ILO and under *the Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)*;
- An interest in facilitating cooperation and consultation on labour issues of mutual interest; and
- A commitment to ensuring that labour laws, regulations and practices are not used for trade protectionist purposes or labour rights weakened to gain a trade advantage.¹

In explaining the approach adopted, the Regulation Impact Statement conducted for MAFTA states that:

MAFTA negotiations on labour and environment issues were complicated by Australia's and Malaysia's involvement in parallel TPP negotiations and concerns that MAFTA outcomes on these issues had the potential to either duplicate, or be inconsistent with, possible TPP outcomes. Both countries therefore agreed to exchange side letters under MAFTA which confirmed a mutual understanding and agreement that, as both countries are also negotiating parties in TPP, it was appropriate to defer consideration of labour and environment provisions to the TPP negotiations.²

This approach is flawed, as is the rationale.

¹ See MAFTA Side Letter on Labour, available at <http://www.dfat.gov.au/fta/mafta/index.html#full-text>, (accessed 4 September 2012), 22 May 2012.

² See Regulation Impact Statement: Malaysia-Australia Free Trade Agreement, available at http://www.apf.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/14august2012/tor.htm, (accessed 4 September 2012), 22 June 2012.

Negotiations on the TPP are far from complete. Despite fourteen negotiating rounds, controversial issues remain unresolved across the negotiations including market access commitments, investment provisions and intellectual property rights. Negotiations in many other sections of the agreement are still in the preliminary stages.

Australia has experience in protracted trade negotiations. Negotiations with China entered their eighth year in 2012, negotiations with Japan are in their sixth year, and negotiations with Korea are in their fourth year; and these are only bilateral negotiations. The TPP currently includes nine parties (Australia, Brunei, Chile, NZ, Malaysia, Peru, Singapore, US, and Vietnam) with Mexico and Canada to join by the end of the year. The US – the key driver in the TPP negotiations – has experience with complex plurilateral negotiations. Negotiations on the Free Trade Area of the Americas (FTAA) began in 1994, and essentially lapsed in 2005. The intentions of the US in the FTAA were not dissimilar to the agenda the US is pushing in the TPP negotiations – a comprehensive agreement that would incorporate disciplines on market access for goods and services, investment, technical barriers to trade, subsidies, procurement, intellectual property rights, and competition policy.

There is no set date for finalising negotiations on the TPP, and with complex issues continuing to destabilise the negotiations, there is no certainty that a completed TPP agreement will cover labour relations between the two countries. Under this scenario, labour relations with respect to trade between Malaysia and Australia will go unregulated.

We note that the side letters include a commitment to review the inclusion of labour provisions in the Agreement no later than two years after the entry into force of the agreement. Some may argue that this clause is a safeguard if the TPP negotiations collapse. However, this clause is *not* a commitment to include enforceable labour rights provisions after two years. *If* both parties agree to negotiate on labour provisions post-review, negotiations may be extended; leaving labour relations with respect to trade between the two countries unregulated for an unlimited period of time.

The explanation presented in the Regulation Impact Statement to not negotiate comprehensive labour commitments in the Malaysia-Australia FTA is problematic. The 'complication' presented is not unique to the labour and environment issues. Below is a table of the MAFTA chapters and the list of issues that we understand are currently under negotiation in the TPP:

Comparison of negotiating areas of MAFTA and the TPP

<u>MAFTA</u>	<u>TPP³</u>
- Trades in goods	- Trades in goods
- Rules of origin	- Rules of origin
- Customs procedures and cooperation	- Customs procedures and cooperation
- Sanitary and phytosanitary measures	- Sanitary and phytosanitary measures
- Standards, technical regulations and conformity assessment procedures	- Standards, technical regulations and conformity assessment procedures
- Trade remedies	- Trade remedies
- Trade in services	- Trade in services
- Financial Services	- Financial Services
- Telecommunications services	- Telecommunications services
- Movement of natural persons	- Movement of natural persons
- Framework on mutual recognition arrangements	- Mutual recognition arrangements
- Investment	- Investment
- Intellectual property	- Intellectual property
- Competition policy	- Competition policy
- Electronic commerce	- Electronic commerce
- Economic and technical cooperation	- Economic and technical cooperation
- Transparency	- Transparency
- General provisions and technical cooperation	- General provisions and technical cooperation
- Institutional provisions	- Institutional provisions
- Consultations and dispute settlement	- Consultations and dispute settlement
-	- Procurement
-	- Environment
-	- Labour

³ See 'Outline of the Trans-Pacific Partnership Agreement', document released at the TPP Leaders' Meeting in Honolulu, available at <http://www.dfat.gov.au/fta/tpp/111112-tpp-broad-outlines.html> (accessed 4 September 2012), November 2012.

