AFTINET
Australian Fair Trade & Investment Network Ltd

Submission to the Joint Standing Committee on Treaties Inquiry on the amendments to the Singapore-Australia Free Trade Agreement May 2017

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) welcomes the opportunity to make a submission to the inquiry on the amendments to the Singapore-Australia Free Trade Agreement (SA FTA).

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. Our member organisations represent over two million Australians.

AFTINET supports the development of fair 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 recognises the special needs of developing countries and are founded upon respect for democracy, human rights, labour rights and environmental sustainability.

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners.

The current process for trade agreements is not consistent with the Australian values of transparency, democracy and accountability which underpin our parliamentary system.

Trade agreements now deal with a wide range of policy issues which would normally be decided through democratic parliamentary processes. This has led to a global movement for more open and accountable and democratic trade processes.

The current Australian trade process 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 is a Cabinet process, only after which the agreement is tabled in Parliament and examined by the Joint Standing Committee on Treaties. The text of the agreement cannot be changed. Parliament only votes on the implementing legislation, not on the whole agreement.

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

Our recommendations for change to this process are summarised briefly below.

- Prior to commencing negotiations, the Government should table in Parliament a document setting out its priorities and objectives. The document should include independent assessments of the projected costs and benefits of the agreement. Such assessments should consider the economic, regional, social, cultural, regulatory and environmental impacts which are expected to arise.

- The Australian Government should release its proposals and discussion papers during trade negotiations. Draft texts should be also released for public discussion, as occurs in the WTO and is now the practice in some EU negotiations (EU, 2015).
- The final text should be released for public and parliamentary debate before it is authorised for signing.
- After the text is completed but before the decision is made to sign it, comprehensive independent studies of the likely economic, health and environmental impacts of the agreement should be undertaken and made public for public debate and review by parliamentary committees.
- Parliament should vote on the whole text of agreements, not just the implementing legislation.

The TPP should not be used as a model for amendments to the SAFTA

AFTINET recognises the need to revise and update trade agreements like the SAFTA. However, we do not agree that the Trans-Pacific Partnership (TPP) text is appropriate as the basis for this updating.

The DFAT National Interest Analysis (NIA) refers to various SAFTA amendments, including those on investment, services, government procurement, and temporary workers, as being based on the text of the TPP (DFAT 2016a: 6-7).

Much of the content of the TPP was extremely controversial, and was criticised by many economists, the Productivity Commission and the Australian Competition and Consumer Commission (Martin, 2016, Verrender 2015, Stiglitz, 2016, Productivity Commission 2016, Australian Competition and Consumer Commission 2015).

The inquiries into the TPP by this committee and the Senate received many critical submissions from AFTINET and a wide range of community organisations and academics (AFTINET, 2016).

The TPP implementing legislation has not been passed by the Australian Parliament. It is therefore important that this committee critically examines whether it is appropriate for the TPP text, which was the subject of so much critical discussion, to be used in this agreement.

This submission will focus on the following issues in the amendments:

1) the use of the TPP text on ISDS, which, despite some additional carveouts, does not provide adequate safeguards for public interest regulation
2) the extension of access for temporary contractual service workers from three months to two years, the abolition of labour market testing, and the inconsistency between this and the Government's recent abolition of the Visa 457 category and claimed improvement of labour market testing
3) the expansion of access for Singapore companies to both federal and state government procurement, and whether this will conflict with changes to government procurement guidelines by both state and federal governments which aim to introduce greater flexibility for governments to take into account the employment and other benefits of using local companies for procurement

4) The updating of the SAFTA did not include any chapters on labour rights and environmental regulation. These were included in the TPP, although the TPP chapters on these were not fully enforceable in the same way as other TPP chapters. AFTINET believes that all trade agreements should contain fully enforceable chapters on labour rights based on International Labour Organisation conventions and fully enforceable environmental regulation based on internationally agreed United Nations conventions

Summary of Recommendations

1. ***AFTINET is opposed to the inclusion of ISDS in trade agreements, because of the risks and costs to governments and public interest policy.***

   The committee should recognise that, despite some additional specific carveouts, the general safeguards for other public interest regulation in the ISDS text of Chapter 8 of the SAFTA amendments (which is based on the TPP text) are not adequate, and will not prevent future ISDS cases in these other areas.

2. ***The SAFTA amendments to Chapter 11 on temporary labour to expand access for contractual service providers and abolish labour market testing are not consistent with recent changes in government policy to limit the numbers of occupations and strengthen labour market testing. The committee should recommend that these amendments be renegotiated.***

3. ***The SAFTA amendments to Chapter 3 on government procurement include access to state government procurement which was not provided in the previous version of the agreement. This is not consistent with the current revision of state and Commonwealth procurement guidelines and recent changes to some state government guidelines, and should be renegotiated. Trade agreements should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement. The amendments to SAFTA are a missed opportunity to include such enforceable rights.***

4. ***Trade agreements should require the adoption and implementation of applicable international environmental standards, including those contained within UN environmental agreements, enforced through the government-to-government dispute processes contained in the agreement. The amendments to SAFTA are a missed opportunity to include such enforceable standards.***

Investor-State Dispute Settlement processes (ISDS)

Background on ISDS

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions contrary to the rules of the agreement. ISDS 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. The current SAFTA includes ISDS.

ISDS was originally designed to compensate for nationalisation or expropriation of property by governments. But ISDS has since developed concepts like “indirect” expropriation which do not exist in national legal systems.

There are many examples of ISDS cases against health and environmental laws and policy, involving local, state and national government regulation. Swiss Pharmaceutical company Novartis is suing the Colombian government over plans to reduce prices on a patented treatment for leukaemia (Williams 2016), 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 municipal government contract dispute in which it is claiming compensation for a rise in the minimum wage (Breville and Bulard 2014). The Mexican transport company Grupo Autobuses de Oriente (ADO) recently threatened Portugal with a €42 million ISDS case after it cancelled plans to privatise part of Lisbon's public transport network (Jones 2016).

Singapore sugar company Wilmar International has threatened to use the ISDS clause in SAFTA to sue for damages over government regulation of a code of conduct for the sugar industry (Wilmar Sugar Australia, 2014: 45).

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico through the North American Free Trade Agreement, the Howard Coalition Government did not include ISDS in the US-Australia Free Trade Agreement in 2004.

There is also widespread criticism of ISDS in the US. In September 2016, more than 200 US law and economics professors sent a letter to Congress warning that the ISDS regime threatens the rule of law and undermines democratic institutions. They included Harvard University’s most senior Constitutional Law Professor Lawrence H. Tribe, and Nobel-Prize-winning economist and Columbia University Professor Joseph Stiglitz. They called on Congress to reject ISDS in the TPP and other trade agreements (Public Citizen 2016).

Australian experts, including Australia’s High Court Chief Justice French and the Productivity Commission, have noted that ISDS is not independent nor 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 and 2015).

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.

ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. An OECD study found ISDS cases last for three to five 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. For example, tobacco companies lost their claim for compensation for Australia's 2011 plain packaging legislation in Australia's High Court. The US-based Philip Morris company did not accept this decision under Australian law. The company could not sue under the US-Australia FTA because that agreement had no ISDS clause. The company found a Hong Kong-Australia investment agreement containing ISDS, shifted some assets to Hong Kong, claimed to be a Hong Kong company and sued the Australian Government, claiming billions in compensation. It took over four years and reportedly cost $A50 million in legal fees for the tribunal to decide the threshold issue that Philip Morris was not a Hong Kong company (Tienhaara

The Australian Government won on the issue of jurisdiction, so the substantive issue of whether the company deserved billions of dollars of compensation because of the legislation was not tested. Even so, the case had a freezing effect on other governments' introduction of plain packaging legislation. The New Zealand Government delayed introducing its own legislation pending the tribunal decision (Johnston 2015).

The most comprehensive figures on known cases from the United Nations Conference on Trade and Development (UNCTAD) show that there has been an explosion of ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 and 767 in 2016 (UNCTAD 2017). Most cases are won by investors or settled with concessions from governments (Mann 2015, UNCTAD 2017).

Under the North American Free Trade Agreement, US companies have launched 56 cases against Canada and Mexico since 1994, an average of more than two cases a year. Thirty-nine of these cases were against Canada, which has a legal system similar to Australia's (Tienhaara 2016).

The June 2015 Productivity Commission examination of ISDS reiterated the conclusions of its 2010 study and recommended against the inclusion of ISDS in trade agreements on the grounds that it poses "considerable policy and financial risks" to governments (Productivity Commission 2010:274, 2015: 82).

The previous ALP government adopted a policy against ISDS from 2011. Many other governments, including those of Germany, France, Brazil, India, South Africa and Indonesia are reviewing their ISDS commitments (Filho 2007, Biron 2013, Uribe 2013, Mehdudia 2013, Bland and Donnan 2014).

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).

ISDS amendments in SAFTA: more carveouts but general safeguards still not effective

The SAFTA amendments claim to improve the version of ISDS contained in the agreement. We welcome the fact that SAFTA specifically excludes or carves out ISDS cases against tobacco regulation, cases related to the PBS, Medicare, the Office of the Gene Technology Regulator, and legislation on foreign investment (SAFTA amendments text, Chapter 8, Article 22, footnotes 18 and 19 and Annex 8-B).