As the table demonstrates parallel negotiations are taking place in the TPP negotiations on every chapter of MAFTA yet there was no concern expressed that this could potentially duplicate or lead to inconsistencies with possible TPP outcomes.

We recommend that the Committee question the rationale for side letters rather than a comprehensive labour chapter.

The question of duplication and inconsistencies leads to a broader question of strategy with respect to bilateral and regional trade negotiations. Australia already has trading arrangements with Malaysia under the Australia-ASEAN-New Zealand trade agreement. With respect to the TPP, for many negotiating parties it will lead to the second or third trade arrangement with another party to the negotiations. Australia has already negotiated bilateral agreements with Chile, New Zealand, Singapore and the US. Australia also has an agreement with ASEAN which includes Malaysia, Brunei and Vietnam. Therefore if the TPP negotiations are finalised, Australia will have trading arrangements with Malaysia under three trade agreements.

There is no clarity from the Government on how the relationship between these multiple agreements will operate in practice; despite questions being asked by civil society, particularly with respect to the TPP.

Labour Rights and Trade Agreements

There are precedents for including a labour chapter in bilateral and regional trade agreements, with Australia previously including labour rights in trade agreements and Australia's trading partners including labour rights in trade agreements.

The Australia-US agreement includes a labour chapter requiring each party to: 'strive to ensure that such labour principles and the internationally recognised labour principles and rights set forth in Article 18.7 [of the agreement] are recognised and protected by its law'.⁴ There is little practical value in clauses of the kind which do not oblige the parties to respect the fundamental rights of workers as established by the ILO or the absence of enforceable provisions preventing countries from waiving or weakening existing labour laws in order to increase trade. Furthermore, the lack of an enforcement mechanism for labour standards (for example, under the dispute resolution provision of the agreement) is a limitation.

Based on cross-country learnings, we recommend a strong and unambiguous labour chapter that incorporates commitments to:

- A shared definition of labour rights that incorporates internationally recognised labour rights;
- Adopt and maintains laws/regulations consistent with ILO core labour rights and effectively enforce those rights;
- Bring labour laws into compliance with international minimum standards;
- Not derogate from these laws for any reason but in particular to enhance commerce *and* parties should continue striving to improve labour standards;
- Provide for this obligation to respect labour rights be monitored and enforced; and monitoring of these provisions should include workers' and employers' representatives;

⁴ See Australia-US Free Trade Agreement: Labour Chapter, available at http://www.dfat.gov.au/fta/ausfta/final-text/chapter_18.html (accessed 14 September 2012), January 2005.

- Subject violations of these and other labour obligations to effective dispute resolution procedures with strong remedies; and
- Build capacity, including mechanisms for ongoing dialogue and collaboration focused on strengthening labour law. While outlining the capacity building activities in the agreement, a commitment to utilizing and resourcing the outlined mechanisms is also required

We strongly call on the government to negotiate labour chapters consistent with these principles in all future trade agreements.

Other Aspects of the Agreement

The ACTU welcomes market access elements of the agreement including elimination of all tariffs on large cars and virtually all tariffs on automotive parts imported into Malaysia from the day the agreement comes into effect (with tariffs on small cars to be eliminated by 2016); the elimination of tariffs on processed foods, plastics, chemicals and a range of manufactured products; and the phasing out of tariffs by 2020 on Australian iron and steel.

We also strongly welcome the exclusion of investor-state dispute settlement provisions in the investment chapter, consistent with Government trade policy and a recognition of the gross imbalance that such provisions, if included, confer on corporations vis-à-vis the public interest.

Conclusion

The ACTU appreciates this opportunity to provide comments to the Committee, an inquiry which adds transparency to what are generally opaque negotiations.

In conclusion we reiterate our view that trade agreements to which Australia is a party must include an enforceable chapter on workers' rights. The failure to include such provisions in MAFTA leaves labour relations with respect to trade between the two countries unregulated and provides no avenue to address labour rights violations as they arise. This is inconsistent with a commitment to ensuring the benefits of trade are fairly distributed. We recommend that the Committee question the rationale for side letters rather than a comprehensive labour chapter.