However, the need for these specific carveouts casts doubt on the effectiveness of the general safeguards for other public interest legislation contained in the text and raises the question of why other public interest laws are not specifically excluded.

The claimed general "safeguards" in the SAFTA amendments text replicate the TPP text and have the same weaknesses. Such "safeguards" for health, environment and other public welfare measures have not prevented ISDS cases. They do not address the main structural deficiencies of ISDS tribunals, which have no independent judiciary, no precedents and no appeals process. These basic features of ISDS remain in the SAFTA amendments.

One claimed safeguard refers to laws or policies which can be seen by investors as "indirect expropriation." The article reads:

> "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances" (SA FTA amendments text, Chapter 8, Annex 8-A)

This has large legal loopholes, as it does not prevent companies from launching cases in which they can argue that the measures are not legitimate, and that the circumstances are rare.

Another claimed safeguard reads:

> "Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent with this chapter** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental health or other regulatory objectives" (emphasis added, SAFTA amendments text, Chapter 8, Article 20).

Associate Professor Amokura Kawharu of Auckland University has commented that this is circular language which "appears to provide no additional protection, and only affirms the right to regulate in a manner consistent with the other terms of the

investment chapter" (Kawharu 2015:9). Internationally-recognised investment law practitioner George Kahale shares this view (quoted in Hill, 2015).

A third claimed safeguard relates to the fact that governments are required to treat international investments in accordance with customary international law, which includes "fair and equitable treatment" and "full protection and security" (SAFTA amendments text, Chapter 8, Article 6.1).

There have been controversial cases where tribunals have found in favour of corporations on the basis that government action has interfered with the company's own expectations of the treatment they should receive. A recent example is *Bilcon vs Canada*, in which a tribunal in March 2015 found in favour of a company claiming damages because its application for a quarry development was refused by a local government authority for environmental reasons. The reasons for the decision included that the decision was contrary to the company's expectations of treatment (Dundas 2015).

An additional protection for governments in such cases is claimed to be provided by SAFTA amendments text, Chapter 8, Article 6.4, which says that "actions by governments inconsistent with investor expectations **alone** do not breach the requirement to give fair and equitable treatment to investors." However, this is qualified by Annex 8-1, Article 3 a) (ii) which says that one of the criteria for the determination of indirect expropriation is government action which interferes with "distinct reasonable investment-backed expectations."

Again, experts question the efficacy of the claimed protection about expectations provided by this text, which is identical to the TPP text. Luke Peterson, respected editor of the *Investment Arbitration Reporter,* says that the detailed language about investment-backed expectations in the identical TPP clauses only gives protection against "subjective" expectations (Peterson 2015). Kawharu comments that governments have defended cases by suggesting that investor expectations should not form the basis of customary law fair and equitable treatment claims at all, and concludes that the TPP text "could have been more emphatic about the issue" (2015:11-12).

Recommendation

> ***The committee should recognise that, despite some additional specific carveouts, the general safeguards for other public interest regulation in the ISDS text of Chapter 8 of the SA FTA amendments (which is based on the TPP text) are not adequate, and will not prevent future ISDS cases in these other areas.***

Movement of temporary workers

Australia is a nation built on immigration and has a permanent migration scheme. Those who migrate under this scheme have the same rights as other Australians. Their employment is not dependent on the sponsorship of one employer and they cannot be deported if they lose their employment.

Temporary work visas for overseas workers were originally designed to address specific skills shortages, and were subject to local labour market testing to establish whether local workers were available. Recently the use of temporary overseas workers without labour market testing has increased to the point where it is replacing permanent migration.

Temporary migrant workers are in a far weaker bargaining position because they are sponsored by a single employer and loss of their employment can lead to deportation. This leaves them vulnerable to exploitation.

Increases in numbers of temporary migrant workers and removal of labour market testing are now frequently included in trade negotiations.

AFTINET opposes the inclusion of temporary worker provisions in trade agreements because it treats workers as if they were commodities. Governments should always retain their ability to regulate labour market policies, which need constant adjustment to ensure workers are not exploited. This can only be ensured by not including temporary labour arrangements in trade agreements.

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).

Both media reports (ABC 2015a, 2015b, 2015c) and 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 457 visa 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 recent Senate inquiry into temporary work visas also provided similar evidence (Senate Standing Committee on Education and Employment, 2016).

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 current Australian government has recognised some of these issues in its recent abolition of the Visa 457 scheme and its replacement with alternative schemes which it claims will restore labour market testing, announced in April 2017. The changes do not apply to arrangements to remove labour market testing in previous trade agreements (Anderson, 2017).

Despite this, the SAFTA amendments extend temporary entry to contractual service providers, which includes a wide range of skilled workers, from three months to two years (SAFTA amendments text, Chapter 11, Article 4). The amendments also abolish labour market testing for these categories of workers (SAFTA amendments text Chapter 11, Article 16). The DFAT Regulatory Impact Statement for SAFTA confirms that the SAFTA requires a Ministerial Determination under the *Migration Act*

1958 to implement temporary entry commitments, which includes abolition of labour market testing (DFAT, 2016b: 6).

The SAFTA amendments were obviously negotiated before the Government announced its new policy in April 2017. For the new policy to have any meaning, future trade agreements should not include the abolition of labour market testing. The SAFTA amendments have not been passed by the Parliament and the agreement has not yet been ratified. The committee should recommend that these aspects of the Chapter 11 amendments be renegotiated to restore labour market testing.

Recommendation

> ***The SAFTA amendments to Chapter 11 on temporary labour to expand access for contractual service providers and abolish labour market testing are not consistent with recent changes in government policy to limit the numbers of occupations of temporary workers and strengthen labour market testing. The committee should recommend that these amendments be renegotiated.***

Government procurement

The current version of SAFTA Chapter 3 deals with government procurement. Annex 3A is a schedule which lists the government entities to which the chapter applies. Only Commonwealth Government entities are included.

Annex 3A amendments to SAFTA Chapter 3 include both Commonwealth Government entities and entities from all state governments, based on the commitments made in the TPP.

This is a considerable increase in access to Australian procurement markets for Singaporean companies. There has been a controversial debate in Australia about both Commonwealth and state government procurement policies. AFTINET believes that Australian procurement policy should follow the example of trading partners like South Korea and the US in that it should have policies with more flexibility to consider broader definitions of value for money, which recognise the value of supporting local firms in government contracting decisions (AFTINET, 2017).

South Australia, Victoria and New South Wales have recently developed such policies, and there is a current Joint Select Committee inquiry into changes to Commonwealth procurement guidelines to incorporate broader definitions of value for money. The inclusion of state government entities in the SAFTA procurement commitments is not consistent with these initiatives.

Recommendation

1. ***The SA FTA amendments to Chapter 3 on government procurement include access to state government procurement which was not provided in the previous version of the agreement. This is not consistent with the current revision of state and Commonwealth procurement guidelines and recent changes to some state government guidelines, and should be renegotiated.***

Internationally-recognised labour rights

Although the TPP was used as a model for SA FTA amendments, the amendments fail to include a chapter on labour rights. AFTNET was critical of the lack of enforceability of the TPP chapter on labour rights, compared to other aspects of the agreement. Webelieve that fully enforceable labour rights chapters should be included in all trade agreements.

The Australian Government should ensure that trade agreements include commitments by all parties to implement agreed international standards on labour rights, including the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work and the associated Conventions. These include:

- the right of workers to freedom of association and the effective right to collective bargaining (ILO conventions 87 and 98)
- the elimination of all forms of forced or compulsory labour (ILO conventions 29 and 105)
- the effective abolition of child labour (ILO conventions 138 and 182)
- the elimination of discrimination in respect of employment and occupation (ILO conventions 100 and 111)

The implementation of these basic rights should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation

Trade agreements should require the adoption and implementation of agreed international standards on labour rights, enforced through the government-to-government dispute processes contained in the agreement. The amendments to SAFTA are a missed opportunity to include such enforceable rights.

Internationally-recognised Environmental Standards

Although the TPP was used as a model for SAFTA amendments, the amendments failed to include a chapter on environmental standards. We were critical of the lack of enforceability of the TPP chapter on environmental standards, compared to other aspects of the agreement. We believe that fully enforceable chapters on environmental standards should be included in all trade agreements.

Protection of the environment is a fundamental value which should underpin trade policy. Trade agreements should require full compliance with an agreed-upon set of Multilateral Environmental Agreements, with effective sanctions for non-compliance.

At the same time, trade agreements must ensure that other provisions, such as investor-state dispute processes, do not undermine the ability of governments to regulate in the interest of protecting the environment.

Trade policy must also work cohesively with measures to address climate change. Trade agreements should not restrict governments' ability to adopt measures to address climate change.

The implementation of environmental standards should be enforced through the government-to-government dispute processes contained in the agreement.

Recommendation

Trade agreements should require the adoption and implementation of applicable international environmental standards, including those contained within UN environmental agreements, enforced through the government-to-government dispute processes contained in the agreement. The amendments to SAFTA are a missed opportunity to include such enforceable standards.

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